APPELLATE CRIMINAL

Before Mr. Justice Thom and Mr. Justice Bennet

1933
April, 20

EMPEROR *v.* SHEO DAYAL AND OTHERS*

Indian Penal Code, sections 142, 149—*Rioting with murder, dacoity and arson—Part played by each member not necessary to be proved—Evidence Act (I of* 1872), *section* 106—*Burden of proof—Intention—Criminal Procedure Code, sections* 417, 418—*Appeal against acquittal—Function of appellate court in such appeal—Criminal Procedure Code, section* 162—"*Refer to such writing*".

In a case of rioting with murder, dacoity and arson the prosecution is not called on to prove the part which each accused person took in the riot. The prosecution has to prove in the first place that there was an unlawful assembly and that the unlawful assembly committed various offences of riot, looting, arson and murder; and, further, that each accused person was a member of the unlawful assembly. Having proved so much, the provisions of section 149 of the Indian Penal Code apply, and every member of the unlawful assembly is guilty of offences committed in the prosecution of the common object of the unlawful assembly.

Section 142 of the Indian Penal Code shows that it is sufficient for the offence of riot to be proved against an individual that that individual should remain in an unlawful assembly as soon as he is aware that the assembly is unlawful. The word "continues" in the section merely means physical presence as a member of the unlawful assembly, that is, to be physically present in the crowd.

Also, under section 106 of the Evidence Act, if the defence in a case of riot is that a particular person was present among the rioters with an innocent intention, then the burden of proving that innocent intention lies upon the defence.

The functions of the High Court in an appeal by the Local Government against an acquittal by a Sessions Judge trying a case with assessors are not similar to the functions on a reference by a Sessions Judge who differs from the verdict of acquittal by a jury. In the case of such a reference, no

*Criminal Appeal No. 47 of 1933, by the Local Government, from an order of J. W. Allsop, Sessions Judge of Cawnpore, dated the 29th of September, 1932.

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doubt, the High Court has to see whether the verdict of the jury is perverse. But no such condition applies to section 418 of the Criminal Procedure Code; and what the High Court has to see is whether the offence charged is proved against each of the accused persons, having regard to the definition of "proved" given in the Evidence Act. *Queen-Empress* v. *Gayadin* (1) and *Queen-Empress* v. *Robinson* (2), overruled.

Section 162 of the Criminal Procedure Code applies both where the witness agrees with the previous statement recorded in the police diary and where he does not so agree. Where a witness is called and the statement to the police is made the subject of cross-examination, then according to this section the court should make a reference to that written statement and make a note on the record of what the written statement actually says.

The Government Advocate (Mr. *Muhammad Ismail*) and Mr. *K. Masud Hasan*, for the Crown.

Messrs. *P. L. Banerji*, *Lal Mohan Banerji* and *Sri Narain Sahai*, for the accused.

THOM and BENNET, JJ. :—This is an appeal by the Local Government against the acquittal of certain persons by the learned Sessions Judge of Cawnpore. Originally there were 41 persons prosecuted by the police on charges of riot, murder, dacoity and arson, the crimes being dated the 25th of March, 1931, and of the 41 persons prosecuted, 24 were committed to sessions, and the learned Sessions Judge acquitted all the 24 persons. The Local Government filed an appeal against the acquittal of 9 persons, and of those 9 persons, 3 persons subsequently absconded. We, therefore, have the following six persons before us as respondents: (2) Sheo Swarup, (4) Chhote, (5) Ram Narain, (7) Gobardhan, (8) Manohar Singh, (9) Puttu Singh Kayastha.

The charge is that during the Cawnpore riots of March, 1931, there was a riot with murder, dacoity and arson committed in Bangali Mahal, a mahal of

(1) (1881) I.L.R., 4 All., 148. (2) (1894) I.L.R., 16 All., 212.

Cawnpore city where the majority of the inhabitants are Hindus and there are a certain number of houses inhabited by Muhammadans.

