APPELLATE CRIMINAL.

Before Lort-Williams and S. K. Ghose JJ.

GIRISHCHANDRA NAMADAS

v.

EMPEROR.*

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Feb. 13.

Witness—Witnesses, whom the prosecution are bound to call—Presumption—Presumption under section 114 (g) of the Evidence Act, when arises—Indian Evidence Act (I of 1872), s. 114 (g).

The fact that certain persons are mentioned in the first information as being witnesses of the occurrence complained about does not, in itself, make it necessary for the prosecution to call any one of them. Nor does it give rise to the presumption under section 114 (*g*) of the Evidence Act. The only witnesses whom the prosecution need call are those who know the facts and are able and willing to give truthful evidence which is relevant to the charge. If persons, primarily the police, whose duty it is to investigate the occurrence and examine those who are alleged to be eye-witnesses come to the conclusion that they are not eye-witnesses and cannot give any relevant evidence, it is no part of the duty of the prosecution to call them.

The police act for the Crown just as much as the public prosecutor does.

Ram Ranjan Roy v. *Emperor* (1) explained.

Before the jury can draw any presumption under section 114 (*g*) of the Evidence Act, they have first to be satisfied that the person, who it is suggested has been kept back, in fact knew the facts and was a willing and truthful witness. A direction to the jury to that effect was a proper direction.

Where, after a confused verdict, the judge explained the law under the appropriate sections and asked the jury to retire again, and, eventually, the jury returned a proper verdict,

held that the verdict should not be interfered with.

CRIMINAL APPEAL.

The material facts appear from the judgment.

Santoshkumar Basu and *Ramendrachandra Ray* for the appellants.

The Officiating Deputy Legal Remembrancer, Debendranarayan Bhattacharya for the Crown.

LORT-WILLIAMS J. The appellants were charged with dacoity under section 395 of the Indian Penal Code. They were tried by the Additional Sessions Judge of Mymensingh and a jury, and convicted and sentenced, Girish, to three years'

*Criminal Appeal, No. 814 of 1930, against the order of G. K. Basu, Additional Sessions Judge of Mymensingh, dated Sept. 1, 1930.

(1) (1914) I. L. R. 42 Calc. 422.

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rigorous imprisonment and Karim and Rahim each to four years' rigorous imprisonment. It is not necessary to deal with the facts of this case. There was clear evidence that a dacoity had been committed and that Girish, among others, had been engaged in committing it.

Several points have been taken on behalf of the appellants, the first of which touches the verdict of the jury. When asked what their verdict was, the jury said that they found Ismail, who was another of the accused on trial under section 412, not guilty and they found the remaining 8 accused guilty and they named them. But they mentioned only seven names. After the last answer which was recorded, the foreman was asked whether all the jurors found all the eight accused named above (presumably the names were read out to them again) guilty under section 395 and he said "Five of them are guilty." Then the court asked the jurors to state whether they found whether five of the accused were guilty of having committed dacoity and whether the rest were not guilty of that offence but guilty of some minor offence Then there was a discussion at the bar, with the result that the judge explained the law under the appropriate sections of the Indian Penal Code and asked the jury to retire again. Eventually the jury came back and stated that they found all the accused guilty under section 395.

It is argued that there was some confusion in the minds of the jury and that the learned Judge should have recharged the jury upon the facts, in addition to explaining the law. We do not think that this contention can be upheld. The only confusion which seems to have arisen was that they were not sure in the first place of the names of the accused and only named seven of them. Otherwise the first verdict they gave was clear. After that the court added to the confusion by asking them again whether they found all the accused guilty under a particular section, namely, section 395. That seems to have led to some

misconception on the part of the jury, which induced them to mention the number "five." However, after discussion, which doubtless took place in their presence, and after a fresh direction about the various sections had been given, they retired to reconsider their verdict and came back and gave the second verdict. In the circumstances, we do not think that the conviction can be set aside upon this ground.

The next point is that certain persons were named as witnesses in the first information report, and were not produced before the magistrate or called at the trial, and it has been argued that because they were named as witnesses by the complainant in the first information report, the prosecution should have called those witnesses, and further, that, in their absence, the jury should have been told to draw the presumption that, if they had been called, they would have given evidence against the case for the prosecution. This statement of the law seems to be mistaken in several ways.

