APPELLATE CRIMINAL.

Before C. C. Ghose and Pearson JJ.

PANCHANAN GOGAI

v.

EMPEROR.*

1929

Dec. 12;

1930

Jan. 17.

Witness—Hostile witness—Testimony of hostile witness, if can be accepted in part—Proper direction in charge to jury as regards hostile witness—Indian Evidence Act (I of 1872), s. 154.

A *hostile witness* is one, who from the manner in which he gives evidence (within which is included the fact that he is willing to go back upon previous statements made by him) shows that he is not desirous of telling the truth to the court.

It is necessary for a judge to explain to the jury that, by asking for leave to cross-examine a witness, the party calling him admits that he is not a witness of truth and one whose evidence is not entitled to credit and that the evidence of such a witness should be rejected and left out of account in the minds of the jury. An omission to do so amounts to misdirection.

Emperor v. *Satyendra Kumar Dutt Chowdhury* (1), *Alexander* v. *Gibson* (2) and *Bradley* v. *Ricardo* (3) referred to.

CRIMINAL APPEAL by Panchanan Gogai and others, accused.

The case for the prosecution was that one Durgaprasad Majumdar had a daughter, named Shashiprabha, aged about 17 years, whose marriage was settled to take place on the 6th May, 1928, with one Lokenath Kakati. The accused Panchanan Gogai had an eye upon the girl and, on the 27th April, when Durgaprasad was away at Shibsagar, making purchases for the intended marriage ceremony, the accused Panchanan, with the help of the accused Kan-

*Criminal Appeal, No. 480 of 1929, against the order of S. K. Som, Additional Sessions Judge of Assam Valley Districts, dated May 19, 1929.

(1) (1922) 37 C. L. J. 173.
(2) (1811) 2 Camp. 555; 170 E. R. 1250.
(3) (1831) 8 Bing. 57; 131 E. R. 321.

Bap, a cousin of Shashiprabha, and the other accused persons, abducted the girl after rendering her and other adult members of the family unconscious by administering *dhaturâ* powder in their curry. The girl was removed from place to place and was ultimately rescued on the 29th May, from the house of one Haranath Gogai, a relative of Panchanan. The case for the defence mainly was that Panchanan and Shashiprabha were secretly in love with each other, that Shashiprabha left her house of her own accord and on his return from Shibsagar, Durgaprasad concocted this case to save the reputation of the family. On the day following her recovery, namely, the 30th May, 1928, the girl was examined by the police. On the 11th June, she was produced before the Subdivisional Magistrate of Shibsagar, who recorded her statement under section 164 of the Criminal Procedure Code. She was examined by the committing magistrate on the 28th August. On all these occasions, she made similar statements supporting the prosecution case. Her father died on the 14th June, and she left her father's house on the 4th September. A letter, Ex. 7, was produced to show that she was forced to leave her father's house on account of ill-treatment for having lost her caste. On the 5th September, she went of her own free will to the house of Panchanan Gogai and on the 7th March, 1929, she personally appeared before the Additional Sessions Judge of the Assam Valley Districts and applied for bail, describing herself as the wife of Panchanan Gogai. The girl was examined in the court of sessions on the 8th May, when she retracted her previous statements. She was, thereupon, declared hostile and allowed to be cross-examined by the Public Prosecutor. The direction of the learned Judge with regard to her various statements is quoted in full in the judgment of the court. Agreeing with the majority verdict of the jury, the learned Additional Sessions Judge convicted the appellants and sentenced them to various terms of imprisonment under sections 366, 366 read with

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107 and 328 of the Indian Penal Code. They, thereupon, preferred the present appeal.

Mr. Narendrakumar Basu (with him *Mr. Abul Kasem*), for appellants. The entire case against the appellants rests on the evidence of Shashiprabha, the abducted girl. At the trial, she was declared hostile and permitted to be cross-examined by the prosecution. According to a well known rule of law, her evidence must be rejected in *toto*. *Emperor* v. *Satyendra Kumar Dutt Chowdhury* (1). This case was subsequently followed in *Khijiruddin Sonar* v. *Emperor* (2). There would, therefore, be no evidence to sustain the charge, and the learned judge should have directed the jury to that effect. In any case, he should have pointed out to the jury that they must reject the evidence of the girl in *toto*, and his omission to do so was a clear non-direction.

