date of the decree, which, as I have said, was passed on the 7th of August, 1933.

I would dismiss the appeal with costs.

WORT, J.—I agree.

S. A. K.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Rowland and Chatterji, JJ.

1939.

Dec. 11, 12.

NEBTI MANDAL

v.

KING-EMPEROR.*

Penal Code, 1860 (Act XLV of 1860), sections 72 and 201—person committing the principal offence, whether can be convicted under section 201—alternative charges—no misjoinder—section 72, application of—Code of Criminal Procedure, 1898 (Act V of 1898), section 288—evidence taken before committing Magistrate, whether can be used for all purposes in trial court—such evidence, when can be effectively utilised in support of conviction—Evidence Act, 1872 (Act I of 1872), section 154—evidence of witness cross-examined by party calling him, whether can be relied on by either party—permission to cross-examine, whether should be given by Court freely—grant of permission, effect of—use of the words "declared hostile" to be avoided.

A person who has actually committed a crime himself—whether murder or any other crime—cannot be said to be any the less guilty of removing traces thereof, if it is proved against him that he has done so, because he was the person who actually committed the offence.

The true principle seems to be that there is no law preventing the main offender being convicted under section 201, Penal Code, 1860, but in practice no Court will convict an

* Criminal Appeal no. 228 of 1939, from a decision of S. Bashiruddin, Esq., Sessions Judge of Purnea, dated the 17th August, 1939.

1939.

NEBTI MANDAL v. KING-EMPEROR.

accused both of the main offence and under this section. But if the commission of the main offence is not brought home to him, then he can be convicted under section 201. Therefore, there is no misjoinder in charging an accused in the alternative with the main offence and under section 201.

Emperor v. *Har Piari*(1) and *Chinna Gangappa, In re*(2), followed.

Rup Narain Kurmi v. *King-Emperor*(3), referred to.

Where the charge is framed in the alternative in respect of offences under sections 302 and 201, the position may arise as contemplated by section 72 of the Penal Code, 1860. It may be open to the Court to give judgment that a person is guilty of one of several offences specified in the judgment, but that it is doubtful of which these offences he is guilty. Such a finding is in accordance with section 367(3) of the Code of Criminal Procedure, 1898, and will have the consequence that under section 72 of the Penal Code, 1860, the offender is to be punished for the offence for which the lowest punishment is provided, the same punishment not being provided for all.

Evidence duly taken before a committing Magistrate can be used under section 288 of the Code of Criminal Procedure, 1898, for all purposes in a trial court so long as the evidence is evidence within the meaning of the Evidence Act, 1872; or in other words, depositions recorded by the committing Magistrate can be utilised in a trial court as of evidential value only if the matter contained therein is, according to the rules of evidence laid down in the Evidence Act, of evidential value.

Unless, however, there is clearly present, besides the evidence given before the Magistrate, evidence which will show that the evidence given before the Magistrate should be preferred to and substituted for that given before the Sessions Judge, the evidence given before the Magistrate cannot be effectively utilised in support of a conviction.

King-Emperor v. *Jehal Teli*(4), *Fakira* v. *The King-Emperor*(5) and *King-Emperor* v. *Lalji Rai*(6), followed.

Manar Ali v. *Emperor*(7), referred to.

(1) (1926) I. L. R. 49 All. 57.
(2) (1930) I. L. R. 54 Mad. 68.
(3) (1930) I. L. R. 10 Pat. 140.
(4) (1924) I. L. R. 3 Pat. 781.
(5) (1937) 41 Cal. W. N. 741, P. C.
(6) (1935) 16 Pat. L. T. 730.
(7) (1933) I. L. R. 60 Cal. 1339.

The evidence of a witness who is cross-examined by the party calling him is still evidence and can be relied on by either party; the credibility of the facts deposed to being a matter for the jury.

Sohrai Sao v. *King-Emperor*(1), *Praphulla Kumar Sarkar* v. *Emperor*(2) and *The King-Emperor* v. *Haradhan*(3), followed.

As it is no longer considered that by giving the permission to cross-examine, something adverse to the credit of the witness is decided, there is no necessity to put obstacles in the way of a party who has called an unwilling witness. The circumstances in which a witness may be cross-examined by the party calling him are not laid down in section 154 of the Evidence Act, 1872, which leaves the matter entirely to the discretion of the Court and there is no legal objection to such permission being freely granted.

Once it is clear that the grant of permission is not equivalent to an adjudication or expression of opinion of the Court adverse to the veracity of the witness, it is harder to justify the refusal than the grant to any party of permission to cross-examine any witness who supports the case of his opponent.

