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March 30.

DEEP CHAND

v.

THE STATE OF RAJASTHAN

(K. SUBBA RAO and RAGHUBAR DAYAL, JJ.)

Criminal Trial — Memorandum prepared by Magistrate in verification proceeding—Statements made to such Magistrate not recorded in prescribed manner—Deposition of Magistrate—Admissibility—Code of Criminal Procedure, 1898 (V of 1898), s. 164—Indian Evidence Act, 1872 (I of 1872), s. 9.

In a verification proceeding held by him the Magistrate prepared a memorandum recording his own observations as also the statements made to him by a prosecution witness but not in the manner prescribed by s. 164 of the Code of Criminal Procedure. He proved the memorandum in court and gave his evidence. It was contended that the High Court was wrong in acting upon the said memorandum.

Held, that although s. 164 of the Code of Criminal Procedure and s. 9 of the Indian Evidence Act deal with two different matters, they must be read together and harmoniously construed so as to give full effect to both of them.

So construed, there could be no doubt that the evidence of the Magistrate himself on the basis of the memorandum would be relevant under s. 9 of the Evidence Act and as such admissible in evidence but the statements made to him by the prosecution witness, having been recorded in contravention of the mandatory provisions of s. 164 of the Code, must be excluded as inadmissible on evidence.

Nazir Ahmad v. The King-Emperor, (1936) I.L.R. 17 Lah. 629, *Legal Remembrancer v. Lalit Mohan Singh Roy*, (1921) I.L.R. 49 Cal. 167 considered.

Amiruddin Ahmed v. Emperor, (1917) I.L.R. 45 Cal. 557, and *Jitendra Nath v. Emperor*, A.I.R. 1937 Cal. 99, referred to.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 156 of 1960.

Appeal by special leave from the judgment and order dated August 1, 1958, of the Rajasthan High Court at Jodhpur in Criminal Appeal Nos. 98 and 155 of 1957 and Criminal Revision No. 116 of 1957.

Jai Gopal Sethi, *C. L. Sareen* and *R. L. Kohli*, for the appellant.

H. J. Umrigar, *H. R. Khanna*, *Bipin Behari Lal*, *R. H. Dhebar* and *D. Gupta*, for the respondent.

1961. March 30. The Judgment of the Court was delivered by

SUBBA RAO, J.—This is an appeal by special leave against the judgment of the High Court of Judicature for Rajasthan dated August 1, 1958, confirming the Judgment of the Additional Sessions Judge, Churu, dated May 3, 1957, in so far as he convicted the appellant under ss. 347, 365 and 386, Indian Penal Code, and setting aside his order acquitting the appellant under s. 458, Indian Penal Code, and convicting the appellant under s. 452, Indian Penal Code. The learned Additional Sessions Judge sentenced the appellant for the offences under ss. 347, 365 and 386, Indian Penal Code, to undergo rigorous imprisonment for 1 year, 2 years and $3\frac{1}{2}$ years respectively. The High Court enhanced the sentences in respect of the offences under ss. 347 and 386, Indian Penal Code, to 3 years and 8 years respectively, and also imposed a fine of Rs. 20,000 on the appellant; the sentence in regard to the offence under s. 365, Indian Penal Code, was confirmed. The High Court further found that the appellant was guilty under s. 352, Indian Penal Code, also and for that offence it sentenced him to undergo rigorous imprisonment for 7 years.

At the outset it would be convenient to state briefly the case of the prosecution. One Kashiram, a prosperous businessman, was residing at Sidhmugh. His only son Suraj Bhan was living at Rajgarh where he was carrying on an independent business of his own. On November 12, 1954, when Suraj Bhan was at his desk in his house, somebody made an enquiry whether one Rameshwar was there, to which Suraj Bhan replied in the negative. A few minutes thereafter, two men with masks entered the room and one of them was armed with a revolver. The said two persons threatened to shoot Suraj Bhan if he made any noise and then took him outside the house where two camels were kept waiting attended by two other persons similarly masked. After covering the face of Suraj Bhan by tying a cloth round his neck, he was made to mount one of the camels. The two persons who pulled Suraj Bhan out of his house also

