

CRIMINAL REFERENCE.

Before Woodroffe and Sharfuddin JJ.

SADASIV SINGH

v.

EMPEROR.*

1913

July 3.

Cross-examination — Postponement — Sessions trial — Applications by defence counsel to postpone cross-examination till next day — Trial for murder — Refusal by Judge, effect of — Prejudice to accused — Re-trial — Practice.

Where, at a Sessions trial, the defence counsel applied, after the examination-in-chief of the first prosecution witness, for postponement of the cross-examination of the witnesses till the next day, on the ground of his unpreparedness, but did not ask for an adjournment of the trial itself :—

Held, that the application was a reasonable one which the Judge should, under the circumstances, have allowed. Though the accused is not entitled to such postponement as of right, the Court may, in a proper case, grant the indulgence.

Where the result of the refusal of such application was that the witnesses examined on its date, four of whom were important, were not cross-examined by counsel or pleader, and the witnesses subsequently examined were inefficiently cross-examined and the cross-examination of the former witnesses might have elicited matters as to which the subsequent witnesses might have been cross-examined :—

Held, that the accused were prejudiced, and that there should be a re-trial by another Judge.

THE accused were tried before the Sessions Judge of Gaya, with the aid of two Assessors, on a charge of murder under s. 302 of the Penal Code, found guilty thereunder, and sentenced to death.

The facts were that one Sita Ram, the *mohunt* of Adjodhia, died some years ago, without having

* Criminal Reference No. 13 of 1913, and Criminal Appeal No. 403 of 1913, against the order passed by F. M. Luce, Officiating Sessions Judge of Gaya, dated April 22, 1913.

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appointed a successor but having executed a *punch-nama* authorizing certain persons, one of whom was Bhagwat Singh, to appoint the same. As the endowed property was mortgaged in the usufructuary form for 14 years, three of which remained unexpired, no successor had been nominated. It appeared that Bhagwat favoured the candidature of Ram Anugrah, a Brahmin, while the accused desired the appointment of Janoki Nath, the brother of one and the cousin of the other prisoners. On the 11th January 1913, Bhagwat went to the Rafigunj Bazar to send a money-order and to pawn certain ornaments. The three prisoners were alleged to have accompanied him to Rafigunj and to have been seen together several hours after sunset on a path near their own village. The next afternoon a *chaukidar* found the dead body of Bhagwat floating in a streamlet and reported the discovery at the thana. The accused Suambar was arrested on the 13th January near his house, but the other two absconded and surrendered themselves in Court later. They were committed for trial to the Sessions Court of Gaya on the 17th March 1913.

The Sessions trial commenced on the 16th April, and after the examination-in-chief of Ram Keshub Singh, the son of the deceased, and the first prosecution witness, the defence counsel requested the Judge to permit him to cross-examine the witness the next day, as he was not prepared to do so at once. The application was refused, but the Judge passed the following order in the order-sheet: "The counsel for the accused wants to cross-examine the witness tomorrow as he is not prepared to cross-examine today. His prayer is refused. Let the eye witnesses and other important witnesses be examined tomorrow, and other witnesses be taken up today." The witness, Ram Keshub, had deposed the dispute between the deceased

and the accused over the appointment of a *mohunt*, and to a quarrel two days before the murder in connection with the matter, and stated that the prisoner, Suambar, had threatened his father. Five more witnesses were examined on the 16th April. Four of them deposed to the dispute and one (P. W. 3) further to the quarrel mentioned by Ram Keshub. The 6th witness merely proved the *Punchnama*. The accused cross-examined the 3rd, 4th and 5th witnesses but not the others.

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On the 17th April, the case was resumed, but the counsel did not appear, and the accused were represented by two local pleaders who cross-examined the remaining witnesses. The Sessions Judge concurring with the Assessors found the accused guilty, and referred the case to the High Court, under s. 374 of the Criminal Procedure Code, on the 19th April.

Mr. Roy and *Babu Atulya Charan Bose*, for the accused.

