

Jwala Mohan and ors. Vs. the State

Jwala Mohan and ors. Vs. the State

SooperKanoon Citation : sooperkanoon.com/452862

Court : Allahabad

Decided On : Oct-05-1962

Reported in : AIR1963All161; 1963CriLJ404

Judge : M.C. Desai, C.J., ;R.A. Misra and ;S.D. Singh, JJ.

Acts : [Evidence Act, 1872](#) - Sections 3; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 207A and 208; [Indian Penal Code \(IPC\), 1860](#) - Sections 396

Appeal No. : Criminal Appeal No. 479 of 1961

Appellant : Jwala Mohan and ors.

Respondent : The State

Advocate for Def. : S.B. Mathur, Adv. for ;G.A.

Advocate for Pet/Ap. : S.N. Misra, Adv.

Judgement :

Desai, C.J.

1. The following question has been referred to a Full Bench by a Bench which is hearing an appeal by Jwala and others against their conviction under section 396, Indian Penal Code, by the Additional Sessions Judge of Kheri:-

'Where the prosecution in support of its case adduces evidence of identification of an accused by witnesses in the trial of the case in Sessions Court, and does not produce those witnesses in the Committing Magistrate's Court, should the evidence of such witnesses be disbelieved merely on the ground that they were not produced by the prosecution in the Committing Magistrate's Court for the said purpose?'

The necessity for referring the question arose because of a conflict of views among Judges of this Court. It was pressed before the learned Judges, who referred the question, that it was a question not of law but of fact, but they felt compelled to refer it for an authoritative decision because in some decisions it was placed on the same footing as a question of law and subordinate Courts were also treating it as such or were taken to task for not treating it as such.

2. The question referred to us is essentially a question of fact and not of law. It does not involve the application or even interpretation of any statutory provision. Whether a person is a competent witness or not may be a question of law governed by the Evidence Act. Once it is found as a matter of law that he is competent to give evidence, whether his evidence on a certain matter is admissible or not is again a question of law governed by the Evidence Act, which contains the provisions as to what statements of a witness are admissible and what inadmissible. After a witness has been found to be competent to give evidence and has made a statement which is admissible in evidence, a third question arises, it being whether it should be believed or not and this essentially is a question of fact. Neither the Evidence Act nor any other Act lays down any law governing the question which statement of a witness should be believed or should not be believed. Whether a statement of a witness should be believed or not depends upon so many circumstances that it is impossible to lay down hard and fast rules. Even in respect of an accomplice,

'It is not a rule of law that the evidence of an accomplice must be corroborated in order to render a conviction on his evidence valid; but it is a general rule of practice that the Judges should advise juries not to convict on the evidence of an accomplice unless it be corroborated, and this is a matter entirely for the discretion

of the Judge before whom a case is tried', per Lord Atkinson in the *King v. Christie*, (1914) AC 545.

Section 114 of the Evidence Act permits, but does not compel, a Court to presume that an accomplice is unworthy of credit unless corroborated. He is a competent witness and it is for the Court to Judge, as a matter of fact, whether his evidence should be believed or not. It may hold that it should not be believed unless corroborated, but if it, considering all the circumstances of the case, chooses to believe it, even though uncorroborated, and convicts the accused solely on its basis, the conviction is not against any law; this is made clear by section 133 of the Evidence Act. Barring these two provisions contained in sections 114 and 133 of the Evidence Act, there are no provisions dealing with the question of believing or not believing a witness; the matter has been left at the sound discretion of the Court. The function of a Court, whether a civil court or a criminal court, is to decide whether a certain fact is proved or not. A civil court has to decide whether a certain fact in issue is proved by the party on whom the onus lay and a criminal court has to decide whether the commission of the offence by the accused is proved. A fact is said to be proved, vide section 3 of the Evidence Act,

'when after considering the matters before it the Court either believes it to exist or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists'.

The law after laying down which persons, are competent to give evidence and which are not and what evidence is admissible and what not, has left it to the Court to decide whether the evidence should be believed or not and, if believed, what weight should be attached to it or what effect should be given to it. It has not given any guidance to the Court in deciding whether the evidence should be believed or not or what weight should be attached to it or what effect should be given to it; these matters have been left at the sound discretion of the Court to be exercised on consideration of all circumstances. When the legislature itself has left these matters at the discretion of the Court without attempting to fetter it by laying down any hard and fast rules, it is not open even to the highest Court to fetter the discretion of not only lower Courts, but also of itself, by laying down hard and fast

rules, because it would be tantamount to legislating. Law is invariable and a finding on a question of law must be given according to the law regardless of circumstances. If the circumstances have to be considered at all, it is only for the purpose of seeing whether the law is applicable or not.

A finding of fact on the other hand is one which depends upon, or varies with, facts and circumstances of the case and is not governed by any rule at all. If a person is found guilty of causing simple hurt to another he must be punished with imprisonment or fine regardless of all circumstances, because that is a matter of law. What punishment should be inflicted upon him depends upon circumstances of the case and is not a matter of law. The only question of law that may arise in the matter of sentence is that it should not exceed a certain limit. Subject to that limit not being exceeded, the law has laid down no rule governing the discretion of the Court in inflicting the sentence. A finding of law is not a matter of discretion as a finding of fact is. The distinction between a matter of law and a matter of fact must be maintained by Courts and they must not convert a matter of fact into a matter of law by propounding a certain result to follow invariably from a given state of facts regardless of all other circumstances. The discretion that is confided upon inferior Courts by the legislature cannot be taken away by the High Court by laying down certain rules to be followed by them regardless of circumstances.