The Officiating Deputy Legal Remembrancer, Mr. Debendranarayan Bhattacharya, for the Crown. The proposition that the evidence of a witness, permitted to be cross-examined by a party calling him, under section 154 of the Indian Evidence Act, is to be rejected in *toto*, is not a rule of law, but merely a rule of weighing evidence and, as such, dependent on the circumstances of each case. A careful scrutiny of the cases will show that this rule was laid down when the cases were being considered on facts and on evidence before the High Court. Thus, the case of *Emperor* v. *Satyendra Kumar Dutt Chowdhury* (1) was a reference under section 307 of the Code of Criminal Procedure. The case of *Surendra Krishna Mondal* v. *Rani Dassi* (3) was a First Appeal. In *Emperor* v. *Sahebjan Sheikh* (4), their lordships held that the dictum of Lord Campbell in *Faulkner* v. *Brine* (5), which was the basis of all these cases, was not applicable to India. See also *Kalagurla*

(1) (1922) 37 C. L. J. 173.
(2) (1925) I. L. R. 53 Calc. 372.
(3) (1920) I. L. R. 47 Calc. 1043.
(4) (1922) Jury Reference, No. 84 of 1922, decided by Newbould and Suhrawardy JJ. on the 22nd Dec.
(5) (1858) 1 F. & F. 254.

Suryanarayana v. *Yarlagadda Naidoo* (1). If the whole of the evidence is to be rejected in *toto*, there would be no meaning in allowing the prosecution to cross-examine the witness. It will be mere waste of time.

Even assuming that the rule was so broad as it was contended to be, it has now been modified by the recent amendment of section 288 of the Code of Criminal Procedure. Now, so far as the deposition before the committing magistrate was concerned, it was substantive evidence in the case for all purposes and so the whole of the testimony of the witness cannot be rejected in *toto*. The learned Judge was right when he asked the jury to consider which version of the girl was correct.

Mr. Basu, in reply. The principle is well recognised for a long time and a wholesome one and should always be followed. Section 288 of the Criminal Procedure Code has nothing to do with this question.

Cur. adv. vult.

C. C. GHOSE AND PEARSON JJ. The accused in this case (Panchanan Gogai, Gopal Gohain, Mohari Ahom *alias* Mohari Dursa, Kan Bap Baruah, Laghona Koar and Ratneswar Ahom) were found guilty by the jury in manner following, *i.e.*, Panchanan and Kan Bap were found guilty under sections 328 and 368, Gopal and Mali Ali or Mohari under section 366 and the remaining two under section 366 read with section 107 of the Indian Penal Code. The learned Additional Sessions Judge of the Assam Valley Districts, agreeing with the verdict of the jury, has sentenced the accused to undergo various terms of imprisonment.

The main point which has been argued in this appeal before us arises with reference to the evidence of one Shashiprabha, a girl aged about 17, who was alleged to have been abducted. The case for the

(1) (1902) 6 C. W. N. 513.

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prosecution, shortly stated, was as follows. It appears that the marriage of Shashiprabha with one Lokenath had been settled and the marriage was to have taken place on the 6th May, 1928. Her father Durgaprasad had been away from home for some time prior to the date of the occurrence hereinafter referred to. It is alleged that, taking advantage of the absence of Durgaprasad, the accused Panchanan, in conspiracy with the accused Kan Bap, Gopal and Mohari and with the approver, Sona Ram, abducted the girl after making her unconscious. They also administered *dhaturâ* poison to the adult members of the family. The abduction took place on the night of the 27th April and the girl was removed from place to place until she was brought to the house of one Haranath, who was the brother-in-law of the accused Panchanan. Haranath sent a wire on the 26th May to Durgaprasad and, ultimately, the police recovered the girl on the 29th May. Shashiprabha appeared before the magistrate for the first time on the 11th June, 1928.

The passage in the learned Judge's charge to the jury, to which exception has been taken before us, runs as follows :—

Of course in a case of abduction, the most important witness is the abducted girl, but the abducted girl in this case has retracted all that she deposed in the lower court. But before we discuss the evidence, you should remember some dates.

The occurrence took place on the night of the 27th April, corresponding to the 14th Baisakh. The marriage of Shashiprabha was to have been celebrated with Lokenath on the 6th May, that is, the 23rd Baisakh. Durga Babu left his house a few days before to purchase articles for marriage and for other important business. He was to return on the 29th April The negotiations of the marriage were going on for about six months or so. The girl was recovered on the 29th May. Haranath sent a wire on the 26th May. She was examined by the police at Shibsagar on the 30th May. After her examination, she was sent to her father's house immediately. She remained at her father's house for 4 or 5 days, after which she again came to Shibsagar. She was again brought home 2 or 3 days before her father's death, which took place on 14th June. Her sister, Ratna's marriage was celebrated with Lokenath on the 6th May, the date on which her marriage with Lokenath was to have been celebrated. On the 11th June, she was produced before the Subdivisional Officer to have her statement recorded under section 164 of the Criminal Procedure Code. An honorary magistrate was deputed to verify the statement so recorded. Shashiprabha was examined by the committing magistrate on the 22nd August, 1928. Durgaprasad died on the 14th June. Shashiprabha left her father's house on the night of the 4th September, while

her mother and her little sister, Santi, and the youngest brother were alone living. Shashiprabha was again produced before the magistrate on the 5th September, the date of commitment. On that date, Panchanan was sent to *hâjat*. Shashiprabha was allowed to go of her own free will to the house of Panchanan. The letter, Ex. 7, which goaded her to take this fatal step is dated the 29th August, 1928. Shashiprabha was examined in this court on the 8th May, 1928. Shashiprabha personally appeared before the Additional Judge, Mr. Mehta, on the 7th March, 1929, to apply for bail, describing herself as the wife of Panchanan Gogai.

