ORIGINAL CRIMINAL.

Before Sanderson C.J.

1916

March 8.

EMPEROR

v.

SREENATH MAHAPATRA.*

Right of Reply—Exhibiting documents, not part of the record, on behalf of the accused during the cross-examination of the prosecution witnesses —Doctrine of surprise—Criminal Procedure Code (Act V of 1898), ss. 289 and 292.

Section 292 of the Criminal Procedure Code is not to be read independently but in connection with s. 289, and gives a right of reply only when the accused, or any of them, adduces evidence after the case for the prosecution has concluded.

The prosecution has no right of reply when the counsel for the accused has, during the cross-examination of a prosecution witness and before the close of the case for the Crown, put certain letters, which do not form part of the record, to such witness, and then tendered and had them admitted in evidence.

The question whether the prosecution has been taken by surprise is not the correct test under s. 292 of the Code.

THE three prisoners, Sreenath Mahapatra, Anil Prokash Shome and Sunil Prokash Shome, were tried at the first Criminal Sessions of the High Court before the learned Chief Justice and a jury. The third prisoner, Sunil, had been employed in the firm of McLeod & Co., who are managing agents for various railways, as a typist on a salary of Rs. 30 per month. On 10th December 1915 he took a forged letter, purporting to be signed by McLeod & Co., and requesting the delivery to bearer of a cheque book on behalf

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of the Burdwan-Cutwa Railway, to J. M. Hartley, the Examiner of Government Railway Accounts (E. I. R.). A cheque book, No. 2181, containing 50 blank forms was thereupon despatched by Hartley, in a cover through his peon addressed to McLeod & Co. Sunil accompanied the peon and on arrival at McLeod & Co.'s office took the peon book with its enclosure into a room, came out shortly after and returned the peon book with some illegible initials. On the next day the first and third prisoners, Sreenath and Anil, went together to the Bank of Bengal, and the former presented to the Bank clerk a cheque for Rs. 12,500 purporting to have been drawn in favour of one M. C. Bhowmik or bearer against the Burdwan-Cutwa Railway. This cheque was taken from the book No. 2181, issued by Hartley the day previous. The Bank authorities communicated with McLeod & Co., and discovered the cheque to be a forgery. Sreenath and Anil were taken into custody and the police next arrested Sunil and, on search, found in his house the book, No. 2181, with a form corresponding to the forged cheque missing.

The prisoners were charged with criminal conspiracy to commit forgery for the purpose of cheating, fraudulently and dishonestly using as genuine a forged document, cheating and certain other offences.

During the cross-examination of two of the prosecution witnesses, Mr. Thornton, counsel for Sunil, put to the witnesses for identification certain letters, which were not on the record, sent up by the Magistrate to the High Court, as having been written by them or their employers, and tendered them in evidence and had them exhibited for the defence. At the close of the case for the prosecution, the counsel for the prisoners stated that they did not intend to call witnesses or adduce evidence, whereupon

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Mr. Norton, counsel for the prosecution, claimed to have the right of reply.

[SANDERSON C. J. The onus is on you, Mr. Norton, to show that you have a right of reply.]

Mr. Eardley Norton, (with him *Mr. McNair* instructed by *Mr. J. T. Hume*, Public Prosecutor), for the Crown. Section 292 of the Code of 1882 was altered by the present Code. Sections 289 and 292 are wholly independent of each other, and s. 292 must be read by itself and as controlling s. 289. Refers to *Emperor* v. *Bhaskar Balwant Bhopatkar* (1) and *Emperor* v. *Timol* (2) where the question whether the prosecution is taken by surprise is laid down as the test. Beaman J. took a different view in *Emperor* v. *Abdulali Sharfali* (3).

Mr. L. Thornton, for Sunil. Section 292 must be read with s. 289. The words "*adduce any evidence*" in s. 292 refer to evidence let in by the accused under s. 290. Section 292 is not a wholly independent section. The prosecution has the right to sum up after the close of its case, and may then deal with the documents put in by the accused during the cross-examination of the Crown witnesses.

