APPELLATE CRIMINAL

Before Mr. Justice Young and Mr. Justice Thom

EMPEROR *v.* SHUKUL AND OTHERS*

1933 *January*, 19

Criminal trials—Duties of prosecution and of courts—Identification by witnesses—Mode of conducting identification—Witness—Whether a witness falsely implicating one accused should be believed as against others—Oath, efficacy of.

In a case of communal rioting with murder 83 persons were committed by the Magistrate for trial, of whom 32 were convicted by the Sessions Judge. 7 of them were sentenced to death, among them being one Shukul. The evidence of 17 principal witnesses went to show that this Shukul was the leader and most active member of the mob, that he scaled high walls, climbed on roofs and acted like a man of powerful physique and athletic prowess and agility. During the hearing of the appeal in the High Court Shukul appeared in Court and was seen to be a wizened and decrepit old man of 70, unable to stand erect; and a medical examination revealed that on account of a peculiar bony formation of his left foot he was unable to stand erect, much less run about or climb roofs, and was a weak, done old man, and that his condition had been the same two or three years ago. The Court thereupon held that the 17 witnesses had committed perjury in respect of their statements regarding Shukul, and no reliance could, therefore, be placed upon their evidence as against the other accused; and as the other evidence in the case was unsatisfactory, the Court acquitted all the accused. In their judgment the High Court made the following observations :—

The duty of the police in the investigation of any crime is to discover the truth and not simply to obtain evidence for the purpose of securing a conviction. It is the duty of the prosecution to lay before the court all the evidence, even though some of that evidence may be in favour of the accused person and may result in an acquittal.

It is the duty of the committing Magistrate and the trial Judge to be solicitous in the interests of the accused. They should take great pains to examine the evidence minutely in considering the prosecution case, especially where

*Criminal Appeal No. 423 of 1932, from an order of W. Y. Madeley, Sessions Judge of Benares, dated the 2nd of May, 1932.

1933

EMPEROR v. SHUKUL

there is a large number of accused. It is emphatically the duty of the Magistrate who commits or the Judge who convicts to see each of the accused before he commits or convicts.

In certain instances, where a witness was unable to pick out a particular accused he had named from amongst the accused persons, the accused person or persons whom it was desired that the witness should identify were asked to stand up and, in one case, also made to give their names, and the witness then identified the accused: This procedure reduced the identification to a mere farce and identification thus obtained was worthless.

In cases where there is reason to believe that certain accused, on the ground of enmity or otherwise, *may* have been falsely charged, then the evidence of those witnesses who have reasons falsely to implicate the particular accused should not be relied on as against that particular accused; on the other hand, the same witnesses might be relied upon against other accused where there is no reason to suspect enmity on the part of the witnesses. Where, however, perjury has definitely been brought home to a witness, it would be extremely dangerous to rely on his evidence against any one. If a witness lies as against one person, his evidence against another should not be relied upon.

There is no religious sanction behind the oath as at present administered to Indian witnesses. A binding oath with religious sanction behind it is one of the foundations of the administration of justice.

Dr. *S. N. Sen*, Mr. *F. Owen O'Neill*, Dr. *K. N. Malviya* and Messrs. *A. M. Gupta* and *Gajadhar Prasad Bhargava*, for the appellants.

The Government Advocate (Mr. *Muhammad Ismail*), for the Crown.

YOUNG and THOM, JJ. :—The appellants in this case are 31 in number. They have been tried in the Sessions Judge's court of Benares for offences under sections 148, 302/149 and 307/149 and 147 of the Indian Penal Code.

* * * * * *

Seven of them have been convicted and sentenced to death under section 302 of the Indian Penal Code and to transportation for life under section 307 of the Indian Penal Code and the rest to transportation for life and

various terms of rigorous imprisonment under section 148 of the Indian Penal Code.

* * * * * *

The offences with which the accused have been charged and convicted are alleged to have been committed in the village of Raiya, police station Punnuganj, on the 16th of March, 1931.