Kalagarla Suryanarayana v. *Yarlagadda Naidoo*(4), relied on.

Emperor v. *Haradhan*(3), followed.

Parmeswar Dayal v. *The King-Emperor*(5) and *King-Emperor* v. *Suar Goala*(6), not followed.

Courts should avoid the use of the words "declared hostile" which by association have come to carry by implication a misleading significance.

The King-Emperor v. *Haradhan*(3), referred to.

The facts of the case material to this report are set out in the judgment of Rowland, J.

(1) (1929) I. L. R. 9 Pat. 474.
(2) (1931) I. L. R. 58 Cal. 1404, F. B.
(3) (1933) 14 Pat. L. T. 494.
(4) (1902) 6 Cal. W. N. 513, P. C.
(5) (1926) 7 Pat. L. T. 567.
(6) (1934) 16 Pat. L. T. 95.

1939.

NEBTI MANDAL v. KING-EMPEROR.

S. C. Chakraverti (as *amicus curiae*), for the appellants.

Assistant Government Advocate, for the Crown.

ROWLAND, J.—The three appellants were charged together and tried at one trial for offences under section 302 of the Indian Penal Code and also under section 201, the substance of the prosecution case being that one or more of the accused on the night of Wednesday, 1st March, 1939, at the residence of all of them committed murder of Musammat Paltanbati, widow of Nebti's brother Jukti and that all of them secretly and hastily disposed of the body in order to prevent detection of the crime and subsequently gave false explanations to account for the death. As to the propriety of trying an accused at one trial both for murder and for causing the disappearance of evidence of it, the old decisions in which it was held sometimes that only a person completely innocent of the murder can be convicted under section 201 have been reconsidered in some of the recent cases. In *Begu* v. *The King-Emperor*(1) the Judicial Committee affirmed the conviction under section 201 of three persons who had been tried on the charge of murder (section 302), but the evidence being insufficient to establish this charge against them, had been convicted under section 201. Their Lordships did not examine in detail the exact point whether in order to be convicted under section 201, the accused person must be innocent of the major offence; but it is clear from the result of the case itself that to be accused of the major offence, does not in itself confer on the criminal any immunity from conviction in respect of the concealment of the evidence. In a case of this Court, *Rup Narain Kurmi* v. *King-Emperor*(2) the accused had been tried on charges both under section 302 and under section 201 and the trial which was before a jury had resulted in their conviction under section 201. The conviction was affirmed, Fazl Ali, J. observing that

(1) (1925) I. L. R. 6 Lah. 226; L. R. 52 Ind. App. 191.
(2) (1930) I. L. R. 10 Pat. 140.

1939.

NEBTI MANDAL v. KING-EMPEROR.

ROWLAND, J.

he was inclined to accept the restricted interpretation of section 201 which has been adopted in some of the recent decisions and according to which a person cannot escape conviction under this section merely because he has been charged also with the principal offence or because there are some grounds for suspicion that he might be the principal culprit. But the learned Judge was not prepared to go so far as the Judges in the Allahabad case of *Emperor* v. *Har Piari*(1) in which they were dealing with a case in which there was evidence that one Beni Singh had been done to death by one of three persons; the body had been done away with by all three and the Sessions Judge found himself unable to convict any of them for concealing the corpse lest he should accidentally be convicting the murderer himself which certainly earlier decisions had said could not be done. The Judges observed that the " point whether section 201 applies to the actual culprit in a case of murder is obviously academic. None the less we are unable to agree with the view that a person who has actually committed a crime himself—whether murder or any other crime—is any the less guilty of removing traces thereof, if it is proved against him that he has done so, because he was the person who actually committed the offence. If the Legislature intended to provide such an exception, they would undoubtedly have said so in express language ". In a later decision, namely, in *Chinna Gangappa, In re*(2) which came before the Madras High Court, Wallace and Jackson, JJ. examined the proposition that sections 201—203 of the Indian Penal Code have no application to the person who actually committed the main offence mentioned in the section and that the person who committed the main offence cannot be himself found guilty of causing evidence of that offence to disappear or of giving false information about it. After examining the decisions

(1) (1926) I. L. R. 49 All. 57.
(2) (1930) I. L. R. 54 Mad. 68.

1939.

NEBTI MANDAL v. KING-EMPEROR.