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mounted the same camel, one in front of Suraj Bhan and the other behind him. After firing some shots in the air, presumably to prevent pursuit, the said persons, along with Suraj Bhan, left the place. After riding for 3 or 4 hours, the camels were made to stop on a railway line, the said persons got down from the camel, Suraj Bhan was also made to get down, and all of them went along the railway line for 3 or 4 furlongs. Thereafter, Suraj Bhan was taken to the house of Deep Chand, the appellant, in village Kalari and was kept there in confinement in a small room for 17 days. During the entire period he was kept blindfolded. Two or three days after the abduction, Suraj Bhan was made to write three letters to his father and put down his father's address on the envelopes. He was made to write these letters under the cover of a blanket after his bandage was removed temporarily. In the first letter he was made to write that if his father reported the matter to the police, he would not see his son again; in the second letter, he was made to inform his father that in view of the attempts made by his father to trace him, his abductors had made up their minds not to release him, but in view of his entreaties they had agreed to release him on payment of a ransom of Rs. 60,000; and in the third letter, he was made to write that the money should be handed over to the bearer of the letter and that he would be released on such payment. After the receipt of the first two letters by Kashi Ram, the abductors entered on the second stage of negotiations. Meanwhile, to facilitate the smooth conduct of the negotiations, on November 29, 1954, Suraj Bhan was removed to the house of one Lachhman and was confined there till his release. Kashi Ram has a son-in-law by name Shiv Bhagwan, the son of one Durga Parshad. Dhannaram and Shiv Bhagwan knew each other. Dhannaram offered to help Kashi Ram to get the release of his son. Dhannaram gave a letter addressed to Deep Chand to Durga Parshad wherein Deep Chand was requested to render his help in the matter of the release of Suraj Bhan. On the basis of the letter, Durga Parshad contacted Deep Chand, who promised

to do his best in the matter. After further talks, Dhannaram met Shiv Bhagwan and told him that Suraj Bhan was alive but a large sum would be required as ransom to get his release. He also warned him not to divulge the secret, for, if he did so, not only the life of Suraj Bhan but also of other relations would be in danger. He demanded Rs. 70,000 as ransom, but after some higgling it was fixed at Rs. 50,000. The third letter written by Suraj Bhan at the instance of Deep Chand was shown to Shiv Bhagwan and to his father Durga Parshad to assure them that Suraj Bhan was alive. After satisfying themselves of the *bona fides* of the negotiations conducted by Dhannaram, Shiv Bhagwan and Durga Parshad went to the house of Dhannaram where they found Deep Chand. The sum of Rs. 50,000 was paid to Dhannaram and Deep Chand; and both of them counted the money. The money was paid on December 17, 1954, and Suraj Bhan was released on December 20, 1954.

Five persons, namely, Deep Chand, Sisram, Jiwan Ram, Dhannaram and Ramji Lal, were prosecuted in the Sessions Court for the aforesaid offences. The learned Sessions Judge acquitted Ramji Lal, Dhannaram and Jiwan Ram, and convicted Sisram under ss. 347 and 365, Indian Penal Code, and Deep Chand as aforesaid. Nothing more need be said about the conviction of Sisram, as on appeal he was acquitted by the High Court and no appeal was preferred by the State against his acquittal. The learned Sessions Judge, on a consideration of the entire evidence placed before him, held that there was overwhelming evidence to show that Deep Chand detained Suraj Bhan in his house for sometime and thereafter in Lachhman's house and released him on payment of a ransom. But he held that there was not sufficient evidence to find definitely that Deep Chand participated in the abduction of Suraj Bhan on November 12, 1954, from the latter's house. On these findings, he convicted Deep Chand under ss. 347, 365 and 386, Indian Penal Code. Deep Chand preferred an appeal against his conviction, and the State filed an appeal

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against the judgment of the learned Sessions Judge in so far as he acquitted Deep Chand of the offence under s. 458, Indian Penal Code. The State also preferred a revision for enhancing the sentences passed on Deep Chand. All the matters were heard together by the High Court and, on a resurvey of the entire evidence, it agreed with the Sessions Judge that Suraj Bhan was confined in the house of Deep Chand and later on in the house of Lachhman and that he extorted money from Kashi Ram by putting him under fear of death of his son, Suraj Bhan. Disagreeing with the Sessions Judge, the High Court further held that it had been established on the evidence that Deep Chand was one of the persons who abducted Suraj Bhan from his house on November 12, 1954. In the result, the High Court convicted the appellant not only under ss. 347, 365 and 386, Indian Penal Code, but also under s. 452 thereof. In the matter of enhancement of the sentences, it was of the view that the case deserved an exemplary punishment and, therefore, it enhanced the sentences as aforesaid. Deep Chand preferred the present appeal by special leave.

