535 and 537 of the Code, prejudice to the accused being the real test as laid down by their Lordships of the Privy Council in *Abdur Rahman* v. *Emperor*.(1)

The application fails and is dismissed.

Courtney Terrell, C. J.—I agree.

Rule discharged.

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MALTU GOPE v. KING-EMPEROR.

ROWLAND, J

APPELLATE CRIMINAL.

Before Fazl Ali and Dhavle, J.J.

KRISHNA MAHARANA

v.

THE KING-EMPEROR.*

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July, 23.

Penal Code, 1860 (*Act XLV of* 1860), *sections* 361 *and* 366—*Kidnapping—bonafide belief as to age—Seduction—Evidence Act*, 1872 (*Act I of* 1872), *section* 114, *Illustration* (*g*)—*Omission to examine witness.*

It is not a good defence to a charge under section 366 of the Penal Code that the accused honestly believed the kidnapped girl to be over 16 years of age.

Queen v. *Prince*(2), referred to.

A person may be guilty of kidnapping a girl for the purpose of seducing her to illicit intercourse even though he had also had such intercourse prior to the kidnapping.

Nga Ni Ta(3), referred to.

The omission by the prosecution to call a witness, who should have been called, merely gives rise to a presumption that the witness, if called, would not have supported the

*Criminal Appeal no. 3 of 1929, from a decision of D. E. Reuben, Esq., I.C.S., Sessions Judge of Cuttack, dated the 22nd April 1929.

(1) (1926) 31 Cal. W. N. 271. P. C.
(2) (1875) 44 L. J. M. C. 122.
(3) (1903) 10 Bur. L. R. 199.

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prosecution case. A Judge, therefore, is not bound to direct the Jury that such an omission entails rejection of the prosecution case.

The facts of the case material to this report are stated in the judgment of Dhavle, J.

A. Dutt (for *D. P. Das Gupta*), for the appellant.

Government Pleader, for the Crown.

DHAVLE, J.—The appellant has been sentenced to three years' rigorous imprisonment under section 366 of the Indian Penal Code by the Sessions Judge of Cuttack. The trial was by jury and the verdict of the jury was unanimous. There was another charge under section 376 of the Indian Penal Code against the appellant and of this charge the appellant was unanimously acquitted by the jury, the learned Sessions Judge accepting that verdict also.

The learned Advocate for the appellant has done his best in a very difficult task. As I have already said, the trial was by jury, and the appeal has accordingly to be confined to misdirection by the Judge, or misunderstanding on the part of the jury of the law as laid down by him, resulting in an erroneous verdict.

It is not necessary to state the facts in great detail. Briefly, the prosecution case was that the appellant induced Narayani, a young woman, whose age among other things was a matter for the jury, to leave her parents' house on the night of the 1st of November last. On the agreed signal Narayani who was sleeping with her mother and grandmother, went out, and found the appellant outside and went with him from one house to another until three days afterwards she was found by her brother-in-law Brindaban Jena who had been searching for her. It is also said that the appellant had illicit intercourse with her in the interval.

The defence was that there had been a scandal between the appellant and Narayani, in consequence of which boys had been throwing stones and brick-bats into the house of Narayani's parents and that accordingly Narayani's mother asked the appellant to take Narayani away to a relative in Calcutta.

The first point raised by the learned Advocate for the appellant is that the learned Sessions Judge should not have told the jury that even if the appellant had honestly believed Narayani to be over 16 years of age, and it turned out that she was in fact under 16, the appellant would still be guilty of an offence under section 366 of the Indian Penal Code. In support of this contention the learned Advocate has referred to Dr. Gour's well-known work on the Penal Law of India, paragraph 3829 of the fourth edition. There are some remarks in this paragraph which imply that good faith, that is to say, an honest belief that the girl was over 16 years of age, would be a good defence in a prosecution under the section. But apparently the only section of the Indian Penal Code under which such a defence can be pleaded is section 76 and the learned Advocate has not been able to urge that section 76 has any possible application to the present case. That section applies to acts committed by a person who in good faith believes himself to be bound by law to commit them, and in the present case there is no room for the pretence that even if the appellant had been asked by Narayani's mother to take the girl away to Calcutta, a story which the jury has unanimously disbelieved, the appellant "believed himself to be bound by law" to take the girl away. It does not seem necessary in this connection to deal with the annotations of Dr. Gour on section 76 of the Indian Penal Code referring to the well-known English case of *Queen* v. *Prince*(1). It was held by the majority of the Court in that case that Prince was guilty of the

(1) (1875) 44 L. J. M. C. 122.

