APPELLATE CRIMINAL.

Before Rankin C. J. and Costello J.

1932

Dec. 9, 12.

ABDUL MAJID

v.

EMPEROR.*

Approver—Special magistrate granting pardon to approver, if can try case himself—In case of inconsistency between Ordinance and Criminal Procedure Code, if the former to prevail—Emergency Powers Ordinance (II of 1932), s. 32, sub-s. (2), s. 37, sub-s. (2), s. 52—Code of Criminal Procedure (Act V of 1898), s. 337, sub-s. (2A).

A special magistrate, trying a case under Ordinance II of 1932, who tenders a pardon to an approver, is not bound to commit the accused for trial to the court of session, as required by section 337, sub-section (2A) of the Code of Criminal Procedure, but may proceed with the trial himself.

The provisions of the Code of Criminal Procedure are to apply to trials by special magistrates so far as they are not inconsistent with the Ordinance as provided for in sections 32, sub-section (2) read with 37, sub-section (2) and 52 of Ordinance II of 1932 ; and, where the provisions of the Criminal Procedure Code are inconsistent with those of the Ordinance, the latter prevails.

APPEALS by the accused, Abdul Majid and Hossainuddin.

The facts of the case and points raised in the arguments are stated in the judgment.

Sudhanshukumar Sen for the appellants in appeal No. 450 of 1932.

The Deputy Legal Remembrancer, Khundkar, for the Crown in both the appeals.

RANKIN C.J. In this case, we have, first of all, two accused, who appeal from jail and next, two other accused, whose cases have been argued very carefully before us by their learned advocate. These persons have all been tried under Ordinance II of 1932 by a special magistrate, who has convicted them on the

*Criminal Appeals, Nos. 450 and 589 of 1932, against the order of J. N. Mitra, Special Magistrate at Chinsura, dated May 19, 1932.

charge of conspiracy to commit dacoity and also on a charge under section 402, Indian Penal Code—preparation for committing dacoity—and has given them sentences of three years and five years respectively to run concurrently. The case is one in which the approver was examined after the special magistrate had commenced the trial. He was tendered a pardon and made a prosecution witness and his story was that the appellants now before us had all taken part with him in a conspiracy to go to a place called Chak near Haripal and carry out a dacoity in the house of a certain barrister. The police had received intimation that a dacoity in this house was contemplated and, on the night of the 6th of February, certain persons went down from Calcutta to Haripal station by the night train and a number of constables were watching out for suspicious persons projecting this dacoity. The evidence is that the accused persons went to the end of the platform, crossed the railway lines and took the road towards Chak. The police party, followed by some of the employees of the railway, thereupon proceeded to overtake them and arrested them. So far as regards the appellants, with whom we are concerned, the first thing to notice is that, as regards the accused Majid, no railway ticket was found in his possession; but when the party was arrested, this man attempted to attack the police officer with a dagger until another police officer came to his rescue and prevented it. As regards Mir Billal Hossain, there were found upon him a false moustache, a pencil sketch of the house where the dacoity was contemplated, a torch light and a return railway ticket. As regards the other two persons before us, namely, Hossainuddin *alias* Maharam and Harendra, we find that a six-chambered revolver and a single ticket No. 2544 were found on Harendra and a ticket No. 2542 and a dagger were found on Maharam.

Now, the suggestion put forward on behalf of Majid is that he was a person who was arrested at the railway station, that he had gone to Haripal in order to

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see whether he could get an employment as a bus driver, that he had no connection with the people who carried the revolver or with the man who carried the false moustache and that he had nothing to do with the dacoity. All the excuses that were given by the different appellants before us were of a vague character and entirely unsupported by any evidence whatsoever. The approver, having been examined before the special magistrate, gave a long and detailed account of the part played by the different people in the conspiracy.

It is quite clear that the appellants before us were known to the approver and the approver to them. It is said about Majid that, according to the approver, he came to the station with a revolver and, as no revolver was found with him, the approver's story has not been corroborated. Of course, that is not so at all. The man who procured and found the revolver was not necessarily the man who was entrusted to use it. We find that the approver's story is corroborated by the fact that these people were all arrested together and that they were all obviously out to commit this dacoity. As regards Majid, though somebody else at that stage had the revolver, he had a dagger and he immediately proceeded to use it. As regards Maharam, his ticket is consecutively numbered with two other tickets found with his party and he had a dagger with him. I have no doubt that the special magistrate was quite right in coming to the conclusion to which he came and that the appeals so far are to be dismissed.

It is right to notice the contention that was put forward to the effect that the proceedings before the special magistrate were bad. It is said that his having tendered pardon to the approver [sub-section (*2A*) of section 337, Criminal Procedure Code] made it obligatory upon him to commit the accused for trial to the court of sessions. It is not disputed that, under the Ordinance (II of 1932), he certainly could not commit the accused for trial to any court of sessions. When we look at the Ordinance, we find that there is

an express provision that the provisions of the Code are to apply in the case of special magistrates so far as they are not inconsistent with the Ordinance and similar phrasing is used more elaborately in section 52 and also in connection with sessions judges in section 32. It makes no difference whatever, so far as I can see, whether the magistrate tendering the pardon had been the District Magistrate and not the magistrate trying the case. The provisions of sub-section (*2A*) would apply equally, whoever had been the magistrate tendering the pardon and it is quite clear that the special magistrate is the magistrate who, under the Ordinance, is to try the case. Unless, therefore, we were to hold that no approver could ever give evidence before a special magistrate, the appellants would not succeed in making the argument logical. But it is quite clear that, in so far as the Ordinance is inconsistent with sub-section (*2A*), the Ordinance prevails and there is no ground for supposing that it is impossible for the special magistrate to hear the evidence.

These appeals must, therefore, be dismissed.

COSTELLO J. I agree.

Appeals dismissed.

A. A.