APPELLATE CRIMINAL.

Before Macpherson and Dhavle, JJ.

1929.

May, 13.

DHANPAT TIWARI

v.

KING-EMPEROR.*

Trial by Jury—Heads of charge—omission of details of judge's directions on law, effect of.

Where the heads of charge stated,

"Sections 361 and 366 of the Penal Code read and explained to the jurors,"

the High Court held this to be a sufficient compliance with the law.

Rupan Singh v. *King-Emperor* (1) and *Chotan Singh* v. *King-Emperor* (2), referred to.

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

B. P. Sinha, for the appellant.

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

DHAVLE, J.—The appellant Dhanpat Tiwari has been sentenced by the Assistant Sessions Judge of Saran to five years' rigorous imprisonment under section 366 of the Indian Penal Code. The charge upon which he was tried, along with his sister Musammat Sanichara, was that on or about the 6th of May 1928 at village Sikandarpur, police-station Maharajganj, they kidnapped Basumatia Chokri, aged about eight years, from the lawful guardianship of her father Rampati Mahto, with intent or knowing it to be likely that she would be compelled to marry Kuber Pandey of Karasghat, police-station Baikunthpur, against her will.

*Criminal Appeal no. 290 of 1928, from a decision of E. A. Khan, Esq., Assistant Sessions Judge of Saran, dated the 10th of December 1928.

(1) (1925) I. L. R. 4 Pat. 626. (2) (1928) I. L. R. 7 Pat. 361.

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Appellant Dhanpat is a neighbour of the complainant Pati or Rampati Mahto, a Nunia of Sikandarpur. The girl Basumatia is a daughter of Pati Nunia by a former wife. In Jyeth of last year Pati went to his mamhar (maternal uncle's house) at Banpura, with his present wife Musammat Tetri and two young children, to attend some weddings, Basumatia being left behind with Sitmi, a seven year-old daughter of Musammat Tetri by a former husband, to look after Pati's buffalo. On the 2nd Jyeth (6th of May, 1928) there was a marriage at the house of Dharamdeo Tiwari (D. W. 3) in Sikandarpur, and Basumatia and Sitmi went to see the barat. When they were coming back past the house of appellant Dhanpat Tiwari, Musammat Sanichara took Basumatia inside. Dhanpat and Sanichara then prevailed on Basumatia to go with them to a village Deokali, seven or eight kos away, with a basket of pakwan (sweets), on a promise of giving her a luga and a jhula (a piece of cloth and a jacket). The party—which included Dhanpat's son Sribhagwan—actually left early the next morning and were met and accosted on the way by three witnesses in the case (P. Ws. 3, 7 and 8). About three days afterwards Basumatia was put through a form of marriage, against her will, with one Kuber Pandey of Karasghat, Dhanpat officiating as the priest. After the wedding, Dhanpat and Sanichara sent Basumatia with Kuber Pandey in a palki to Karasghat. Kuber's mother and elder brother Jagdish Pandey (P. W. 10) discovered at Karasghat that Basumatia was not a Brahmin but a Nunia. Jagdish thereupon had a panchayat held at Deokali and, getting no satisfaction, lodged an information at the thana of Baikunthpur on the 17th of May, charging Sheoprasad Dube, son of Musammat Sanichara and father of the girl who it had been settled was to be married to Kuber, and one Pucha Kuer, with cheating by personation. While this case was under investigation, Pati Mahto learnt on his way

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back from Banpura that Basumatia had been missing, and lodged a sanha about it at the thana of Maharajganj on the 20th of May. The police submitted a charge-sheet in Jagdish Pandey's case under section 419 of the Indian Penal Code against Sheoprasad Dube and Pucha Kuer, but the case was ultimately compromised on the 27th of June, 1928, on the persons then accused paying Jagdish Rs. 200. On the 2nd of July Pati Mahto preferred a complaint under sections 363, 366 and 419 of the Indian Penal Code against Dhanpat, Musammat Sanichara and others before the Subdivisional Magistrate of Siwan, who committed Dhanpat and Sanichara to the sessions on a charge under section 366 of the Indian Penal Code.

