1914

RAMCHANDRA MARTAND WAIKAR v. VINAYEK VENKATESH KOTHEKAR.

Their Lordships are of opinion that this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

The appellants must pay the costs of this appeal.

Appeal dismissed.

Solicitor for the appellants: *Edward Dalgado.*

Solicitors for the respondents: *T. L. Wilson & Co.*

J. V. W.

APPELLATE CRIMINAL.

Before Jenkins C.J., and N. R. Chatterjea J.

1914

Aug. 4.

RAM RANJAN ROY

v.

EMPEROR.*

Public Prosecutor, duty of—Duty to produce all the evidence in his power bearing directly on the charge—Duty to call all the available eye-witnesses in capital cases—Omission to examine material witnesses, effect of—Inference adverse to the prosecution arising therefrom—Practice.

The purpose of a criminal trial is not to support at all costs a theory, but to investigate the offence and to determine the guilt or innocence of the accused; and the duty of a Public Prosecutor is to represent not the police but the Crown, and this duty should be discharged fairly and fearlessly and with a full sense of the responsibility attaching to his position.

It is not his duty to call only witnesses who speak in his favour.

Empress v. *Dhunno Kazi* (1) discussed and explained.

He should, in a capital case, place before the Court the testimony of all the available eye-witnesses, though brought to the Court by the defence, and though they give different accounts. The rule is not a technical one, but founded on common sense and humanity.

Reg. v. *Holden* (2) followed.

Where witnesses (who from their connection with the transactions in question must be able to give important information) are not called

* Criminal Appeals No. 439 and 440 of 1914, against the order of C. Twidell, Sessions Judge of Bankura, dated May 28, 1914.

(1) (1881) I. L. R. 8 Calc. 121, 124. (2) (1838) 8 C. & P. 609.

without sufficient reasons being shown, the Court may properly draw an inference adverse to the prosecution.

Empress v. *Dhunno Kazi* (1) referred to.

A conviction under s. 114 of the Penal Code cannot stand where the abetment charged necessarily requires the presence of the abettor. To come within the section, the abetment must be complete apart from the presence of the abettor.

THE appellants were tried before the Sessions Judge of Bankura with the aid of assessors. Ram Ranjan Roy, a zemindar in the Bankura district, was charged under ss. 302 and $\frac{302}{114}$ of the Penal Code, respectively, with the murder of one Dhan Kristo Laik, and abetment by presence of the murder of Banwari Laik. Umesh Chandra Mookerjee, a *gomasta* of the zemindar, was charged, under ss. $\frac{302}{114}$, with being present and abetting the murder of Banwari Laik, and Madhab Mistri, a peon, was indicted under ss. 302 and 323, with the murder of Banwari, and simple hurt to one Hari Laik. The Judge acquitted Umesh altogether, but convicted Ram Ranjan only under ss. $\frac{302}{114}$ and Madhab under both sections. He sentenced them to transportation for life.

The facts alleged by the prosecution were as follows. Ram Ranjan went on the 6th March 1914 to the village of Dejuri and tried to induce his tenants to consent to an enhancement of their rents. On the 8th he sent for Banwari Laik, a tenant, through Madhab Mistri. Banwari having refused to pay the enhanced rent demanded, was being assaulted by the peon when Dhan Kristo went up to the zemindar and remonstrated, whereupon the latter and Umesh Mookerjee gave the peon orders to beat, saying "*mar salako.*" The peon first kicked Banwari and then struck him on the head with a *lathi* causing injuries from the effects

(1) (1881) I. L. R. 8 Calc 121.

1914

RAM RANJAN ROY v. EMPEROR.

of which he died, and he also beat Hari Laik. Ram Ranjan struck Dhan Kristo fatally with a *lathi*.

Two persons, Gosto Chatterjee and Ramanath Roy, *gomastas* of the zemindar, were eye-witnesses of the occurrence, but were not examined before the Committing Magistrate, nor called at the trial by the Public Prosecutor, though repeatedly requested to do so by the appellants' counsel. It appears that their names had been entered in the list of defence witnesses.

Mr. Eardley Norton, *Mr. Bagram* (with *Babu Manmatha Nath Mookerjee* and *Babu Probodh Chandra Chatterjee*), for the appellant. (In Appeal No. 439).

Mr. Bagram (with *Babu Probodh Chandra Chatterjee* and *Babu Mrityunjoy Chatterjee*), for the appellant. (In Appeal No. 440).