The girl has spoken in four voices. The first three statements are substantially the same. In all the statements, she spoke of being drugged and then carried by force in an unconscious state. All these statements have been read before you and you have also heard her deposition here. The suggestion of the defence is that what she spoke on the previous occasions were tutored, and it is only here that she has spoken the real truth. It is also suggested that what she spoke to Bheduri Kameswari and others when she was being taken from place to place were false and intended to convey wrong impression. This suggestion is made in the cross-examination, to anticipate the evidence to be given by these persons. You must bear in mind the adverse comments of the defence pleader about the delay in producing her before the magistrate and also that she did not appear before the magistrate voluntarily. It is for you to decide in what voice she spoke the truth. The determining test should be, what version has been corroborated by the independent evidence. It has been the attempt of the prosecution to prove that her first three statement have been so corroborated.

On behalf of the accused, it has been contended before us that the learned judge had misdirected the jury in not calling their attention to the fact that the girl had been declared hostile by the prosecution and that she was allowed to be cross-examined and, further, that, in the circumstances which happened, the learned judge ought to have directed the jury that the evidence of the girl ought to be rejected altogether. In support of this contention, reliance has been placed upon the case of *Emperor* v. *Satyendra Kumar Dutt Chowdhury* (1). The learned Deputy Legal Remembrancer, on behalf of the Crown, has argued that it is not a hard and fast rule that when a witness is cross-examined by the party calling him his evidence must be rejected in *toto* and has drawn our attention to a number of cases in the courts in this country, where a somewhat different view has been taken.

Before I proceed further, I desire to refer to the order of the learned judge under section 154 of the Indian Evidence Act, allowing the prosecution to

(1) (1922) 37 C. L. J. 173, 176-177.

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cross-examine the girl. The order is as follows: "The Public Prosecutor who, after examining the "witness for some time found out that the witness is "making statements contrary to what she deposed in "the lower court, wants the permission of the court "to cross-examine her after she is declared hostile. "The other side objects. I am of opinion that the "prosecution should be granted." The order of the learned judge is not very happily expressed, but I take it to mean that he, having considered the submissions made by the prosecution, exercised his discretion in the matter and gave leave for the cross-examination of the witness. This the learned judge did, because the witness was clearly, in his opinion, one who was hostile. A hostile witness may be defined as one who, from the manner in which he gives his evidence (within which is included the fact that he is willing to go back upon previous statements made by him) shows that he is not desirous of telling the truth to the court. Where, therefore, one comes across a witness of this description, there is very high authority for the proposition that the evidence of such witness cannot in part be relied upon and the rest of it discarded or rejected. See *Alexander* v. *Gibson* (1). This case has been followed ever since 1811 and only in one case, namely, in the case of *Bradley* v. *Ricardo* (2), it was not followed. Where the witness is declared hostile, so that leave to cross-examine is granted to the party calling him, it is, in our opinion, necessary that the judge should explain to the jury what the position is, that then arises; namely, that by asking for leave to cross-examine the witness, the party calling him admits that he is not a witness of truth and one whose evidence is not entitled to credit, who is prepared to make one statement on oath at one time and another at another time and that the evidence of such a witness should be rejected and left out of account in the minds of the jury. On principle, we can see nothing why this rule, which is in accordance

(1) (1811) 2 Camp. 555; 170 E. R. 1250.

(2) (1831) 8 Bing. 57; 131 E. R. 321.

with justice and fairplay, should not be adhered to. At any rate, it is a rule which leans in favour of the accused and as such ought not to be departed from lightly.

In our opinion, the learned judge should have told the jury to reject the evidence of the girl altogether and that his omission to do so amounts to misdirection. The verdict of the jury must, therefore, be set aside and with it the conviction and sentence. The question then arises as to what should be done. We have very carefully considered the position and have come to the conclusion, in view of all the circumstances, that it would not be unduly stretching the law if we were to direct that there need not be a retrial. The accused, who are on bail, will be discharged from their bail bonds.

Appeal allowed. Accused acquitted.

A. C. R. C.