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DAS, J.

at all. In my opinion the defendants have not established a case of adverse possession. It is well-settled that in the case of mineral rights, non-user is not an abandonment of possession on the part of the owner, whose right is not barred so long as the minerals are not worked by some one else; and that by working a part of the minerals or opening up particular quarries, possession over a continuous field of minerals or of quarries cannot be obtained.

While dismissing the appeal with costs as against Chrestien, I must allow the appeal, so far as the defendants other than Chrestien are concerned, set aside the judgment and the decree passed by the Court below and give the plaintiff a decree as against those defendants in terms of the relief claimed in this suit. The result is that the plaintiff will be entitled to joint possession with Chrestien, Chrestien's interest being restricted to the shares acquired by him from the Thakur defendants on or before the 14th August, 1919, the date on which the suit 98 of 1918 was dismissed.

The plaintiff is entitled to his costs throughout as against the Thakur defendants.

WORT, J. I agree.

Appeal allowed in part.

APPELLATE CRIMINAL.

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June, 5, 6, 7, 8.

Before Terrell, C. J. and Dhavle, J.

SOHRAI SAO

v.

KING-EMPEROR.*

Hostile witness—effect of declaring witness hostile—Murder—sentence—effect of doubt.

A hostile witness is not necessarily an untruthful witness. Therefore, the mere fact that the prosecution declares

*Criminal Appeal no. 15 of 1929, against a decision of Babu Phanindra Lal Sen, Sessions Judge of Gaya, dated the 8th January, 1929.

a witness to be hostile and cross-examines him does not imply an admission that all the statements made by the witness are false.

Where a witness is declared hostile during a Sessions trial his deposition made in the court of the committing Magistrate is admissible and must be taken into consideration.

Faulkner v. *Brine*(1), *Khijiruddin Sonar* v. *King-Emperor*(2) and *Makbul Khan* v. *King-Emperor*(3), disapproved.

Emperor v. *Jehangir Cama*(4) and *Bradley* v. *Ricardo*(5) followed.

A judge should not sentence a person accused of murder to transportation for life, instead of sentencing him to death, merely on the ground that the evidence is not strong enough to justify an irrevocable sentence. If the court has any doubt as to the guilt of the accused it should acquit him.

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

H. L. Nandkeolyar and *B. P. Jamuar*, for the appellants.

C. M. Agarwala, Assistant Government Advocate, for the Crown.

COURTNEY TERRELL, C. J.—This is an appeal by Sohrai Sao and Sawki Sao, who are brothers, against their conviction by the Sessions Judge of Gaya, under section 302 of the Indian Penal Code, of the murder of Musammat Gauri, the wife of Sohrai Sao. The learned Sessions Judge sentenced both of the appellants to transportation for life and we issued a rule directing the appellants on the hearing of the appeal to shew cause why the sentence should not be enhanced to death. The trial took place with the help of four assessors one of whom was of opinion that both of

(1) (1858) 1 F. & F. 254.
(2) (1925) I. L. R. 53 Cal. 372.
(3) (1927) 32 Cal. W. N. 872.
(4) (1927) 27 Bom. L. R. 996.
(5) (1831) 8 Bing. 57; 131 Eng. Rep. 321.

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the accused were guilty, and three that neither was guilty.

The appellants together with a third brother Kishun and an uncle Kasi Sao reside in a house in village Tarwan. On the night of the murder of Musammat Gauri the uncle, Kasi, was sleeping at the village katchery, and the youngest brother Kishun was sleeping at the shop owned by the three brothers at a short distance from the house. Neither Kasi nor Kishun is directly implicated in the crime. There were also in the house Musammat Dakhia, the mother of the appellants, Musammat Panhas Kuar, the sister of Kasi Sao, Musammat Balua, Kasi Sao's wife, and the deceased woman, Musammat Gauri. The deceased was about 22 years old and lived in pardah. There is some evidence that she was not on good terms with the other women who used to scold her because she sometimes went out of the house stealthily at night, and that the two brothers would also scold her for the same reason. It is true that the evidence on this point is slender and the relatives of the appellants, in their efforts to shield them and to dispose of any motive for their crime, have one and all declared that she was a woman of good character. But since the evidence of these relatives is false on many and material points I am disposed to give little credit to it. The mother of the appellants, Musammat Dakhia, died before the case reached the committing Magistrates's Court.