Mr. Donogh (with *Babu Manindra Nath Banerjee*), for the Crown, in both the appeals. The Public Prosecutor is only bound to call witnesses who speak in his favour: *Empress* v. *Dhunno Kazi* (1). Even under this decision he is not bound to call witnesses who would not speak the truth. The views there exressed as to the necessity of calling all witnesses able to give important information have been considerably modified in later cases. Refers to *Queen-Empress* v. *Ram Sahai Lall* (2), *Empress* v. *Kaliprosonno Doss* (3). In the present case the Public Prosecutor may well have supposed that the *gomastas* would not speak the truth, and that, having been cited as defence witnesses, they would presumably have been called by the accused. The Allahabad High Court has gone further than the Calcutta rulings, and given the prosecutor an absolute discretion: see *Queen-Empress* v. *Stanton* (4) and *Queen-Empress* v. *Durga* (5).

(1) (1881) I. L. R. 8 Calc. 121, 124. (3) (1886) I. L. R. 14 Calc. 245.
(2) (1884) I. L. R. 10 Calc 1070. (4) (1892) I. L. R. 14 All. 521.
(5) (1893) I. L. R. 16 All. 84.

1914

RAM RANJAN ROY v. EMPEROR.

[*Mr. Norton* was not heard on the point but he dealt with the evidence.]

JENKINS C. J. Ram Ranjan Roy, a zemindar in the Bankura district, Umesh Chandra Mookerjee, one of his *gomastas*, and Madhab Mistri, his up-country peon, have been charged with offences which resulted in the death of Dhan Kristo Laik and his nephew Banwari Laik, tenants of Ram Ranjan. The charges against Ram Ranjan were that he, on or about the 18th of March 1914, at Dejuri, committed murder of Dhan Kristo Laik by striking him with a *lathi* and thereby killing him, and also that he committed murder of Banwari Laik by being present and abetting Madhab Mistri in striking and thereby killing him. Umesh Chandra Mookerjee was also charged with the murder of Banwari by being present and abetting Madhab. The charge against Madhab Mistri was that he murdered Banwari, and that he caused simple hurt to Hari Laik.

Umesh has been acquitted. Ram Ranjan has been acquitted of the murder of Dhan Kristo, but convicted of the murder of Banwari by being present and abetting Madhab Mistri. And Madhab Mistri has been convicted of both the offences with which he was charged. The sentence in each case has been transportation for life. Ram Ranjan and Madhab have appealed, but no appeal has been preferred by the direction of the Local Government. We, therefore, have to assume that Ram Ranjan was not guilty of the murder of Dhan Kristo or of any offence against him of a lesser degree.

I will here state the broad features of the case for the prosecution, largely borrowing for the purpose from the first information as contained in Ex. I. Ram Ranjan, on the 6th of March, came to his village of

1914

RAM RANJAN ROY v. EMPEROR.

JENKINS C.J.

Dejuri and put up at the Durga mela. He was anxious to secure his tenants' assent to an enhancement of their rents, and sent for some of them with a view to discussing the matter. The zemindar's demands were resisted, and ultimately on the 8th of March he summoned Banwari through Madhab Mistri, to whom I will in future refer as the Nagdi.

Banwari was taken to the Durga mela and detained there. What followed is thus described in the first information. "As he (that is Ram Ranjan) was having him (that is Banwari) assaulted by the aforesaid Nagdi for his not agreeing to pay rent at an enhanced rate, Dhan Kristo Laik went to Ram Ranjan Baboo and said 'yesterday you brought away a he-goat and have kept it tied, and today why are you having my nephew assaulted by the Nagdi?' On this Ram Ranjan Baboo and Umesh Mookerjee gave orders to the up-country Nagdi saying *mar salako*, whereupon the Nagdi wounded Banwari Naik by kicking him first and then striking him with a *lathi* on the head. Ram Ranjan Baboo has caused grievous hurt to my uncle Dhan Kristo Naik by striking him on the head with the *lathi* which was in his hand. The wounds on Banwari Naik and Dhan Kristo Naik are serious, There is no hope of their lives."

Besides the appellants and Dhan Kristo and Banwari, there were in the Durga mela at this time Umesh Chandra Mookerjee, Gosto Chatterjee and Ramanath Roy, all *gomastas* of the zemindar.

Even on the case for the prosecution the conviction of Ram Ranjan for murder under section 302 of the Indian Penal Code read with section 114 cannot stand for the simple reason that the only abetment charged necessarily required the presence of Ram Ranjan, while to come within section 114 the abetment must be complete apart from the presence of the abettor.

