APPELLATE CRIMINAL.

Before Sir Shadi Lal, Chief Justice and Mr. Justice Zafar Ali.

RAKHA,—Appellant,

versus

THE CROWN,—Respondent.

1925

March 3.

Criminal Appeal No. 5 of 1925.

Criminal Procedure Code, Act V of 1898, section 162 (as amended by Act XVIII of 1923)—Statement made to police, whether admissible to corroborate the testimony of a witness for the prosecution—Indian Evidence Act, I of 1872, section 157.

In this case the mother of the accused and some other witnesses had made statements before the Committing Magistrate in favour of the prosecution, but when examined by the Sessions Judge they repudiated those statements. Whereupon the Sessions Judge transferred the statements to his own record and treated them as evidence in the case. He also allowed the Public Prosecutor to produce and prove copies of the statements made by the witnesses to the police during the investigation in order to corroborate their depositions before the Committing Magistrate.

Held, that the rule laid down in section 157 of the Indian Evidence Act is controlled by the special provisions contained in section 162 of the Criminal Procedure Code (as amended by Act XVIII of 1923), and that the latter section prohibits the use of the record containing the statement of a witness to the police as evidence against the accused as well as proof of such statement by oral evidence.

Mam Chand v. *Crown* (1), disapproved.

Appeal from the order of J. Addison, Esquire, Sessions Judge, Sialkot, dated the 19th November 1924, convicting the appellant.

C. L. MATHUR, for Appellant.

DES RAJ SAWHNY, Public Prosecutor, for Respondent.

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The judgment of the Court was delivered by—

SIR SHADI LAL, C.J.—The appellant Rakha, a Christian sweeper, of the village Budho Chak in the Sialkot District, has been convicted of the murder of his wife *Mussammat* Hussaina; and has been sentenced under section 302 of the Indian Penal Code to suffer the penalty of death. The convict has preferred an appeal to this Court, and the case has also been submitted to us under section 374 of the Code of Criminal Procedure for confirmation of the capital sentence.

There is abundant evidence on the record, and indeed it is not disputed by the learned counsel for the appellant that, on the afternoon of the 3rd August 1924, at about 3 P.M., *Mussammat* Hussaina was found lying wounded on the floor of a room in the house of her husband; and that she expired shortly afterwards. The medical evidence shows that the unfortunate woman had sustained no fewer than forty incised injuries on her face, neck, hands and other parts of the body; and that all the injuries were caused with a weapon such as a chopper.

Now, there is no eye-witness to depose to the assault on the deceased, and the case for the prosecuption rests upon circumstantial evidence and the confessional statements made by the accused. It appears that his mother and some other witnesses had made before the Committing Magistrate statements in favour of the prosecution; but, when examined by the Sessions Judge, they repudiated those statements as having been made under police pressure. The learned Judge has, however, treated the former depositions as evidence in the case, and there can be no doubt that section 288 of the Code of Criminal Procedure empowers a Court of Session to treat such depositions as substantive evidence at the trial.

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The learned Sessions Judge has also allowed the Public Prosecutor to produce and prove copies of the statements made by the witnesses to the police during the investigation in order to corroborate their depositions before the Committing Magistrate; but we consider that those statements were inadmissible in evidence. The judgment in *Mam Chand* versus *The Crown* (1) relied upon by the trial Court is no doubt an authority for the proposition that the prior statement of a witness to the police is admissible in evidence to corroborate his testimony before the Committing Magistrate, but it appears that the attention of the learned Judges, who decided that case, was not invited to the provisions of section 162 of the Code of Criminal Procedure. The aforesaid section, as amended by the Criminal Procedure Code (Amendment) Act, XVIII of 1923, runs as follows :—

"No statement made by any person to a police officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police-diary or otherwise, or any part of such statement or record be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made."

