APPELLATE CRIMINAL.

1915
August, 3

Before Justice Sir Pramada Charan Banerji and Mr. Justice Muhammad Rafiq.

EMPEROR *v.* RUSTAM.*

Criminal Procedure Code, section 512—Evidence taken against an accused person who has absconded—Condition precedent to use of such evidence against accused when arrested.

Evidence purporting to have been recorded under the provisions of section 512 of the Code of Criminal Procedure cannot be used against the person concerning whom it was taken, unless it can be shown that before such evidence was recorded it was proved to the satisfaction of the court that the accused had absconded and that there was no immediate prospect of arresting him.

THIS was an appeal against an order of the Sessions Judge of Farrukhabad convicting one Rustam under section 307 of the Indian Penal Code and sentencing him to transportation for life. The facts upon which the charge (originally one under section 302 of the Code was based) occurred so long ago, as 1897, and most of the evidence against the accused consisted of evidence purporting to have been recorded under section 512 of the Code of Criminal Procedure in 1897, 1898 and 1911. In appeal the main contention was that this evidence was inadmissible. The facts of the case are set forth in detail in the judgement of Court.

Mr. *C. Ross Alston*, for the appellant.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

MUHAMMAD RAFIQ, J.—The appellant in this case is one Rustam, who was committed to the Court of Session on the charge of murder under section 302 of the Indian Penal Code. During his trial the learned Sessions Judge added a further charge under section 307, that is, an attempt at murder, and convicting him under that section sentenced him to transportation for life. The murder was committed as long ago as the 3rd of December, 1897. The case for the prosecution is that on the night of the 3rd of December, 1897, the appellant was driving a camel cart from Farrukhabad. On his arrival at Nandsa he had to change the camel, and asked Sad-ullah, who was in charge of the camel that was relieved, to

* Criminal Appeal No. 543 of 1915, from an order of A. Sabonadiere, Sessions Judge of Farrukhabad, dated the 21st of June, 1915.

1915

EMPEROR v. RUSTAM.

help him in the harnessing of the other camel and also to accompany him to the next stage. Sad-ullah refused to go with the appellant any further, upon which the appellant took up an axe and attacked him with it and inflicted blows on the head which resulted in almost instantaneous death. Rustam, the appellant, then ran away and was not heard of till he was arrested this year, and put on his trial. Soon after the murder the chaukidar of the place reported the occurrence and a Sub-Inspector proceeded to the spot at once. The case was sent up to the court on the 24th of December, 1897, and on the same date evidence purporting to be taken under section 512, was recorded. Subsequently it was discovered that the proceedings which were taken in 1897 were incomplete and an order was issued to the police to furnish proper evidence. This was in 1898. A proclamation under section 87 was issued, as also a warrant for the arrest of Rustam, both of which were sent to the district of Mainpuri, of which district he was a resident. One Ata-ullah, a constable of the Mainpuri district, was examined on the 16th of August, 1898, who deposed to having made a search for the appellant and to having failed to find him. On the 3rd of September, 1898, the witnesses who were examined in 1897, were re-examined. Some time in April, 1911, the prosecuting Inspector of Farrukhabad, presumably on going through the old files, came upon the file of this case. He reported that the evidence which purported to have been taken under section 512 of the Code of Criminal Procedure was not legally correct and recommended that fresh proceedings should be taken. In accordance with his suggestion, the case was again taken up by a magistrate of the district and formal evidence of the appellant having absconded was recorded and the only surviving witness Musammat Vilayatan was examined. These facts we have discovered by going carefully through the files of 1897, 1898 and 1911, which are in the record of this case. The only evidence against the appellant on his trial in the present case, consists of the deposition of Musammat Vilayatan, who is alive, and was examined before the learned Sessions Judge, and the depositions of four other witnesses who were examined in 1897, namely, Imtiazan, Husaini, Mohan and Ram Singh. The learned Sessions Judge, by a formal order, dated the 21st of June, 1915, brought the statements of the said four witnesses

