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BRADLEY v. ATKINSON.

I am therefore of opinion that my brother Oldfield was right; and I concur in allowing the appeal with all costs, and in varying the decree of the lower Court as proposed by the learned Chief Justice.

BRODHURST, J.—I am of the same opinion.

TYRRELL, J.—Under s. 106 of the Transfer of Property Act, the notice to quit the tenancy of a house may be in excess of fifteen days, at the pleasure of the lessor; but it is imperative that a valid notice must be such a notice that its last day will be the same as the last day of a month of the tenancy.

APPELLATE CRIMINAL.

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July 20.

Before Mr. Justice Tyrrell.

QUEEN-EMPRESS *v.* TULLA AND OTHERS.

Practice—Trial in Sessions Court—Non-production of material witnesses for Crown—Duty of Public Prosecutor.

It is the duty of the Public Prosecutor at a trial before the Court of Session to call and examine all material witnesses sent up to the Court on behalf of the prosecution, and the Judge is bound to hear all the evidence upon the charge.

The Public Prosecutor is not bound to call any witnesses who will not, in his opinion, speak the truth or support the points he desires to establish by their evidence; but in such circumstances he should explain to the Court that this is his reason for not calling these witnesses, and he should offer to put them in the box for cross-examination by the accused at their discretion. In the absence of any such explanation, or of other reasonable grounds apparent on the face of the proceedings, inferences unfavourable to the prosecution must be drawn from the non-production of its witnesses.

IN this case, six persons named Tulla, Chidda, Chiddu, Jairam, Kallu and Lalji, were tried before the Sessions Judge of Moradabad, under s. 411 of the Penal Code, for dishonestly receiving stolen property, knowing or having reason to believe the same to be stolen property. All the accused were convicted and were sentenced, the first four to six months' rigorous imprisonment, and the last two to three and two years' rigorous imprisonment respectively with reference to the provisions of s. 75 of the Penal Code. Five of the witnesses for the Crown, who had been present on the various occasions when the premises of the accused were examined, and who had been sent up to the Sessions Court, were not called, and no reason for the exclusion of

their evidence appeared on the record. The accused appealed to the High Court. They were not represented by counsel.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

TYRRELL, J.—(after examining the evidence on the record in detail, continued):—It is obvious that the trial of this case has been in all respects inadequate, and, so far as regards the evidence for the prosecution, only half completed. In view of the order that I must make in the case, I refrain from comment on the evidence on the record further than to remark that, as it stands, it would not be sufficient to prove that the accused had the stolen articles in their possession, so as to make them guilty under s. 411 of the Penal Code. It has not been established that the stolen goods were in such places that the accused must necessarily have been privy to their deposit there, or that the places are not equally accessible to other persons; but in the imperfect state of the record, it is impossible to say whether these defects in the proof of the case for the prosecution might or might not have been removed by the evidence which has been excluded. It is true that the rule of the Criminal Procedure Code simply requires in general terms that the witnesses for the prosecution shall be called and examined before the accused is put on his defence, and contains no special prohibition of the exclusion of one or more of them from examination; but it does not require a rule stating in express terms that *all* the witnesses must be examined to indicate the necessity or propriety of examining all material witnesses sent up to the Sessions Court on behalf of the prosecution. It is the duty of the Public Prosecutor to call and examine all such witnesses, and the Judge is bound to hear all the evidence upon the charge. It is true that the Public Prosecutor is not bound to examine persons who will not, in his opinion, speak the truth or support the points he desires to establish by their evidence; but in such circumstances he should explain to the Court that this is his reason for not calling these witnesses, and he should offer to put them in the box for the cross-examination of the accused at their discretion. In the absence of any such explanation or of other reasonable grounds apparent on the face of the proceedings, inferences unfavourable to the prosecu-

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QUEEN-EMPRESS v. TULLA.

tion must be drawn from the non-production of its witnesses. If, however, the witnesses in the present case are excluded only because the Public Prosecutor or the Court thought their evidence superfluous, it would still have been proper to tender them for cross-examination by the accused. In the state of the record indicated by the foregoing observations, it is obviously impossible to deal justly with the appeal; for, while there may not be sufficient evidence on the record to support the conviction, it is very possible that the Court has illegally excluded evidence which would have sufficed to prove the guilt of the accused, in which case the determination of the case as it stands might result in a deplorable miscarriage of justice.

Under these circumstances, it is necessary—and I make this order with great reluctance—to cancel all the proceedings in the Sessions Court, and to direct a new trial of the accused according to law with the least possible delay.

New trial ordered.

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July 21.

EXTRAORDINARY ORIGINAL CRIMINAL.

Before Sir W. Comer Petheram, Kt., Chief Justice.

LAIDMAN *v.* HEARSEY.

Defamation—Justification—Express malice—Evidence of complainant having previously acted as alleged in the libel—Act XLV of 1860 *(Penal Code), s.* 499.

In a prosecution for defamation under s. 500 of the Penal Code, the alleged libel accused the complainant, who was a judicial officer, of (i) having, upon a particular occasion, used abusive language to certain respectable native litigants appearing before him in Court, and (ii) having, upon other occasions not specified, treated other respectable natives (not named), "in a similar manner." This latter accusation was contained in a postscript. The complaint filed by the complainant in the Court of the committing Magistrate, and the charge-sheet in which the Magistrate committed the defendant for trial, covered the whole of the document complained of, except the postscript. At the trial of the case, the defendant pleaded not guilty, and also relied on the first, eighth, and ninth exceptions to s. 499 of the Penal Code. The prosecution gave evidence to prove that, in making the charges contained in the alleged libel, the defendant was actuated by express malice toward the complainant.

Held, with reference to the terms of s. 499 of the Penal Code, that evidence of particular instances of abusive language applied by the complainant upon former occasions to natives appearing in his Court was admissible, first as relating to the question what was the reputation which the defendant was said to