APPELLATE CRIMINAL.

Before Rankin C. J. and Patterson J.

1929

Aug. 14.

KHADEM

v.

EMPEROR.*

Evidence—Witness tendered only for cross-examination in Sessions Court—Evidence before committing court not put in—No cross-examination thereon—Reference to it by Sessions Judge—Code of Criminal Procedure (Act V of 1898), s. 288.

Where the Sessions Judge said, in his charge to the jury, "Prosecution witness No. 13 says that he saw 18 or 19 persons coming out of Bhuta's *bdrhi* on Saturday evening. Of course he did not say he recognised the men," and the said witness had never given any such evidence before the Sessions, but had done so before the committing court, which evidence had not been put in nor referred to at the trial, he having been merely tendered for cross-examination,

held that the Sessions Judge had brought in a piece of evidence which was extremely damaging against the accused, Bhuta, as identifying and implicating him, and thus a quite important matter which was not on the record had been treated as evidence and therefore the conviction could not stand.

Held, further, that, even if the Sessions Judge had put in this evidence under section 288 of the Criminal Procedure Code, he would have exercised his discretion in a manner that was not fair to the defence.

CRIMINAL APPEAL by Sheikh Khadem and others, accused.

The accused were tried before the learned Additional Sessions Judge of Midnapur, who, accepting the unanimous verdict of guilty, under section 395 of the Indian Penal Code, brought in by the jury, sentenced accused Nos. 1 to 6 to 4 years' rigorous imprisonment and accused No. 7 to 5 years' rigorous imprisonment. The accused, thereupon, preferred an appeal to the High Court, *inter alia*, on the ground "that the learned Additional Sessions "Judge, while dealing upon the evidence of "identification of the accused by the respective "witnesses in his charge, grossly misdirected the jury "in placing before them that 'prosecution witness

*Criminal Appeal, No. 70 of 1929, against the order of Behari Lal Sarkar, Additional Sessions Judge of Midnapur, dated Dec. 4, 1928.

" 'No. 13 says that he saw 18 or 19 persons coming out " 'of Bhuta's *bârhi* on Saturday evening' which was no "evidence of the said witness at the Sessions Court, "and which evidence, accordingly, was wholly "inadmissible."

Mr. Sasmal and *Mr. Phanindranath Das*, for the appellants.

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

RANKIN C. J. In my opinion, this appeal must succeed, the conviction and the sentences must be set aside and the case must be retried.

The allegation against the seven appellants was that they had committed a dacoity in the house of the complainant on Saturday night, the 16th of June, at about 8 o'clock in the evening. The First Information was lodged at the *thânâ*, some two or three miles away, by 9 o'clock. The amount of property taken away was in value only some Rs. 50 and the case for the prosecution is that the inmates of the house were allowed to leave the house and that, in a very short time, the neighbours were assembling with the result that the dacoits could not continue with their endeavours and in the end managed to get away with very little. The defence clearly denied that there was any dacoity at all and they laid stress upon certain suspicious features in the prosecution case and maintained that there were reasons why the prosecution witnesses had enmity against these accused, who lived not far off, in a neighbouring village and why the attempt to make out that they were guilty of dacoity should be indulged in. The accused people were persons who were known to the inhabitants of the house and it appears that a number of them were said to be identified by different witnesses for the prosecution.

So far as can be gathered from the charge of the learned Judge, there is undoubtedly a substantial body of evidence called by the prosecution to the effect that this dacoity took place. There are the first six

1929

KHADEM v. EMPEROR.

RANKIN C. J.

prosecution witnesses, who are inmates of the house. Prosecution witnesses Nos. 7, 9 and 10 appear to be close neighbours and prosecution witness No. 8 appears to be a co-villager.

The jury had before them the question whether they would or would not believe the general story told by these prosecution witnesses; and, if this case had been tried upon evidence that was on the record, there can be no doubt that very strong reasons indeed would be required before this Court, on appeal, would think of interfering with the verdict of the jury.