on the record as evidence on behalf of the prosecution. We also find the evidence of the said four witnesses recorded in 1898 on the file of the Sessions Court, though no order appears on the file showing how and when and under what circumstances those statements were brought on the record. The evidence of Musammat Vilayatan, as recorded by the learned Sessions Judge at the present trial, was rejected by him. The conviction of the appellant rests on the statements of the other witnesses recorded in 1897. The learned counsel for the appellant contends that the said evidence is inadmissible inasmuch as no proof of the absconding of the accused had been formally received and recorded prior to the examination of the said witnesses. We think that this objection is valid and must prevail. In section 512, it is distinctly laid down that if it is proved that an accused person has absconded and there is no immediate prospect of arresting him, the court competent to try or commit for trial such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution and record their depositions. It is clear from the language of the section that the court which records the proceedings under it, must first of all record an order that in its opinion it has been proved that the accused has absconded and that there is no immediate prospect of his arrest. No such finding appears on the file of 1897, in fact, no evidence was taken in that year to show that the present appellant was absconding and that there was no immediate prospect of his arrest. The evidence of 1897 being inadmissible, the conviction of the appellant on the basis of such evidence cannot stand. But it is suggested on behalf of the Crown that the case should be sent back for re-trial with a direction to the learned Sessions Judge to admit the evidence taken in 1898, inasmuch as that evidence was taken after proof had been received of the absconding of the accused. We find that the only statement in 1898 with regard to the absconding of the accused is that of one Ata-ullah, a constable of the Mainpuri district. He does not say that there is no immediate prospect of the arrest of the accused, nor is there any finding by the Magistrate that he is satisfied that the accused is absconding and that there is no immediate prospect of his arrest. Moreover, we have considered the evidence of the other witnesses who were

1915

EMPEROR v. RUSTAM.

examined in 1898 and are of opinion that their evidence is insufficient to bring the charge home to the appellant. Of the witnesses examined in 1898, Musammat Vilayatan cannot be relied upon. Mohan Chamar and Muhammad Yusuf distinctly say that they did not see Rustam the appellant, strike the deceased. The other witnesses Imtiazan, Ram Singh and Husaini do swear that they recognized Rustam as the assailant of the deceased. It should be observed here that none of the witnesses was present actually on the spot when the assault on Sad-ullah is said to have taken place. All the witneses say that they ran upon hearing the cries of Sad-ullah. Imtiazan and Husaini also ran up. It was a dark night, and, according to Muhammad Yusuf, it was not possible to recognize any person at any distance. There is therefore room for doubt as to the evidence of Imtiazan, Husaini and Ram Singh. In our opinion it would serve no useful purpose to send back the case for re-trial with the direction to admit the evidence taken in 1898. We therefore accept the appeal, set aside the conviction and sentence passed upon the appellant and acquit him of the offence of which he has been convicted, and direct his immediate release.

BANERJI, J.—I concur.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Mr. Justice Tudball.

EMPEROR *v.* BHOLE SINGH.*

1915 *August*, 4.

Criminal Procedure Code, sections 4 and 476—"Complaint"—Statement made to magistrate in his executive capacity - Act No. XLV of 1860 (Indian Penal Code), section 211.

Held that it was not competent to a Magistrate to treat as a complaint, and found thereon such procedure as would naturally follow on a complaint, including a prosecution under section 211 of the Indian Penal Code, a statement which was made to him extra-judicially and without any intention or desire that it should be taken as a complaint, but merely in reply to a question asked by the Magistrate.

THE facts of this case are, shortly, as follows :—

One Paras Ram, who was a village headman, appeared before the District Magistrate of Jhansi and put in a petition stating

* Criminal Revision No. 459 of 1915, from an order of E. A. Phelps, District Magistrate of Jalaun, dated the 6th of April, 1915.