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share of the land, but his judgment does not show how he has arrived at that share.

The learned counsel for the respondent concedes that as the daughter would be entitled, under the Muhammadan Law, to one-half of the estate of her father, the gift to that extent should be upheld. I would accordingly modify the decree of the District Judge by declaring that the gift is valid to the extent of one-half of the landed estate of Jowaya and also with respect to the house property. The appeal is accepted *pro tanto*, and the parties are directed to bear their own costs in this Court.

SKEMP J.—I agree.

SKEMP, J.

A. N. C.

Appeal accepted in part.

APPELLATE CRIMINAL.

Before Mr. Justice Tek Chand and Mr. Justice Agha Haidar.

GHULAM HAIDAR, Appellant,

versus

THE CROWN, Respondent.

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Jan. 23.

Criminal Appeal No. 1334 of 1928.

Indian Evidence Act, I of 1872, section 33—Deposition of witness before committing Magistrate—admission of, at trial, in absence of witness—Procedure—non-compliance with—Accused's consent—whether irregularity cured by.

Held, that before the previous deposition of a witness can be admitted in evidence at the trial under section 33 of the Indian Evidence Act, the Court must decide judicially that a proper effort had been made to secure the presence of the witness, that in spite of that effort he had not been traced and could not be found, or that he was incapable of giving evidence, or was kept out of the way by the adverse party, or his presence could not be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable.

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Re *Annavi Muthiriyan* (1), *Kottammal Kalathingal Umar Hajee* v. *King-Emperor* (2), *Emperor* v. *Kangal Mali* (3), and *Sajjan Singh* v. *Crown* (4), followed.

Held further, that non-compliance with section 33 was not cured by the fact that counsel for the accused had given his consent thereto.

Kottammal Kalathingal Umar Hajee v. *King-Emperor* (2), followed.

Appeal from the order of Lt.-Col. F. C. Nicolas, Sessions Judge, Rawalpindi, dated the 29th October 1928, convicting the appellant.

MOTI SAGAR and W. CHANDRA DATTA, for Appellant.

ABDUL RASHID, Assistant Legal Remembrancer, for Respondent.

The judgment of the Court was delivered by :—

AGHA HAIDAR J.—The appellant, Ghulam Haidar, has been convicted by the Sessions Judge, Rawalpindi, of an offence under section 302 of the Indian Penal Code and sentenced to death. He has appealed to this Court, and the record is also before us under the provisions of section 374, Criminal Procedure Code, for confirmation of the death sentence.

The facts of the case are briefly these :—

A boy named Shah Mir Haidar, son of Mehdi Shah, aged eight or nine years, was murdered late in the afternoon, on the 25th of May, 1923, in the village Mohra Shah Wali Shah, in the Rawalpindi District. Information was at once given to Karam Hussain Shah (P. W. 12), Zaildar of the village, who *immediately* despatched the *ruqqa*, exhibit P. D., through

(1) (1916) I. L. R. 39 Mad. 449.
(2) (1923) I. L. R. 46 Mad. 117.
(3) (1914) I. L. R. 41 Cal. 601.
(4) (1925) I. L. R. 6 Lah. 437.

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Hassan Shah to the nearest police station at Golra. This *ruqqa* is printed at page 3 of the paper book and simply mentions the fact of the deceased being beaten by four persons, namely Talab Hussain, Ghulam Haidar (appellant), Sarwar and Mehra. At the time this *ruqqa* was despatched the deceased was alive, and it was feared that he would not live very long. As a matter of fact, the boy died between 4 and 5 A.M. the following morning.

On the 26th of May, 1923, the Police arrived on the spot and investigation was taken up. The four persons mentioned above were chalaned ; but, as the present accused and Mehra were absconding, Talab Hussain and Sarwar only were sent up to take their trial under section 302 of the Indian Penal Code. Talab Hussain was convicted and sentenced to death, while Sarwar was sentenced to transportation for life. They filed an appeal to this Court and their appeal was dismissed,—*vide* Criminal Appeal No. 1001 of 1923 decided on the 22nd of January 1924.

The present accused, Ghulam Haidar, who had been absconding during all these years, was arrested on the 3rd of May, 1928, at Abbottabad, and has now been tried and convicted by the learned Sessions Judge of Rawalpindi as already mentioned.

The case for the prosecution depends mainly upon the evidence of three persons, namely, Nawab Shah (P. W. 10), Alaf Shah (P. W. 11) and Hassan Shah (P. W. 15). We may take up Hassan Shah first. This witness was examined before the Committing Magistrate on the 11th of July, 1928. It appears that a *sub-pœna* was issued for his appearance as a prose cution witness in the Sessions trial; but, before the

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sub-pœna could be returned, the trial before the Sessions Judge commenced. The Sessions Judge, however, without waiting for the return of the said *sub-pœna* or taking any other steps to secure the presence of Hassan Shah before the Court admitted his deposition before the Committing Magistrate as evidence for the prosecution. We find that counsel for the accused did not raise any objection to this procedure. The procedure adopted by the learned Sessions Judge was irregular and not justified by law. A previous deposition can be admitted in evidence only under the provisions of section 33 of the Indian Evidence Act, but before it can be placed on the record of a criminal trial the Court must decide judicially that a proper effort had been made on behalf of the prosecution to secure the presence of the witness; that in spite of that effort he had not been traced and could not be found, or that he was incapable of giving evidence, or was kept out of the way by the adverse party, or his presence could not be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable. None of the requirements of section 33 of the Indian Evidence Act were complied with in the present case, and the learned Sessions Judge, therefore, was in error in using it as evidence. There are several authorities in support of this view, but we may refer here only to some recent cases, *Re*: *Annavi Muthiriyan* (1), *Kottammal Kalathingal Umar Hajee* v. *King Emperor* (2), *Emperor* v. *Kangal Mali* (3), and *Sajjan Singh* v. *The Crown* (4). These authorities are sufficient to justify our action in not treating the deposition of Hassan Shah, which had

(1) 1916) I. L. R. 39 Mad. 449.
(2) (1923) I. L. R. 46 Mad. 117.
(3) (1914) I. L. R. 41 Cal. 601.
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been brought on the record by the irregular procedure adopted by the Sessions Judge as evidence in the case. The fact that the counsel for the accused gave his consent does not make any difference,—*vide Kottammal Kalathingal Umar Hajee* v. *King-Emperor* (1). As a matter of fact, we have refrained from looking into the deposition of Hassan Shah, and it need not therefore be considered as part of the record in the present case.

After we had intimated to the learned counsel for the appellant and the Crown our decision to exclude the deposition of Hassan Shah, Mr. Moti Sagar, the learned counsel for the appellant, made a statement that he was not anxious that the evidence of this witness should be secured at this stage by examining him either in this Court or in the Court of the learned Sessions Judge. He definitely stated that the case should be decided on the evidence as it stands on the record after excluding the deposition of Hassan Shah.

* * * * *

After examining the remainder of the record, their Lordships concluded :—

Having regard to the evidence on the record, as already stated, we are of opinion that the case against the present appellant is proved beyond all doubt. We accordingly affirm the conviction and the sentence passed upon the appellant under section 302 of the Indian Penal Code and, dismissing his appeal, order that the same be carried out according to law.

N. F. E.

Appeal dismissed.

(1) (1923) I. L. R. 46 Mad. 117.