Learned counsel for the appellant in an attempt to dislodge the findings arrived at by the High Court raised the following points before us: (1) The High Court erred in relying upon the statement made by Suraj Bhan before the Magistrate at the time of verification proceedings, though it was not recorded in compliance with the provisions of s. 164 of the Code of Criminal Procedure, and if the said statement and the verification proceedings based on that statement were excluded, it is not possible to predicate that the High Court would have accepted the evidence of Suraj Bhan in respect of his version that he was confined in the house of Deep Chand. (2) The High Court also went wrong in upholding the privilege claimed by Shri S. Gajender Singh, the District Magistrate, in respect of important questions put to him in the cross-examination; and if the claim of privilege had not been upheld, answers would have been elicited from him which might have established that Suraj Bhan was lying in the witness-stand and that his previous

statements represented the truth. (3) The High Court erred also in setting aside the order acquitting the appellant under s. 458, Indian Penal Code, without sufficient and compelling reasons and in convicting him under s. 452, Indian Penal Code.

To appreciate the said questions, it is necessary to notice briefly the facts found by the courts below. On the first part of the episode, that is, the abduction of Suraj Bhan, the High Court accepted the evidence of Suraj Bhan. Suraj Bhan stated in his evidence that when he was writing his accounts at about 7-15 p.m. in his house on November 12, 1954, two persons with their faces covered with masks entered his house and by threatening to shoot him, forcibly took him away on one of the two camels brought by them. He further alleged that he recognized one of the abductors who threatened him with a revolver as Deep Chand, as he was a local Congressman known to Suraj Bhan from before. This identification of Deep Chand as one of the accused was not accepted by the Sessions Judge, but the High Court accepted it for the reason given in its judgment. As regards the second stage, namely, the confinement of Suraj Bhan in Deep Chand's house, the High Court accepted the evidence of Suraj Bhan identifying the said house by giving particulars thereof. Suraj Bhan's version was as follows: During his confinement in the house, he used to loosen the bandage and see through the chinks in the wall of the room in which he was interned. He was in that house for 17 days and he had heard the voice of Deep Chand whom he knew before. During his confinement there, he also heard a lady enquiring whether Deep Chand had gone out and another lady answering the query. He had also given in detail the landmarks he gathered in the course of his journey from his house to the house of Deep Chand which substantially tallied with those leading to Deep Chand's house. This evidence of Suraj Bhan was corroborated by the evidence of Devisingh, the Magistrate, Randhawa and Ratan Singh. The Magistrate took Suraj Bhan along with him to the house of Deep Chand. He inspected the house and got the plan, Ex. P-28, prepared under his

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supervision by P.W. 25, the Reserve Inspector, Churu. He also recorded the memorandum, Ex. P-27, in which his observations and the statements made by Suraj Bhan were noted down. The Magistrate gave evidence as P.W. 21 and in his evidence he described the building of Deep Chand and also proved the memorandum prepared by him. His evidence is further corroborated by the evidence of two witnesses, P.W. 25, Randhawa, and P.W. 39. The memorandum prepared by the Magistrate, his evidence and the evidence of P.Ws. 25 and 39 establish that there used to be chinks in the wall through which Suraj Bhan used to see a tree and that these chinks had been recently closed "by pointing the room from inside" and that two new rooms were constructed towards the north of the house. P.W. 27 deposed that these two new constructions were made about the beginning of the year 1955. This evidence, which was accepted by the courts below, supported the evidence of Suraj Bhan in regard to the condition of the building at the time he was interned therein. On the basis of the said evidence, both the courts concurrently held that the house in which Suraj Bhan was interned for 17 days was the house of Deep Chand.