3. I must strongly protest against any attempt on the part of a Judge of a High Court to impose his will not only upon an inferior Court, but also upon other Judges of the High Court. When a question of fact is presented before him, he is certainly free to decide it in any way that he thinks proper, but he has no jurisdiction to disguise his finding of fact into a finding of law and impose it upon the whole world. Just as he has the discretion in the matter, so also has any other Judge of the High Court (and also any Judge of an inferior Court) and no jurisdiction vests in him to deprive them of the discretion conferred upon them by the legislature. A Judge of a High Court may give an advice or instruction to a judge of an inferior Court, but it is nothing more than a counsel of prudence; it is not a ruling of law, and a judge of an inferior court does not act illegally in going against it. There are a couple of recognised counsels of prudence, such as that it is dangerous to convict an accused on the sole testimony of an approver, and the

number of such counsels should not be extended arbitrarily.

4. In *The Tidy v. Battman*, (1934) 1 KB 319, Lord Wright strongly commented against the practice of converting questions of fact into one of law in these words:

'No one case is exactly like another, and no principle of law can in my opinion be extracted from those cases. It is unfortunate that questions which are questions of fact alone should be confused by importing into them as principles of law a course of reasoning which has no doubt properly been applied in deciding other cases on other sets of facts.'

5. In *Morris v. Mayor Aldermen and Burgesses of the Borough of Luton*, (1946) 1 All ER 1, Lord Greene, M.R. Mackinnon and Tucker, L. JJ. approved of this criticism. Our Supreme Court, speaking through Sinha, J., (as he then was), in *Prakash Chandra v. State of U.P.*, AIR 1960 SC 195 at p. 197 observed:-

'decisions even of the highest court on questions which are essentially questions of fact, cannot be cited as precedents governing the decision of other cases which must result in the ultimate analysis upon their own particular facts. The general principles governing appreciation of circumstantial evidence are well established and beyond doubt or controversy. The more difficult question is one of applying those principles to the facts and circumstances of a particular case coming before the Court. That question has to be determined by the Court as and when it arises with reference to the particular facts and circumstances of that individual case. It is no use, therefore, appealing to precedents in such matters.'

Du Parcq, L.J., in *Easson v. London and North Eastern Ry., Co.*, (1944) 2 All ER 425 and Lord Denning in *Qualcast (Wolverhampton) Ltd. v. Haynes*, (1959) AC 743 have warned us against the danger of exalting to the status of propositions of law what really are particular applications to special facts of propositions of ordinary good sense. That a finding that the Court will not believe a witness must rest upon a supposedly general rule of prudence enjoined by law (as in the case of accomplice) was emphasised by the Supreme Court in *Dalip Singh v. State of Punjab*, AIR 1953 SC 364. There can be no ruling in respect of a matter at the discretion of the Court, vide *Evans v. Bartlam*, 1937 AC 473. Any attempt on the

part of a Judge to interfere with the discretion of another Judge or to dictate to another Judge has met with strong criticism in the past. In *Emma Silver Mining Co. v. Grant* (1878) 11 Ch D 918, Jessel, M.R. referring to the practice of laying down general rules observed at page 926:

'I think one Judge has no right to embarrass other Judges by laying down general rules of construction; and, in the second place, I think it is very undesirable to limit the operation of a rule expressed in general terms by stating the circumstances, or all the circumstances under which the Judge thinks the discretion ought to be exercised. The discretion is general.'

Lord Cairns, L. C, used even stronger language in *Fulton v. Andrew*, (1874) 7 HL 448 at page 460 when he said:

'I should in this case, as indeed in all other cases, greatly deprecate the introduction or creation of fixed and unyielding rules of law which are not imposed by Act of Parliament. I think it would be greatly to be deprecated that any positive rule as to dealing with a question of fact should be laid down, and laid down now for the first time, unless the Legislation has, in the shape of an Act of Parliament distinctly imposed that rule.'

Our Supreme Court in *Gurcharan Singh v. State of Punjab*, (S) AIR 1956 SC 460 deprecated 'undue servitude to the bondage of precedents' in these words:

'Reference to that reported case is only by way of illustration and not by way of an appeal to precedent, because on the facts no two cases can be similar. Each case has its own peculiar facts and it is therefore always risky to appeal to precedents on questions of fact.'

I may also recall the comment made by the editors in 34 LQR 228:

'It is a further question whether a judge of first instance is bound to carry humility to the point of passively submitting to dicta in the Court of Appeal which do not convince his own judgment and were not necessary to the decision. We think, with all respect, he is not'.

6. It is a matter to be regretted that some of the decisions resting only on questions of fact have been reported; this has resulted in miscarriage of justice. D. Payne in his articles on 'Appeals on questions of fact' in 1958 Current Legal Problems, 185 at page 197 has rightly deplored the practice of reporting decisions on questions of fact, which do not materially assist future courts. To report a case of 'very special facts' is to mislead the profession, in the words of Lord Greene in *Maitland v. Baisbeck*, (1944) 1 KB 689 : 61 LQR 8. A case deciding only questions of fact is no better reportable than a case deciding a question of law but of 'very special facts.'

7. It is well known that a case is an authority for what it actually decides and not for cases to arise in future and that a proposition of law contained in a judgment, however, widely it may be expressed, is applicable only to the facts of the case. In *Quinn v. Leathern*, (1901) AC 495 Lord Halsbury, observed at page 506:

'Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides.'

In *Caledonian Railway Company v. Walker's Trustees*, (1881) 7 AC 259, Lord Selborne, said at page 275:

'A Judgment which is right, and consistent with, sound principles, upon the facts and circumstances of the case which the House had to decide, need not be construed as laying down a rule for a substantially different state of facts and circumstances, though some propositions, wider than the case itself required may appear to have received countenance from those who then advised the House.'

Similar sentiment was expressed by U.S. Supreme Court in *United States v. Wong Kim Ark*, (1897) 169 US 649 : 42 Law Ed 890, where Gray, J., observed at p. 901.

'General expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be

respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.'

I may also refer to J.W. Salmond's article. 'The theory of judicial precedents' in 16 LQR 376, in which he has warned the Courts against laying down principles which are not required for the due decision of the particular case, or which are wider than is necessary for this purpose, giving as the reason the fact that the prerogative of a Judge is not to make law by formulating and declaring it, but to make law by applying it, and that judicial declaration unaccompanied by judicial application is not authority.