The riot, in which four persons were killed and two seriously injured, was the result of bitter communal antagonism in the district. For some considerable time before the riot hostility between the Muhammadans and the Hindus had been smouldering. Two days before, that is, on the 14th of March, 1931, this hostility flared up in the neighbouring village of Manchi where a riot occurred, the Hindus attacking the Muhammadans. It is unnecessary to go in detail into the events leading up to this riot. These are described by the learned Sessions Judge of Benares in his judgment in the Manchi riot case. Suffice it to refer to the fact that feelings for some time between the two sections of the community had been running high and that the immediate cause of the outburst was the alleged killing of a cow by one Muhammad Raza. The Hindus were determined to avenge the sacrilege and the riot in Raiya in which the accused are alleged to have participated was really a continuation of the riot in Manchi on the 14th of March, 1931. It appears that the Hindus had determined to attack the Muhammadans of village Raipur, which is about one mile distant from the village of Raiya, because the leading Muhammadan in Raipur, Imam Bakhsh, gave shelter to Muhammad Raza who was said to have killed the cow and who succeeded in making good his escape from Manchi on the 14th.

* * * * * *

A large number of the Hindus were rounded up by the police in the village of Raiya and were taken to the thana. The list of their names is Exhibit Y. From these persons the police collected a large number of weapons, axes, spears and *lathis*. No attempt has been made, however,

1933

EMPEROR v. SHUKUL

to prove that any of these weapons was the property of the accused.

A hundred Hindus were subsequently challaned by the police. Ninety-nine appeared before the committing Magistrate who discharged 16 and committed 83. During the course of the trial before the Sessions Judge one accused died. The Sessions Judge acquitted 50 of the charges which were preferred against them and convicted 32. Seven of these have been sentenced to death and the remainder to transportation for life.

This case presents certain special features to which, in view of our decision, we desire at this stage to make reference :—

(1) In this case the prosecution has relied almost entirely upon the oral testimony of the prosecution witnesses. Their evidence has not been supplemented or supported by facts and circumstances such as, for example, the recovery of arms or blood-stained garments. As has been stated above, no attempt was made to identify any of the weapons taken possession of by the police as the property of the accused, and although firearms are alleged to have been freely used, none appear to have been recovered.

(2) The Pandeys of the village of Khalyari who have been convicted and sentenced are all related, being descended from a common ancestor. None of the Pandeys of Khalyari, who, according to the witnesses, took a prominent part in the riot, were rounded up by the police in Raiya and taken to the thana and their names do not, therefore, appear in Exhibit Y already referred to. This is an extraordinary circumstance.

(3) The prosecution witnesses are practically all Muhammadans and many of them are related to Imam Bakhsh, the leading Muhammadan in Raipur where he is known as the Bara Babu. We

append to our judgment a chart showing the relationship of these witnesses.

(4) Between many of these witnesses and a number of the accused there had been long standing enmity—an enmity which is evidenced by numerous civil and criminal actions. We append to our judgment a chart setting forth these actions. If litigation is proof of enmity between witness and accused, enmity, bitter and long standing, has been established in this case.

(5) Two reports were made to the police purporting to give the names of those who took part in the riot. One report is by the witness Ismail, son of Imam Bakhsh, and the other by the witness Ali Husain, brother of Imam Bakhsh. The persons named in these reports, Ismail and Ali Husain say they recognized during the course of the riot. Both reports include a very large number of names and it is impossible to believe that the witnesses recognized and remembered so many of the rioters. Ismail names 60 persons; Ali Husain 90. Both reports were made to the police *two* days after the riot.

The facts above referred to are sufficient to rouse the suspicion that the Muhammadan witnesses may have falsely named a large number of innocent persons. During the course of the hearing of these appeals this suspicion was confirmed by the appearance in court of the appellant Shukul, who had applied to be present.

Shukul is one of the accused who has been condemned to death. As no fewer than 17 witnesses have testified to his having taken part in the riot, and as the view we take of the evidence against him and of his conviction and sentence has so important a bearing upon our decision in all these appeals, we think it proper to set forth *in extenso* what the learned Sessions Judge has said about

1933

EMPEROR v. SHUKUL

his case in his judgment. The learned Judge deals with the case of Shukul at page 233, Volume 2. He states:

