APPELLATE CRIMINAL.

Before Cuming and Lort-Williams JJ.

BIKRAM ALI PRAMANIK

v.

EMPEROR.*

1929

July 24.

Misdirection—Indian Penal Code (Act XLV of 1860), ss. 395, 457—Indian Evidence Act (I of 1872), ss. 143, 154.

It is a clear misdirection, when the Judge does not tell the jury that the statement of an accused can only be used against himself.

As in certain circumstances a confession can be used against the co-accused, the judge entirely neglected to draw the attention of the jury to the way in which the confession or statement in this case was extracted from the confessing accused, *viz.*, where the statement was in answer to the leading question by the Public Prosecutor which practically put the answer into the mouth of the witness.

The judge failed to give any direction to the jury as to how they should treat and the weight they should give to the evidence of an accused person as against his co-accused.

Per CUMING J. Section 154, read with section 143, of the Evidence Act, provides that the court may allow the party to put leading questions to his own witnesses. But it does not necessarily mean that he must declare the witness hostile and cross-examine him. It is only when he declares the witness hostile and cross-examines him that he cannot rely on his evidence. This is quite clear from section 154 itself. It does not say that a person who calls a witness may cross-examine him in certain circumstances, but he might put questions to him which might be put in cross-examination by the adverse party. That is not the same as cross-examination. If it were so, the Code would have said so.

Per LORT-WILLIAMS J. Sections 143 and 154, Indian Evidence Act, read together, do not give power to the prosecution to put leading questions to their own witnesses even with the assent of the judge.

The meaning of section 154 is that, with the permission of the court, the prosecution may treat a witness as hostile and cross-examine him.

The wording of the section 154 shows that the legislature did not intend to distinguish the law in this country from the law which obtains in England.

APPEAL by some of the accused.

The two appellants, together with a third person, were put upon their trial before the Additional Sessions Judge of Pabna and Bogra, and a jury under section 395 or in the alternative under section 457 of the Indian Penal Code. The case for the prosecution

*Criminal Appeal, No. 58 of 1929, against the order of B. C. Chatterjee, Additional Sessions Judge of Pabna and Bogra, dated Jan. 17, 1929.

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was that the three accused, together with a number of persons, broke into the house of the complainant on the night of the 27th May, 1928. The defence denied the whole occurrence. The third accused alleged enmity. The appeal of the third accused was summarily dismissed. In the appeal of the two appellants the grounds taken were misdirection and non-direction amounting to misdirection.

Mr. Dineshchandra Ray, for the appellants. Alternative charge under section 395 or 457, Indian Penal Code, is bad in law. The Additional Sessions Judge has not properly dealt with or has misdirected the jury with regard to the confession of the third accused. The Public Prosecutor, having declared a witness hostile, should not rely upon his testimony. The judge gave no direction to the jury on this point. He has further failed to deal properly with the evidence of a co-accused.

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

CUMING J. This is an appeal by two persons, Bikram Ali Pramanik and Kudrutulla Khan. These two persons, together with one Samatulla, were tried by the learned Additional Sessions Judge of Pabna and a jury on charges of dacoity and house breaking by night. The jury unanimously found all the three persons guilty under section 457, Indian Penal Code, and not guilty under section 395 of that Code. The appeal of Samatulla has been summarily dismissed and that of the other two appellants is now before us.

The case for the prosecution briefly was that these persons, together with a number of other persons, broke into the house of the complainant on the night of the 27th May, 1928. The defence briefly was a denial of the whole occurrence; and there was a suggestion in the case of Samatulla of enmity.

The first point raised by the learned vakil for the appellants is that the alternative charges under sections 395 and 457, Indian Penal Code, are bad in

law. Why it is bad in law I am unable to understand. Offence under section 457 is really in some cases a minor offence under section 395. There can be no reason why there should not be alternative charges of these two offences.

The next point raised is that the learned judge has not properly dealt with or has misdirected the jury with regard to a certain alleged confession. It is alleged that Samatulla, whose appeal has been rejected, on the night of the dacoity made a confession to a cousin of his one Ketabali Sarkar, in which he admitted that he and the two appellants had committed dacoity in the house of the complainant. In dealing with this confession, the learned judge's charge to the jury is as follows :—"P. W. 15 Ketabali, "a deed writer in the Salanga Registration office, "says that the accused Samatulla is his cousin and "that he went to him at about 3-30 a.m. on the night of "occurrence and requested him to save him, as his "name had been mentioned in connection with the "dacoity. This person says that after pressure being "put, the accused Samatulla stated that he with the "other two accused and also two other persons had "committed the dacoity. The witness admits that "there was a quarrel between him and the accused "Samatulla regarding the deduction of Rs. 10 from "the price of 3 maunds of sweetmeats taken by Samat "from his shop. This witness further admits that he "(Samat) also said that his name had been falsely "mentioned in the *ejâhâr* at the *thânâ*. P. W. 15 "was not examined by the Sub-Inspector. It is for "you to say whether the accused Samatulla went to "this witness on the night of occurrence and made the "confession." With regard to the alleged confession itself it is to be found in the evidence of Ketabali Sarkar, when examined before the magistrate. There he stated that Samatulla, on being pressed, said that he. Bikram Ali, Kudarali Khan and two others, committed dacoity in the house of Chandulla Sarkar. When examined in the sessions court, he states as follows: "Accused Samatulla is my co-villager. At