8. I may now consider the law, so far as it is relevant to the question referred to us, regarding inquiries into cases triable by, and tried in, the Court of session. In a police case the Magistrate holding an inquiry is required to take 'the evidence of such persons, if any, as may be produced by the prosecution as witnesses of the actual commission of the offence alleged', consider all the documents referred to in Section 173, examine the accused and decide whether he should be committed for trial; see Section 207-A of the Code of Criminal Procedure. It is noteworthy that the legislature has conferred the right upon prosecution to decide which eye-witnesses should be produced; it is not bound to produce all of them or a particular percentage of them. If the Magistrate finds it necessary in the interest of justice to take the evidence of any one or more of other witnesses for the prosecution, he is empowered to take their evidence also, but the prosecution is not obliged to produce them. For a High Court to rule that the evidence of a witness not examined before the Magistrate should be disbelieved is in direct conflict with the provision of Section 207-A, conferring upon the prosecution the right to refrain from examining him. No Court has any jurisdiction to take away from the prosecution the right conferred upon it by the legislature or even to whittle it down, directly or indirectly.

In a complaint case also the Magistrate is required to take 'all such evidence as may be produced in support of the prosecution', vide Section 208; this also confers discretion upon the complainant to produce such evidence as he considers necessary. At the trial in the sessions court, the prosecutor opens his case and

then examines his witnesses, the Sessions Judge then examines the accused and his witnesses and after hearing the arguments decides whether the accused is guilty or not. He has to decide this on the basis of the evidence recorded by himself; the evidence recorded by the (committing) Magistrate is not to be considered by him except in three circumstances. Under Section 288 he may treat the evidence of a witness given before the Magistrate as evidence in the case if he is produced and examined before him. If a witness dies or cannot be found or is incapable of giving evidence or is kept out of the way by the adverse party after his examination, before the Magistrate but before his examination in the sessions court, the evidence given by him before the Magistrate is receivable as substantive evidence at the sessions trial, vide Section 33, Evidence Act.

The third exception is that the evidence given before the Magistrate by a witness can be used to contradict him when he gives evidence at the sessions trial, vide Section 145, Evidence Act. In the first two exceptions the evidence given before the Magistrate is treated as direct evidence of the facts stated therein and can be used for proving the offence; the use of the evidence in the third exception is of a negative character and it can be used only to demolish the effect of the evidence given at the sessions trial, not as direct evidence of the facts stated therein.

There is no provision either in the Code of Criminal Procedure or in the Evidence Act debarring a witness from being examined in the Sessions Court if he was not examined in the Magistrate's Court and there is nothing illegal in it. Once the Sessions Judge decides to examine him and he gives evidence, he should judge it in the same way as the evidence given by any other witness, without any pre-bias. Of course there is the additional fact in regard to his evidence and it is that he was not examined in the Magistrate's Court but it is of no relevancy; the Sessions Judge cannot consider it at all in deciding whether his evidence should be believed or not. He may be disbelieved on other grounds, but he is not permitted by any law and must not, disbelieve it on that ground.

Surely if the law permits a witness to be a competent witness at the sessions trial even though he was not examined before the Magistrate, he cannot refuse to believe the evidence given by him on that ground. If a witness were to be

disbelieved because he was not examined before the Magistrate, it would have been wholly useless for the Legislature to allow him to be examined at the Sessions trial. If a witness examined at the sessions trial was examined before the Magistrate, the evidence given by him even before the Magistrate may be used by, the prosecution in the circumstances mentioned in Section 288 of the Code of Criminal Procedure and Section 33 of the Evidence, Act, or by the accused under Section 145, Evidence Act, but it would be fallacious to argue that every witness who is to be examined at the sessions trial must have been examined before the committing Magistrate so that the evidence given by him may be available for such use by the prosecution or the accused.

It is illogical to argue from the use that can be made if a fact exists that the fact must exist in order that the use may be made. Merely because a previous statement can be used to contradict the witness it cannot be laid down that every witness must make a previous statement, so that if his deposition in Court is in conflict with it may be used to contradict it.

No Court has yet placed a prospective witness under an obligation to make a statement under Section 164 of the Code of Criminal Procedure. If an eye-witness is examined and there is another, he may be examined to corroborate him, but the law does not compel this; on the other hand Section 134 clearly lays down that 'no particular number of witnesses shall in any case be required for the proof of any fact.' Similarly corroborative evidence can be given if it exists, but the law does not require that evidence must be corroborated before it can be believed and that corroborative evidence must be created. In the same way if a previous statement conflicting with the evidence of a witness exists, it may be used to contradict him, but there is no law which makes the prosecution responsible for seeing that a previous statement of every prosecution witness comes into existence, so that if he gives contradictory evidence, he may be confronted with it and discredited.

9. There is no distinction in law between an eye-witness who gives evidence against an accused whom he knew before and an eye-witness who gives evidence against an accused whom he did not know before and the effect of the non-examination of a witness in the committing Magistrate's Court upon the evidence

given by him at the sessions trial is same whether he knew the accused previously or not. When a witness gives evidence against an accused, since the accused is present in the dock, he gives evidence against the man in the dock and the evidence is same whether he knew him before or not. This is in theory; in practice sometimes a difference arises in this respect that in the case of the accused not being known to the witness previously there is a previous statement of the witness made by him during the identification proceedings to the effect that the accused was (or was not) one of the persons who committed the offence.

When an unknown person has committed an offence and the police arrest a person on suspicion, they have to show him to the eye-witnesses and inquire whether he was the offender or not. Unless the eye-witnesses have named him or point him out as the offender, there is no (direct) evidence against him. Therefore, in order to have direct evidence the police have identification proceedings held by a Magistrate. Any statement made by a witness before the Magistrate about the identity of the suspect with the offender is a previous statement, which can be used either to corroborate him or to contradict him at the trial, but since, as I pointed out above, the law does not require that there must be either corroborative evidence or evidence of a previous statement which can be used to contradict, the evidence of the witnesses at the trial cannot be rejected simply on the ground of the absence of such previous statement.