ROWLAND, J.

they observed: "The true principle seems to be that there is no law preventing the main offender being convicted under sections 201 to 203, but in practice no Court will convict an accused both of the main offence and under these sections. But if the commission of the main offence is not brought home to him, then he can be convicted under sections 201 to 203. Therefore, there is no misjoinder in charging an accused in the alternative with the main offence and under sections 201 and 203, Indian Penal Code, nor is there anything irregular or improper in a Judge holding, as the learned Sessions Judge has done in this case, that, while the accused is himself not free from the suspicion of being the actual murderer, he can be none the less convicted under sections 201 or 203". I am of opinion that the view expressed in these two decisions of the Allahabad and Madras High Courts is correct.

Where the charge is framed in the alternative in respect of offences under sections 302 and 201, the position may arise as contemplated by section 72 of the Indian Penal Code. It may be open to the Court to give judgment that a person is guilty of one of several offences specified in the judgment, but that it is doubtful of which of these offences he is guilty. Such a finding is in accordance with section 367(*3*) of the Code of Criminal Procedure and will have the consequence that under section 72 of the Indian Penal Code the offender is to be punished for the offence for which the lowest punishment is provided, the same punishment not being provided for all.

Coming now to the facts, the deceased Musammat Paltanbati had her maternal home in village Khirda, police-station Araria. She was daughter of Bhore Lal deceased and his wife Bulni P. W. 4 of this case. Bulni has a brother Agamlal P. W. 7 of this case and Agamlal has a daughter Rama P. W. 5 of this case, a child of six or seven years. Bhore Lal also had a brother whose son Resamlal is, a name which will

1939.

NEBTI MANDAL v. KING-EMPEROR.

ROWLAND, J.

to form a Panchayati to settle her claim for a partition in default of being given the money she asked for by Nebti. It is the prosecution case that the partition awarded to her and her son a half share in the property which had been joint property of the brothers Jukti and Nebti. Paltanbati on the Tuesday night, 28th February, 1939, had slept at the house of her relative Resamlal which is only two doors away from that of Nebti. On the Wednesday night, the first March, 1939, Paltanbati slept at Nebti's house. There is some contradiction between successive statements of Rama as to whether on the Wednesday night she slept at Resamlal's house or Nebti's. I shall return to that later. Be that as it may, during the night Rama according to her evidence heard Paltanbati cry out that she was murdered. Rama wished to go to Paltanbati but was prevented by her hostess. Paltanbati was not again seen alive. On Thursday, 2nd March, 1939, she was cremated at Sankhpokhar about a mile to the east of Nebti's house and one admittedly curious circumstance about this cremation is that the only persons present at it were the three accused. None of the villagers attended the cremation. On Friday, 3rd March, 1939, Agamlal it is said met Uchit at Jokihat and on his enquiring about Paltanbati was told that Paltanbati hanged herself. Agamlal returned to Khirda and informed Bulni of this. Agamlal went to Potia where he met Nebti, Uchit and Raj Kumar all of whom said to him that Paltanbati had committed suicide by hanging herself. He returned to Khirda without Rama. Foul play was suspected by Bulni and Agam as they had not been informed before the cremation and Bulni thought it unsafe to allow Rama to remain in Khirda. The next morning Saturday, 4th March, Agam went to Potia, met Rama outside the house of accused and took her home. On the road she told Agamlal of having heard the cry in the night. That afternoon the three accused came to Khirda and there was some sort of a Panchayati at which they told a number of

1939.

NEBTI MANDAL v. KING-EMPEROR.

ROWLAND, J.

Agamlal's co-villagers that the death of Paltanbati had been due to her hanging herself and asked Agamlal to hush the matter up. For this they offered a sum of Rs. 40; but Agamlal would not accept it. On the next day, Sunday, 5th March, 1939, at 4 P.M., Agamlal made a statement at Araria police-station which was recorded in the form of *fard-beyan* as the occurrence related to the jurisdiction of police-station Palasy and on the same day the village chaukidar of Potia made a report at his police-station of the death of Paltanbati as having occurred on 28th February, 1939, on account of fever. The *fard-beyan* or the statement of Agamlal was sent from Araria police-station to Palasy where it reached in the morning of Monday, the 6th March, 1939. The Sub-Inspector reached Potia at about 11 A.M., and made a search of the house of the accused without finding anything which appeared to him particularly incriminating or suspicious. He arrested Uchit, Raj Kumar and Nebti and sent them to court. Investigation was continued on Tuesday, the 7th March, 1939, when a second search was made of the house of the accused in the presence of the Inspector and Deputy Superintendent of Police. On this search articles were found bearing stains which to the eyes of the superior officers appeared suspicious. Accordingly charge was taken of one *sari*, one *rezai*, one mat, one *khurpi*, one *kurta* and scrapings of earth from the wall of a room of the house at a level of 1½ cubits from the floor. Search was also made at the cremation ground and 29 pieces of burnt bones were found at the place where Paltanbati was supposed to have been cremated. The bones have been proved to be human, but that is all that the medical evidence can prove about them. Of the articles seized one *kurta* of red colour is supposed to have been the property of Uchit. The stains on it were found on chemical examination to be stains of blood, but owing to disintegration the source of the blood could not be positively determined. At the trial evidence has not been led to prove that this

1939.

