APPELLATE CRIMINAL.

Before Sanderson C. J. and Walmsley J.

1920

Feb. 24.

FAIJUDDI

v.

EMPEROR.*

Witness—Application to enforce attendance of witnesses named in the list given to the Magistrate and summoned for the trial—Application made at the last moment after examination of defence witnesses present—Refusal by the Judge of the application on the ground of delay—Materiality of the evidence of the absent witnesses—Proper course to be followed by the Judge—Criminal Procedure Code (Act V of 1898) s. 291.

Where, after the examination of the defence witnesses present had concluded, and the case was ready for arguments, an application was made to the Court to enforce the attendance of certain witnesses, whose names had been entered in the list given by the accused to the Committing Magistrate, and who had been summoned but failed to attend, and it further appeared from the petition of appeal to the High Court that their evidence was material :—

Held, that the refusal of the Judge to enforce the attendance of the witnesses, based not on the ground of their evidence being immaterial but of delay in the application, was not justifiable, and that the conviction ought, therefore, to be set aside and a retrial ordered.

Steps should be taken by the Sessions Judge to ensure an early application by the parties with regard to the attendance of their witnesses.

THE appellants were tried by the Additional Sessions Judge of Faridpur with the aid of a jury on the following charges: Faijuddi, under ss. 148 and 304, Indian Penal Code; Badruddi, under ss. 148 and 326, eight others, under ss. 147 or 148, and $\frac{304}{149}$, and the remainder, under s. 147 of the same. They were convicted under ss. 147, 148, 326 and $\frac{326}{149}$ of the Indian Penal Code, respectively, and sentenced to various terms of imprisonment.

* Criminal Appeal No. 644 of 1919 against the order of Girish Chandra Sen, Additional Sessions Judge of Faridpur dated Oct. 31, 1919.

It appeared that on the 8th June 1919 one Mentajuddin, who lived on *chur* Bachmara, in the district of Faridpur, and his brothers were erecting the walls of a hut on a strip of land adjacent to their homestead, when a body of men, numbering about 50 or 60, and variously armed, went on the disputed plot and asked Mentajuddin to vacate the land. He refused and was beaten. In the course of the occurrence, the appellant Faijuddi, was alleged to have inflicted a wound on one Kafiluddi who died shortly after from the effects of his injury.

The trial in the Court of Session commenced on the 27th October 1919, and the prosecution case closed on the 29th, on which date the accused entered upon their defence. On the next day, after the examination of the defence witnesses and when the case was ready for arguments, an application was made to the Court by the accused to secure the attendance of four witnesses, whose names had been entered in the list given by them to the Committing Magistrate, and who had been summoned but had failed to appear at the trial. The Additional Sessions Judge passed the following order:

> There was no such prayer on the first date of the trial, *i.e.*, 27th October 1919, nor on the second date, nor the third, but on the fourth date, when all the defence witnesses have been examined and the case is ready for hearing arguments. . . . . As the prayer is too late, and cannot be attended to at the conclusion of the trial, it is refused.

The fifth paragraph of the petition of appeal to the High Court stated "that these witnesses (named in the preceding paragraph), if examined, would have proved that the disputed *bari* was in possession of the appellant Badaruddi, and that the complainants' party were the aggressors."

Mr. K. N. Chaudhuri (with him *Babu Atulya Charan Bose* and *Babu Jagat Chunder Bose*), for the

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appellant. The witnesses were named in the list, and not rejected by the Magistrate, under s. 216 of the Criminal Procedure Code on the ground of their being so included for the purpose of harassment Under s. 291, I had the right to examine them. Delay in the application is no answer. My *bonâ fides* is shown by the fact that I actually examined only five of the witnesses present, and wanted to call the four men on a material point. Reads para. 5 of the petition of appeal.

The Deputy Legal Remembrancer (Mr. Orr), for the Crown. There was an inexcusable delay in making the application. If such an application, made at the last moment, were to be granted, considerable inconvenience and unnecessary expense and delay would be the result. The appeal ought to be disallowed on this ground.

SANDERSON C. J. This appeal has been based by the learned counsel, who appears for the appellants, on the grounds stated in paragraphs 3 and 4 of the petition. It appears that there were four witnesses whose names had been included in the list of persons whom the accused wished to be summoned to give evidence on their behalf, and the list had been handed in to the Magistrate's Court on behalf of the accused. These four persons did not attend the trial at the Sessions to which the accused had been committed, notwithstanding that summonses had been served upon them. The trial began on the 27th of October, 1919, the prosecution case was concluded on the 29th, and the defence case began on the same day, the 29th. On the 30th, it appears that a petition was filed, on behalf of the accused, applying to have the four witnesses summoned to give evidence on their behalf. The learned Judge refused the application. This refusal was not

based upon the ground that the learned Judge was satisfied that their evidence would be immaterial, but it was solely upon the ground that the application ought to have been made at an earlier date. The learned Additional Sessions Judge said, "There was no such "prayer on the 1st date of trial, i.e., 27th October 1919, "nor on the 2nd date, nor on the 3rd, but on the 4th date "when all the defence witnesses have been examined "and the case is ready for hearing arguments, this "petition for adjournment has been filed." There is nothing before us to enable us to judge whether the evidence of the four witnesses would be material or not, except the statement in the fifth paragraph of the petition "that those witnesses, if examined, would "have proved that the disputed *bari* was in possession "of Badaruddi and that the complainants' party were "the aggressors." In view of that statement I find it impossible to say that the evidence of these witnesses, if they had attended the trial, would not have been, material. Inasmuch as the trial took four days, and the learned counsel for the Crown says it was a heavy case, and the facts of the case, so far as they were represented to the jury, were enquired into and a verdict was given, I regret that we have to allow the appeal and set aside the verdict and the sentences. On the other hand, however, it is a matter of importance that the accused should have their witnesses (whose names they had mentioned before the Magistrate and who had been summoned but did not attend) present at the trial in the Sessions Court. The learned counsel for the Crown has pointed out that if an application such as this, which is not made until the last moment, is granted, considerable inconvenience and unnecessary expense and delay may be caused, and for that reason this appeal ought not to be allowed. I quite appreciate the force of the learned counsel's

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remarks—in fact the matter had occurred to me before he mentioned it—but I think that if, proper precaution is taken by the learned Judges who are presiding over the trial at the Sessions Courts, this kind of thing may be avoided. Steps may be taken by the learned Judges to see that the parties, at a sufficiently early stage of the trial, make any application with regard to the attendance of witnesses, which they desire. If they do not comply with the direction of the learned Judge to make their application with regard to the attendance of witnesses within a reasonable time, they cannot complain afterwards if they make an application at the last moment and such application is rejected.

For these reasons, in my judgment, this appeal must be allowed, the verdict and the sentence should be set aside, and the matter should be remanded to the Sessions Court to be retried.

WALMSLEY J. I agree.

Retrial ordered.

E. H. M.