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of Haro Sundari Baistami by Gopal Chandra Mazumdar, and that such order of the Magistrate was in no way illegal. The Sessions Judge's order of the 26th July is set aside, and if Gopal Chandra Mazumdar desires be can proceed with his complaint, and the Deputy Magistrate will hear and pass orders upon it.

The Deputy Magistrate's decision of the 14th August dismissing Gopal Chandra Mazumdar's complaint is set aside.

Before Mr. Justice Macpherson and Mr. Justice Ainslie.

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THE QUEEN *v.* ZULFUKAR KHAN AND OTHERS.*

Evidence—Intoxication—Recording Evidence.

Evidence taken on the trial of one prisoner wrongly admitted as evidence on the trial of another. Intoxication wrongly treated as an aggravation of offence.

THE facts sufficiently appear in the judgment of the Court, which was delivered by

MACPHERSON, J.—The case against Zulfukar Khan has been so carelessly and badly tried that the conviction and sentence must be set aside and a new trial had.

It appears that Kamru Khan, Guldad Khan, Dyanath, and others, on the one side, had a regular fight with Kulfukar Khan and others, on the other side; both parties using swords and *latties* freely. Dyanath received a sword wound, of which he subsequently died; and Zulfukar Khan also received very serious injuries.

The matter having been taken up by the Magistrate, Kamru and Guldad were committed for trial in respect of the injuries done to Zulfukar, while Zulfukar was committed for trial charged with causing the death of Dyanath. Their separate commitment in this manner was quite regular and in proper form.

The Sessions Judge first tried Kamru and Guldad; and the whole matter having been fully gone into, the jury found them guilty (under sections 326 and 109 of the Penal Code) of abetting the causing of grievous hurt to Zulfukar, being armed with weapons of offence, &c.

As soon as their trial was over, Zulfukar was put on his trial charged with causing the death of Dyanath, causing grievous hurt to him, &c.

The jury was composed of the same persons who had just tried the case of Kamru and Guldad: and the Judge seems to have considered that all the evidence taken in the first trial was to be deemed as imported bodily into the second, and might be fairly used as evidence against Zulfukar. The result is, that the record of the case against Zulfukar, taken by itself, contains absolutely no evidence of the death of Dyanath or of grievous hurt to Dyanath caused or abetted by the prisoner. The Judge in his summing up to

* Criminal Appeal, No. 401 of 1871, against the Order of the Sessions Judge of Patna, dated the 9th June 1871.

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the jury treated the evidence which had been taken in the first case as evidence against Zulfukar and the jury, also treating it as such, found him guilty of abetting the causing of grievous hurt, &c., to Dyanath.

Kamru and Guldad and Zulfukar were thereupon, on their several convictions, sentenced to rigorous imprisonment for five years each. And now they have filed a joint appeal to this Court.

It is impossible to say that the trial of Zulfukar has been properly conducted, or that there was any evidence whatever before the jury of the offence of which he has been convicted. It may be, that if the evidence which had just been taken in the first case had been repeated in the second, there would have been ample evidence to support a conviction. But the knowledge that this may be so is not enough. There is no evidence at all on the record, as it stands: and if the evidence necessary to support the conviction of Zulfukar is imported from the record of the case against Kamru and Guldad, it is evidence given behind the back of Zulfukar—evidence given by witnesses in his absence, whom he has had no opportunity of cross-examining. The irregularities which have been committed are most serious and patent. It is the duty of a Judge to take care on that the evidence in each case is complete in itself; and no Judge has any right whatever to place before the jury any evidence save that which has been legally put in, in the particular case which is under trial.

The Judge in the case against Kamru and Guldad alludes to the evidence of Dr. Jackson, but there is nothing to show that that evidence was formally put in, in either of the trials in the Sessions Court. It ought to have been expressly noted by the Judge that it was put in, and the deposition ought to have been taken from among the proceedings before the Magistrate and placed with the record first of the one, and then of the other, of the cases in the Sessions Court, a memorandum of its removal from each record being made.

The Judge in his summing up told the jury that drunkenness, in the eye of the law, makes an offence the more heinous. There is no authority for such a proposition, and all that the Judge should have said was that drunkenness is no excuse, and that an act which, if committed by a sober man is an offence, is equally an offence if committed by one when drunk if the intoxication was voluntarily caused.

The Judge has taken down the evidence of the witnesses, for the most part, in the third person. This causes much awkwardness and confusion, and must waste a good deal of the time of the Judge himself. The ordinary and proper and convenient way of recording evidence is to take it down in the first person, exactly as spoken by the witness.

As regards Kamru and Guldad the conviction and sentence will stand, and this appeal is dismissed.

The conviction of Zulfukar and the sentence passed on him are set aside, and a new trial is ordered.