In the very early morning of August 16th a rumour spread through the village that Musammat Gauri had died on the previous night of cholera, and it is not disputed that this rumour was started by the appellants assisted by their third brother Kishun. The women were heard wailing inside the house and the two appellants were seen standing at the doorway of their house and were heard consulting about the cremation of the dead body. A number of villagers assembled outside the house. One of them, Budhan

Pasi, who had met Kishun and had been told by him of the death from cholera, entered the angan of the house by the door leading from the angan on to the road. He there found the body covered with a piece of cloth lying partly on a veranda on the south side and partly in the angan. The ground of the angan and the veranda appeared to have been recently washed and smeared with ashes but bloodstains were still apparent. Lying by the side of the body was a curved knife. He uncovered the body and found that the throat had been cut. He enquired of the appellants why they had alleged that she had died of cholera and the appellants replied that in fact she had committed suicide by cutting her throat. A number of other witnesses relate the same story, that is to say, the fact that the appellants were standing at their door and weeping, that on enquiry the appellants stated that Musammat Gauri had died of cholera and of the later discovery by the witnesses that the woman's throat had been cut.

It must soon have become clear to the appellants that the story of cholera could not be sustained and that having regard to the fact that the woman's throat had been cut, the death must be explained on the basis of suicide. Accordingly shortly after sunrise the appellant Sohrai came to the village katchery where he spoke to Deonarain Lal, the diwan of the landlord, and stated that his wife had committed suicide by cutting her throat. The diwan said that he ought to go to the thana and lodge an information. He refused to go stating that he was ill and in fact it would appear that he was suffering from acute toothache. The diwan then sent for Tilak Rajwar, one of the two chaukidars of the village, and told him to lodge an information. Tilak stated that he must first see the body and went to the house. There he saw the body and noticed that it had been freshly washed and that the hair was still wet. He saw that an attempt had been made to wash the floor of the angan and the veranda of blood and

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ashes were scattered about and there were blood marks on the walls of the veranda. Musammat Dakhia and the other women were present and weeping by the side of the body. They said that they knew nothing as to how the deceased had come to her end. Tilak waited there about an hour until the second chaukidar, Bipat Dusadh, arrived. This man had also heard of the cholera rumour and on his way had met Sawkhi. He arrived at the house two hours after sunrise. He was left to watch the body while Tilak went to give the first information. Tilak left the house and met Sohrai a short distance away. He asked him to come to the thana. At first Sohrai said he could not on account of his toothache but ultimately he reluctantly consented. The appellant Sawkhi had by that time disappeared. At the thana, which was reached at about noon, Sohrai lodged an information in which he stated that for the last 17 or 18 days he had been ill with fever and toothache, that his wife who had been attending him the night before, when he had told her that his pain would end with his life, had wept and said

"What should I do by remaining alive;"

that he had risen, when about two gharis of the night was remaining, to make water and had found his wife lying where she was in fact found with her throat cut, the knife lying by her side. He adds

"I raised an alarm and began to wail and weep, when the other members of my house, viz., my mother, aunt, father's sister, cousin sister and my brother came up. My aunt opened the door of my house when the people of the mahalla and the village also began to come in."

The brother referred to is clearly his co-appellant Sawkhi. The story that the house had been opened to the village people immediately on raising his alarm is clearly untrue, for no one of the neighbours heard the wailing of the women until at or very shortly after dawn and the first that was heard of the matter was the story of the death of Gauri from cholera. The Sub-Inspector went at once from the thana to

