

1904 save it from being barred by limitation. We must therefore set aside
 JULY 11. the judgments and decrees of both the Courts below and in lieu thereof
 decree the plaintiff's claim in full with costs.

APPELLATE
 CIVIL.

Appeal allowed.

31 C. 1043=9
 C. W. N. 83.

31 C. 1050 (=8 C. W. N. 528=1 Cr. L. J. 451.)

[1050] ORIGINAL CRIMINAL.

Before Mr. Justice Geidt.

EMPEROR v. ROBERT STEWART.*

[10th May, 1904.]

*Reply, Prosecutor's right of—Depositions of witnesses before committing Magistrate—
 Evidence adduced by accused—Criminal Procedure Code (Act V of 1898), ss. 162,
 288, 289, 292.*

In a sessions trial before the High Court, the accused, before he was asked by the Court under s. 289 of the Criminal Procedure Code whether he meant to adduce evidence, put in as evidence on his own behalf the depositions of certain witnesses taken before the committing Magistrate which formed part of the record sent up by the Magistrate;—

Held, that this could not be said to be 'evidence adduced by the accused' after the case for the prosecution had been closed, and that the prosecution was therefore not entitled to reply under s. 292.

[Ref. 15 Cr. L. J. 241=23 I. C. 198=7 L. B. R. 84=4 Cr. L. R. 128=4 L. B. R. 5
 Dist. 10 Cr. L. J. 24.]

In this case the accused, Robert Stewart, was tried at the Sessions under ss. 307 and 326 of the Penal Code for an attempt to commit murder and voluntarily causing grievous hurt by a dangerous weapon.

During the trial, while a Sub-Inspector of Police was being cross-examined, Mr. Garth, who appeared for the accused, put in a statement made by the accused to a head constable on the day of the occurrence, which formed part of the record sent up by the committing Magistrate. Immediately after the case for the prosecution was closed, Mr. Garth, before he was asked by the Court whether he meant to adduce evidence, put in the depositions of nine witnesses for the prosecution taken by the committing Magistrate, all of whom had given evidence at the trial then proceeding, for the purpose of contradicting them.

Mr. Garth (Mr. Remfry with him) for the accused. The mere fact that the statement made by the accused and the depositions of the nine witnesses put in as evidence on his behalf, does not [1081] entitle the prosecution to reply. Section 288 of the Criminal Procedure Code deals with the evidence taken before the committing Magistrate. The word "evidence" in s. 289 of the Code must therefore mean evidence other than the depositions taken before the committing Magistrate. When, therefore, the accused put in such depositions he could not be said to have adduced evidence so as to come within the purview of s. 292. The same argument applies to the statement of the accused to the head constable.

The Standing Counsel (Mr. S. P. Sinha) (Mr. K. S. Bonerjee with him) for the Crown. The deposition of a witness taken before the committing Magistrate when put in by the accused to contradict the evidence given by that witness is undoubtedly evidence; and full weight should

* Original Criminal.

be given to the words "any evidence" in s. 292. I am informed that the same question arose before Mr. Justice Pratt when presiding over a Criminal Session of this Court, and that he decided that the prosecution was entitled to reply.

GEIDT, J. I have seen Mr. Justice Pratt with reference to his decision cited by the Standing Counsel and he has very kindly shown me his note of the case. From that it appears that, in addition to depositions taken before the committing Magistrate, other documents that did not form any part of the record sent up by the committing Magistrate were put in by the accused during the cross-examination of the witnesses for the prosecution and it was upon that circumstance that his decision was based. This is not the case here. The depositions of witnesses taken before the committing Magistrate and statements of the accused forming part of the record sent up by that Magistrate cannot be said to be evidence adduced by the accused after the case for the prosecution is closed. As the witnesses have been examined in this Court, their depositions, before the committing Magistrate may, in the discretion of the presiding Judge, be treated as evidence, independently of their being tendered by the accused and I regard the tender as an application that the discretion of the presiding [1052] Judge be exercised in the manner provided by section 288. The record of the statement of the accused, made by the head constable cannot be used by itself as evidence. That is forbidden by section 162 (1) of the Criminal Procedure Code. Properly speaking it could only be used by the Sub-Inspector as a writing from which he refreshed his memory as to what was said by the accused. I am of opinion, therefore, that no evidence has been adduced by the accused in this case, and that the prosecution is not entitled to reply.

1904
MAY 10.

ORIGINAL
CRIMINAL.

31 C. 1050=8
C.W.N. 528=
1 Cr. L. J.
481.

31 C. 1053 (=8 C. W. N. 745=1 Cr. L. J. 713.)

[1083] APPELLATE CRIMINAL.

Before Mr. Justice Pratt and Mr. Justice Handley.

HIRA LAL THAKUR v. EMPEROR.*

[10th June, 1904.]

Joint trial—Different transactions—New trial—Criminal Procedure Code (Act V of 1898) ss. 235, 239—Indian Penal Code (Act XLV of 1860) ss. ⁴⁰³/₁₀₉ 414, 420, 471.

On the 23rd August 1903 the appellant obtained a payment from the firm of S. R. R. D. of Rs. 5,000 in currency notes of Rs. 500 each on a *hundī* by falsely representing himself to be a durwan to the firm of H. R. R. C. On the 22nd January 1904 the appellant accompanied by S. T. went to a shop and purchased some silk, and in payment S. T. gave a note of Rs. 500, which was one of the notes received by the appellant on the 23rd of August. The appellant and S. T. were tried jointly and convicted,—the appellant under ss. 420, 471 and 403 of the Penal Code with regard to the occurrence of the 23rd August, and S. T. under ss. ⁴⁰³/₁₀₉ and 414 of the Penal Code with regard to the occurrence of the 22nd January:—

Held that the joint trial was bad in law, and that a new trial should be held by a different Magistrate.

[Fol. 11 Cr. L. J. 30.=4 I. C. 700=6 M. L. T. 17.]

APPEAL by Hira Lal Thakur.

* Criminal Appeal, No. 452 of 1904, against the order passed by Bazial Karim, 3rd Presidency Magistrate of Calcutta, dated March 22, 1904.