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Court : Kolkata

Decided On : Nov-23-1949

Reported in : AIR1950Cal327,54CWN221

Judge : Chunder and ; Guha, JJ.

Acts : [Code of Criminal Procedure \(CrPC\)](#) , , 1898 - Sections 297 and 367; ;
[Evidence Act, 1872](#) - Section 157

Appeal No. : Criminal Appeal No. 139 of 1949

Appellant : Bhupati Ghosh

Respondent : The King

Advocate for Def. : N.K. Sen, Adv.

Advocate for Pet/Ap. : S.S. Mukherjee, Adv.

Judgement :

Chunder, J.

1. This is an appeal against the conviction and sentence of the appellant under Section 395, Penal Code. Briefly, the facts are that there was a dacoity in the house of the complainant Jiten. There were three other inmates in the house, of them P. W. 2 is said to have fainted and P. W. NOS. 3 and 4 were two ladies.

P.W. Nos. 6, 7 and 8 are three neighbours who came the next morning some hours later.

2. As the learned Magistrate's order sheet seems to show, he considered that the public prosecutor had good reason to think that P. Ws. Nos. 6, 7 and 8 will not be witnesses of truth, but as the defence wanted them to be tendered for cross-examination, he directed that they should be so tendered, purporting to follow a decision of this Court, and at the same time when calling upon the public prosecutor to do so he gave him an opportunity to cross-examine these witnesses later.

3. Mr. Mukherjee, appearing for the defence, has rightly pointed out that the learned Magistrate could have saved himself all the trouble and the complication he had later created in his charge if he had excluded all this evidence. It is clear that his charge as to how the evidence of hostile witnesses should be valued is not at all happy. What the learned Judge did not notice was that the evidence of these witnesses was really not relevant. To be evidence of corroborative value 'It must be at or about the time of the occurrence' which means that the evidence should be by persons who had heard the occurrence before there was sufficient time for concoction. That is the criterion. The evidence of witnesses who came several hours after the occurrence may be very interesting as village gossip, but is not ordinarily proper evidence over which a Court should spend its time. Such evidence has ordinarily got to be excluded.

4. In the re-trial we are going to order, the learned Judge will exclude the evidence of all these three witnesses. Mr. Mukherjee has rightly controverted about the hopeless way in which the learned Judge has dealt with the evidence of identification and, if we may add, really the whole case in his charge. What he has done is he has begun telling the jury in sentences after sentences of what the Public Prosecutor had said and then after exhausting their patience he must have exasperated them by repeating to them in a succession of sentences of what the learned pleader for the de-fence had said and then left the jury without any direction as to what the learned Judge has to pay. As a charge, the charge is hopeless and could not under any possible circumstances have given any help to

the jury in deciding the case. It is, therefore, necessary that the case should be retried and in view of this we refrain from passing any opinion whatsoever on the merits of the case, excepting to point out that there should be some explanation for the non-examination of Lakshmi Narayan who appears to have been examined by the committing Magistrate.

5. The conviction and sentence of the appellant are set aside and the case is remanded for retrial by some other Judge selected by the Sessions Judge.

6. The appellant will continue in the same bail.

Guha J.

I agree.

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