If a witness who did not know the accused is examined before the committing Magistrate, the evidence given by him there can be used at the sessions trial, like the evidence given by any other witness before the committing Magistrate, only for contradicting him under Section 145, Evidence Act, or as substantive evidence under Section 288 of the Code of Criminal Procedure. The law makes no distinction between an eye-witness who knew the accused from before, and an eyewitness who did not know the accused from before, in respect of the rule that an eye-witness can be examined at the sessions trial without being examined before the committing Magistrate. Though the question referred to us relates to a witness of identification, the answer to be given is the same as that in respect of any other witness.

10. Now I shall take up the conflicting decisions. In *Lalla Singh v. State*, Criminal Appeal No. 291 of 1958, decided on 15-12-1959 (All.), Mulla, J., observed (James, J., concurring) as follows:-

'No witness of identification can be deemed reliable unless he is found to consistently identify an accused person in the jail and in the Courts of the Committing Magistrate and Sessions Judge, and day to day experience shows that not unoften a witness identifies a person in the jail and in the Sessions Court but fails to do so in the Magistrate's Court, with the result that his evidence is invariably rejected. No doubt the amended Code of Criminal Procedure does not compel the prosecution to examine every witness in the Magistrate's Court; nevertheless the prosecution take a big risk by withholding from the Committing Magistrate's Court witnesses whose testimony includes personal identification. Even though his identification of a given accused person may be correct in the jail and in the Sessions Court, I would consider him trustworthy only if I found him identifying him in the Magistrate's Court also. I am therefore not disposed to attaching any value to Sitladi's identification by Sarju.'

11. In *Rameshwar v. State*, Criminal Appeal No. 386 of 1959, decided on 16-12-1959 (All.), Mulla, J., said:-

'It has been held uniformly without any dissension on the point that the evidence of identification in order to create confidence must be consistent throughout and if that evidence is not consistent it is not reliable and it has to be discarded. The reason is that the evidence of identification is a weak type of evidence and a man of prudence wants a reasonable assurance that the evidence of identification is dependable before it is accepted..... Any witness who is not produced before the committing Magistrate unless there are very good reasons for such non-production, cannot be acceptable as a reliable witness, if he is examined for the first time before the trial Court.in order to create an assurance in the mind of the court a witness should also be produced before the Magistrate in order to satisfy a court that his identification is dependable.'

In *Bajnath v. State*, Criminal Appeal No. 254 of 1959, decided on 9-2-1960 (All) Mulla J. made similar observations. It was certainly open to the learned Judge to

disbelieve the witnesses on the ground that they were not examined in the committing Magistrate's court, but it is equally open to another Judge to believe them despite the fact. When there is no law which ordains that a witness must be disbelieved because he was not examined in the Magistrate's court, and on the other hand the law is that he is a competent witness in the sessions court, another Judge can very reasonably take the view that the fact of his non-examination in the Magistrate's court is not fatal. After all his non-examination in the Magistrate's court does not necessarily make him an untruthful or even unreliable witness and does not make his evidence a tissue of lies. A witness can be reliable and can give true evidence even though he was not examined in the Magistrate's court. It is not the sign of a true witness or the truth of a witness's evidence that he was examined in the Magistrate's court and had made the same statement there.

It does happen that a witness, who identifies an accused in a jail, fails to identify him in the Magistrate's court but identifies him in the sessions court, or identifies him in the Magistrate's court but fails to identify him in the sessions court, or that he identifies him in one court or the other or both without identifying him in the jail, but the reasons for his failure to identify him at one place or another are so many that it is impossible to lay down any rule. If a witness fails to identify him in the Magistrate's court because temporarily he is under the influence of the accused, it would be an act of injustice to disbelieve his evidence in the sessions court merely because he temporarily came under the influence of the accused and made a false statement. The accused certainly cannot take advantage of his own wrong in tampering with the witness. Similarly, if he is not examined in the Magistrate's court because he was won over and refused to give evidence against the accused and the police subsequently weaned him from the influence and he gave evidence, it would be illogical and unjust to disbelieve it solely on the ground that he was not examined in the Magistrate's court. The effect of the non-examination on the evidence given at the sessions trials depends upon, the reasons for his non-examination and not upon the mere fact of it.

I respectfully disagree with the view of Mulla J. which stakes everything upon the mere fact of the non-examination regardless of the circumstances. To say that the prosecution is not bound to examine the witness in the Magistrate's court and then

to penalise it for not examining him, is not only taking away with the left hand what is given with the right hand but also the Court's taking away something which is granted by the legislature. A witness, who points to an accused and deposes that he was the offender, can be believed, if he is found to be a truthful person, even though he was not produced to identify him earlier; as I said earlier the law does not require the evidence of any witness to be corroborated before it can be accepted as true. Of course if a Judge wants not to believe a witness unless he is corroborated, he may not believe him, but that is not the law as I understand it to be.

A witness, who is not corroborated, may be disbelieved because there are other grounds, but to go on disbelieving every witness simply on the ground that he was uncorroborated, is a misuse of judicial discretion. Though Mulla J. took pains in Lalla Singh's case, Cri. Appeal No. 291 of 1958, D/- 15-12-1959 (All) to make it clear that the view expressed was his own, in Rameshwar's case, Cri Appeal No. 386 of 1959, D/- 16-12-1959 (All) he proceeded as if it were a universal rule or rule of law. It may be that if there are two pieces of evidence, they must be consistent with each other, but it is quite a different thing to say that one piece of evidence will not suffice. The absence of evidence in the committing Magistrate's court cannot be placed on the same footing as a contradictory statement made by the witness in the committing Magistrate's court. Every witness, who is not examined, cannot be presumed to have made a statement contradictory in every respect to the deposition made in the Sessions Court. A witness, who points out an accused at the sessions trial as the offender may not be believed in the absence of any corroboration, but it is going too far to say that there must be at least two pieces of corroboration or that he must have made at least two previous statements identifying the accused.