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In the evidence for the prosecution and in the reports there are three main events. The first is the assault on the house of Fakhruddin; the second is the assault on the house of Yasin; and the third is the assault on the house of Mahbub. In each of these three cases murders were committed. * * * * Altogether, it is shown from the evidence that there were 17 persons murdered in Bangali Mahal, mostly women and children. All the houses of Muhammadans in this mahal were burnt and looted. The evidence in the case consists of statements of witnesses who saw these various incidents and sacking of some other houses, such as the house of Muhammad Azim and the house of Jan Muhammad.

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Certain points of law arose in this case. One point arises as to what the prosecution has to prove in the present case. The learned Sessions Judge states: "The question, however, is whether the offences were committed exactly in the manner described by the witnesses and whether the accused were the real culprits." Learned counsel for defence began on these lines and considered that the issues before us were whether different accused persons had taken part in different murders and assaults. We do not consider that the prosecution is called on to prove the part which each accused person took in the riot. The prosecution has to prove in the first place that there was an unlawful assembly and that the unlawful assembly committed various offences of riot, looting, arson and murder. Having proved this the prosecution has to prove that each accused person was a member of the unlawful assembly. We do not consider that the prosecution has

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to prove anything further, and no authority has been shown to us that the prosecution has to prove anything further. Having proved so much, the provisions of section 149 of the Indian Penal Code apply, and every member of the unlawful assembly is guilty of offences committed in the prosecution of the common object of the unlawful assembly. In the present case we consider that the prosecution has proved beyond any reasonable doubt whatever, and this was also held by the learned Sessions Judge, that there was an unlawful assembly on the date in question and at the place in question which committed the offences of riot, looting, murder and arson. The only question, therefore, is whether each of the accused persons was a member of that unlawful assembly. Learned counsel for defence argued that it is possible that certain accused persons were seen in the crowd and that they may have been there with innocent intentions, as the accused persons were all either residents of this mahalla or resided close to it. But section 142 of the Indian Penal Code lays down: "Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly." We consider that this section shows that it is sufficient for the offence of riot to be proved against an individual that that individual should remain in an unlawful assembly as soon as he is aware that the assembly is unlawful. Some argument was made by learned counsel that the word "continues" may have some special meaning. But we consider that it merely means physical presence as a member of the unlawful assembly, that is, to be physically present in the crowd. Learned counsel referred to a ruling in *Har Dayal Singh* v. *King-Emperor* (1). But this ruling was not on a riot at all but on a case where three persons were accused of murder, and therefore it has no application whatever. In the

(1) (1933) 10 O.W.N., 506.

present case there is no doubt that any one who was present in the crowd was at once aware that the crowd constituted an unlawful assembly and that the crowd were committing the offences of murder, arson and looting.

We may also refer to the provisions of section 106 of the Indian Evidence Act, which states: "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him." And illustration (*a*): "When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him." Therefore in a case of riot, if the defence is that a particular person was present among the rioters with an innocent intention, then the burden of proving that innocent intention lies upon the defence. In the present case the defence have given no evidence of any innocent intention for the presence of any accused persons and, in fact, the plea of the accused is that they were not present. The defence, therefore, is not open to the counsel for the respondents.

Another point of law which was argued was what are the functions of this Court in an appeal by the Local Government against an acquittal, and learned counsel for the respondents argued that the functions were similar to the functions on a reference by a Sessions Judge who differs from the verdict of acquittal by a jury. In the case of such a reference, no doubt, this Court has to see whether the verdict of the jury is perverse. But no such condition applies to section 418 of the Code of Criminal Procedure as amended by Act XVIII of 1923. That section provides in sub-section (1) that "An appeal may lie on a matter of fact as well as a matter of law except where the trial was by jury, in which case the appeal shall lie on a matter of law only." It is to be noted that the reference to a trial by jury under this section means