NEETI MANDAL v. KING-EMPEROR.

ROWLAND, J.

kurta in fact belonged to Uchit. It remains then that it is simply a shirt found on those premises. The mat has been identified by Bulni as the property of her daughter Paltanbati. The stains on it were found on chemical examination to be of blood which was proved to be human blood. The scrapings of earth from the wall of the room were found on chemical examination to contain stains of human blood. * *

* * * * *

[His Lordship then dealt with the evidence in the case and proceeded as follows:]

Other suspicious circumstances are the failure to advise Paltanbati's mother Bulni or son Domra either of her illness or of her death. Then there is the evidence of Utam Hari before the committing magistrate in which he had told about the Panchayati in the evening at which Paltanbati was present and had deposed that the body was removed for cremation before dawn. He says that he did not ask anyone how the Musammat had died, not that any explanation was offered to him at that time. The Sessions Judge relied on this deposition in preference to the contradictory statement which he made during the sessions trial. His procedure was quite correct and in accordance with *King-Emperor* v. *Jehal Teli*(1) where Bucknill, J. laid down that "evidence duly taken before a magistrate can be used for all purposes in a trial court so long as the evidence is evidence within the meaning of the Indian Evidence Act; or, in other words, that magisterial depositions can be utilised in a trial court as of evidential value only if the matter contained therein is, according to the rules of evidence laid down in the Indian Evidence Act, of evidential value". He further observed that the principle was settled "that unless there is clearly present besides the evidence given before the magistrate evidence which will show that the evidence given before the

(1) (1924) I. L. R. 3 Pat. 781.

magistrate should be preferred to and substituted for that given before the Sessions Judge the evidence given before the magistrate cannot be effectively utilised in support of a conviction". These rules have since been followed and may be regarded as settling the practice for all Courts in Bihar. They are in accord with *Fakira* v. *The King-Emperor*(1), a decision of the Judicial Committee of the Privy Council. That was a case in which a question arose as to the admission of evidence in the Sessions Court under section 288 of the Code of Criminal Procedure and their Lordships observed that "by the express provision of section 288 of the Code the previous deposition is to be treated as evidence in the case for all purposes. The words 'subject to the provisions of the Indian Evidence Act, 1872,' cannot be read so as to limit the purpose for which it may be used". The same principles have been followed in *King-Emperor* v. *Lalji Rai*(2) where *Jehal Teli's* case(3) was applied and a conviction was supported, the depositions under section 288 being corroborated by previous statements recorded under section 164 of the Code of Criminal Procedure as well as by some other evidence. The use of previous statements recorded under section 164 to corroborate a deposition put in under section 288 was also supported as permissible in *Manar Ali* v. *Emperor*(4).

But in this case the Sessions Judge found that there was corroborative material which inclined him to prefer the statement of Utam Hari made before the committing magistrate to the evidence given by him in the Sessions Court. The corroboration available is in my opinion more ample than the Sessions Judge had thought because I would accept the evidence of Rama that she heard the death cry in the night. In connection with Rama's evidence, however, as also

(1) (1937) 41 Cal. W. N. 741, P. C.
(2) (1935) 16 Pat. L. T. 730.
(3) (1924) I. L. R. 3 Pat. 781.
(4) (1933) I. L. R. 60 Cal. 1339.

1939.

NEETI MANDAL v. KING-EMPEROR.

ROWLAND, J.

that of Utam, it is to be mentioned that both these witnesses having made statements which the prosecution did not accept as correct, they as well as some others of the witnesses were by permission of the Court cross-examined by the public prosecutor after a note had been made that they were "declared hostile" by the prosecution.