Mr. W. Gregory, for the Crown.

Cur. adv. vult.

WOODROFFE J. In this case the three appellants, Sadasiv Singh, Bhabuti Singh and Suambar Singh, have been tried and convicted of murder. According to the evidence, another man, Tulshi Singh, was present at and took part in the alleged crime. The Public Prosecutor, however, elected not to proceed against him, for no reason that I am aware of except that this man surrendered after the trial had commenced in the Magistrate's Court, and it was not thought worth-while to charge him and recommence the trial. However this may be, no other reason appears on the record.

In the order-sheet of the 16th April, on which date the case was taken up, learned counsel who appeared

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on behalf of the appellants asked that he might cross-examine the witnesses on the day following, as he was not prepared to cross-examine that day. This application was refused, the learned Judge ordering "that the eye witnesses and other important witnesses should be examined on the 17th, and that the examination of the other witnesses should be taken up on that day," *i.e.*, the 16th. On the following day, the 17th April, learned counsel, who had appeared for the appellants on the preceding day, did not appear. We have been informed by Mr. J. N. Roy who appears on behalf of the appellants in this Court, that, as counsel for the appellants in the lower Court was not granted the application which he had made, he was unable to accept the responsibility of conducting the case on their behalf. Certain pleaders, however, did appear on behalf of the appellants. This application by learned counsel appears to me to have been a reasonable application and one which, under the circumstances, should have been granted. The case is a capital one in which every reasonable opportunity should be given to the appellants to clear themselves of the charge if they can. It is not as if an adjournment of the trial itself had been asked for. No inconvenience, it seems to me, would have been suffered if the request had been granted, or even if the witnesses, or some of them, had been examined-in-chief and their cross-examination postponed. It may be, as learned counsel for the Crown has pointed out to us, that this would not have been the right of the appellants. But I know no reason why the Sessions Court if it thinks the case a proper one, should not show such an indulgence. However this may be, this was not asked for, but something less than this, namely, that the cross-examination might be only postponed until the following day.

The result of this refusal has been that the first six witnesses have not been cross-examined in the Sessions Court by either counsel or pleader; and, of these, four at least are of importance. And the other witnesses do not appear to have been very efficiently cross-examined, possibly owing to the circumstances under which the gentlemen who defended them undertook their defence.

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I think that the appellants have been prejudiced, in that they have lost the opportunity of cross-examination in the Sessions Court.

We have heard the case at considerable length, and owing to the inefficient manner in which the Sub-Inspector Dwarka Nath was examined, we had to examine him ourselves under the provisions of section 428 of the Code of Criminal Procedure. His evidence was left in such an ambiguous state that, for the reasons which we gave in our order directing his examination before us, it was not possible, without further enquiry, to determine upon the evidence.

We have now heard the whole case, and we are unable to accept the responsibility of adjudging it when the appellants had not, as I have stated, proper opportunity of cross-examination. For, on a review of the whole case, we find that there are matters which might, and probably would have been, cross-examined into, if due opportunity had been given.

In this case it is not sufficient to direct the cross-examination merely of the first six witnesses, as it is possible that, at their cross-examination, it may appear that there are matters as to which the other witnesses might have been, but were not, in fact, cross-examined, and the appellants lost the benefit, which they would have had, of being represented by counsel, had the Court not refused the application in respect of the cross-examination. The learned pleader

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for the appellants asks us for an opportunity of fully examining the witnesses; and to this I think he is entitled.

I would, therefore, set aside the conviction and sentence and direct that the appellants be re-tried. The trial should commence *de novo*, and a certified copy of the evidence taken by us of the Sub-Inspector Dwarka should be returned with the record to the Sessions Court. Under the circumstances, I would direct that the case be re-tried by another Sessions Judge, and would transfer the case to the Sessions Judge of the Patna District. A certified copy of the deposition of the Sub-Inspector may also be furnished to the appellants.

SHARFUDDIN J. I agree.

E. H. M.

Re-trial ordered.