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a trial where the Judge has agreed with the jury in the verdict of acquittal and that the case is not similar to a reference by a Sessions Judge where he differs from the jury. This section 418 as it now stands provides for an appeal on a matter of fact where an acquittal is by a Judge trying the case with assessors. No condition is imposed on this Court in an appeal of this nature. All that this Court has to see is whether the offence charged is proved against each of the accused persons, and for this purpose this Court has to take the definition of "proved" given in the Indian Evidence Act. Reference was made by the learned counsel for the defence to certain early rulings of this Court in *Queen-Empress* v. *Gayadin* (1) and *Queen-Empress* v. *Robinson* (2). These rulings have been overruled by *Queen-Empress* v. *Prag Dat* (3) where it is stated : "Indeed it is not easy to see any distinction in the Criminal Procedure Code between the right of appeal against an acquittal and a right of appeal against a conviction." The matter is also clear from the language of section 418 of the Code of Criminal Procedure.

Another point which occurred in this case was the proper use of statements made by prosecution witnesses to the police. Under section 162 of the Code of Criminal Procedure a special procedure is laid down for the use of such statements. The learned counsel for the defence argued that that procedure only applied where it is desired to contradict the evidence of the witnesses by the statements, and that where the witness agrees with the statement section 162 did not apply. It is no doubt correct that section 145 of the Indian Evidence Act provides that in case it is desired to contradict the witness by the statement, that statement must be put to the witness, and it would follow that where the witness agreed with the statement it would not be necessary to put the statement to the witness. But it does not follow

(1) (1881) I. L. R. 4 All., 148. (2) (1894) I.L.R., 16 All., 212.
(3) (1898) I.L.R., 20 All., 459.

that section 162 does not apply where the witness agrees with the statement. We consider that the language of section 162 is meant to be comprehensive, as it definitely says: "Nor shall any such statement or any record thereof . . . . . be used for any purpose (save as hereinafter provided)." These words are perfectly general. The distinction between a statement and a record thereof is a distinction between the oral statement and the written record in the diary of that oral statement. The language of section 162 therefore covers all cases of any use of the statements to the investigating officer except as excepted by the Code of Criminal Procedure. Now section 162 provides that "The court shall, on the request of the accused, refer to such writing and direct that the accused be furnished with a copy." In the present case the court has merely directed that the accused be furnished with copies of statements of the prosecution witnesses and those statements have been subsequently proved by a general reference to them by the investigating officer. We consider that the court should also have complied with section 162 by making a reference to such writing. By these words we understand that where a witness is called and the statement to the police is made the subject of cross-examination, then the court should make a reference to that written statement and make a note of what the written statement actually says. It is not proper to rely on the memory of a witness as to what he thinks, many months afterwards, he stated to the investigating officer. When the writing itself is available, the court should refer to that writing and make a note on the record. The court has not done so and therefore it has been necessary for us to refer to these statements and see in each case exactly what the statement says. This may be a small matter but it saves a considerable amount of time of a court of appeal if the sessions court carries out the provisions of section 162.

We next proceed to consider the evidence against each of the accused persons.

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There is, in our opinion, a large body of evidence against each of the six respondents before us and the learned counsel for the defence has failed to show that we should reject the evidence of these witnesses as unreliable. On the contrary we consider that the minor discrepancies which have been pointed out in the evidence of the witnesses for the prosecution are discrepancies such as would naturally arise from the long interval of nearly a year and a half from the date of the occurrence to the date of their statements in the sessions court. We see no reason to reject the evidence of any of the prosecution witnesses as false. On the contrary we consider that these witnesses have in the main given a truthful account of what they saw.

Under these circumstances we convict each of the six respondents before us of the offences with which they are charged, namely, 302/307/396/436/149 of the Indian Penal Code. It is not necessary for us to pass separate sentences under each of these sections. We do not consider that the present is a case in which we should award the sentence of death because we have applied the provisions of section 149 of the Indian Penal Code, but we consider that the ends of justice will be met by sentencing each of the six respondents before us to transportation for life and we order so accordingly. The appeal will remain pending against the three absconding accused.