Sheoraj Singh Vs. Emperor

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Court : Allahabad

Decided On : Feb-02-1926

Reported in : AIR1926All340

Appellant : Sheoraj Singh

Respondent : Emperor

Judgement :

Walsh, J.

1. In this appeal the first question which we have to decide is the admissibility of the evidence of two witnesses who are absent. It is necessary to dispose of this question first because their evidence has formed part of the material on which the case has been decided and if we agree with the appellant that it ought not to have been considered at all, we ought not to include their evidence as part of the relevant subject-matter for the appeal. The learned Judge in the Court below has treated the evidence as though given under Section 512 and his mind has been diverted from the real difficulty by reason of the fact that the defence objected under Section 512 that it was not shown that the accused was absconding at the time when the statement of the witnesses were taken and the Judge decided against that objection on the ground that although the declaration that the accused was absconding was subsequent, the fact that ha absconded was prior to the taking of the evidence. We do not disagree with him. It is not necessary to decide

the point to-day, whether if evidence is taken under Section 512, the fact of the accused having absconded may be established by any means or proof known to the law, even although the formal declaration of his having absconded is not made until later. But we may, at any rate, add as a general rule it is better that the finding that the accused has absconded should be recorded as a condition precedent by the Magistrate who takes the evidence under Section 512 as was done in the case cited, Emperor v. Bhagwati AIR 1918 All 60. But the real point before us is this. The statements of these two witnesses were not recorded under Section 512 at all. They were called in the ordinary course of the case before the committing Magistrate and before the sessions as part of the case against four men who were then under trial. They may have mentioned-no doubt they did mention the name of the present appellant who is said to have been absconding at the time-but the attention of the Court was not directed to the case against that absconding person, nor was the evidence given in any sense as evidence against that absconding person.

2. The question of law therefore is this. When two witnesses who have given evidence at a previous trial against persons then on their trial happen to have referred in the course of their evidence at the trial to a person who is absconding and is subsequently tried, can their statements be read at the subsequent trial of the accused who was then absconding, merely because they happen to be absent and cannot give evidence? In other words, can evidence given at a trial for another purpose be by an ex post facto operation converted into an equivalent of what is called a deposition taken under Section 512 when as a matter of fact everybody knows it was nothing of the kind, and at the time they gave their evidence the question of recording a deposition under Section 512 was never intended.

3. We think clearly not. The provisions of the statute forbid it. The objection to the evidence is the fundamental objection, that statements made against a person in his absence cannot be used as evidence against, him in a criminal trial. Exceptions to that fundamental rule can only be created by statute and when a statute permits something to be done which a fundamental rule prohibits, that thing can only be done by strict compliance of the statute which creates the exception. On grounds of ordinary justice there would be great objection to the practice. As

my brother has pointed out, the mind of the Court and of the counsel for the prosecution at the time when such witnesses would be giving their evidence in the box would not be directed at all to the question of the guilt or otherwise of the absconding person, and many things which ought to be asked might be omitted and a fortiori questions in cross-examination asked by the four persons who are on their trial or by the lawyer with the express purpose of throwing guilt upon the absent party might extract from such witnesses statements very prejudicial to the absent party which could not be permitted if the witnesses were being properly examined under Section 512.

4. We, therefore, hold as a question of law that the evidence of these two witnesses ought to have been excluded from the trial and we must consider it with out that evidence.

5. On the merits the case has given us some difficulty. There is no doubt that the accused was present. There is no doubt that he was not only the brother of the principal offender, but a sympathizer with the attacking party, and although we have nothing to do with the former cases, which have been decided, we do not feel called upon to say anything to cut down the provisions of Section 149, I.P.C.S. 149 merely enacts the general principle that if parties are shown to have taken part in general assault with a common object, they may be held guilty of acts committed even in excess of that common intention. It is the natural result, but circumstances alter cases, and in this particular case it so happens that there are upon the evidence facts favourable to the present appellant. He absconded and want to Africa and only came back apparently when the police pressure made his position there uncomfortable. It seams that extradition proceedings were in contemplation and he decided to return to India. In this particular case the evidence of two witnesses, whose testimony was admitted in the previous trials without objection, has been excluded by us. On the balance the following appears. The evidence of the actual participation by the use of the lathi on the part of Sheoraj Singh, the present appellant, is vague and general. It is there no doubt. Debi Singh included him in the common indictment in his dying declaration, although he had not gone so far in the first report. Naubat Singh, whom the Judge regards as an honest witness, puts it in the most general way. He did not see any

beating himself. He only heard what was going on after Debi Singh had been dragged outside. He says 'those six dragged Debi out', and although he like Dabi includes Sheoraj Singh in the common indictment, he does not add anything more which specifically fixes Sheoraj Singh with a definite share in the subsequent crime.

6. The next consideration in logical sequence is the result of the medical examination. Undoubtedly there ware more than one lathi used, if one may legitimately infer it, because there were five marks of what were probably lathi blows on different parts of the deceased's body. But as was observed from the Bench in argument, none of them was aimed at the head as they undoubtedly would have been if the lathi users had intended to kill the man, and they are of a superficial and unimportant character on the hip, knee-cap, and possibly, though not certainly, on the foot. It may, therefore, be legitimately concluded that those who used the lathis did not intend to inflict any grievous injuries, but merely punishment upon the deceased. As against this general body of evidence the appellant relies on one item which is very much in his favour. The witness Ronak Shah, although it is true that he says all six beat Debi thereby repeating the general allegation made by the other witness, states that Sheoraj was actually kicking the principal offender saying 'let him off, he will die'. If this is true, this particular offender is clearly excluded by positive evidence from the general liability which may otherwise be imposed upon him by the application of Section 149. We cannot say under these circumstances that he was not a participant, at any rate in what was technically a riot and undoubtedly an assault. On the other hand, we think his case is clearly different from that of those who have already been dealt with.

7. There is another point upon which the learned Judge thinks the appellant is entitled to receive credit, that is to say, he suggested that, even although he was finding him guilty under Section 302, the executive might well reduce the sentence to a comparatively short term under that section, partly it appears upon the ground that the learned Judge regarded the temporary visit of the appellant to Africa as a sentence of transportation voluntarily inflicted upon himself. So that in a sort of manner of speaking the learned Judge seemed to think that the appellant had

already suffered the equivalent of five years' transportation.

8. On the whole we think the appeal succeeds and although we cannot entirely acquit the appellant, we alter the conviction to one under Sections 147 and 323, I.P. C, and sentence him under each of these sections to three months' rigorous imprisonment, such period to date from 9th November 1925. The two sentences will run concurrently.