Cur. adv. vult.

SANDERSON C.J. In this case the three prisoners (Sreenath Mahapatra, Anil Prokash Shome and Sunil Prokash Shome) were charged with criminial conspiracy to commit the offences of forgery for the purpose of cheating, fraudulently and dishonestly using as genuine a forged document and cheating, and certain other offences, which it is not necessary to specify in detail.

(1) (1906) I. L. R. 30 Bom. 421 (2) (1906) 10 C. W. N. ccixvii.
(3) (1909) 11 Bom. L. R. 177.

During the cross-examination of certain of the witnesses for the prosecution, the learned counsel appearing for one of the prisoners put to the witnesses certain letters as having been written by them or their employers.

The witnesses identified the letters which were then tendered as evidence and admitted.

At the end of the case for the prosecution, the learned counsel for all the three prisoners declared that they did not mean to call witnesses or adduce evidence.

The learned counsel for the prosecution thereupon claimed the right to reply under section 292 of the Code of Criminal Procedure of 1898, alleging that one of the accused had adduced evidence, by reason of the letters which the learned counsel appearing for him had put in during the cross-examination of the witnesses for the prosecution, and, therefore, that the terms of section 292 gave him a right of reply. I held that the learned counsel for the prosecution had not, under the circumstances above mentioned, the right to reply, and at the request of the learned counsel engaged in the case, who urged that it was desirable to have a definite ruling on the point, I undertook to put my reasons for so holding into writing.

In my judgment the question depends upon whether section 292 is to be construed independently of the preceding sections of the Act, or whether it must be read in connection with them and in particular with reference to section 289.

If section 292 is to be construed independently of section 289, then the putting in evidence of the letters by the learned counsel for one of the accused during the cross-examination of the witnesses for the prosecution would, in my opinion, bring the case within

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the section and give the prosecution the right of reply: for I do not think that the correct test for deciding this matter is whether the prosecution is taken by surprise, as has been suggested in some of the decisions. There is nothing to this effect in section 292, and to hold that this was the test would mean the implied addition to the section of some such words as "provided that the Judge who tries the case thinks the prosecution has been taken by surprise by the evidence adduced by any of the accused."

Such an implication, in my judgment, is not permissible or necessary.

In my judgment, however, section 292 must be read in connection with section 289 and must be construed accordingly. When so read, the intention of the Legislature to my mind is clear. The scheme of the Act is that at a certain stage of the proceedings, *viz.*, "when the examination of the witnesses for the prosecution and the examination of any of the accused are concluded," the question is to be put to the accused whether he means to adduce evidence. If the accused does not then adduce evidence, provisions as to the course to be adopted are made by the Act: if he does, then certain other provisions as to the course to be adopted are made, one of which is the provision contained in section 292 as to the right of reply. Reading, therefore, the two sections together the right to reply which is given by section 292 arises only if the accused or any of the accused takes advantage of the right to adduce evidence at the time and in the manner specified by the Act, *viz.*, after the case for the prosecution is concluded.

The object of the Legislature, in my opinion, being to give each side an opportunity of commenting on the evidence of the other, this is accomplished by giving the prosecution the right to sum up at the

conclusion of the case for the prosecution, when the accused does not adduce evidence in the sense above-mentioned, but confines himself to getting in certain facts or documents by the legitimate employment of the cross-examination of the witnesses for the prosecution, and in giving a right of reply to the prosecution when the accused does adduce evidence in the manner specified by the Act. It is to be noted that this should not give rise to any inconvenience, for, in the cases where documents are put in by means of legitimate cross-examination of the witnesses for the prosecution, it must be obvious to those conducting the case for the prosecution for what purpose or with what object they are put in, and the prosecution will have an opportunity of commenting upon them in the summing up which is expressly provided by the Act at the conclusion of the case for the prosecution. For these reasons, I held that the learned counsel for the prosecution in this case had not the right to reply.

E. H. M.