The case was tried by jury.

Mussammat Sanichara's defence was that Basumatia had not been kidnapped but had carried sweets for them accompanied by her father Pati Mahto, and that it was not Basumatia but the daughter of her son Sheoprasad that had been married to Kuber Pandey. There was a quarrel at the time of the rukhsati, and in the confusion that followed Basumatia was forcibly taken away by the barat party of the bridegroom Kuber Pandey. Pati Nunia knew all the facts, though he had gone back from Deokali; and he had falsely brought the present case because he was disappointed that Jagdish Pandey's case had been compromised without his getting anything out of it.

Dhanpat Tiwari's defence was that the case had been brought on account of enmity; that he had nothing to do with Basumatia being kidnapped and did not even attend the wedding at Deokali; and that Pati Mahto had not gone away from Sikandarpur to Banpura at all.

By a majority of four to one the jury brought in a verdict of guilty against both Dhanpat and

Sanichara. The Assistant Sessions Judge accepted the verdict and passed sentence as already stated.

Dhanpat alone appeals.

The first point raised on his behalf is that the Assistant Sessions Judge did not sufficiently explain the law to the jury, and the case of *Rupan Singh* v. *King-Emperor* (1) is relied on in support. The learned Assistant Sessions Judge's note on this point in the heads of charge is :—

"Sections 361 and 366 of the Indian Penal Code read and explained to the jurors."

It has been held in several cases that this is not a sufficient record of the charge on the questions of law; but the convictions in *Rupan Singh's* case (1) were quashed on much more substantial grounds than a mere insufficiency of record in this respect. In an unreported decision of this Court, *Prabhu Singh* v. *King-Emperor* (2) where this part of the heads of charge merely ran "charges read and explained from the Code", Jwala Prasad, J. referred to several previous decisions and held (my learned brother concurring) that "there was no misdirection to the jury on the score that the law was not explained as is required by section 297 of the Code", adding "Mr. Hasan Imam very frankly concedes this." The position was also examined in *Chotan Singh* v. *King-Emperor* (3) where it was held (to quote from the head-note): "The failure of the Judge to record in the charge what actually his explanation of the law was did not necessarily involve the setting aside of the conviction if the omission had not occasioned a miscarriage of justice", and "The High Court will not order a retrial when it is of opinion that, if the jury accepted the evidence which was put forward on behalf

(1) (1925) I. L. R. 4 Pat. 626.

(2) (1924) Cr. A. 94 of 1924, unreported.

(3) (1928) I. L. R. 7 Pat. 361.

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'of the prosecution, there was no doubt that they were entitled to convict the accused of the offences charged."

In the present case it cannot be pretended that the law applicable to the facts was at all complicated. Basumatia, if taken away, was taken away from her father's keeping and, as to her age, there was unchallenged evidence before the jury that she was eight or nine years old, the Lady Doctor (P. W. 5) saying that her age did not exceed ten years. Following the ruling in *Chotan Singh's* case (1), I am not prepared to interfere on the ground that the record is not sufficient to show that the jury was adequately directed on the questions of law arising in the case.

It has next been urged that the delay of nearly two months in the lodging of the complaint has not been properly placed before the jury. I see no force in this contention at all. The learned Assistant Sessions Judge has pointedly referred to the relevant dates, the 20th of May when Pati Nunia lodged his saneha, the 27th of June when Jagdish Pandey's case was compromised, and the 2nd of July when Pati Nunia filed his petition of complaint. He then proceeds:

> "Now it would be for you gentlemen to consider whether under these circumstances the delay would be such as would go to the very root of the case of the prosecution and would destroy their whole story of kidnapping."

