

In Re: Dhunno Kazi and anr. and Vs. Dhunno Kazi and anr.

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Court : Kolkata

Decided On : Oct-01-1881

Reported in : (1882)ILR8Cal121

Judge : Prinsep and ;Wilson, JJ.

Appellant : In Re: Dhunno Kazi and anr. and ;The Empress

Respondent : Dhunno Kazi and anr.

Judgement :

Wilson, J.

1. We think there must be a new trial in this case. The first accused person is charged with knowingly and dishonestly using as genuine a forged document. The second is charged with abetting that offence. The using charged, was a using of the document as evidence in a civil suit. In that suit, which was in respect of certain land, the plaintiff derived his title from the sister of the accused by right of inheritance from her father. The document put in on behalf of the accused and which forms the subject of the present charge, purported to be a conveyance of the property by the father in his lifetime to the accused.

2. The learned Judge appears to us, looking at his summing up as a whole, to have left the right issues to the jury, which were briefly stated, whether the document was forged, whether it was used with knowledge of that fact, and

whether this was done fraudulently or dishonestly.

3. But in dealing with the evidence bearing upon these issues, the learned Judge seems to us to have directed the jury erroneously upon several material points.

4. The learned Judge says: 'Then I must bring to your notice the circumstance that the accused's pleader in the civil suit adopted the extraordinary precaution of requiring his client to endorse on the document itself a statement that he and his brother tendered it for production in evidence in the suit, before he, the pleader, would undertake to put it in.' Whether this conduct on the part of the pleader be usual or unusual, it is no evidence against the accused in the prosecution.

5. A more serious error is to be observed in the manner in which the learned Judge has dealt with the fact of the non-production of the survivors among those whose names appear as attesting witnesses to the document in question. The learned Judge points out first,--' Of the ten, only three survivors; of whom two have been cited to this Court by the defence, but have not been called by them, and the third has kept out of the way in rather a marked manner.' He then, after stating quite correctly that the burden of proof is on the prosecution, proceeds--' But the prosecution may please itself without dictation from any one as to the extent or amount of proof that they will put forward. If they do not put forward enough to satisfy a jury, they have of course, only themselves to blame; but they are not required to bring exhaustive proof of their case.'

6. He then points out correctly, as it appears to us, that the weight to be attached to the non-production of material evidence by the prosecution must depend upon the circumstances of the case. And he proceeds: Now this present is a very peculiar case. It is practically a sister prosecuting two brothers, and with the serious offence of forgery. You will at once understand how difficult it is for the prosecution to depend upon the evidence of the purporting attesting witnesses, who are still available. One of these has kept out of the way of both sides, the other two have been secured for the defence, and one of them is in the employ of the accused; but others have not after all been called before you by the defence.' And he adds,--' You are entitled to presume from this mere fact that these witnesses, being cited for the defence, as they were, would not, if called, have

supported it.' Later on he says,--'The two attesting witnesses snatched from the prosecution, after it had been declared on the appeal in the previous trial by the accused that the prosecution ought to call them, might and should have been called,' i.e., by the defence.

7. The views expressed in these passages form the foundation for a considerable part of the learned Judge's summing up; and they seem to us to convey erroneous notions of the position of prosecutor and accused in a criminal case.

8. 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 connection 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 (and the mere fact of their being summoned for the defence seems to us by no means necessarily a sufficient reason), the Court may properly draw an inference adverse to the prosecution.

9. There is no corresponding inference against the accused. He is merely on the defensive, and owes no duty to any one but himself. He is at liberty, as to the whole or any part of the case against him, to rely on the witnesses of the case for the prosecution, or to call witnesses, or to meet the charge in any other way he chooses; and no inference unfavourable to him can properly be drawn, because he takes one course rather than another. In the present case, these considerations apply with peculiar force. If the witnesses referred to by the learned Judge are thought by the prosecution to be trustworthy men, the prosecution was bound to call them. If they are thought not to be so, it seems to us specially unreasonable to reproach the accused with not calling them.

10. On these grounds, we think that the jury has been misled in a manner that must have prejudiced the accused, and the case must be tried again.

11. As the case has already been twice tried, it seems to us to be better, and it will, we think, be more satisfactory to the learned Judge whose summing up we have had to consider, that it should not be a third time tried at Hooghly.

12. We, therefore, direct the new trial to take place at Burdwan.

13. The Magistrate of Hooghly will make arrangements for the attendance of the witnesses before the Sessions Court at Burdwan, after hearing from the Sessions Judge the date fixed for the trial.

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