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misdemeanour charged notwithstanding that he mistakenly believed the girl's declaration of her own age as 18. The English law was subsequently altered, and in the present case we have to deal with section 361 of the Indian Penal Code which is framed in such terms as to make it immaterial what the offender took the age of the girl or victim to be.

The next ground taken by the learned Advocate is the meaning of the expression " seduced to illicit intercourse ". The learned Sessions Judge began by explaining that the word seduction in the ordinary sense meant " the enticing of a girl to part with her virtue for the first time ". He then referred to an oft quoted passage from the judgment of Adamson, J. of the Lower Burma Chief Court in *Nga Ni Ta*(1) in which it was observed, after referring to the definition of the word " seduce " in Webster's Dictionary, that it would be monstrous to hold that because a man may have induced a girl, while in the custody of her parents, to surrender her chastity, he committed no further act of seducing to have illicit intercourse when he persuaded her to go away with him. The learned Advocate for the appellant has here again drawn attention to Dr. Gour's annotations on the section. With all respect for the distinguished annotator it seems clear that he has not arrived at any very definite view, for after saying in one place that " no one speaks of subsequent acts of cohabitation as seduction ", he says more than once that " it cannot be categorically asserted that because the woman has once yielded to her seducer, therefore the latter can never be convicted under this section ". Having regard to the ordinary meaning of the expression " seduced to illicit intercourse " and to the plain object of the section which is to punish not the seduction by itself but the kidnapping of the kidnapped in order to seduce, it does not seem to me that

(1) (1903) 10 Bur. L. R. 199.

there is any sufficient reason to hold that the learned Sessions Judge committed an error of law in following the view taken in the case referred to.

The next point raised by the learned Advocate refers to the age of the girl and the bearing of the evidence of the Assistant Surgeon on it. What the learned Sessions Judge has done is to point out to the jury that the estimate made by the doctor of the girl was admittedly only an approximate one. He next refers to an important statement made by the doctor when recalled for cross-examination, and he points out that the meaning of the witness was that a girl may develop so rapidly as to look older than she is, but that she will not develop so slowly as to look younger than she is. The learned Advocate for the appellant contends that the learned Sessions Judge should have pointed it out to the jury that this was absurd. Why that should be so, the learned Advocate has not been able to explain. As I have already said the learned Sessions Judge began by saying that the doctor's estimate was only an approximate one, and if, as has been contended before us, the absurdity of the statement of the Assistant Surgeon is a mere matter of common sense, it seems to me that in the context the jury was properly left to exercise that common sense. A little later the learned Sessions Judge notes in his heads of charge—

> "In the present case if you consider that the doctor's opinion as to the age of Narayani is an honest one, you will have to remember that the truth of the defence story as to the age of Narayani will involve an under-estimation of about four years. It is for you to decide whether such an under-estimation is likely to have occurred."

As regards this passage the learned Advocate has contended that the charge to the jury should have drawn the attention of the jury not to the difference of four years between the age of Narayani as given by the defence and her age as given by the prosecution, but to the difference of a year and a half, namely, the difference between the age of 16 mentioned in section 361 of the Indian Penal Code and the age

