MISCELLANEOUS CRIMINAL.

1910
February 25.

Before Mr. Justice Sir George Knox and Mr. Justice Karamat Husain.

EMPEROR *v.* WAJID HUSAIN AND OTHERS.*

Act No. XLV of 1860 *(Indian Penal Code), section 76—Act No.* I *of* 1872 *(Indian Evidence Act), section* 105*—Question whether act done by accused falls within general exceptions—Evidence—Presumption—Pleadings.*

Where an accused person has raised pleas inconsistent with a defence which would bring his case within one of the general exceptions in the Indian Penal Code, he cannot, in appeal, set up a case, based upon the evidence taken at his trial, that his act came within such general exception. Circumstances which would bring the case of an accused person within any of the general exceptions in the Indian Penal Code can and may be proved from the evidence given for the prosecution or to be found elsewhere in the record; but there must be evidence upon which such circumstances can be found to exist, and, when they are not shown to exist, the Court is not competent to assume, more particularly when the pleas taken are inconsistent with such assumption, that such circumstances might have existed or that doubt may arise in consequence of such assumption, and the accused ought to be given the benefit of the doubt. *Queen Empress* v. *Timmal* (1) referred to.

THIS was a reference made by the Judicial Commissioner and the Additional Judicial Commissioner, Lucknow, under section 9, clause (*b*) of Act No. XIV of 1891, for the determination of the question as to whether for the reasons given in the judgement, the appellants should be acquitted or their appeals dismissed. The circumstances which gave rise to the reference appear from the order of the High Court thereon.

Babu *M. M. Ghoshal, Government Pleader, Lucknow,* for the Crown.

KNOX and KARAMAT HUSAIN, JJ.:—Eleven persons were convicted by the Additional Sessions Judge of Gonda of various offences falling under sections 195, 196, 211 and 218 of the Indian Penal Code. They appealed to the Court of the Judicial Commissioner of Oudh. The appeal was heard before the Judicial Commissioner and the Additional Judicial Commissioner sitting together. There was a difference of opinion between the members of the Court regarding the guilt of seven of the appellants, viz., Wajid Husain, Muhammad Hashim, Najab Ali, Ghaus Ali, Ram Kuber, Mata Din and Lachman. In consequence of this the

* Criminal Reference No. 18 of 1910.

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learned Judicial Commissioner and the Additional Judicial Commissioner acting under clause (*b*) of section 9 of Act No. XIV of 1891, have jointly stated the question as to which they have differed, and have forwarded such statement with their respective opinions to this Court. The question on which the members of the Court differed is whether the accused, who are constables, should be acquitted on the ground that they acted under the orders of the Inspector and Sub-Inspectors. No definite orders, the reference proceeds to say, to the constables have been proved; but one of the learned members of that Court is disposed to think, and the other holds definitely, that it should be assumed in favour of the constables that they acted under the orders of the Inspector and of the Sub-Inspectors.

The Judicial Commissioner was of opinion that all the accused proceeded to the *kutti* or hut near the *abadi* of mauza Gokulpur with criminal intent; that it was proved that the constable Ghaus Ali wrote out the original report made to the police knowing it to be false; that the constable Wajid Husain prepared the special diary which followed upon the report in a manner which he knew to be incorrect, that after that Ghaus Ali and Wajid Husain assisted the Inspector and the Sub-Inspector Wazir Khan to prepare the false statement which was made by the witness Shankar, and that the constable Lachman also took part in this. He was disposed to hold that, even if the constable acted under express orders from the Inspector and Sub-Inspectors they did so knowing that these orders were unlawful, and therefore they were not bound to obey them, and are not protected by these orders from liability.

The learned Additional Judicial Commissioner on the other hand, being of opinion that it was reasonable to hold that the constables may have proceeded to the *kutti* in ignorance of the plan devised by the Inspector and Sub-Inspectors, held that the prosecution had failed to prove that the constables set out to the *kutti* with criminal intention; and that as no other act is proved against them to show that they knew of the conspiracy before the arrests were made, they were, as regards the subsequent acts, protected by the orders of the Inspector, under which it must be presumed that they acted.

