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consideration even in second appeal; but if raised at all in this case in the Courts below it was very slightly raised, and it appears to me that we have no right to presume that the ordinary rule, applicable to suits of this nature, was neglected by the learned Judge in the Court below, or to hold, upon the presumption arising from the length of the delay condoned by him, that it was unduly disregarded. On reference to Lord Justice Fry's book on Specific Performance, ss. 1070 to 1079, where this subject is referred to, it will be noticed that the Lord Justice mentions several cases in which very considerable delay was held in England to be fatal, but in others not so. In s. 1078, a delay of fourteen months was held not to be such a bar. In another case, three and half years was considered fatal, and in more recent cases, a delay of one and half years, and a somewhat lesser delay, was held to be fatal. In this case, the time which was allowed to elapse was so long, that under ordinary circumstances specific performance would not be granted by the Court; but it is impossible for us to say in the form in which this case comes before us in second appeal, that there may not have been circumstances in the present case that would justify the grant of a decree even after the period which has elapsed. As the point has been raised before us, I have thought it desirable to refer to one of the authorities in which the subject is dealt with, because the principle is an important one, and under the new Specific Relief Act it is a principle which ought to be considered by the Court in the exercise of its judicial discretion under s. 22 of that Act.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Field and Mr. Justice Norris.

QUEEN EMPRESS v. RAM SAHAI LALL AND ANOTHER.*

Witnesses, Duty of the prosecution to produce.

Where a Sessions Judge gave it as a sufficient reason for the non-production of certain witnesses in Court on the part of the prosecution, that they had been examined by the Committing Magistrate against the express wish of the police officer in charge of the prosecution, *Held*, that that was not

* Criminal Appeal No. 441 of 1894, against the order and sentence passed by W. Vermer, Esq., Sessions Judge of Monghyr, dated the 3rd July 1894.

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a valid ground for the non-production of the witnesses in the Sessions Court.

In conducting a case for the prosecution all the persons who are alleged or known to have knowledge of the facts ought to be brought before the Court and examined.

THE two accused in this case were charged with causing grievous hurt to one Gandauri Kahar and with culpable homicide. One Pokhan, the brother of Gandauri, laid the charge against the accused at the thanna, and, in giving certain details of what had taken place, stated that he had received the information from Jitan Singh, Chita Singh and Tiloke, who were to be his witnesses. At the preliminary inquiry the Sub-Inspector, Mohamed Baker, who had the conduct of the prosecution, objected to the examination of Jitan Singh, Chita Singh, and Tiloke on behalf of the Crown, as they had been discovered to be hostile witnesses. Nevertheless the Deputy Magistrate insisted upon their examination and recorded their evidence. The accused were committed to the Sessions Court, where the three witnesses were not produced, and the Judge expressed his opinion that the prosecution was not bound under the circumstances to ensure their attendance. The accused were convicted and they appealed to the High Court.

Mr. Allen and Baboo Rajendra Nath Bose for the appellants.

Baboo Ram Churn Mitter for the Crown.

The Court (FIELD and NORRIS, JJ.) delivered the following judgments:—

FIELD, J.—We have heard the evidence in this case, and have considered the arguments addressed to us by the learned counsel who appeared on behalf of the appellant, and we think that the proper course to take will be to set aside the conviction, and direct a new trial of the prisoner Ram Sahai Lall; and for this reason, Pokhan, the brother of the deceased Gandauri, gave the first information to the police station. Pokhan was not speaking from his own personal knowledge in giving an account of the transaction which resulted in the death of Gandauri, but he did give certain details, and he stated that he had received these details from three persons, Tiloke, Jitan and Chita, and he proceeded

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to add that these three persons were his witnesses. These three persons were examined by the Deputy Magistrate, and their evidence did not support the case for the prosecution. It would appear, and it is so stated in the judgment of the learned Sessions Judge, that the police officer who had charge of the case did not wish these persons to be examined, and that the Deputy Magistrate, notwithstanding this expressed wish, proceeded to examine them, and this is given by the Sessions Judge as a good reason for not calling these witnesses in the Court of Sessions, or tendering them for cross-examination in that Court. Now, it must be understood, and it has recently been pointed out in more than one judgment of this Court, that in conducting a case for the prosecution, all the persons who are alleged, or are known, to have knowledge of the facts ought to be brought before the Court and examined. No doubt, it may happen that certain witnesses will conceal facts which they know, or alter their account of what they have seen. Nevertheless, these witnesses should be before the Court, and the Judge and the Assessors, or the Jury, if the case is tried by a Jury, should have an opportunity of forming their own judgment as to their credibility or otherwise. This course was not followed in the present case, and we think that the learned counsel has rightly pressed upon us that the prisoner has been prejudiced in his defence in consequence. On this ground we set aside the conviction, and direct that the prisoner be re-tried.

NORRIS, J.—I am of the same opinion. I would only add that I think the learned Sessions Judge has, subject to this omission, tried this case with remarkable ability, and I trust that when the case goes back to him, he will look upon it as an entirely new case, and not allow his mind to be at all prejudiced by the fact that the case have been previously tried.

Retrial directed.