"Imam Bakhsh saw the accused on the *mardana* roof. Raghonath says he came to his door along with others taking the crowd to Raiya. Shukrullah saw him among the pursuers of the Mussalmans and mentioned him in the first report. Ali Husain saw him among the rioters. Taj Uddin saw the accused on the northern roof with an axe. Habiban saw accused pursuing Ramzan and Saham Ali. Rajmati corroborates her. Razzaq saw the accused on the roof of the northern room. Tafazzul also saw accused on the roof. Abhaiman says accused took him from his well where he was working. Idan saw him on the roof. Sita Ram saw him running off. Gaya Koeri also names him. Ram Dhani says he was one of the riotous crowd which went to Raipur. Shukul says he was one of those who persuaded witnesses to go to Raiya and that he saw him in Raiya. Jhuri also names him. Farzand says he saw this accused in front of the *baithak*. There is a good deal of discrepancy as to the weapon with which this accused was armed. He is mentioned as being armed with a gun by many witnesses, with an axe by several, and with a sword by one at least. There can be no doubt at all of his presence in the riot. The most that can be said is that he might possibly be given the benefit of the doubt as to what arms he had in his hand. Personally I have no doubt that he was armed with a gun at some time during the riot. Rajmati, who in examination-in-chief, is in clear conflict with Habiban, seems to mean in cross-examination that he had a gun. The same confusion has arisen in the case of Tika who is proved beyond doubt to have shot Farzand and Ramzan. Shukul took a leading part in the riot. Shukul pleads *alibi* in Jadunathpur, district Shahabad. Shukul produced one witness, who denied all knowledge. One of the assessors finds him guilty and two give him the benefit of the doubt. There is no doubt. I, therefore, agreeing with one and disagreeing with two of the assessors convict Shukul of the offences with which he is charged."

It appears, therefore, that no fewer than 17 witnesses have testified against this accused, and if their evidence is to be accepted, Shukul was the leader of the riot. We have very carefully considered the evidence against this accused. He is represented as the moving spirit and the

most active member of the riotous mob. According to the witnesses, in an attempt to induce those people unwilling to accompany the mob he instructed, exhorted, cajoled and threatened. He led the mob from Khalyari to Raipur and from Raipur to Raiya, a distance of 5 miles. From beginning to end he was in the forefront of the riot. He was here, there and everywhere,—urging, leading and directing the mob. He chased the fleeing Muhammadans through the streets of the village of Raiya and led the attack on Raghunandan's house. He climbed on the roof of the house not once but several times. The walls of the house, we have been told, are about 10 feet high. The roof is sloping and tiled. He clambered up the tiles and along with others tore some of them off in an attempt to make a hole in the roof through which he could shoot the Muhammadans who had taken refuge in the house. At one time he is said to be armed with a gun, at another with an axe, at another with a sword. He fired his gun on several occasions whilst on the roof and whilst descending from the roof. It was he who, according to the evidence in the Manchi riot case, took one of the most prominent parts in the riot in that village on the 14th of March. If the evidence against him is reliable he is a man of powerful physique, untiring energy, exceptional endurance, possessed of the strength and prowess of an athlete and the agility of an acrobat.

When Shukul appeared before us in Court he had practically to be carried in by two police constables. He is a wizened old man of about 70 years of age. He is in the last stages of senility and physical decrepitude; he is unable to stand erect. He has little power of movement and he is just able to hobble slowly about. In view of the weight of the evidence to the effect that he was the leader of the riot, and of the fact that so many witnesses had testified on oath to the extraordinary feats he performed during the course of the riot, we considered it advisable to have him examined by the Civil Surgeon of Allahabad. We append a copy of the Civil Surgeon's

1933

EMPEROR v. SHUKUL

evidence upon his condition to this judgment. In the course of his evidence the Civil Surgeon states: "Shukul is a weak, done old man. He is unable to run. His muscles are very weak and flabby and he is unable to adopt by himself the erect posture. His condition now is about the same as it has been for the last two or three years. Two years ago it would have been impossible for him to climb upon the roof of a house or to run about the village of Raiya chasing Muhammadans. If he were left to himself today he might be able to hobble along for 2 or 3 miles and this would take him the better part of the day. His ability to move about would be the same as two years ago. He has two extra sesamoid bones in his left foot. These bones are so placed as to cause him pain when he uses his foot in the ordinary manner."