The case therefore appears to resolve itself into a finding by both the members of the Oudh Court that the seven accused persons did commit acts amounting to the offences charged against them, but that it must be assumed that they acted as they did in obedience to the orders of a superior authority, and that the benefit of the general exceptions contained in section 76 of the Indian Penal Code, should be given in their favour. If the benefit of the exception can be given them, the acts committed by them would cease to be offences punishable under the Indian Penal Code, those acts being taken out of the category of offences in that Code by reason of section 76 of the said Code.

We have therefore not considered it necessary to go into the general evidence contained in the record of the case. We have only considered (1) the statements made by the accused and by the witnesses produced by them; (2) such portions of the record as have been brought to our notice by the learned officer of the Oudh Court who has been permitted to address us and to prosecute the reference.

Section 105 of the Indian Evidence Act, lays down that "when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code.....is upon him and the Court shall presume the absence of such circumstances." In the present case, therefore, it was for the seven accused persons to prove the existence of circumstances bringing their cases within the general exception contained in section 76 of the Indian Penal Code. It was for them to prove that such acts and circumstances existed as would show that they were not liable to be convicted of the offences with which they had been charged; in other words, it was for them to show that there were orders given to them by persons in authority over them, and that all that they did was merely to carry out their duties as subordinates in obeying such orders. In the case provided for by section 105, Evidence Act, this is all the more necessary, inasmuch as that section requires the Court to presume the absence of such circumstances. All the accused were defended on their trial by pleaders of the Fyzabad Court. We have, as we have stated

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above, examined the record, and specially the statements made by the accused throughout the case, and we have also examined the pleas taken by the learned counsel, a barrister of standing and experience, who appeared on their behalf in the Judicial Commissioner's Court. The result of our search is that in the court of the committing Magistrate, Wajid Husain alone set up a plea of this nature; he said that he had written what he did in the diary under orders of the Inspector. When we come to the appeals we find that in the case of Mata Din and Lachman no plea in any way touching a defence based upon section 76, Indian Penal Code, was raised; that Ghaus Ali does not appear to have sent in any petition of appeal; that Wajid Husain in the petition sent in by him by way of appeal does say that whatever he did was done at the instance of his superior officers; that it was incumbent upon him to obey the orders of the Circle Inspector in the discharge of his duty; that he was not free to go against his officers in the matter or to disobey their orders, and that as he was bound under the law to act according to the instructions of his officers, he cannot therefore be held to be guilty. To the same effect is the appeal of Ram Kuber and of Najaf Khan. Muhammad Husain says in his petition:—"The appellant was with his superiors and carried out all the lawful orders given by them. Had he disobeyed them he would have been punished. How could he have acted independently in the presence of his superiors?" In the petition filed on behalf of the appellants by the learned barrister who appeared for them in the Judicial Commissioner's Court, this particular plea does not appear to have been put forward. The petition discloses 14 grounds of appeal more or less bearing upon the plea that the case of dacoity was a true case and had not been proved to be false. It is true that in paragraph 13 there is a plea to the effect that the defence has been proved, but as we have already pointed out, we cannot, save in the solitary case of Wajid Husain, find in the various examinations taken of these accused persons that they anywhere specifically stated that they had received orders from superior officers and that they only carried out such orders. None of the orders, if there were any, was produced in evidence. No one was

