APPELLATE CRIMINAL.

Before Sir Shadi Lal Chief Justice and Mr. Justice Coldstream.

GAUNS, Appellant

versus

THE CROWN, Respondent.

1926

June 3.

Criminal Appeal No. 281 of 1926.

Criminal Procedure Code, Act V of 1898, section 237—Charge of murder—whether can be altered on appeal to one of an offence against property—Evidence—circumstantial—must be incompatible with innocence of the accused.

In order to justify the inference of guilt, the circumstantial evidence, where there is no direct evidence, must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

Where the conviction of the appellant for murder of a woman was based solely on two circumstances, (1) that on the afternoon in question he had been seen working in his field near the field in which was the deceased woman, and (2) that 3 days later he produced some of her jewellery.

Held, that this evidence did not necessarily point to the conclusion that the murder was committed by the appellant, and that therefore the conviction and sentence under section 302 of the Penal Code must be set aside.

Held further, that although the appellant's acquittal would not preclude a fresh prosecution under a different charge, the appellate Court was not justified in altering the conviction to one under any of the sections dealing with offences against property.

Wallu v. *Crown* (1), followed.

Begu v. *The King-Emperor* (2), distinguished.

Appeal from the order of F. W. Skemp, Esquire, Sessions Judge, Gurdaspur, dated the 26th February 1926, convicting the appellant.

(1) (1923) I. L. R. 4 Lah. 373. (2) (1925) I. L. R. 6 Lah. 226 (P. C.).

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MEHR CHAND, MAHAJAN, for Appellant.

CARDEN-NOAD, Government Advocate, for Respondent.

The judgment of the Court was delivered by —

SIR SHADI LAL C. J.—The appellant, Gauns, a *Rajput* of Jhanda Langah in the Gurdaspur District, has been convicted of the murder of one *Mussammat* Hassan Bibi of the same village; and has been sentenced under section 302 of the Indian Penal Code to the penalty of death. The prisoner, who is a bachelor of about 25 years of age, is said to have made improper overtures to *Mussammat* Hassan Bibi in the beginning of October 1925, but when summoned before a *panchayat* of the village he begged her husband to pardon him.

On the 24th October 1925, *Mussammat* Hassan Bibi left her house during the absence of her husband, and went to her sugarcane field. The husband returned to the house in the afternoon and, finding his wife absent, he searched for her in the village, and ultimately found her corpse lying in the field. The medical witness, who conducted the *post-mortem* examination, found five injuries on the body and declared that death was due to throttling.

Now, there is no eye-witness of the affair, and the case for the prosecution depends entirely upon circumstantial evidence. The two circumstances, which have been proved by the prosecution, are these :—

(1) On the afternoon in question the prisoner Gauns was seen working in his field, and *Mussammat* Hassan Bibi was, at that time, in her own sugarcane field at a distance of about 30 or 35 *karams*.

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(2) On the 27th October he dug out from beneath a *shisham* tree five earrings, and also gave information which led to the recovery of two bangles from Mohna, goldsmith. These ornaments have been proved to be the property of the deceased.

Now, it has been repeatedly laid down that, in order to justify the inference of guilt, the circumstantial evidence, where there is no direct evidence, must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. We do not think that the circumstances proved in this case exclude every reasonable hypothesis other than that the death of the woman was caused by the appellant. They are not incompatible with the theory that the prisoner stole the ornaments after she had been killed by some other person and when she was lying in the field. Be that as it may, we are not prepared to hold that the evidence in this case necessarily points to the conclusion that the murder was committed by the appellant.

Nor do we think that we would be justified in altering the conviction under section 302 to a conviction under one of the sections dealing with offences against property. In this connection it is necessary only to refer to the judgment in *Wallu* v. *Crown* (1) which is on all fours with the present case. The observations of their Lordships of the Privy Council in *Begu* v. *The King-Emperor* (2) must be read with the facts of that particular case and are not intended to lay down any rule of general application.

Whether the appellant should be tried on another charge is a question which must be decided by the District Magistrate. We offer no opinion on that

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question beyond saying that the present order of acquittal on the charge of murder should not be taken as precluding the prosecution of the prisoner for an offence relating to property.

For the aforesaid reasons we accept the appeal and, setting aside the conviction and the sentence, direct that the accused be released forthwith.

N. F. E.

Appeal accepted

APPELLATE CRIMINAL.

Before Mr. Justice Fforde.

1926

June 4.

LACHHMAN SINGH, Appellant

versus

THE CROWN, Respondent.

Criminal Appeal No. 468 of 1925.

Criminal Procedure Code, Act V of 1898, section 342 (1)—Examination of accused by the Court, during the course of the prosecution evidence, but not afterwards—Illegality—effect of.

Where the accused was questioned by the Court after two witnesses for the prosecution had given evidence, and, a charge having then been framed to which the accused pleaded not guilty, four more witnesses were examined for the prosecution and then the defence evidence taken, the accused not being further questioned by the Court.

Held, that the provisions of section 342 (1) of the Criminal Procedure Code are mandatory and that the conviction and sentence must therefore be set aside, the trial be resumed from the close of the prosecution case, and the accused be examined before entering upon his defence.

Surendra Lal Shaha v. *Isamaddi* (1), and *Hamid Ali* v. *Sri Kissen Gosain* (2), followed.

Appeal from the order of J. W. Fairlie, Esquire, Sub-Divisional Magistrate, Rupar, District Ambala, dated the 10th April 1926, convicting the appellant.

(1) (1924) 84 I. C. 325. (2) 1925 A. I. R. (Cal.) 574.