the house and called on Shiva Prasad Lal, a patwari, and the Diwan Deonarain Lal to assist him in making an inquest report. He saw at once that it was *not* a case of suicide and he took a statement from the chaukidar, Bipat Dusadh, which forms the first information in this case. He searched the house and found blood marks in the angan and in the veranda room immediately adjoining it. A great quantity of blood had clearly flowed on the floor and an attempt had been made to clean this up with water and to conceal the blood with ashes. There were blood marks on the walls of the veranda room to a height of two feet. There were also blood marks on an earthen kothi which stood in an adjoining room and the appearance of the marks was such as to suggest that a person with blood-stained hands had touched it. On the following day he went to the back of the house where at a distance of about twenty paces there runs a pyne. In this pyne he found an earthen pot and in this was a *nimastin* or half-sleeved shirt which the appellant Sohrai admits to be his. It bore blood stains. Concealed in some bushes immediately behind the house were two *dhotis* and a *sari*. These were wet and had evidently recently been washed. They had been wrapped up together and concealed behind some bushes. The Sub-Inspector noticed that they bore blood stains. One of the *dhotis* the appellant Sohrai admits belongs to him. As to the other there is a certain conflict of evidence; Kishun and the other relatives say it is his property but a *dhobi* who washes the clothes of the family says that it is the property of Sawkhi; the evidence is, I think, inconclusive on this point. The *sari* was the property of the mother of the appellants. The report of the Chemical Examiner states that the *nimastin* was stained with blood as was the *dhoti* identified as belonging to Sohrai. No blood was detected on the other *dhoti* whose ownership is doubtful, or on the *sari*. It appeared, however, to the Sub-Inspector and the Patwari that these garments were blood-stained

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In any case they had been washed, had been wrapped together and were wet. The Chemical Examiner has also found stains of human blood on the knife which the Sub-Inspector found lying near the body and in the samples of earth which the Sub-Inspector scraped from the blood-stained ground and the earthen kothi. The Sub-Inspector sent off the body for postmortem examination and the evidence of Colonel Napier, the Civil Surgeon, is to the effect that the wounds found on the deceased could not have been self-inflicted.

The appellant Sohrai was arrested on the following day. The appellant Sawkhi absconded and did not surrender until the case reached the committing Magistrate. The appellants called no evidence either before the committing Magistrate or at the trial. At the hearing of the appeal Mr. Nandkeolyar, who has conducted the case for his clients with conspicuous ability and great earnestness, has offered the following argument: He admits that it is impossible to contend that the deceased committed suicide. He suggests that the story related in the first information by Sohrai is substantially true and that on awaking Sohrai found his wife dead in the angan and called the female relatives. Terrified by the embarrassing position in which they found themselves and fearing that they would be charged with the murder, they first invented the story of the death from cholera. When it became apparent that this could no longer be maintained, they fell back on the story of suicide. He suggests that although they may themselves have believed that it was a case of murder, they had no one on whom they could fasten their suspicions, and accordingly made the most of the possibility of suicide. Indeed in the first information lodged by Sohrai at the thana he evidently sought a motive for the suicide in the grief of his wife at his painful illness and the additional fear that if he died she would be unable to re-marry. Sohrai, in addition to lodging a first information, made a statement to the Sub-Inspector at

the house before his arrest. In this statement Sohrai had said that he had pledged some of his wife's ornaments and that on the night of the occurrence they had quarrelled over this fact and that the quarrel probably led her to commit suicide. Mr. Nandkeolyar contends that these varying statements as to the motive for the suicide are mere exhibitions of the distracted mind of a man who is trying to find a plausible explanation for what he very well knows to have been a murder, but believes himself in a desperate position because he has no adequate solution to offer to the question of the identity of the murderer. It is further pointed out that the house affords easy opportunity for the entrance and escape of a murderer. In the north wall of the angan there is an unclosed doorway which provides uninterrupted access and it is said that an assassin may very well have entered through this doorway in the night and have equally easily escaped. In view of the fact that no one can suggest a possible murderer with any adequate motive this suggestion is inherently improbable, and in view of the conduct of the inmates of the house it is altogether unbelievable. Had the accused really found his wife two hours before sunrise as he says, he would have raised a commotion which could not have failed to attract the attention of the neighbours as well as that of the other females of the household. At a much later hour when the story of cholera had been invented, when the washing of the floors had been completed, the females then began to wail in a manner which attracted the neighbours and the appellants also wept outside their house. The theory, moreover, does not account satisfactorily for the attempt to conceal the blood-stained clothes. It is probable that these clothes were disposed of in the pyne behind the house before it became light. It is, moreover, clear that the woman was killed whilst sleeping for no one heard a sound of a cry or a struggle and, as the prosecution point out, an assassin from outside would have had no