In Baijnath's case, Cri. Appeal No. 254 of 1959, D/- 9-2-1960 (All) Mulla J. treated the non-examination of a witness in the committing Magistrate's court as a 'suppression' of the evidence by the prosecution. Non-examination of a witness is one thing and suppression quite another thing; the distinction lies in the reason or motive for the non-examination. For this distinction, see Wigmore on Evidence, Volume 2 (Third Edition) Section 279. He writes that the inference from the former

is a more restricted one. It would be unwarranted to brand every non-examination of a witness as suppression by the prosecution. In *Mohd. Umar v. State*, Criminal Appeal No. 596 of 1959, decided on 16-3-1960 (All), Mulla J. took the Sessions Judge to task for ignoring his previous decision and relying upon a witness even though he had not been examined in the committing Magistrate's court. With great respect to Mulla, J., I must point out that the Sessions Judge committed no illegality by not disbelieving the witness simply on the ground of his not being examined before the committing Magistrate and that whether a witness should be believed or not is a matter of discretion and not of law. When he observed that 'it is only the formal evidence which cannot be produced before the committing Magistrate', he went beyond the language of Section 207-A., Then he observed that 'where material evidence is suppressed the prosecution does so at its risk, for if that evidence which it produces before the Magistrate is not sufficient, it cannot be supplemented by adding to it that evidence which was not produced before the Magistrate.' I may accept that when the prosecution does not examine some witnesses whose evidence is relevant, it does so at its risk, but it is only a risk, and not a certainty, of failure. Further no law prevents a witness's being examined in the sessions court on the ground that he was not examined before the committing Magistrate.

James and Takru JJ. said in *Asharfi v. State*, 1960 All LJ 595 at page 614 : (AIR 1961 All 153 at p. 166), with regard to the argument that notwithstanding the provisions of Section 207A of the Code of Criminal Procedure every identifying witness must be examined in the committing Magistrate's Court so that if he makes a mistake there the mistake may be utilized by the accused at the Sessions Trial :

'The argument is plausible and merits consideration. Now, the accused has a right to use a witness's statement before the Committing Magistrate for contradicting him, and that right cannot be abridged, provided the legislature itself does not decide otherwise. But what has the legislature done By introducing Section 207A in the Code by Act No. XXVI of 1955 it has considerably altered the law relating to the procedure to be adopted in commitment proceedings instituted on a police report, and by virtue of Clause (4) has given to the prosecution absolute discretion

in the matter of production of eye-witnesses and indeed this Bench has held in *State v. Yasin*, (AIR 1958 All 861) that if in a particular case the prosecution do not choose to call a single eye-witness they cannot be compelled to do so. It is clear therefore that the legislature itself has conferred a power upon the prosecution which results in the curtailment of the right of the accused to utilise a witness's statement in the committing Court for his own benefit. Since this is the outcome of a specific statutory provision, no grievance can be made of the fact that by the non-production of an identifying witness in the Magistrate's Court the accused has been deprived of a possible chance of discrediting him in the event of his failure to identify him in that Court--we are not aware of any principle of law by which the prosecution can be penalised for exercising a right conferred upon them by the statute. Besides, it is seriously open to question as to why an identifier's testimony in a sessions trial must be subjected to a double check, to wit first, his identification in the jail parade, and second, his identification in the Magistrate's Court. Now, if an offence happens to be one cognizable by a Magistrate and yet rests on evidence of identification, only one check on it is permissible, namely, the jail identification parade. Yet all that the law requires is that the charge should be proved beyond reasonable doubt, and the standard of proof required is the same whether the offence is triable by the Sessions Court, for example, dacoity, or triable by Magistrate, for example, theft. Hence, if in a theft case the law considers a single check sufficient, there can be no legal jurisdiction for demanding a double check in dacoity. It might also be pointed out that to think that a witness who has identified the accused' in the jail parade and in the Court of Session would have failed to do so had he been produced before the Committing. Magistrate, is pure speculation -- it is extremely rare to find this happening in practice. Under these circumstances we are unable to agree that in Sessions Cases resting on identification evidence the Court should insist that every identifying witness be produced in the committing Court, or that if any such witness is withheld his evidence in the Sessions Court becomes clothed with suspicion..'

I agree with these observations, subject to one-comment. It is that the so-called right of the accused to use a witness's previous statement to contradict him arises out of the existence of the previous statement and not out of any inherent or fundamental right of his. If there is a previous statement he has a right to use it,

but he has no right to demand existence of a previous statement, which right is quite different. There is no obligation upon the prosecution to bring into existence a previous statement so that the accused can use it. When the legislature enacted Section 207A by providing that a committing Magistrate should examine only such of the witnesses as are produced by the prosecution before him, it did so not with any intention of curtailing any right of the accused.

12. In *Jadunathram v. State*, Criminal Appeal No. 11 of 1960, decided on 18-8-1960 (All), Mulla J. took the same view as in *Lalla Singh's case*, Cri. Appeal No. 291 of 1958, D/- 15-12-1959 (All).

13. *State v. Ram Dayal*, Govt. Appeal No. 330 of 1960 was decided by our brothers Nigam and Misra JJ. on 27-10-1960 (All), Nigam J. observing :

'The evidence of identification has always been treated by courts to be a weak kind of evidence. Technically, the prosecution is now entitled to refrain from examining witnesses in the court of the Committing Magistrate but we are clear to our mind that where such action proceeds from oblique motives, it has not to be only discouraged but must of necessity affect the value that can be attached by the Courts to the evidence of seen identifying witnesses. We would like to point out that each case has to be considered on its particular facts and no rule of thumb can be laid down.....The value to be attached to the evidence of every particular witness has to be judged in the particular case by the court concerned and, as stated earlier, no rule of thumb can be laid down to guide the subordinate courts' in every, case.'