Now coming to the third stage of the journey, that is, the confinement of Suraj Bhan in Lachhman's house, Lachhman, as P.W. 3, deposed that on a request made by Jiwan Ram on behalf of Deep Chand he agreed to keep a lady whom Jiwan Ram and Deep Chand would bring to his house for a few days and on the next day, Deep Chand and Sisram brought in the midnight Suraj Bhan instead of a lady. He also described in detail the instructions given to him by Deep Chand and the manner in which he attended on Suraj Bhan, during his stay of 21 days in his house. This house was also identified by Suraj Bhan. Suraj Bhan further gave some details of the surroundings of the house and also the name of the son of Lachhman. This evidence proves that Suraj Bhan was shifted by Deep Chand to the house of Lachhman on the eve of the negotiations. The High Court held against the appellant, even without calling in aid the evidence of Lachhman, on the basis of other facts.

Then there is the evidence of Shiv Bhagwan and Durga Parshad, who actually paid the ransom. These witnesses spoke about the negotiations and also the actual payment of Rs. 50,000 to Deep Chand. This evidence was again accepted by both the courts. Then there was the evidence of Lachi Ram and Amar Singh, who carried on negotiations with Deep Chand for the return of the ransom in the presence of Chowdhuri Kumbharam, the then Home Minister of Rajasthan. This evidence was also accepted by both the courts. The aforesaid evidence, along with other circumstances, according to the High Court, brought home the guilt to the appellant on all charges.

It is the usual practice of this Court to accept the concurrent findings of fact arrived at by the courts below and there are no exceptional circumstances in this case to depart from the usual practice.

We shall now proceed to consider the arguments of learned counsel for the appellant *seriatim*. His first criticism is directed against the verification proceedings conducted by the Magistrate at the house of Deep Chand. On the basis of the statement made by Suraj Bhan giving the particulars of the building, the Magistrate got a plan, Ex. P-28, prepared and also a memorandum, Ex. P-27. He also gave evidence in the court. It is said that the High Court went wrong in acting upon the said memorandum by the Magistrate. The relevant provisions are s. 164 of the Code of Criminal Procedure and s. 9 of the Evidence Act. The material part of s. 164 of the Code of Criminal Procedure reads:

“(1) Any Presidency Magistrate, any Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf by the State Government may, if he is not a police-officer record any statement or confession made to him in the course of an investigation under this Chapter or under any other law for the time being in force or at any time afterwards before the commencement of the inquiry or trial.

(2) Such statements shall be recorded in such of the manners hereinafter prescribed for recording

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evidence as is, in his opinion, best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in section 364, and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried."

Section 9 of the Evidence Act says that facts which establish the identity of any thing or person whose identity is relevant, are relevant in so far as they are necessary for that purpose. These two sections deal with different situations: s. 164 of the Code of Criminal Procedure prescribes a procedure for the Magistrate recording statements made by a person during investigation or before trial; s. 9 of the Evidence Act, on the other hand, makes certain facts which establish the identity of a thing as relevant evidence for the purpose of identifying that thing. If a statement of a witness recorded by a Magistrate in derogation of the provisions of s. 164 will go in as evidence under s. 9 of the Evidence Act, the object of s. 164 of the said Code will be defeated. It is, therefore, necessary to resort to the rule of harmonious construction so as to give full effect to both the provisions. If a Magistrate speaks to facts which establish the identity of any thing, the said facts would be relevant within the meaning of s. 9 of the Evidence Act; but if the Magistrate seeks to prove statements of a person not recorded in compliance with the mandatory provisions of s. 164 of the Code of Criminal Procedure, such part of the evidence, though it may be relevant within the meaning of s. 9 of the Evidence Act, will have to be excluded. By such a construction of the provisions a satisfactory solution could be evolved. The decision of the Judicial Committee in *Nazir Ahmad v. The King-Emperor* ⁽¹⁾ is rather instructive. There, a Magistrate gave evidence in court on the strength of a confession made to him which was not recorded under s. 164 of the Code of Criminal Procedure. The question was whether the said evidence was admissible against the accused. The Judicial Committee quoted and approved the well recognized rule that

(1) (1936) I.L.R. 17 Lahore 629.

where power is given to do a certain thing in a certain way, the thing must be done in that way or not at all, and other methods of performance are necessarily forbidden. Adverting to s. 164 of the Code of Criminal Procedure, the Judicial Committee proceeded to state at p. 642 thus:

"It is also to be observed that, if the construction contended for by the Crown be correct, all the precautions and safeguards laid down by sections 164 and 364 would be of such trifling value as to be almost idle."