It is true that section 157 of the Indian Evidence Act lays down the rule that, in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact is admissible in evidence; but this general rule is controlled by the special provisions contained in section 162 of the Criminal Procedure Code relating to criminal trials. It will be observed that section 162, as it existed prior

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to its amendment in 1923, expressly prohibited the use of the record containing the statement of a witness to the police as evidence against the accused; and that, while the High Courts were at variance as to the admissibility of the oral evidence of such statement in order to corroborate the prosecution witness, they were unanimous that the writing could not be admitted in evidence against the accused. Even the controversy as to the admissibility of such statement by oral evidence has now been set at rest by the amendment made in 1923 which has substituted the words " nor shall any such statement or any record thereof * * * be used for any purpose (save as hereinafter provided) at any inquiry or trial * * * * " for the words " nor shall such writing be used as evidence " which occurred in section 162 prior to its amendment. The result is that not only is the record of the statement of a witness taken under section 161 of the Criminal Procedure Code excluded from evidence but also the proof of such statement by oral evidence for the purpose of corroborating the testimony of the witness for the prosecution.

We accordingly hold that the statements made by the witnesses to the police were wrongly admitted in evidence, and we must exclude them from consideration. Nor are we prepared to attach any value to the evidence of the witnesses before the Committing Magistrate which was repudiated by them at the trial. Confining our attention to the remaining material on the record, we find that there is ample evidence to prove the fact that on the afternoon in question the prisoner was seen running away from his village, and that when arrested he was wearing a shirt on which the Imperial Serologist discovered human blood. There is also evidence to the effect that his hands were, at that time, stained with blood; and that he admitted having killed his wife with a chopper.

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Moreover, the prisoner, when examined by the Committing Magistrate, stated that he had killed his wife, because he suspected her fidelity, as she would not talk to him or have intercourse with him. He explained that on the afternoon in question he desired to have intercourse with her, but that she refused saying that she did not care for him. He took it that she cared more for somebody else and he accordingly killed her. At the trial, he admitted the correctness of this statement, but tried to reduce the gravity of his offence by alleging for the first time that on the afternoon, when he returned to his house, he found one Jhanda in the house and that his wife was naked at that time. He accordingly picked up the chopper in order to attack Jhanda, but the latter escaped partly because he was a strong man and partly because his wife intervened. He, thereupon, lost his temper and attacked her with the weapon which he was holding in his hand. Now, there is not a scintilla of evidence that the deceased was a woman of immoral character or that she had contracted a liaison with Jhanda, or that Jhanda was present in the house on the afternoon in question. We have only the evidence of one witness to the effect that about a month and a half before the murder he once saw the deceased and Jhanda talking and laughing together; but he admitted that Jhanda was married to the deceased's cousin and that there was no rumour in the village that they were on terms of illicit intimacy with each other. It may be, as stated by the prisoner before the Committing Magistrate, that the woman declined to have sexual intercourse with him (the prisoner) and the latter thereupon got angry and struck her with the chopper.

The *onus* of proving grave and sudden provocation, such as would reduce the offence of murder to one of culpable homicide not amounting to murder, was

on the accused; and he has wholly failed to discharge that *onus*. We accordingly find him guilty of an offence under section 302 of the Indian Penal Code. Considering that he acted in a cruel manner and that he practically hacked his wife to death, we are not prepared to interfere with the sentence of death imposed by the Sessions Judge. Confirming, therefore, the sentence we dismiss the appeal.

C. H. O.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Harrison.

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Nov. 22

FAKHRUDDIN—Petitioner,

versus

THE CROWN—Respondent.

Criminal Revision No. 1224 of 1924.

Indian Evidence Act, I of 1872, section 30—Trial of several persons for same offence—plea of guilty by one—whether admissible against his co-accused—The word 'trial' in warrant cases explained.

The petitioner was one of three accused persons sent up for trial for an offence under section 9 (*c*) of the Opium Act. One of the co-accused, when questioned, said he was guilty and subsequently pleaded guilty after the charge had been framed. He asked, however, to be allowed to produce witnesses as to character and he was therefore not sentenced at once. His confession was taken into account as against the petitioner and this was objected to on the ground that there was no joint trial.

Held, that the confession was admissible against the co-accused under section 30 of the Indian Evidence Act. So far as warrant cases are concerned the word 'trial' includes the whole of the proceedings and the hearing of evidence, and not merely the concluding stage of the proceedings after the framing of the charge.