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of $14\frac{1}{2}$ or about 14 referred to by the doctor. If the passage from which I have made the above extract is considered by itself, there seems to be some force in the contention of the learned Advocate for the appellant. But we must read the heads of charge as a whole, and the learned Sessions Judge has devoted several pages to the consideration of the question whether the girl Narayani was a minor and has begun his discussion of the point by asking the jury to remember that a minor for the purpose of this charge means a girl under 16 years of age. Where the learned Sessions Judge deals with the difference of four years between the two estimates placed before the jury, one by the prosecution and another by the defence, he seems merely to have confined himself to the bearing of the evidence of the doctor on the story of the prosecution and the story of the defence. Reading the charge as a whole, it does not seem to me that the charge can be taken to refer to the age of 18, nor that the omission in any other place expressly, and in so many words, to point out to the jury that there was a difference of a year and a half between the limit of age given in the section and the age mentioned by the Assistant Surgeon could really have resulted in the jury overlooking the bearing of the statutory limit on the evidence of the doctor.

The only other point raised by the learned Advocate is the non-examination of Narayani's mother by the prosecution. This is expressly dealt with in the heads of charge and the learned Sessions Judge's remarks conclude with the following—

"You will have to decide for yourselves whether this omission is such a material one as to raise in your minds a reasonable doubt as to the truth of the prosecution evidence. In other words whether you will from this omission draw an inference against the truth of the prosecution story."

It has been contended by the learned Advocate that the learned Sessions Judge has in substance told the jury that the mother was not a material witness. This contention is based on the observation of the

learned Sessions Judge that if the prosecution story is true, all that the mother could tell is that she woke up at night and found the girl missing. He has, however, observed to the jury that it would have been better if the prosecution, in view of the defence story, had put the mother into the witness-box so that the defence could have cross-examined her and valuable material would have been placed before the jury " in deciding the truth or falsity of the defence story." It was contended at one time that the failure of the prosecution to call the mother was fatal to their case. But that proposition in that extreme form cannot possibly be accepted. If a witness is not called by the prosecution, which it was the duty of the prosecution to call, what happens is at the most that there arises a presumption that if the witness had been called, he would not have supported the prosecution case. As *Illustration* (*g*) to section 114 of the Evidence Act puts it, the Court may presume that evidence, which could be and is not produced, would, if produced, be unfavourable to the person who withholds it. The learned Advocate also contended that the charge to the jury was erroneous in that the learned Sessions Judge said—

> " It is not necessary that the prosecution should examine all witnesses who can say anything about a particular occurrence."

He contrasted this with another passage from the heads of charge in which it is stated—

> " It is the duty of the Public Prosecutor to place before you for your decision the evidence of all witnesses who can throw any light upon the occurrence."

There is no question about the sound character of this last passage. But the learned Advocate has contended that that passage should have been repeated in connection with the failure of the prosecution to call Narayani's mother. I do not think that it was at all necessary to do so. There is, after all, some difference between the duty to call witnesses " who can throw any light upon the occurrence " and the

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absence of necessity to examine "all witnesses who can say *anything* about a particular occurrence". In any case the learned Sessions Judge has clearly left it to the jury to say for themselves how far the failure of the prosecution to call Narayani's mother was so material as to raise in their minds a reasonable doubt as to the prosecution evidence.

The contentions raised on behalf of the appellant all fail, and there is no room for interference by this Court. The sentence does not seem to be excessive having regard to the circumstances of the case. I would accordingly affirm the conviction and sentence and dismiss this appeal.

FAZL ALI, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

MUSSAMMAT KISHUNI KUER

1929.

July, 28.

v.

ANDU MAHTON.*

Chota Nagpur Tenancy Act, 1908 (*Beng. Act VI of* 1908), *sections* 23, 23A, 46, 76 *and* 79—*raiyat, whether can make a valid testamentary disposition of occupancy holding.*

Section 23, *Chota Nagpur Tenancy Act*, 1908, *lays down* :—

"If a raiyat dies intestate in respect of a right of occupancy it shall, subject to any local custom to the contrary, descend in the same manner as other immoveable property....."

*Appeal from Appellate Decree no. 516 of 1928, from a decision of Babu Narendra Nath Banarji, Additional Subordinate Judge of Ranchi, dated the 12th December, 1927, reversing a decision of Babu Ramesh Chandra Sur, Munsif of Giridih, dated the 12th January, 1927.