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motive for killing the sleeping woman or for moving her body to a position half in and half out of the veranda where it is clear that she had been sleeping. It has been suggested that a silver necklace and a gold nose-ring had vanished from the person of the deceased. Now the nose-ring could not have been removed while she was awake. It could only have been removed after her death and the person who removed it after cutting her throat would necessarily have been drenched with blood and he would have been standing in a pool of blood while he performed the operation. In this condition he could not have slipped out of the northern doorway without leaving most conspicuous blood stains of which there is no trace whatever. In my opinion this theory of a murder by a stranger is quite impossible to believe and the suggested explanation of Sohrai's conduct, therefore, falls to the ground.

As to the accused Sawkhi it is suggested, but with very little force, that he was not present. He was seen by several witnesses at the door of the house weeping with Sohrai. He had been seen by the two chaukidars for the two days previously in the village and at the shop. Immediately after the event he fled to a village called Etawa where his father-in-law resides and took refuge with him. The whole family has attempted to shelter Sawkhi by saying that he had been absent from Tarwan for several days although they were unable to suggest where he had gone. But Kasi Sao, the uncle, is proved to have written a letter to Sawkhi and to have sent it to Etawa after Sawkhi had left for that place. In it he advised Sawkhi to get the people of Etawa to say that he had been there for several days. The letter was delivered to Sawkhi but there is no evidence as to the nature of Sawkhi's action as a consequence of receiving the letter. It is, therefore, no evidence against Sawkhi but it serves to discredit Kasi Sao in his story that he did not know where Sawkhi had gone. The reference to " my brother " in Sohrai's first information, which I have

quoted above is clearly to Sawkhi and not to Kishun Sawkhi, moreover, has not attempted to call any evidence as to his whereabouts at the time of the occurrence.

A further point was taken by Mr. Nandkeolyar on behalf of the appellants based upon the matter of an alleged reception before the Sessions Judge of inadmissible evidence. The youngest brother Kishun was examined as a prosecution witness and upon manifestation by him of hostility to the prosecution the learned Judge in his discretion gave to the prosecution leave to cross-examine him. He was asked whether he had not previously made a statement which had been recorded by the Deputy Magistrate which conflicted with the account given by him in the Sessions Court. That statement after mentioning his visit to the house and the finding of the woman with her throat cut runs as follows:—

"I enquired from mother who had killed her. She said 'Sohrai had cut the neck.' Sohrai was also in the house but not within hearing distance from us. I did not ask him anything. For a month Sohrai and his wife were not pulling well with each other. I do not know why. I had not seen Sohrai ever beat her but I saw them quarrel during the period of one month as mentioned above. I could not make out why they quarrelled among them."

Now it is conceded by the prosecution, and rightly, that the quotation of the mother's statement, although the mother is now dead, was inadmissible. Had the mother herself made the statement in the witness-box as quoted by Kishun, it would not have amounted to evidence at all but merely to a statement in usurpation of the functions of the Court. It would have been otherwise if she had been reported as having said "I saw Sohrai cut her throat". This part of the defence objection is sound, but the misreception of this piece of evidence could, in my opinion, have had very little weight and no substantial injustice has been done. Moreover, it would not appear that any objection was raised at the trial.

