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RAM FAQIR v. BINDESHRI SINGH.

independent execution. We mention this fact as further illustrating our decision upon the preliminary objection.

Appeal decreed.

APPELLATE CRIMINAL.

1918. *July*, 31.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

EMPEROR *v.* BHAGWATI.*

Criminal Procedure Code, section 512—Evidence taken against accused persons who have absconded—Conditions precedent to the use of such evidence against accused when arrested.

A Magistrate recording evidence under the provisions of section 512 of the Code of Criminal Procedure put on record a finding that the accused had absconded, but did not further state that there was no immediate prospect of their arrest. There was, however, evidence on the record from which he might have reasonably inferred that there was no immediate prospect of their arrest.

Held that, the evidence so recorded was admissible against the accused when subsequently arrested. *Emperor* v. *Rustam* (1) distinguished.

THE facts of this case are fully stated in the judgment of the Court.

Mr. *C. Ross Alston* (with him Babu *Piari Lal Banerji*), for the appellant.

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

RICHARDS, C. J., and TUDBALL J. :—The accused in this case has been found guilty of murder and sentenced to transportation for life. The alleged murder took place as far back as the 24th of June, 1904. A trial took place in respect of this murder in the year 1904 and one Khedu was convicted. He was sentenced in the first instance to transportation for life, but that sentence was subsequently enhanced by the High Court to a sentence of death. The present accused was arrested on the 8th of February, 1918, at Madras. He was put upon his trial and convicted and sentenced to transportation for life. The depositions of three witnesses were used as evidence against him. All these three persons were dead. Mr. *Ross Alston*, on behalf of the appellant, has raised the point that these depositions were not admissible. The Magistrate in the year 1904 took the evidence of these

* Criminal Appeal No 459 of 1918 from an order of Abdul Halim, Additional Sessions Judge of Allahabad, at Mirzapur, dated the 31st of May, 1918.

(1) (1915) I. L. R., 38 All., 29.

witnesses having previously made the following order :—" I find that Mahabir and Bhagwati have absconded. The evidence which I am about to take will be regarded as taken under section 512 of the Code of Criminal Procedure as regards Mahabir and Bhagwati." The point raised by the learned counsel is that the omission in the order of an express finding that there was no immediate prospect of arresting the two persons renders the evidence inadmissible. In support of this contention the case of *Emperor* v. *Rustam* (1) has been quoted. In that case a person was put upon his trial some time after an offence had been committed. The evidence of certain witnesses, who had been examined previously, was admitted at the trial. The evidence, it seems, purported to have been taken under section 512. At page 31 the learned Judges say : — " 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 deposition. *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 had absconded 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 "

It would seem from this passage that the learned Judges looked at the file of the previous trial and found that there was no evidence from which the Magistrate could draw the inference that the accused was absconding and that there was no

(1) (1915) I. L. R., 38 All., 29.

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immediate prospect of his arrest. In the present case we find that a witness was examined who proved that the accused were absconding and from his evidence the Magistrate might most reasonably have inferred that there was no immediate prospect of their arrest. In the evidence as recorded by the Magistrate the witness actually said that the accused had absconded and that there was no prospect of arresting them and that action under sections 87 and 88 had been taken by the court. In the passage we have quoted the learned Judge who delivered the judgment says :— "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 . . ."

The section nowhere says that the Magistrate must record a finding. We wish to make it quite clear than in our opinion a Magistrate before recording evidence under section 512 ought to be satisfied that the accused is absconding and that there is no immediate prospect of his arrest, and it is certainly advisable that he should recite in his order that he finds this to be the case. However, in this case we find that the Magistrate had clear evidence that the accused were absconding, and evidence from which the Magistrate might reasonably infer that there was no immediate prospect of their arrest. In his order he expressly states that he is taking the evidence under section 512. The presumption is that the Magistrate did his duty and did not record the evidence under section 512 unlawfully. In our opinion the mere fact that the learned Magistrate did not recite a finding that there was no immediate prospect of the arrest of the accused does not render the evidence inadmissible. In the present case neither of the accused were very promptly arrested. One was only arrested in the present year and the other is still absconding. We think that the evidence was clearly admissible. Once we decide this point we see no reason whatever to differ from the conclusion arrived at by the court below. The evidence was believed at the original trial and there is no reason to doubt it. We dismiss the appeal.

Appeal dismissed.