The fact that certain persons are mentioned in the first information report as being witnesses of the occurrence complained about does not, in itself, make it necessary for the prosecution to call any one of them. Nor does it give rise to the presumption under section 144 (*g*) of the Evidence Act. The only witnesses whom the prosecution need call are those who know the facts and are able and willing to give truthful evidence which is relevant to the charge. Those who have to decide whether a particular witness knows the fact or not, obviously must be those who conduct the case for the prosecution, primarily, the police. Before a witness is produced at a trial or before a magistrate, some one must decide whether he knows anything about the case or not. The mere statement by the complainant that some one was a witness of the occurrence is not conclusive. Further, before the police can decide, or those who conduct the prosecution can decide whether a witness knows the facts or not, they have to ascertain whether he seems

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to be a person worthy of credit or not. Until they are assured that a witness knows the facts, and is a truthful and willing witness, what possible duty can there be to produce him as a witness at a trial? If such were not the case, it would mean that the prosecution might have to call everybody who was in the neighbourhood of the occurrence at the time, regardless of whether they were present or not. The presumption, which may arise under section 114 (*g*), carries the case no further, because that section refers to "evidence" which can be and is not produced. If there is such "evidence," then a presumption may be drawn against the prosecution, who might have produced that evidence. But before the jury can draw that presumption, they have first to decide whether there was such evidence, that is to say, they have to be satisfied that the person, who it is suggested has been kept back, in fact knew the facts, and was a willing and truthful witness, and, therefore, was willing and able to give relevant evidence at the trial. The same remarks apply to the case of *Ram Ranjan Roy v. Emperor* (1) which has been cited to us, and which is so often cited upon this question. The decision and the remarks therein seem to be quite correct. But incorrectness often arises in the application which learned counsel and advocates make of this decision. The learned Chief Justice there stated, and I quote below a few short passages from the headnote, "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." No one can quarrel with that statement. "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 responsibility attaching "to his position." That seems to me to be a correct statement, except that it seems to draw a distinction between the police and the Crown, the reason for

(1) (1914) I. L. R. 42 Calc. 422.

which I am unable to appreciate. The police act for the Crown, just as much as the public prosecutor does. They are all agents for the Crown, though differing in status, and in the character of their duties.

The next sentence in the headnote is "It is not his "duty to call only witnesses who speak in his favour." Of course it is not. He should call all witnesses, whether they speak for or against the prosecution case, so long as they are witnesses of truth, and can give relevant evidence.

The next sentence in the headnote is "He should, "in a capital case, place before the court the testimony "of all the available eye-witnesses." So he should and in all cases. But he has first to decide who are eye-witnesses. The fact that certain persons are mentioned in the first information report does not make them eye-witnesses. The only persons who can decide whether they are eye-witnesses or not, are those whose duty it is to investigate the occurrence, and examine those who are alleged to be eye-witnesses. If they come to the conclusion that they are not eye-witnesses and cannot give any relevant evidence, it is no part of the duty of the prosecution to call them. For these reasons, we think that there is nothing in the contention that, because certain witnesses were mentioned in the first information report, they should have been called, regardless of whether they saw anything, or were in a position to give any evidence which would be relevant to the charge.

The next point is that the learned judge did not direct the jury properly that in the absence of these witnesses they might draw the presumption mentioned in section 114 (*g*). What he said was that, if they accepted the contention of the public prosecutor that these witnesses, who were named in the first information report, were not called because their evidence was valueless, then they ought not to draw the presumption. But if, on the other hand, they did not believe his explanation, they were at liberty to draw the presumption if they thought fit. That was a

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proper direction, because the meaning of the evidence being valueless was that they did not know the facts, that is to say, they were not able to give evidence relevant to the trial.

The last point is that the learned judge stated that there was no evidence worth the name that the two witnesses for the prosecution had any enmity with the accused, as had been suggested by the accused, and that there could be no doubt that the witnesses were respectable and independent. Immediately after this the learned judge stated that the jury had heard the evidence of these witnesses and had noticed their demeanour, and that it was for them to consider whether the present case had been concocted, or whether their evidence went to corroborate the story of the prosecution. That seems to us a perfectly fair direction. The learned judge previously had reminded the jury that a great deal of mud had been thrown at these two witnesses, that suggestions had been made against their respectability and independence, that there was not a tittle of evidence to support the suggestions, and that the jury had seen them and heard their evidence and watched their demeanour. If, after that, they were of opinion that they ought to disagree with the learned judge's view that these witnesses were respectable and independent, then they could, if they liked, come to the conclusion that they had helped to concoct a case against the accused. If, on the other hand, they thought that they ought to disregard the suggestions made against these two witnesses, then they ought to find a verdict against the accused. That is what the direction means, and there is no reason to quarrel with it.

This being our conclusion, the result is that there is no substance in any of the contentions raised on behalf of the appellants and this appeal must be dismissed.

GHOSE J. I agree.

Appeal dismissed.

A.C.R.C.