At one time it was thought that to declare a witness hostile had the effect of disqualifying the prosecution and even the defence from relying on the evidence of such a witness. This doctrine was developed in a series of decisions of the Calcutta High Court. But after a contrary view had been taken in this Court in the case of *Sohrai Sao* v. *King-Emperor*(1) those decisions were overruled by a Full Bench in *Praphulla Kumar Sarkar* v. *Emperor*(2) and the law as stated in *Sohrai Sao's* case(1) was followed and further explained in *The King-Emperor* v. *Haradhan*(3). It is now settled that the evidence of a witness who is cross-examined by the party calling him is still evidence and can be relied on by either party; the credibility of the facts deposed to being a matter for the jury.

As a corollary to the earlier view, it was said in some cases that leave to declare a witness hostile should not lightly be given. There must first be good reason to believe that the witness had been "gained over" [*See* observations in *Parmeswar Dayal* v. *The King-Emperor*(4) and *King Emperor* v. *Suar Goala*(5)]. The former of these cases was considered and not followed in *Emperor* v. *Haradhan*(3). When it is no longer considered that by giving the permission to cross-examine, something adverse to the credit of the witness is decided, there is no necessity to put

(1) (1929) I. L. R. 9 Pat. 474.
(2) (1931) I. L. R. 58 Cal. 1404, F. B.
(3) (1933) 14 Pat. L. T. 494.
(4) (1926) 7 Pat. L. T. 567.
(5) (1934) 16 Pat. L. T. 95.

obstacles in the way of a party who has called an unwilling witness. The circumstances in which a witness may be cross-examined by the party calling him are not laid down in section 154 of the Indian Evidence Act which leaves the matter entirely to the discretion of the Court and there is no legal objection to such permission being freely granted. Once we are rid of the mischief of considering the grant of permission to be equivalent to an adjudication or expression of opinion of the Court adverse to the veracity of the witness, it is harder to justify the refusal than the grant to any party of permission to cross-examine any witness who supports the case of his opponent. Thus in *Kalagurla Suryanarayana* v. *Yarlagadda Naidoo*(1) when a party had by the trial court been refused leave to cross-examine their Lordships of the Judicial Committee expressed their regret that this course was adopted. "Common fairness" they said "required that opportunity to test such statements by cross-examination should be given, if the evidence was to be relied on": and that not having been done, they said that (in the case before them) the evidence was of no value. In the present trial, we find no error in the procedure followed by the Sessions Judge: though, as I said in *The King-Emperor* v. *Haradhan*(2), I consider it preferable to avoid the use of the words "declared hostile" which by association have come to carry by implication a misleading significance.

The depositions of Rama and Utam are still evidence notwithstanding their cross-examination on behalf of the prosecution. So also are the depositions of P. W. 15 Kare, P. W. 17 Mahangu, P. W. 18 Sarfu and P. W. 19 Anoop Lal. These witnesses support the defence case that on the Wednesday Paltanbati was suffering from cholera which caused her death. These witnesses may be regarded as in

(1) (1902) 6 Cal. W. N. 513, P. C.
(2) (1933) 14 Pat. L. T. 494.

1939.

NEBTI MANDAL v. KING-EMPEROR.

ROWLAND, J.

effect defence witnesses. Their testimony did not favourably impress the Sessions Judge, and has in our view rightly been rejected. The prosecution theory receives very material corroboration from the recovery at the house-search of the house of the accused of the articles I have referred to above of which Paltanbati's mat was found to be stained with blood and the scrapings of earth from the wall of the room were found to be stained with human blood. That being so, the inference cannot be in my opinion resisted that Paltanbati was murderously done to death in the house of the accused on the night of 1st March, 1939, and the three accused persons all took part in causing the evidence of the crime whoever was its author to disappear.

I would affirm the conviction. In awarding sentence the Sessions Judge has had regard to the ages of the accused persons and to what appeared in all probability to be their relative degrees of responsibility. I see no reason to differ from the Sessions Judge's appreciation of these matters and I do not consider the sentence on either of the accused to be excessive. I would dismiss the appeal.

CHATTERJI, J.—I agree.

S.A.K. *Appeal dismissed.*

1939.

Nov. 22, 23, 24.
Dec. 22.

APPELLATE CIVIL.

Before Fazl Ali and Chatterji, JJ.

MUSAMMAT DAULAT KUAR

v.

BISHUNDEO SINGH.*

Hindu Law of Inheritance (Amendment) Act, 1929 (Act II of 1929), section 2, applicability and scope of—"sister", whether includes half-sister.

* Appeal from Appellate Decree no. 708 of 1938, from a decision of D. E. Reuben, Esq., I.C.S., District Judge of Patna, dated the 14th April, 1938, confirming a decision of Babu Shivapujan Rai, Munsif at Patna, dated the 18th March, 1937.