What has happened in the present case is that a witness, who appears to be a Mahomedan witness (prosecution witness No. 13) and who lived in the same village as the accused persons, gave evidence before the committing magistrate and, in the course of that evidence, as recorded, he stated, among other things, that, on this very night, he saw 18 or 19 persons coming out of the *bârhi* of the accused man Bhuta. When the case was tried in the Sessions Court this piece of evidence which, if true, was extremely important, was not thought of such importance by the prosecution that they were minded to examine this witness before the jury at all. He was tendered merely for cross-examination. He was asked one or two harmless questions about the topography of his own village and about certain persons which affected only the fringe of the case, and nothing more happened as regards this witness. He did not tell before the jury any story about seeing 18 or 19 people leaving the *bârhi* of Bhuta on the night of the occurrence. Then, when the learned Judge comes to charge the jury he says nothing at all about this witness' evidence in that part of the charge in which he is considering the question whether there was dacoity at all on that night, or not. But when he comes to the part of the charge, in which he deals with the evidence against particular accused, he says "Prosecution witness No. 13 says that he saw 18 or 19 "persons coming out of Bhuta's *bârhi* on Saturday "evening. Of course he did not say he recognised the

"men." Prosecution witness No. 13 had never given any such evidence before the Sessions. His deposition before the committing magistrate had never been put in. No reference had been made to it accordingly, and the learned Judge in bringing in this as a piece of evidence, to my mind, brought in a piece of evidence which was of an extremely damaging character. To begin with, it was extremely damaging as regards Bhuta, and the learned Judge introduces it apparently with the idea that it is evidence identifying and implicating Bhuta.

It is said that, as the learned Judge has not introduced it in that part of the charge where he is considering whether there was a dacoity or not, we should not pay too much attention to this statement in the case of the other accused. It appears to me, on the contrary, that what Mr. Sasmal has represented to us may well be the true state of affairs, namely, that the evidence of this co-villager and co-religionist to the effect that he saw such a large number of people on that night proceeding from the *bârhi* of Bhuta in this neighbouring village may well have appeared to the jury to be remarkable confirmation of the evidence as regards the existence of a dacoity. I do not feel disposed to speculate too closely as to the effect it would have on the mind of the jury. It appears to me that, on the whole, the probability is that if the jury noticed this part of the charge, as they must be supposed to have done, it would have a highly prejudicial effect upon the general case of the accused.

It is said that this evidence could have been put in under section 288, Criminal Procedure Code. A Sessions Judge certainly has a discretion to put in depositions before the committing magistrate, but I am bound to say that, in this case, I am somewhat clearly of opinion that, if the learned Judge had, in the circumstances, put in this evidence about this gang of men by means of section 288, he would have exercised his discretion in a manner that was anything but fair to the defence. For the first time, in this way, there would have come upon the record an

1929

KHADEM
v.
EMPEROR.

RANKIN C. J.

extremely damaging piece of evidence, a piece of evidence which should have been got from the mouth of the witness in the examination-in-chief; and, speaking for myself, I cannot imagine I should have allowed such evidence to go in, there being no cross-examination directly or indirectly affecting or purporting to impinge upon this very cardinal question. In my judgment, the discretion to let in such evidence under section 288, Criminal Procedure Code, is one that must be carefully exercised, and in this case I have no hesitation in saying that nothing would have induced me to let this piece of evidence in by this roundabout method. But, apart from that, there remains the fact that the deposition was not put in under section 288, Criminal Procedure Code. Had it been put in, the pleader for the defence would have had his chance to represent to the jury that this was a way of making out the prosecution case which rendered the prosecution case highly suspicious. He would have been able to deal with it. He would have notice of it. He might apply for a further opportunity to cross-examine the witness. In my judgment, this is a case where a quite important matter, which is not on the record, has been treated as being in evidence, and I am not prepared to let the conviction stand either in the case of Bhuta or in the case of any other appellant.

The appeal must, therefore, be allowed, the convictions and the sentences must be set aside and the case must be remanded for a retrial. The appellants may continue on the same bail as before to the satisfaction of the District Magistrate.

PATTERSON J. I agree.

G. S. *Case remanded.*