The heads of charge do not contain a specific reference to exhibit 6, the order-sheet in Jagdish Pandey's case, from which it appears that Pati Nunia objected more than once to the matter being compromised, but the omission can obviously furnish the appellant with no ground of complaint.

The third point raised in the appeal is that sufficient stress was not laid on the fact that the name

(1) (1928) I. L. R. 7 Pat. 361.

of appellant Dhanpat was not mentioned in the case under section 419 of the Indian Penal Code brought by Jagdish Pandey. As to this, the learned Assistant Sessions Judge records, after dealing with the evidence of Basumatia:

"Here I would remind you, gentlemen, that the case at Gopalganj was under section 419 of the Penal Code which was of cheating by personation, and therefore you will have to consider how far it would have been necessary in that case to give that part of the story there which was connected with kidnapping. You will have also to consider whether the omission in any particular statement there, would go to show that those statements made in the kidnapping case have been falsely got up for the purposes of this case or not."

He again refers to the point when dealing with the evidence of the Sub-Inspector of Baikunthpur, and, after mentioning that the witness had sent up Basumatia and Rampati Nunia as witnesses in the case under section 419 of the Indian Penal Code to prove that Basumatia was Pati's daughter and that she had been married to Kuber Pandey and sent to his house as a Brahmin girl, he observes:

"It would be for you gentlemen to consider whether it was material for the Sub-Inspector to inquire and for the witnesses to depose in a cheating case under section 419 of the Penal Code about Dhanpat Tiwari who actually did not cheat Jagdish or Kuber. The cheating case was against the father of the girl Kosila and Rucha Kuer."

It seems to me clear that the non-mention of Dhanpat during the investigation of Jagdish Pandey's case was placed before the jury in a perfectly proper manner and that sufficient stress was laid on it by the learned Assistant Sessions Judge in charging the jury.

The only other question raised is that of the sentence. The offence of the appellant has been aggravated by the procuring of a large number of false defence witnesses; but, even so, the sentence does seem excessive. In my opinion a sentence of three years' rigorous imprisonment and a fine of Rs. 100, with nine months' rigorous imprisonment in default would be sufficient to meet the ends of justice; and I would further, under section 545 of the Code of Criminal Procedure, direct that the fine, if recovered,

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be paid to Pati Nunia as compensation. Apart from this modification of the sentence, I would dismiss the appeal.

MACPHERSON, J.—I agree. I desire to add that prior to the decision in *Chhotan Singh* v. *King-Emperor* (1) in the vacation of 1927 where somewhat different views are expressed though perhaps obiter, it appeared to be settled law in this Court that in recording "the heads of the charge to the jury", as directed under section 367 of the Code of Criminal Procedure, it was sufficient for the Session Court, at least unless the case was extremely complicated, to record as a head of the charge that the sections of the Penal Code relating to the offence charged had been read and explained to the jury. In *Prabhu Singh* v. *King-Emperor* (2) (1924) Bench and Bar regarded the matter as not open to dispute. In *Eknath Sahay* v. *King-Emperor* (3) the record of which I have examined, the head of charge to the jury "laying down the law by which the jury are to be guided" (section 297) was not more extensive than in the present case when allowance is made for the difference in the nature and complexity of the two cases. Indeed it has been the normal practice to *record* this head of charge in the manner in which the Sessions Judge usually made a brief note of it for his own guidance. Section 367 expressly provides that in a trial by jury the Court need not write a judgment. Any suggestion to the Courts that in recording the heads of the charge to the jury they should practically write a judgment, and indeed should write out to no purpose the elements of criminal law which the Court must explain to a jury but no experienced Judge sets out in a judgment, is, in my opinion strongly to be deprecated. To my mind no exception can be taken to the record by the learned Assistant Sessions Judge of the head of the charge showing how he laid down the law to the jury.

(1) (1923) I. L. R. 7 Pat. 361.
(2) (1924) Cr. A. 94 of 1924 (unreported).
(3) (1916) 1 Pat. L. J. 317.