I respectfully agree generally with these observations though they do not explain which motive for the non-examination of a witness before the committing Magistrate can be said to be an oblique motive. If a witness has been tampered with by the accused or refuses to give evidence unless he is well remunerated or has lost memory or is an idiotic person who can be easily misled or would answer a question without understanding it, or is considered a superfluous witness or is on bad terms with the accused the prosecution would be fully justified in not examining him.

'The duty of a fair prosecutor extends only to examine such of the witnesses who are necessary for the purpose of unfolding the prosecution story in its essentials" (vide Sardul Singh v. State of Bombay, (S) AIR 1957 SC 747, at p. 766, per Jagannadhadas, J.) and the court cannot normally compel a prosecution to examine a witness it does not choose to.

A clear case of unjustified refusal to examine would be where an eye-witness without a bad motive would give evidence conflicting with other evidence. If two apparently impartial eye-witnesses are likely to give conflicting versions, the prosecution should put both before the Court and leave it to the court to judge which of them is true. In the above case the learned Judges treated the evidence of a witness with suspicion just because the prosecution did not offer any explanation for not examining him before the committing Magistrate. I am not aware of any provision which requires the prosecution to state reasons for not examining a witness. The non-examination of a witness is neither a fact in issue nor even a relevant fact and no evidence about the reasons for it can be given in the court. The court has to decide every case on the basis of the evidence actually produced before it and has nothing to do with evidence not produced before it.

A case has to be decided on positive evidence and cannot be decided on negative evidence. In certain circumstances an inference of a positive nature may be drawn from the absence of evidence, but it is not true that the non-examination of every witness who could give relevant evidence leads to the presumption that if he had been examined his evidence would have been adverse to the party examining him and, even if it did lead to the presumption, it should not matter if he would have dishonestly or corruptly given false evidence against the party, A party is not affected by adverse evidence if it is given dishonestly or corruptly. There is no presumption that a witness who was not examined would have given true evidence, or evidence which would have been relied upon.

Further, the rule of adverse presumption from the non-production of evidence applies only to non-production of the best evidence. It is stated in Greenleaf on Evidence, volume 1, para. 82 as follows :

'No evidence shall be received which is merely substitutory in its nature so long as the original evidence can be had. The rule excludes only that evidence which itself indicates the existence of more original sources of information'.

In *Clifton v. United States*, (1843-46) 11 Law Ed 957 it was stated that

'the best evidence of disputed facts must be produced of which the nature of the case will admit. This rule, speaking technically, applies only to the distinction between primary and secondary evidence; but the reason assigned for the application of the rule in a technical sense is equally applicable, and is frequently applied, to the distinction between the higher and inferior degree of proof, speaking in a more general and enlarged' sense of the terms, when tendered as evidence of a fact. The meaning of the rule is, not that courts require the strongest possible, assurance of the matters in question; but that no evidence shall be admitted, which, from the nature of the case, supposes still greater evidence behind in the party's possession or power;'

Stone, J. observed in *Interstate Circuit v. United States* (1938) 83 Law Ed, 610 that

'The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse.'

Consequently no presumption adverse to the prosecution can be drawn from the non-production of a witness, whether in the Sessions court itself or in the committing Magistrate's. In any case no presumption, that the witness not examined would, if he had been examined, have truthfully given evidence adverse to the prosecution, can be drawn without sufficient material to justify it. When there are several witnesses, whose evidence would more or less be of the same weight or credibility, the choice is of prosecution to examine such of them as it thinks fit, and to draw an adverse inference from its not examining the rest would be nothing short of depriving it of the choice.

14. The same question arose before Nigam and Misra, JJ. again on 1-2-1962 in *State v. Jhabhu*, Govt. Appeal No. 511 of 1960 (All). The learned Judges relied

upon the cases of Rameshwar Cri. App. No. 386 of 1959, D/- 16-12-1959 (All) and Ram Dayal, Govt. Appeal No. 330 of 1960 (All) and refused to interfere with the Sessions Judge's order who had refused to believe the evidence of the witnesses who had not been examined before the committing Magistrate. State v. Ram Autar, Govt. Appeal No. 465 of 1960, decided on 8-2-1961 (All) by Nigam and Misra, JJ. was another appeal from acquittal. The learned Judges relied upon the case of Ram Dayal, Govt. Appeal No. 330 of 1960 (All) and observed that consistency is one of the requirements in the identification by witnesses for inducing confidence in courts. But they recognised that no question of law is involved in disbelief of the witnesses because

'the question whether a particular witness is to be relied upon in the particular circumstances of the case is strictly a question of fact,'

With which observation I respectfully agree.

The last three cases were all appeals from acquittal in which the appellate court attached weight, to the appreciation of the evidence by trial court.

When a Sessions Judge disbelieves the evidence of a witness on the ground that he was not examined in the committing Magistrate's court and acquits the accused, the High Court in Government appeal may feel powerless to interfere with the Sessions Judge's appreciation of the evidence, but that would not justify the High Court's interfering with a Sessions Judge who believes the evidence of a witness in spite of his non-examination before the committing Magistrate and convicts the accused. As a matter of fact an appellate court has to pay the same regard to the appreciation of the evidence by the trial court, whether it convicts the accused or acquits him, and just as it should be slow in differing from it in an appeal from acquittal so also it should be slow in differing from it in an appeal from conviction. The learned Judges differentiated between the evidence of identification and other evidence and laid down that in the absence of compelling reasons the prosecution should buttress the 'weak evidence of identification' by requiring the witnesses to identify the accused repeatedly at every opportunity. What is called evidence of identification is really not evidence of identification; it is evidence of commission of the offence by the accused with only this difference that the witness not having

known the offender before is unable to name him and can only point him out.

