APPELLATE CRIMINAL.

Before Cuming and Lort-Williams JJ.

EMPEROR

v.

MOKBUL KHAN.*

1928

April 18.

Prosecution—Witness—Hostile—Discrediting by cross-examination—Effect of an evidence—Evidence Act (I of 1872), s 154.

If the prosecution discredits their own witness, and he is the sole witness to prove their case, there is no evidence on which the accused can be found guilty and, therefore, no evidence to go to the jury and the Sessions Judge must direct them accordingly.

Where a party is allowed to cross-examine his own witness, the effect of that cross-examination must be to discredit that witness altogether and not merely to get rid of part of his testimony, and hence that witness's evidence must be excluded altogether.

In the case of a witness for the prosecution, this means *so far as it supports the case for the prosecution*, for obviously the defence is entitled to rely on so much of his evidence as supports their case : otherwise a party who found that his witness had given evidence, which supported his adversary's case, could get rid of this evidence by declaring him hostile.

Emperor v. *Satyendra Kumar Dutt Chowdhury* (1), *Khijiruddin Sonar* v. *Emperor* (2) and *Faulkner* v. *Brine* (3), referred to and explained.

APPEAL by Mokbul Khan, accused.

The facts of the case out of which this appeal arose are as follows :—The prosecution alleged that in the evening of the 24th September, 1926, the complainant had an altercation with the accused, Mokbul Khan, and his brother, Mansur Khan, in connection with an exchange of labour. He called a *pradhan*, Babu Khan, to arbitrate in the matter, at about 9 o'clock at night. The accused Mokbul Khan and Mansur Khan went to beat the complainant, who stepped back and his sister's husband, Foiz Bepari, advanced and protested. On this the accused, Mokbul, struck him on the head with a piece of bamboo. Mansur

* Criminal Appeal, No. 847 of 1927, against the order of S. N. Guha, Sessions Judge of Pabna and Bogra, dated Sept. 21, 1927.

(1) (1922) 37 C. L. J. 173. (2) (1925) I. L. R 53 Calc. 372.

(3) (1858) 1 P. & F. 254.

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Khan also hit him on the right side and he fell down senseless on the ground. He could not speak and expired before dawn. The complainant narrated the occurrence to some neighbours who had come. The complainant lodged a first information at the Sajadpur Thana on the next day at 9 A.M. The Sub-Inspector recorded the information, went to the place of occurrence, prepared an inquest report and sent the dead body to Serajganj for post-mortem examination and then submitted a charge sheet against the accused who pleaded not guilty in court, his defence being that he had been falsely implicated out of enmity owing to a boundary dispute. It was also suggested that Faiz Bepari, the deceased, was a widower of questionable character and he might have something to do with the young wife of the complainant and that the latter might have beaten him to death either inside the complainant's house or elsewhere and then falsely got up this case against the accused with the help of the prosecution witnesses, who were all more or less related to him. Only one solitary witness, Mahajan, was an alleged eye witness, all other witnesses having derived their knowledge from him and heard the accused's name from him. But owing to some discrepancies between his first information and his deposition the Public Prosecutor declared him hostile and obtained the permission of the Court to cross-examine him. Agreeing with the unanimous verdict of the jury, the learned Sessions Judge of Pabna convicted the accused under section 327, I. P. C., and sentenced him to undergo rigorous imprisonment for two years. Thereupon he preferred an appeal to the High Court.

Mr. K. N. Chaudhuri (with him *Babu Mrityunjoy Chattopadhya*, *Babu Manindra Nath Banerjee*, *No. 2* and *Babu Gopal Chandra Mukherji*) for the appellant.

Mr. B. M. Sen for the crown.

Cur. adv. vult.