This was recognized by Mr. Donogh, who has appeared on behalf of the Crown, and he conceded that all he could ask for was a conviction of abetment of murder under section 109.

We must, therefore, see whether the evidence would justify a conviction of Ram Ranjan under that section. At the outset we are confronted with a serious difficulty by reason of the way in which this case was conducted before the Sessions Court. Gosto Chatterjee and Ramanath Roy were admittedly eye-witnesses of the occurrence, and yet the Public Prosecutor did not call them as witnesses notwithstanding repeated requests by Mr. Norton.

The Public Prosecutor cannot shelter himself behind the suggestion that he was able to form an opinion from evidence previously given that these men would not be truthful witnesses, for they were not even examined before the Committing Magistrate.

Mr. Donogh contended that the prosecution, even in a case of murder, was only bound to call witnesses "in their favour," and for this he relied on a remark attributed to Sir Arthur Wilson in the report of *Empress* v. *Dhunno Kazi* (1) at page 124. But this remark appeared to me so opposed to the established rule and also to the whole trend of the judgment that I examined the original record, and there found that the word used by the learned Judge was not "favour" but "power," and this is how the judgment is reported in 10 C. L. R. 151 (at p. 153). Obviously, therefore, Sir Arthur Wilson's authority cannot be invoked in favour of the prosecution's contention, and if, as we have been told, the conduct of the Public Prosecutor is in accordance with the general mufassal practice, the sooner the practice is stopped the better. The practice, if it exists, rests on a fundamental

(1) (1881) I. L. R. 8 Calc. 121, 124.

1914

RAM RANJAN ROY v. EMPEROR.

JENKINS C.J.

misconception of the purpose of a criminal trial and the duty of a Public Prosecutor.

That purpose is not to support at all costs a theory, but to investigate the offence and to determine the guilt or innocence of the accused, and the duty of a Public Prosecutor is to represent not the police, but the Crown, and his duty should be discharged by him fairly and fearlessly, and with a full sense of the responsibility that attaches to his position. The guilt or innocence of the accused is to be determined by the tribunals appointed by law and not according to the tastes of any one else.

It was, therefore, undoubtedly the duty of the Public Prosecutor, in a capital case like the present, to have placed before the trial Court the testimony of all available eye-witnesses. This duty is clearly illustrated by the case of *Reg.* v. *Holden* (1), where in a murder trial counsel for the prosecution did not propose to call an eye-witness because she was brought to Court by the defence. On that the presiding Judge remarked "she ought to be called. She was present at the transaction. Every witness who was present at a transaction of this sort ought to be called, and even if they give different accounts, it is fit that the jury should have their evidence so as to draw their own conclusion as to the real truth of the matter." This is no technical rule: it is founded on common sense and is dictated by humanity.

The omission of the Public Prosecutor has involved this case as it comes before us in what Mr. Donogh on behalf of the Crown has very justly described as mystery. Indeed he felt this mystery to be so embarrassing that he asked for a retrial or at any rate for an examination of the witnesses that had been called. But having regard to the time already

(1) (1838) 8 C. & P. 609.

occupied by the case and the expenditure incurred, this was opposed and reasonably opposed by the defence, and we must, therefore, dispose of the case on the record as it stands.

The sequence of events as described by the prosecution is improbable and unnatural and hardly accords with the connected actions of responsible human beings. There is obviously something kept back, something omitted which is required to link up the narrative, and to present a reasonable and connected story of what occurred.

The papers before us, however, disclose the description given by Gosto and Ramanath shortly after the event, and it is a description that acquires some value from its correspondence with the story told by Ram Ranjan in his first information, and the statement made by the Nagdi to the Magistrate on the 9th. Correspondence of this class may be attributed to concoction, but in estimating the probability of this it has to be borne in mind that Gosto and Ramanath did not escape with Ram Ranjan but were kept prisoners by the villagers, and that even when Ram Ranjan and Umesh were brought to Dejuri, where Gosto and Ramanath were, they were throughout kept first under police observation and then under arrest.

There was, therefore, no opportunity of concoction except in the presence and with the knowledge of the police, and the evidence discloses no such concoction. Nor is the opportunity of concoction in the case of the Nagdi obvious if regard be had to the statements of the *goalas*, who were also kept back, and, in my opinion, wrongly kept back by the prosecution. The importance of the story thus told by the defence is that it unmistakeably points to an angry inrush of the villagers into the Durga mela.

