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Court : Kolkata

Decided On : Aug-06-1929

Reported in : AIR1930Cal134

Appellant : Nayan Mandal and ors.

Respondent : Emperor

Judgement :

Graham, J.

1. This is an appeal by three persons named Nayan Mandal, Panchanan Mandal and Moti Lal Mandal who have been convicted by the Sessions Judge of Faridpur on a trial with the aid of a jury and convicted under Sections 148 and 304 (part 1) read with Section 149, I.P.C., and sentenced as follows : Nayan Mandal to rigorous imprisonment for ten years under Section 304 (part 1) read with Section 149, I.P.C., and Panchanan Mandal and Moti Lal Mandal to five years' rigorous imprisonment under Section 304 (part 1) read with Section 149 I.P.C. No sentences were inflicted under Section 148, I.P.C.

2. The case for the prosecution was that on the day of occurrence the complainant with a number of other persons had gone to cultivate a certain plot of land, and that the accused came in numbers-variously armed and ordered them to stop cultivating the land. The complainant's party refused and thereupon the accused attacked them and one Tarini was killed and one Lakhi Kanta was also injured and

died afterwards. The defence was that the accused were in possession of the land and were cultivating it, and that the complainant's party came up and attacked them while they were peacefully cultivating the land and that any injuries, which were caused, were caused by the accused in the exercise of their right of private defence.

3. On behalf of the appellants three points were argued before us. It was first contended that the learned Sessions Judge erred in allowing the prosecution to withhold four witnesses named Abhoy Charan Shikari, Ramananda Biswas, Bonornali Biswas and Jagabandhu Biswas, who were examined in the committing Court, but were not examined in the Sessions Court, or tendered for cross-examination. It is urged that they ought at least to have been tendered for cross-examination. Two of these witnesses Abhoy and Ramananda were named in the first information. In the committing Court they were declared hostile because they did not support the prosecution. The prosecution is under no obligation to examine witnesses who it has reason to believe will not speak the truth : see *Empress v. Dhunno Kazi* [1882] 8 Cal. 121. It is usual in such circumstances for the prosecution to tender such witnesses for cross-examination, and it is not clear whether this procedure was adopted or not. The defence, however, was certainly entitled to claim that privilege. Having omitted to do so they cannot be permitted to make capital of the fact that these witnesses were not cross-examined.

4. As regards the other two witnesses Banamali and Jagabandhu there does not appear to be anything to show that they were material witnesses. The prosecution was not bound to examine them. The remarks which have been made above apply to these witnesses also.

5. It is also urged on behalf of the appellants that the learned Judge should have told the jury that if material witnesses are not called, it may be presumed that, if they had been called, they would not have supported the prosecution. The charge does, however, contain a direction of this nature.

6. Secondly, it was contended for the appellants that the learned Judge misdirected the jury inasmuch as he did not clearly and explicitly tell them that the settlement record was in favour of the accused and that the presumption was that

the record is correct. The learned Judge has referred to the point in his charge. It was perhaps not so clearly put as it might have been. But however that may be, it is well settled that the presumption of correctness, which attaches to the finally published Record-of-Rights, relates only to possession at the time when the record is prepared, and, even if such presumption can be made in a criminal trial, as to which, speaking for myself, I entertain some doubt, it is clear that where there has been an interval of 10 or 12 years, as in this instance, between the preparation of the record and the occurrence, any presumption arising from the record is obviously of the weakest possible description. Indeed the probative value is practically nil since all sorts of changes may obviously take place in the course of 10 or 12 years. The material question in a case of this description is possession at the date of the occurrence. If the learned Judge had told the jury that the settlement record gave rise to a presumption in favour of the possession of the accused at the date of the occurrence he would certainly have misdirected them.

7. Thirdly and lastly, it was urged for the appellants that the defence was seriously handicapped by the fact that rebutting evidence was allowed to be brought on the record at the 11th hour for the purpose of contradicting the evidence adduced on behalf of the defence, and it was further contended that certain documents, which were called for from the Sadar Registration Office, were not admissible in evidence, and that the trial has been vitiated by the reception of inadmissible evidence. As regards the first part of this contention reference may be made to Section 540, Criminal P.C., and Section 135, Evidence Act. Section 540 empowers the Court at any stage to summon any person as a witness, if his evidence appears to it to be essential to the just decision of the case. Section 135, Evidence Act, lays down that the order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and in the absence of any such law by the discretion of the Court. I think, therefore, that the Court had power to admit this evidence and that the objection on this point must fail. Finally as regards the objection that the documents in question Exs. X and Y, are not admissible in evidence we think there can be no doubt that these documents are public documents, and they were, therefore, rightly admitted. In the result all the points which have been urged on behalf of appellants fail, the appeal must be dismissed

and the convictions and sentences are confirmed.

Lort-Williams, J.

8. I agree. I desire to add that, in my opinion, the statement of Wilson, J., in *Empress v. Dhunno Kazi* [1882] 8 Cal. 121, p. 124 is too wide. The learned Judge says:

The only legitimate object of a prosecution is to secure not a conviction, but that justice be done. The prosecutor is not, therefore, free to choose how much evidence he will bring before the Court. He is bound to produce all the evidence in his favour directly bearing upon the charge. It is *prima facie* his duty, accordingly, to call those witnesses who prove their connexion with the transactions in question, and also must be able to give important information. The only thing that can relieve the prosecutor from calling such witnesses is the reasonable belief that, if called, they would not speak the truth. If such witnesses are not called without sufficient reason being shown, the Court may properly draw an inference adverse to the prosecution.

9. It is difficult to understand what in practice would be the effect of the first part of the learned Judge's dictum, namely that the only legitimate object of a prosecution is to secure not a conviction, but that justice be done. If the evidence in the hands of the prosecution points to the conclusion that a crime has been committed, it is the legitimate object of the prosecution to see that the prisoner is convicted. If the evidence in hand does not point to the probability that he is guilty of a crime, he ought not be prosecuted at all. Consequently if the prosecution are of opinion that the evidence in their possession points to the probability that the prisoner has committed a crime, obviously in their view justice would be done by his conviction, which it should be their object to secure. The dictum, therefore, though rhetorically and theoretically excellent, is meaningless in practice. The law in my opinion is correctly stated in Archbold's Criminal Pleadings, 27th Edn., 496:

Although in strictness it is not necessary for the prosecutor to call every witness whose name is on the back of the indictment, (or, in India, 'whose deposition has been taken'), it has been usual to do so, that the defendant may cross-examine

them.

10. That is supported by a number of cases, the first being *R. v. Simmonds* 1 C. & P. 84 and the last being *R. v. Barley* 2 Cox. C.C. 191:

If counsel will not call the witness, the Judge in his discretion may : *R. v. Simmonds* 2 Cox. C.C. 191... However the prosecutor is not bound to call them all; though he ought, it has been said, to have them in Court, that they may be called for the defence, if the prisoners choose : *R. v. Cassidy* 1 F. & P. 79.

11. The latter part of the learned Judge's statement about the presumption which may be drawn, is of course correct. If the prosecution, in their discretion, do not choose to call such a witness, then the presumption may be drawn that his evidence, if given, would be unfavourable to their case.

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