

The total of items 1 to 5 is Rs. 2,313-4-0 and 1/3rd of this is Rs. 771-1-4. We therefore accept the appeal so far as to reduce the amount fixed by the lower Court and to make the decree for partition of the house in favour of the plaintiff conditional on plaintiff and Narain Das paying Rs. 771-1-4 to Dwarka Das. As appellants have succeeded only to a very small extent in their appeal we direct that they should pay 5/6ths of his costs to Dwarka Das, respondent.

C. H. O.

Appeal accepted in part.

APPELLATE CRIMINAL.

Before Mr. Justice Scott-Smith and Mr. Justice Fforde.

ALI—Appellant,

versus

THE CROWN—Respondent.

Criminal Appeal No. 88 of 1924.

1924

April 29.

Criminal Procedure Code, Act V, of 1898 (as amended by Act XVIII of 1923), sections 339 and 339 (A)—Necessity of strict adherence to the terms of the section in trial of an approver after forfeiture of his pardon.

Four persons were tried by the Sessions Judge of Attock for murder and were acquitted on the 1st of January 1923. A., the present appellant, was an approver in that case, having been granted a conditional pardon under section 337 of the Code of Criminal Procedure. On the 1st of June 1923, the District Magistrate recorded an order that A. had forfeited his pardon, and directed that he should be tried for the murder. He was accordingly tried before the Sessions Judge, convicted, and sentenced to death.

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Held, that the trial has been vitiated by non-compliance with the provisions of sections 339 and 339 (A) of the Code of Criminal Procedure as amended by Act XVIII of 1903, inasmuch as:—

- (1) No certificate had been given by the Public Prosecutor to the effect that the accused had not complied with the conditions on which the tender of pardon was made.
- (2) The accused was not asked before the charge was read out to him whether he pleaded that he had complied with the conditions on which the tender of pardon was made nor were the terms of section 339 (A) explained to him.

Appeal from the order of H. F. Forbes, Esquire, Sessions Judge, Attock, at Campbellpore, dated the 5th January 1924, convicting the appellant.

GHULAM RASUL and UMAR BAKHSH, for Appellant.

PUBLIC PROSECUTOR, for Respondent.

The judgment of the Court was delivered by—

SCOTT-SMITH J.—*Mussammat Kahan Devi* was killed on the night of the 3rd July, 1922. Mangal Singh and three others were tried by the Sessions Judge of Attock for this murder and were acquitted on the 18th January 1923. Ali, the present appellant, was a witness in that case, having been granted a conditional pardon under section 337 of the Criminal Procedure Code. On the 1st June 1923, the District Magistrate recorded an order in which he held that Ali had forfeited his pardon and directed that he should be tried for the murder. He was accordingly committed for trial on the 3rd December 1923, and the case came on for trial in the Sessions Court on the 4th January 1924, and he was convicted on the following day and sentenced to death.

A preliminary objection is raised by appellant's counsel to the effect that the provisions of sections 339

and 339-A of the Criminal Procedure Code, as amended by the Act which came into force on the 1st September, 1923, have not been complied with and that the trial is, therefore, vitiated. In the first place, no certificate has been given by the Public Prosecutor as required by section 339 (1) to the effect that in his opinion, Ali has; either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender of pardon was made. There is no certificate on the record, and it is clear that none was ever given by the Public Prosecutor, and its absence, in our opinion, vitiates the trial.

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Section 339-A lays down that the Court trying a person, who has accepted a tender of pardon, shall, if the Court is a Court of Session, before the charge is read out and explained to the accused, ask him whether he pleads that he has complied with the condition on which the tender of the pardon was made. There is nothing on the record to show that the accused was so asked, but there is a note by the Sessions Judge, recorded apparently before the trial commenced, to the effect that the accused pleads that he has not complied with the conditions on which the tender of pardon was made. According to the vernacular record the accused was asked the following question:—"Did you fulfil the conditions on which the pardon was granted and give true evidence" and his reply was in the negative. This appears to have been taken as a plea that he was not raising his pardon as a bar to the trial. The accused should have been asked whether he pleaded that he had complied with the conditions on which the tender of pardon was made. The terms of the section should have been clearly explained to him, and it should have been made clear to him that he could plead the pardon as a bar to his trial.

We do not think there has been a proper compliance with the terms of this section.

We, therefore, accept the appeal and set aside the conviction and sentence as well as the trial, and discharge the accused, and we leave it to the authorities to take such further action if any as they may deem necessary.

A. R.

Appeal accepted.

APPELLATE CIVIL.

Before Mr. Justice Martineau and Mr. Justice Moti Sagar.

KHURSHAID ALAM AND OTHERS (DEFENDANTS)

Appellants

versus

**PHANGU (PLAINTIFF) AND
THE SECRETARY OF STATE } Respondents.
(DEFENDANT)**

Civil Appeal No. 1026 of 1920.

Custom—Succession—Whether the ala malik succeeds to an adna malkiat where the line of the adna malik has become extinct, in absence of proof of a custom to that effect, in villages where the ala malik is merely a taalukdar.

Held, that in villages where the adna maliks are the real proprietors, the ala malik being merely a taalukdar receiving a certain percentage on the revenue, the latter does not succeed to the adna malkiat when the line of the adna malik has become extinct, in the absence of a provision to that effect in the Wajib-ul-arz or any other evidence in proof of such a custom.

Sardar Sarup Singh v. Sundar (1), followed.

Surjan v. Lahu (2), distinguished.