If this be true, the whole story takes a natural

1914

RAM RANJAN ROY v. EMPEROR.

JENKINS C.J.

shape, and the improbabilities are smoothed out. Nor is there any unlikelihood in this story: on the contrary the record, with all its imperfections, discloses much that points in the direction of its truth, and supports the idea of an inrush and consequent scuffle and exchange of blows. Thus one of the prosecution witnesses says there were villagers outside the Durga mela before the occurrence. When the place was searched a *lathi* was found, and there is no suggestion that it belonged to the accused's party: there were indications of disturbance in the Durga mela: there were injuries on the Nagdi which both assessors think, and in my opinion rightly, were genuine and these injuries are suggestive of an attack on him with a *lathi*.

These matters may not alone amount to proof of an inrush and scuffle, but they certainly encourage the idea that the whole story has not been placed before us, and justify the application here of the view expressed by Sir Arthur Wilson in *Empress* v. *Dhunno Kazi* (1) that, where witnesses are not called without sufficient reason being shown, the Court may properly draw an inference adverse to the prosecution.

I certainly infer that the prosecution has not placed before us a complete picture of what occurred, but has withheld that which would have been favourable to the accused.

I do not suggest that the prosecution story is wholly false: far from it. Thus I am convinced that it was a blow delivered by the Nagdi that caused Banwari's death, but I am far from satisfied that the prosecution have placed before us the circumstances that immediately led up to this fatal blow.

It may be that Dhan Kristo addressed the zemindar in terms which were regarded as impertinent, and that

(1) (1881) I. L. R. 8 Calc. 121, 124.

this village magnate called out "*maro salako*" or some such offensive and provocative expression. But I cannot for a moment suppose that he meant thereby to instigate the murder of his tenant, nor can I believe that the Nagdi to whom it was addressed so understood it. A cuff, a blow, or a kick was all that can have been intended, and curiously enough in the first information of the villagers it is said that, after the zemindar so called out, the Nagdi kicked Banwari first and not until after this struck him with the *lathi*. It is true that the villager who gave this information showed an anxiety to correct it when he came to give evidence. I wholly distrust this correction; it is unlikely that the head constable would write down an expression of that kind if it was not said to him, and though his statement was read to him at the time the villager did not then perceive the error upon which he promptly fastened in the witness box without any apparent aid.

It is possible that more astute minds than his realized that those words might help to save Ram Ranjan and Umesh from the gallows, and that they should be explained away. It is intelligible that the villagers, already exasperated by the high-handed action of the zemindar, went to their companion's aid when they heard the zemindar's order and saw the kick. If there was an inrush of villagers this would be the probable sequence of events, and the treatment of the case by the Public Prosecutor has made it impossible for us to hold with the assurance requisite on a capital charge that this did not occur.

I wish to say nothing in palliation of the zemindar's conduct or of his exclamation, if in truth it was uttered by him, but I am unable on the record as it stands to hold him guilty of instigating Banwari's murder or even the *lathi* blow which caused Banwari's death.

1914

RAM RANJAN ROY v. EMPEROR.

JENKINS C.J.

Even if it be assumed that Ram Ranjan uttered the exclamation attributed to him, the only natural consequence of that was the kick described in the first information. That might have amounted to an offence but no charge has been made in respect of it. In the circumstances, therefore, we have no option but to acquit Ram Ranjan, but it may be hoped that his experience of the 8th of March will teach him the danger of having in his train a man armed with a deadly weapon when he is dealing with his tenants: for though he is not proved to be legally responsible for the crime, I can hardly suppose him to be so callous as to contemplate without some remorse his association with the killing of two of his villagers. The Nagdi is proved to have inflicted the blow, of which Banwari died, but I do not think the case justifies a conviction under section 302. At the same time the defence has not been able to establish a plea of private defence justifying what he did. We, therefore, convict him under section 304 and pass on him a sentence of 7 years' rigorous imprisonment. The appeal in respect of the offence on Hari fails, but the sentences will run concurrently.

Mr. Norton has told us of the fairness with which the Sessions Judge placed materials at his disposal for the purpose of the defence. This is as it should be, and I am further gratified with the treatment by the learned Judge of the assessors as disclosed by the record, and his careful and conscientious use of their experience. It is much to be commended and presents a pleasing contrast with the treatment of assessors which has sometimes come under my notice in other cases.

N. R. CHATTERJEA J. concurred.

E. H. M.