The question of evidence of identification being of a weak nature really arises only in respect of a genuine witness. In the case of a false witness there is no question of weakness because he has been tutored to point out the accused as the offender and he makes no mistake about it. Genuine evidence does not require to be corroborated and certainly not at every step. In a genuine case of evidence of identification, as time passes, the evidence of identification should become weaker and weaker. Further if a witness identifies the accused in a jail and then at the sessions trial, there should arise no question of his not being called upon to identify him in a Magistrate's court because he would have surely identified him there.

15. *Gaya Din v. State*, Criminal Appeal No. 391 of 1960 was decided by Jagdish Sahai and Nigam JJ. on 10-2-1961 (All). Nigam J., who delivered the judgment said :

'The question whether a particular witness is to be believed or not is a question of fact and not a question of law. The prosecution certainly has a right to refuse to examine all the witnesses in the court of the committing Magistrate. We must however emphasize that the evidence of identification has always been considered a weak kind of evidence..... In order to assure the Court that this evidence is reliable, it is desirable that a witness should be repeatedly asked to identify the person he had seen at the time of the dacoity. This is particularly true in the case of a dacoity when some of the witnesses might have reasonably got nervous and may not be able to fully comprehend the features of the dacoits. No reasonable explanation has been furnished to us to explain this omission on the part of the prosecution, an omission which may have deprived the accused persons of an opportunity for the witnesses to commit mistakes in the parade or to be able to indicate that the person he had identified in the jail was not really the person he meant to identify. In these circumstances, we are of opinion that the evidence of the persons not examined in the committing court should be excluded from consideration.'

These observations remind us of 'the sporting theory of justice' from which Rascos Pound called for our deliverance in his 'scholarly but complacency-shattering

address : 'The Causes of Popular Dissatisfaction with the Administration of Justice' to the American Bar Association in 1906. The theory to which some adhere even today

'regards a law suit not as a means for ascertaining truth but as a game of skill or chance, where we may use a procedural device or a rule of evidence as one plays a trump card, or draws to three aces, or holds back a good horse till the home stretch,' and where the successful advocate 'is a game bird with the best pluck and the sharpest spurs';' (see the article 'The Law, a Dynamic Profession' by J. W. McWilliams published in 41 American Bar Association Journal (1955) page 18 and reprinted in The Lawyer's Treasury, page 457).

An accused is certainly to be presumed to be innocent so long as he is not proved to be guilty, but it does not follow that he must be given every chance to escape from the clutches of the law. Finding a person guilty of a criminal offence is not such a wicked act that it must be avoided at all cost and must not be done by a Court until it is cornered and has no option but to do it. I agree with Nigam, J., that the question is of fact and not of law but I must emphatically disagree with the rule laid down by him that if no reasonable explanation has been furnished for the non-examination of a witness in the Committing Magistrate's Court, his evidence at the sessions trial should be completely disregarded.

Disregarding the evidence completely regardless of all circumstances is treating it as a matter of law and not of fact. To say that the evidence of every witness, who was not examined in the committing Magistrate's Court and whose non-examination was not sufficiently explained, is false or even unreliable is to lay down a law. To state an invariable rule to be applied regardless of other circumstances is to lay down a law -- a legislative function. I have pointed out that no evidence can be given of the reasons for not examining a witness and the Criminal Procedure Code, which deals with the procedure, also does not contain any provision for the prosecution's giving reasons for not examining a witness. As I said earlier, if the accused wants the Court to draw an adverse inference, it is for him to have brought on the record the basic facts, e.g. sufficient material from which it can be reasonably presumed that if the witness had been examined, his

evidence, though untainted, would have gone against the prosecution. If the law does not permit him to do so, it only means that the presumption cannot be drawn.

If a witness does not point out an accused as the offender, there can be several reasons for it; that the accused was not the offender is only one of them. There are others, such as that his memory is weak, that he has been won over by the accused, that he is displeased with the police and does not want to give evidence to support their case, that he has been threatened by the accused or other person etc., and the Court without any justification cannot ignore them and assume that the witness did not point out the accused because he was not the real offender. Similarly there are many reasons for an eye-witness not being examined by the prosecution, such as that he was ill or trace-less and his evidence was superfluous (sufficient evidence already having been produced), that he was not prepared to point out the accused as the offender for any reason other than that he was not the real offender or that his evidence, though true, would be adverse to the prosecution and the Court must have a reason for selecting any of these reasons as the reason in the particular case. It would be a wild guess to say in every case that the witness was not examined because his evidence, though true, would have been against the prosecution case.

One of the reasons given by Nigam, J., for the view that identification witnesses should be repeatedly asked to identify the accused is that when the dacoity was committed the witnesses might have become nervous. This is a layman's view; the view of psychologists is that

'on the contrary, fear generally has a large emotional factor and as a result the attention is sharpened, the mental faculties are concentrated, and better memory on material points should result. Intense feeling of any kind is apt to key up the powers of the brain and sharpen perception. When we feel a thing strongly we are sure to retain the recollection of it. It is more firmly impressed upon us than the humdrum affairs of our ordinary life;' (see 'Psychology and the Law' by Dwight G. McCarty, 1960 page 198).

Further, if a witness became so nervous on seeing the dacoits that he could not note their features carefully, he would not be able to identify any of them at any

time and no question of his being asked to undergo repeated identification should arise. A witness, who lost all control of his faculties at the time of the commission of the dacoity, cannot regain it with retrospective effect. The argument sometimes advanced on the side of defence that if a witness had been examined his evidence would have resulted in some discrepancies is too speculative to be seriously considered. If the prosecution examines more than one witness it is to support its own case and not because it is under an obligation to the accused to multiply statements so that there might be many occasions for conflict in the testimony.