The Judicial Committee also stated the policy underlying the section thus at p. 643:

"In the result they would indeed be relegated to the position of ordinary citizens as witnesses and then would be required to depose to matters transacted by them in their official capacity unregulated by any statutory rules of procedure or conduct whatever."

These are weighty observations and we respectfully adopt them. But this decision does not preclude a Magistrate from deposing to relevant facts if no statute precludes him from doing so either expressly or impliedly. Neither the Evidence Act nor the Code of Criminal Procedure prohibits a Magistrate from deposing to relevant facts within the meaning of s. 9 of the Evidence Act. In *Legal Remembrancer v. Lalit Mohan Singh Roy* ⁽¹⁾, a Magistrate sought to give evidence of an unrecorded statement made to him by the accused. The court rightly held that it was not permissible. The same remarks we made in regard to the decision of the Privy Council would apply to this case.

In this context a few relevant decisions bearing on the admissibility in evidence of verification proceedings could conveniently be noticed. In *Amiruddin Ahmed v. Emperor* ⁽²⁾, a Magistrate conducted verification proceedings with a view to test the truth of a confession made by the accused. Teunon, J., made the following observations at p. 564:

"They are undertaken, it would seem, with a view

(1) (1921) I.L.R. 49 Cal. 167.

(2) (1917) I.L.R. 45 Cal. 557.

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to testing the truth of a confession and to obtain evidence either corroborating the confession or indicating its falsity. In so far at least as such evidence may be obtained, for instance, in ascertaining that the prisoner is familiar with, or wholly ignorant of, the localities of which he has spoken, or in furnishing clues to further enquiry, such proceedings may be useful. In connection with such proceedings, the main concern of the Court would seem to be to ensure that evidence not strictly admissible is not admitted. In the present case that precaution has not been taken: for we find that the verifying Magistrate has been permitted to speak to statements said to have been made to him in the course of his proceedings. Such additional statements being statements made in the course of an investigation, when not recorded in the manner provided in section 164 of the Code of Criminal Procedure, are, in my opinion, inadmissible."

The other learned Judge, Shamsul Huda, J., made the following statement at p. 572:

"I think, 'verification' under conditions such as these lends itself to very great abuses and should be avoided. There is perhaps nothing objectionable in a verification made independently of the confessing accused and unaided by him".

We are not concerned in this case with the propriety of verification proceedings in regard to a confession made by an accused. This decision is an authority for the position that the evidence given by a Magistrate on the basis of the verification proceedings conducted by him is relevant evidence, though he could not speak of statements made by the accused or a witness recorded by him in contravention of s. 164 of the Code of Criminal Procedure. The same distinction was pointed out by the Special Bench of the Calcutta High Court in *Jitendra Nath v. Emperor* (1). In that case, the learned Judges observed at p. 110 thus:

"In one case there was a verification report so far as the confessional statement of an accused person was concerned, which it would appear was fairly

supported by other evidence bearing on matters covered by the said report by the Magistrate by whom it was recorded, and which cannot be ruled out on the ground that it was inadmissible in evidence, seeing that the Magistrate himself was examined as a witness in the case, and spoke to the contents of the report made by him, which is placed on record as evidence, in support of the confessional statement of Sudhir Bhattacharjya."

Then the learned Judges proceeded to state,

"Statements made by the accused to the verifying Magistrates in the course of the proceedings, if they are not recorded in the manner provided in s. 164, Criminal Procedure Code, are however inadmissible."