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It is, however, further objected that the entire statement (and in particular that portion relating to quarrels between Sohrai and his wife) was inadmissible for the following reason: The witness had been declared hostile and according to the contention of Mr. Nandkeolyar this necessarily implies that the witness was wholly discredited and the prosecution having discredited their own witness are not entitled to rely upon any part of his evidence. I am aware that in India from time to time this curious view of the consequence of declaring a witness hostile has become current. The whole idea has been allowed to grow out of an observation reported as having been made by Lord Campbell in an old Scottish case, *Faulkner* v. *Brine*,(1). This was accepted by the Calcutta High Court in such cases as *Khijiruddin Sonar* v. *King-Emperor*(2) and more recently by Cuming and Lort-Williams, JJ. in *Makbul Khan* v. *King-Emperor*(3). In this latter case the learned Judges said: "In other words a party cannot be allowed to say that his witness is a truthful witness so far as a part of his evidence is concerned but an untruthful witness so far as some other portion is concerned." The theory so stated is fallacious. A party is allowed to cross-examine his own witness because that witness displays hostility and not necessarily because he displays untruthfulness The theory has gained currency owing perhaps to the common belief that the sole object of cross-examination is to discredit the witness whereas its main purpose is to obtain admissions, and it would be ridiculous to assert that a party cross-examining a witness is thereby prevented from relying on admissions, and to hold that the fact that the witness is being cross-examined implies an admission by the cross-examiner that all the witness's statements are falsehoods. The correct view was, in my opinion,

(1) (1858) 1 F. & F. 254. (2) (1925) I. L. R. 53 Cal. 372.
(3) (1927) 32 Cal. W. N. 872.

expressed in *Emperor* v. *Jehangir Cama*(1). Moreover, the opinion of Lord Campbell has never been followed in England and the English law upon which the Indian Evidence Act is founded was clearly stated by Tindal, C. J. in *Bradley* v. *Ricardo*(2). Therefore, that part of Kishan's statement which is contained in his statement to the Magistrate was clearly admissible.

In my opinion the guilt of both the appellants has been established on the clearest possible grounds and admits of no doubt whatever and the appeal should be dismissed. The learned Sessions Judge has come to the conclusion, upon what I think is very inadequate evidence, that the murder was committed by the appellants with a view to save their family from dishonour which would sooner or later have fallen upon them by reason of the habits of the deceased. But even if there had been adequate ground to believe that they were so inspired, this would not constitute any reason for relieving these men of the extreme penalty. It would establish a most dangerous and immoral principle to concede to any jealous husband the right to assassinate his wife and escape the gallows. The reason for passing the lesser sentence must be express and adequate. Such reasons are sometimes to be found in the order of mentality to which the person belongs. A simple-minded ignorant savage who slaughters a person whom he really believes to be a dangerous magician may well fall into this class. In this province, moreover, the position of women, deprived of contact with the world, of education and of all opportunity for mental development would, save in very extreme cases, justify a Court in treating them as persons who should not be sentenced to death. Sometimes also an extenuating fact may be found in the circumstances of the crime itself, such, for example, as those which often occur in agrarian riots where a free and honest fight

(1) (1927) 27 Bom. L. R. 996.
(2) (1831) 8 Bing. 57; 131 Eng. Rep. 321.

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on equal terms results in death although the crime may nevertheless not fall within the exceptions to section 300 of the Indian Penal Code.

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I must observe that a feeling of doubt as to the guilt of the accused is a matter to be considered by the tribunal before but not after the verdict. It has no place in the determination of the sentence after conviction. If the evidence is not strong enough to justify an irrevocable sentence the accused is entitled to acquittal, and our law does not recognize the right of a judicial tribunal to give effect to more than one degree of doubt. It is not permissible for a Judge to sentence a prisoner to transportation for life on the ground that he is sufficiently certain of the guilt for that purpose but not sufficiently certain to sentence him to death. I mention this matter because it may throw light on some of the reported decisions which are otherwise inexplicable on judicial grounds.

Finally, it must be noted that those in whose hands is placed the exercise of the Royal Prerogative of mercy are not trammelled by any legal considerations whatever and may be trusted to exercise their powers. The Legislature has wisely not thought fit to entrust judicial tribunals with the prerogative of mercy and Judges must remember that they are sworn to administer the law not as they wish it might be but as they find it. The case we are dealing with is one of brutal assassination of a sleeping and defenceless woman and I can see no reason why the murderers should not suffer the extreme penalty. I would, therefore, set aside the sentence of transportation for life and sentence the appellants Sohrai Sao and Sawkhi Sao to be hanged by the neck till they are dead.

DHAVLE, J.

I agree.

Appeal dismissed.
Sentence enhanced.