16. The matter came up again before the Lucknow Bench in *State v. Ram Bilas*, 1961 All LJ. 402 : (AIR 1961 All 614) and *Mulla and Nigam, JJ.* confirmed the view taken in the case of *Lalla Singh, Cri. Appeal No. 291 of 1958, D/-15-12-1959 (All)* and disagreed with the view expressed in the case of *Asharfi*, 1960 All LJ 595 : (AIR 1961 All 153). It is on account of this conflict that *Beg and S. D. Singh, JJ.* have referred the question to a Full Bench.

17. My answer to the question, which, as framed, is one of law is unhesitatingly 'no'; there is no such law. The prosecution is under no obligation to examine all the eye-witnesses, (even if they did not know the offender and could only point him-out) in the committing Magistrate's Court and is not debarred from examining any such witness in the Sessions Court by the fact that he was not examined in the committing Magistrate's court. The evidence of such a witness must be judged by the Sessions Judge, like that of any other witness without any prejudice. It cannot be disbelieved on the ground of his not being examined in the Magistrate's court. The Sessions Judge must appraise it in the light of all the circumstances excluding this and decide whether it should be believed and (if believed) what weight should be attached to it. He cannot draw a presumption adverse to the prosecution from the fact of his non-examination and would not be justified in assuming that he was withheld from an oblique or bad motive.

18. The case may be laid before the bench concerned with the above reply.

S.D. Singh, J.

19. I agree.

Misra, J.

20. This reference to Full Bench has arisen out of a Criminal Appeal filed by three persons, namely Jwala, Kali Charan and Chhotta in this Court against their conviction and sentence of imprisonment for life under Section 396, Indian Penal Code, passed by the learned Additional Sessions Judge, Kheri.

21. The conviction of the appellants was based on evidence of identification alone. In the Jail parade, Jwala had been identified by nine witnesses. Kali Charan by three witnesses and Chhotta by nine witnesses. Basing his judgment on the decision in 1961 All LJ 402 : (AIR 1961 All 614), the learned Additional Sessions Judge held Jwala guilty on the evidence of two witnesses. Kali Charan also on the statements of two witnesses and Chhotta also only on identification by two witnesses. He excluded the identification by other witnesses against each appellant on the ground that those witnesses had not been examined before the committing Magistrate. On behalf of the appellants the evidence of the witnesses which had been relied on by the trial court was challenged. On behalf of the State it was contended that the learned Additional Sessions Judge acted illegally in excluding the evidence of those witnesses who had identified the accused in the Jail parade and also before the trial court only on the ground that they had not been produced to identify the accused in the committing Magistrate's Court. As there was some opinion contrary to the proposition laid down in 1961 All LJ 402 : (AIR 1961 All 614) (Supra), the learned Judges who heard this appeal have referred the following question for answer to a Full Bench :

'Where the prosecution in support of its case adduces evidence of identification of an accused by witnesses in the trial of the case in the Sessions Court, and does not produce those witnesses in the Committing Magistrate's court, should the evidence of such witnesses be disbelieved merely on the ground that they were not produced by the prosecution in the Committing Magistrate's court for the said purpose ?'

22. I have had the advantage of reading the judgment proposed by his Lordship the Chief Justice. I respectfully agree with his opinion that as a legal proposition the answer to the question which, as framed, is one of law, should be unhesitatingly 'No'. There is no law which lays down that the identification of an accused by a witness at the trial must be disbelieved merely on the ground that the witness was not produced before the committing Magistrate. Section 207A Cri. P.C., which has been introduced in the Code since after the amendment of 1955, gives the prosecution an option to produce as many witnesses 'to the actual commission of the offence' as they choose during the committal proceedings and they are under no compulsion to produce all of them at that stage. They would be well within their rights to produce witnesses at the trial whom they did not examine before the committing Magistrate and they can insist that the evidence of such witnesses is entitled to consideration. As a legal proposition, therefore, it is not open to the Court to say that the identification evidence of a witness who is not produced before a committing Magistrate must be disbelieved in all cases solely on the ground that he was not produced before the committing Magistrate. It would virtually amount to excluding the evidence of that witness from consideration and denying to the prosecution a right which the statute confers upon them.

23. However, as the power to assess the weight of evidence produced before the court vests solely in it, in cases of dacoity committed during night where the witnesses have to identify unknown culprits under peculiarly difficult conditions, the court, in its discretion, in the particular circumstances of a case may hold the identification evidence of a witness to be valueless, if in its opinion the non-production of the witness before the committing Magistrate was motivated by oblique reasons and was intended to avoid the test of consistency in identification at various stages which is one of the main considerations in attaching value to it. But then again this is a matter to be judged on the facts of each case.

24. To sure up my view on the question, I may quote a passage from the decision in Criminal Appeal No. 330 of 1960 (All) decided by a Bench of this Court to which I was a party :

'The evidence of identification has always been treated by courts to be a weak kind of evidence. Technically, the prosecution is now entitled to refrain from examining witnesses in the court of the Committing Magistrate, but we are clear in our mind that where such action proceeds from oblique motives, it has not to be only discouraged but must of necessity affect the value that can be attached by the courts to the evidence of such identifying witnesses. We would like to point out that each case has to be considered on its particular facts and no rule of thumb can be laid down The value to be attached to the evidence of every particular witness has to be judged in the particular case by the court concerned and, as stated earlier, no rule of thumb can be laid down to guide the subordinate courts in every case.'

25. My answer to the question referred to Full Bench, therefore, is as indicated above.

BY THE COURT

26. Our answer to the question is 'No'. Whether a witness should be believed or not is a question of fact and the fact that he was not examined in the committing Magistrate's court is not a ground for disbelieving his evidence given in the Sessions Court. He may be disbelieved on other grounds but not on the ground of his non-examination in the Magistrate's Court, because the right of the prosecution to refrain, from examining him in the Magistrate's Court even if he was a witness of identification, cannot be even indirectly curtailed.

27. Let the reference be returned with this answer to the Bench concerned.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com