called upon to produce them. The whole tenor of the defence so far as can be gathered from the examinations recorded, was to the effect that there had been a dacoity, that all the persons who had been arrested were the genuine people concerned in that dacoity and not people caught and kept beforehand to be produced as persons who had taken part in a sham dacoity. It may be safely said that in the case before us none of the accused persons have in their defence proved the existence of circumstances bringing their cases within section 76 of the Indian Penal Code. We have gone into the pleas taken in appeal, but it must always be remembered that this Court has held in *Queen-Empress* v. *Timmal* (1) that where an accused person has raised pleas inconsistent with a defence which would bring his case within one of the general exceptions in the Indian Penal Code, he cannot, in appeal, set up a case, upon the evidence taken at his trial, that his act came within such general exception. While we agree with what was laid down in *Queen Empress* v. *Timmal*, we also hold that circumstances which would bring the case of an accused person within any of the general exceptions in the Indian Penal Code can and may be proved from the evidence given for the prosecution or to be found elsewhere in the record; but there must be evidence upon which such circumstances can be found to exist, and when they are not shown to exist, the Court, which is under section 105 of the Evidence Act, bound to presume the absence of such circumstances, is not competent to assume, more particularly, when, as in this case, the pleas taken are inconsistent with such assumption that such circumstances might have existed or that doubt may arise in consequence of such assumption, and that the accused must be given the benefit of such doubt. Section 105 of the Evidence Act, in using the words "shall presume the absence of such circumstances" requires the Court to regard such absence as proved unless and until it is disproved: *vide* section 4 of the Evidence Act, 1872. In saying this we do not overlook the provisions of section 114 of the same Act. In an ordinary criminal trial the Court undoubtedly may and should presume the existence of facts which it thinks likely to have happened, having regard to the common course of natural events and human

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conduct and public and private business in relation to the facts of the particular case. It is quite natural to assume, as the learned Judicial Commissioners did in this case, that the accused persons, being police officers, acted as they did in consequence of orders given to them by their superiors. The conflict lies between what the court may presume and what the Court shall presume. Where the law requires that the Court shall presume the absence of these special circumstances, the Court must continue to presume their absence unless and until their absence is disproved, or in other words, their presence is proved.

The Evidence Act in laying down the principle set forth in section 105 has at times been said to have introduced something new, and to have put the law regarding criminal cases upon a different basis than the one upon which it stood before it was enacted. We are unable to take this view. Undoubtedly, in criminal trials the *onus* of proving every particular element, if we may use the term, which goes to the making of an offence lies upon the prosecution, and if the prosecution do not prove all such elements, and room is left for doubt, the benefit of *that doubt* must unquestionably be given to the accused. But there are several cases both in English and in Indian case law, which satisfy us that in enacting section 105, the Legislature laid down no new principle, but put in a crisp and rigid form that which was before generally acted upon : *vide King* v. *Turner* (1), *Rex* v. *Handson*, quoted in Russell on Crimes, Vol. 3, p. 407, *Reg.* v. *James Johnson* (2). In the case of most general exceptions the circumstances which bring the case within a general exception are circumstances within the special knowledge of the accused person and lie within the rule that when any fact is especially within the knowledge of any person the burden of proving that fact is upon him.

However, it is not for us to consider whether the principle enacted in section 105, Evidence Act, was a new or an old principle. It is sufficient that it has been carefully and distinctly laid down by law, and we have no alternative but to follow it. We have gone into the matter at this length because we wish to show that we would have been prepared to go into the question,

(1) (1815) 5 M. and S., 206. (2) (1902) 1 Q. B., 540.

by no means an easy one, viz., how far a subordinate is justified in carrying out the orders of a superior officer which he knows to be illegal, and how far he can set up such obedience as an answer to an act required of him which he knows to be a criminal act. So far as we can see and with all respect to the learned Commissioners that question does not arise for determination in the case. The question referred to us is therefore thus decided:—We hold that, on the evidence upon the record, it cannot be assumed in favour of the constables that they acted under the orders of the Inspector and Sub-Inspectors. It was for the accused and the learned counsel who appeared for them definitely to set forth that they did so, and to prove both the orders and that their action was in obedience to such orders. They have not laid even this foundation for the question which appears to us to lie beyond. It is perhaps not too much to assume that the counsel who appeared for the accused saw great difficulty in proving the existence of such circumstances from the record and thought it prudent to ignore the point. The acts found upon the record are offences. They are not shown to be taken out of the category of offences by any general or special exceptions. The benefit of any assumption that the accused or any of them acted as they did in obedience to orders from superior authority can and may well be given in the sentences that may be awarded. This is our answer to the question; and we direct that it be transmitted to the Judicial Commissioner under the signature of our Registrar in conformity with the provisions of section 10 of Act No. XIV of 1891.