It is, therefore, clear that the memorandum prepared by the Magistrate describing the present condition of the house and the evidence given by him on the basis of that memorandum would be relevant evidence under s. 9 of the Evidence Act; but the statements made by Suraj Bhan to the Magistrate said to be not recorded in the manner prescribed by s. 164 of the Code of Criminal Procedure would be inadmissible. We are proceeding on the basis that the said statements were not recorded in compliance with the provisions of s. 164 of the Code of Criminal Procedure and we should not be understood to have expressed any opinion on the question whether they have been so recorded or not, or whether mere irregularities, if any, committed in the manner of recording such statements by Magistrates under s. 164 of the Code of Criminal Procedure would make such statements inadmissible. That apart, Ex. P-27 and the evidence given by the Magistrate were only used by the court as corroborating the evidence of Suraj Bhan in regard to his evidence describing the house of Deep Chand. Apart from the Magistrate's evidence there is also other evidence in the case in regard to the original condition of the building and the subsequent additional structures put up by Deep Chand. As the High Court accepted that evidence, even if the evidence of the Magistrate was excluded it would not have made any difference in the result. We, therefore, hold that the evidence of the

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Magistrate, excluding that part pertaining to the statements made to him by Suraj Bhan, was relevant evidence in the case.

The second contention turns upon the claim of privilege raised by witness Gajender Singh and allowed by the learned Sessions Judge. Some of the relevant facts may now be stated. Suraj Bhan was released on December 20, 1954. On February 14, 1955, one Shiv Dutt made a statement before the District Magistrate, S. Gajendar Singh, and the said Magistrate recorded the same under s. 164 of the Code of Criminal Procedure. In that statement Shiv Dutt stated that Suraj Bhan told him the present version of the prosecution. On March 12, 1955, Suraj Bhan was examined by the police and he made a statement (Ex. D-8). Therein he gave an altogether different version contradicting the statement of Shiv Dutt. On April 29, 1955, Suraj Bhan filed an affidavit, Ex. P-5, in the Court of the Additional District Magistrate, Ganganagar, stating that Deep Chand had nothing to do with the offence. On May 5, 1955, the prosecution got five copies of the said affidavit made and attested. On May 23, 1956, for the first time, Suraj Bhan implicated Deep Chand in the crime. Regarding the question whether Shiv Dutt made such a statement on February 14, 1955, Gajender Singh and Shiv Dutt were examined and both of them spoke to that fact. The argument is that important questions put to Gajender Singh were illegally disallowed and if they had not been disallowed the accused would have been in a position to establish that Gajender Singh was not speaking the truth and that if that evidence was eliminated, the High Court might not have accepted the reasons advanced by the prosecution explaining away the inconsistent versions given by Suraj Bhan. At the outset it may be stated that it is not quite correct to state that the High Court explained away the earlier versions given by Suraj Bhan on the basis of the evidence given by Gajender Singh. On the other hand, both the courts have given convincing reasons why Suraj Bhan and the members of his family did not come forward immediately with the true version of the incident; for, at one stage, they were anxious to

save the life of Suraj Bhan and at a later stage they were equally anxious to get back the money paid as ransom by Suraj Bhan's father. The courts have also accepted the evidence of Shiv Dutt. That apart, the question of privilege was not raised before the High Court. In the circumstances, we would not be justified in allowing the appellant to raise before us the question of privilege based upon the disallowance of a few questions put to one of the witnesses. This objection is, therefore, rejected.

The third argument has no merits either. The High Court considered, and in our view rightly that there was no reason to disbelieve the evidence of Suraj Bhan when he identified Deep Chand at the time of abduction. Suraj Bhan knew the accused before and he also knew his stature and voice. Suraj Bhan was in the company of Deep Chand from the time of his abduction till he was finally released. When Suraj Bhan, in the circumstances, stated that he identified Deep Chand, there is no valid reason to reject his evidence. In the circumstances, the High Court was quite justified in setting aside the order of acquittal under s. 458, Indian Penal Code, and convicting him for the offence under s. 452 thereof.

Finally learned counsel for the appellant made an impassioned appeal on the question of sentence. He said that the learned Sessions Judge had awarded a reasonable sentence to the accused and the High Court was not justified in enhancing the said sentence. The Sessions Judge held that the accused was guilty of a grave and heinous crime and we are surprised that he should have sentenced the accused to undergo rigorous imprisonment for one year under s. 347, 2 years under s. 365 and $3\frac{1}{2}$ years under s. 386, Indian Penal Code, and direct the sentences to run concurrently. When the Sessions Judge gave such a disproportionately lenient sentences, it was the duty of the High Court to rectify such an obvious error. In our view, the learned Judges of the High Court rightly enhanced the sentence imposed on the appellant.

In the result, the appeal fails and is dismissed.

Appeal dismissed.

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