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CUMING J. The appellant, Mokbul Khan, was found guilty under section 325 by a unanimous verdict of the jury, and the learned Sessions Judge of Patna agreeing with this verdict has sentenced the appellant to two years' rigorous imprisonment and a fine of Rs. 200. The facts briefly are these. The appellant and his brother, Mansur, had an altercation with the complainant about an exchange of labour. One *pradhan*, Babu Khan, came to arbitrate. Mokbul and Mansur began to beat complainant. Foiz Bepari protested. Mokbul struck him on the head with a *lathi* and Mansur on the side. He fell down and shortly after expired. Defence was that the case was entirely false. In order to understand Mr. Chaudhuri's point, a few more facts are necessary. The occurrence took place at night. The only witness as to what happened is the complainant, Mahajan, and the case of the prosecution depends on the belief or disbelief of his evidence and also of the witnesses to whom it is alleged he stated what had occurred immediately or shortly after the occurrence. After Mahajan had been examined, the Public Prosecutor apparently considered his evidence in some respect hostile and with the leave of the Court proceeded under section 154 to cross-examine him apparently with the view of getting rid of some part of his evidence which was unfavourable to the prosecution. That this was done has not been challenged by the Crown. Mr. Chaudhuri argues that it is not open to the Crown to cross-examine its own witness merely for the purpose of discrediting him so far as a portion of his evidence is concerned. The effect of discrediting a witness as to a part of his evidence is to discredit him as regards the whole. Therefore the Crown had by seeking to discredit their own witness said that he was not a witness on whom they relied. As he was the only witness on whom the prosecution relied to ask the Court to convict the accused, it was the duty of the Judge to have directed the jury that there was no evidence and that they should return a verdict of not guilty. As to the position of a witness who has been declared hostile and

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the party calling him allowed to cross-examine him we have been referred to two cases. The first case is the case of *Emperor* v. *Satyendra Kumar Dutt Chowdhury* (1). In that case it was held that where a party was allowed to cross-examine his own witness, the effect of that cross-examination must be to discredit the witness altogether and not merely to get rid of part of his testimony, and that hence the witness's evidence must be excluded altogether. I presume that this means *so far as it supports the case for the prosecution*, for obviously the defence would, I think, be entitled to rely on so much of his evidence as supported their case. Otherwise a party who found that his witness had given evidence, which supported his adversary's case, could get rid of this evidence by declaring him hostile.

The other case to which we have been referred is *Khijiruddin Sonar* v. *Emperor* (2), a decision to which I was myself a party. There it was also held following the *dictum* of Lord Campbell in *Faulkner* v. *Brine* (3), that the result of allowing a party to cross-examine his own witness was to discredit him altogether. In other words a party cannot be allowed to say that his witness is a truthful witness so far as part of his evidence is concerned but an untruthful witness so far as some other portion is concerned. Therefore, it seems that once a party cross-examines his own witness he must be held to no longer rely on him.

Mr. Chaudhuri argues, therefore, that the position is this. The prosecution have discredited or sought to discredit their own witness. He is the sole witness to prove their case.

It is the duty of the Judge to determine whether any evidence has been given on which the jury could properly find the question for the party on whom the onus lay. *The King-Emperor* v. *Upendra Nath Das* (4).

Mr. Chaudhuri argues that the prosecution have cross-examined their own witness. In other words

(1) (1922) 37 C. L. J. 173.
(2) (1925) I. L. R. 53 Calc. 372.
(3) (1858) 1 F. & F. 254.
(4) (1914) 19 C. W. N. 653, 663.

they seek to discredit him and do not rely on him. They can not ask the jury to find for the prosecution on the testimony of a witness whom they have themselves discredited. Hence the Judge should have told the jury that there was no evidence on which they could find the accused guilty and directed them to find a verdict of not guilty. Not having done so the Judge has misdirected the jury.

This contention in the circumstances seems to me to be well-founded.

In view of the prosecution treatment of their own witness there was no evidence on which the accused could have been found guilty and therefore no evidence to go to the jury and the Judge should have directed them accordingly. There has been a serious misdirection therefore, and we are obliged to set aside the verdict of the jury and the sentence passed by the Judge agreeing with the jury's verdict. In the circumstances of the case it would obviously be useless to retry the accused and we order that he be acquitted.

LORT-WILLIAMS J. I agree.

Appeal allowed.

G. S.