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"about 3 or 3-30 a.m., the Nanugachi *melâ* day, I "came to know of a dacoity in Chandulla's house; * * * "accused Samatulla went to me that night. He is "here. He said that his name had been taken in "connection with the dacoity in Chandulla's house. "He asked me to go to the *pradhâns* of that *pârhâ*. I "told him to come in the morning, as I could not go "at that hour of the night. He did not come to me "any more. He said that three names were mentioned "in connection with the dacoity, *viz.*, those of Bikram "and himself and the man who was a Hindu before "and converted to be a Mahomedan afterwards." It would be noticed that in that statement Samatulla does not say that he and the other two appellants committed the dacoity. He only says that three names had been mentioned. The Public Prosecutor was evidently not satisfied with that statement; for he asked the permission of the court to put further questions to the witness and he then asked as follows: "Did Samatulla tell you that he and "Bikram and Kudratulla and two others had "committed dacoity in the house of Chandulla "Sarkar?" The answer was "Yes, he said so." Mr. Rav who appears for the appellants contends that the public prosecutor, having declared the witness hostile and cross-examined him, it was not open to the prosecution to rely upon the evidence of this witness. The only effect of declaring the witness hostile and cross-examining him was to discredit the witness altogether. But it does not appear that the prosecution wished to cross-examine the witness for the purpose of discrediting his evidence. As far as can be seen what the Public Prosecutor did was to ask the permission of the court to put questions to this witness which might be put by the adverse party. From this, it cannot be said necessarily that he intended to declare the witness hostile and to cross-examine him. Section 154, read with section 143, of the Evidence Act provides that the court may allow the party to put leading questions to his own witnesses. But that I do not think necessarily means that he

must declare the witness hostile and cross-examine him. It is only when he declares the witness hostile and cross-examines him that he cannot rely on his evidence. It will be seen from a perusal of the evidence that what the Public Prosecutor desired to get from the witness was not a contradiction of what he had said, but something in addition. He was not cross-examining his own witness, but, with the permission of the court, was asking him leading questions. That is not necessarily to cross-examine.

This is clear from section 154 itself, which does not say that a person who calls a witness may cross-examine him in certain circumstances, but that he might put questions to him which might be put in cross-examination by the adverse party. That is not the same as cross-examining him. If it were, the Code would have said so.

Be that as it may, it has further been argued by Mr. Ray that the judge has entirely failed to direct the jury as to how they should deal with the evidence of a co-accused. Here Mr. Ray is on firmer ground. As far as can be seen from the charge of the learned judge, he gave no direction whatever to the jury on this point. It is clear from his charge that he did not tell the jury that the statement of Samatulla that he himself, Bikram, Kudarali and two others were the persons who had committed the dacoity could only be used against Samatulla and, therefore, apparently has allowed it to be used, as in certain circumstances it can be used, against the co-accused, but he entirely neglected to draw the attention of the jury to a very important matter, namely, the way in which this evidence was extracted from the witness. The witness first of all made no mention whatever of the fact that Samatulla had made a statement to him in which he said that he, Bikram, Kudar Ali and two other persons had committed dacoity; and it is only in answer to the leading question by the Public Prosecutor which was practically put into the witness's mouth. The answer which he wanted the witness stated that Samatulla

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had told him that he, Bikram, Kudarali and two others had committed the dacoity. Neither does he give any direction to the jury as to how they should treat and the weight they should give to the evidence of an accused person as against his co-accused. It is impossible for us to say that the omission of the judge to bring this fact to the notice of the jury has not seriously prejudiced the two accused persons.

In these circumstances we must set aside the verdict of the jury and direct that the appellants be retried.

LORT-WILLIAMS J. I agree with my learned brother that this conviction should be set aside and the two appellants retried.

I desire to add that, in my opinion, sections 143 and 154 of the Evidence Act read together do not give power to the prosecution to put leading questions to their own witnesses even with the assent of the judge. The meaning of section 154 is that they may, with the permission of the court, treat a witness as hostile and cross-examine him. The wording of section 154 shows that the legislature did not intend to distinguish the law in this country from the law which obtains in England.

Appeal allowed: retrial ordered.

S. R.