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v.
AMIR.

RAM LALL J.

ADDISON J.

For these reasons I would dismiss this appeal but having regard to all the circumstances I would leave the parties to bear their own costs throughout.

ADDISON J.—I concur.

A. K. C.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Young C. J. and Blacker J.

MUZAFFAR KHAN AND OTHERS (CONVICTS) Appellants,

versus

THE CROWN—Respondent.

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Feb. 27.

Criminal Appeal No. 1099 of 1938.

Criminal Procedure Code (Act V of 1898), SS. 162 and 164 — Indian Evidence Act (I of 1872) S. 145 — Witness' previous statement made under S. 164 of the Code of Criminal Procedure — Whether should be proved first before cross-examining him — Illiterate witness — whether governed by different process of law.

Held, that there is no duty cast upon counsel, who wishes to cross-examine a witness by putting to him a previous statement made under S. 164 of the Code of Criminal Procedure first to prove that statement.

That S. 145 of the Indian Evidence Act, which has to be read with S. 162 of the Code of Criminal Procedure, quite clearly indicates that the attention of a witness is to be called to the previous statement before the writing can be proved. If the witness admits the previous statement, or explains any discrepancy or contradiction, it becomes unnecessary for the statement thereafter to be proved. On the other hand if the statement still requires to be proved that can be done by calling the person before whom the statement was made.

That the proposition that an illiterate person is imune from the processes of law with regard to contradiction by a

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previous statement has no authority in law and would nullify almost completely the provisions of S. 145 of the Indian Evidence Act if it were so, as the majority of witnesses in criminal cases in this province are illiterate. It makes not the slightest difference whether the witness is literate or illiterate; attention can be drawn to any portion of a previous statement by reading the statement to the witness; he does not require to read it himself.

Appeal from the order of Mr. I. M. Lall, Additional Sessions Judge, Lyallpur at Sargodha, dated 15th November, 1938, convicting the appellants.

ABDUL AZIZ and SHANTI NARAIN, for Appellants.

MAURICE for Advocate-General, for Respondent.

The judgment of the Court was delivered by—

YOUNG C. J.—In this case Ghulam Muhammad and Ghulam Sher have been sentenced to death and Muzaffar Khan to transportation for life by the learned Additional Sessions Judge of Lyallpur at Sargodha for the murder of Sher Muhammad.

When this case was in the Sessions Court, Mr. Shanti Narain, counsel for the accused, in cross-examining a witness wished to put to him, in order to contradict him, a previous statement made by him to a Magistrate under section 164 of the Criminal Procedure Code. The learned Judge took an original view of the law on this subject. He held :—

(*a*) That a copy of a previous statement of a witness has first to be duly proved before it can be put to the witness for the purpose of contradicting him.

(*b*) That under section 145 of the Indian Evidence Act a previous statement reduced into writing cannot be put to an illiterate witness for the purpose of contradicting him.

The learned Judge, therefore, did not allow counsel effectively to cross-examine the witnesses called for the Crown when they had made previous statements which contradicted their statements in the Sessions Court, as (*a*) their previous statements had not at that stage been proved, and (*b*) the witnesses were illiterate. At the end of the proceedings, it was agreed, however, by the Public Prosecutor, and assented to by Mr. Shanti Narain, Advocate, for the accused, that the previous statements might be read by the learned Sessions Judge before he wrote his judgment in order that any discrepancies which might exist might be taken into consideration.

With regard to the first point: there is no duty cast upon counsel who wishes to cross-examine a witness by putting to him a previous statement first to prove that statement. Section 145 of the Indian Evidence Act, which the learned Judge himself quotes in his order, has to be read with section 162, Criminal Procedure Code, and quite clearly indicates that the attention of a witness is to be called to the previous statement before the writing can be proved. If the witness admits the previous statement, or explains any discrepancy or contradiction, it obviously makes it unnecessary for the statement—thereafter to be proved. On the other hand, if the statement still requires to be proved that can be done later by calling the person before whom the statement was made. This has been the invariable practice in every Sessions Court in this province for several generations. There is no authority in law for any alteration to be made now.

With regard to the second point, the proposition that an illiterate person is immune from the processes

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of law with regard to contradiction by a previous statement has no authority in law, and would nullify almost completely the provisions of section 145 if it were so, as the majority of witnesses in criminal cases in this province are illiterate. Section 145 of the Indian Evidence Act provides that "a witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him." It makes not the slightest difference whether the witness is literate or illiterate; attention can be drawn to any portion of a previous statement by reading the statement to the witness; he does not require to read it himself. This again has been the invariable practice in this province for generations.

The result of the opinion held by the learned Sessions Judge is that we have to come to the conclusion that there has been a failure of justice in the hearing of this case. The mere fact that the Judge may have taken into consideration any discrepancies which might exist before he wrote his judgment does not cure the failure of justice. It is quite possible that a witness on being effectively cross-examined in Court upon a vital difference in a previous statement might be so shaken in his evidence on that point as to make his evidence on other points of no value at all. Counsel for the defence having been deprived of his proper opportunity of effectively cross-examining witnesses called for the prosecution, it is impossible to say that this has not occasioned a failure of justice. It is a

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failure of justice to deprive an accused of his legal rights, *i.e.*, of defending himself effectively.

The case under these circumstances must be sent back for re-trial. We order accordingly. The case will go to the Sessions Judge, Sargodha, who will not be the same Sessions Judge who originally tried the case in the first instance.

The application for revision in this case obviously fails and is dismissed.

A. N. K.

REVISIONAL CRIMINAL.

Before Din Mohammad J.

RAM CHAND AND ANOTHER—Petitioners,

versus

THE CROWN—Respondent.

1938

Dec. 20.

Criminal Revision No. 1324 of 1938.

Criminal Procedure Code (Act V of 1898), S. 522 — Indian Penal Code (Act XLV of 1860), SS. 349, 350 — Criminal force within the meaning of S. 522 of the Code of Criminal Procedure — Criminal force whether can be used to a thing.

Held, that the term " force " is defined in S. 349 of the Indian Penal Code and the term " criminal force " is defined in S. 350 of the Indian Penal Code and both contemplate the use of force to a person and not to a thing.

Section 522 of the Code of Criminal Procedure comes into play only when the offence is attended by criminal force, show of force or by criminal intimidation and not otherwise.

When, therefore, the complainant himself alleges that the house was locked when the unlawful entry was effected, it cannot be argued that the offence of criminal trespass was attended by criminal force or show of force or by criminal intimidation within the meaning of S. 522 of the Code of Criminal Procedure.