In addition to having this accused examined by the Civil Surgeon we called for reports from the Superintendents of the District Jails of Mirzapur and Benares, where he has been incarcerated since his arrest. There is no mention in these reports of his having suffered from any illness or physical deterioration during his imprisonment.

During the hearing of these appeals the prosecuting inspector, who was present when the case was being heard before the committing Magistrate and during the course of the trial in the court of session, has informed us that the man who appeared before us as Shukul Pandey is the same man who was arrested after the riot and who appeared before the committing Magistrate and who was tried, convicted and sentenced upon the evidence to which we have already referred, in the sessions court.

As has already been mentioned, this accused was alleged to have taken a prominent part in the Manchi riot. In connection with that riot he was tried, convicted and sentenced to transportation for life. On appeal to this Court, however, he was acquitted. We have examined the file in the Manchi riot case. We find that he was

convicted in that case upon the evidence of two witnesses Dukhi and Mt. Bachchi. According to Mt. Bachchi, Shukul was one of the men who entered the house in which Rasul, one of the men who was murdered in the course of the Manchi riot, had taken refuge, and he assisted in dragging Rasul out. It appears from the judgment in the Manchi riot case that the witness Dukhi in identification identified Sumer Pandey as Shukul Pandey. Sumer Pandey is a man of between 30 and 40 years of age. Shukul Pandey is a decrepit old man of about 70. No one who had seen Shukul Pandey in a mob could honestly mistake him for Sumer. In this connection we would note further that Shukul is mentioned in the first information report and also in the statements which the learned Sessions Judge regards as confessions made by the accused Mauj, Damri, Harnandan and Misri under section 164 of the Criminal Procedure Code. These statements were subsequently retracted, the accused alleging that they were made as the result of pressure and ill-treatment on the part of the police. The fact that Shukul, who, for the reasons we have already given, could not have taken part in the riot, is mentioned in these statements supports the allegation that they were not made voluntarily.

In view of all these facts there is no doubt left in our minds that Mt. Bachchi and Dukhi in the Manchi riot case and the 17 witnesses who testified against Shukul in the present case have been guilty of the grossest perjury and have implicated this accused falsely. Mt. Bachchi also gave evidence against some of the accused in this case.

We find it impossible to understand how Shukul was ever challaned in connection with this case. It must have been clear to the police that it was absolutely impossible for him to have taken part in the riot at all. We have been told that on his arrest he was conveyed to the police station in a motor car. We are equally at a loss to understand how he was committed for trial by the

1933

EMPEROR v. SHUKUL

committing Magistrate. His appearance should have been sufficient to have convinced the committing Magistrate that the prosecution case against him was completely false. Further, we are unable to understand how he came to be convicted by the learned Sessions Judge. If the learned Sessions Judge had seen the man whom he was condemning to death he could not have failed to have been convinced that the evidence against him was false from beginning to end.

We now consider the bearing of the clearly false implication of Shukul upon our decision in the appeals of the other accused. So far as Shukul is concerned, we unhesitatingly acquit him, finding that the case against him is false. Seventeen witnesses have sworn on oath that he took an active part in the riot. These 17 witnesses are guilty of perjury. They have given false evidence against one accused charged with murder. We have come to the conclusion that we cannot rely upon their evidence as against the other accused. We refuse to believe their testimony against any of the accused. For the same reason we refuse to accept the testimony of Mt. Bachchi, who gave evidence against Shukul in the Manchi riot case and whom the learned Sessions Judge in this case regards as a good and reliable witness. Mt. Bachchi has clearly been guilty of perjury against Shukul in the earlier case. We decline to accept her testimony against any of the accused in the present case.

The prosecution has called in this case 46 witnesses, apart from those who are formal. Of these 18 must be discarded as "Shukul" witnesses. Of the rest only Mt. Gulzari, Nur Muhammad, Bhola, Akhtar Ali, Majid, Guput, Bismillah and Kishun escaped criticism by the Sessions Judge. Most of the criticism is serious as will be seen from the appendix to this judgment. * * * * * It will thus be seen that there is really no evidence on which this Court can rely. The learned Sessions Judge has refused to rely on witnesses whom he has severely criticised in the cases of some accus-

ed, but has relied upon the same witnesses against others without giving any reason for his action. We cannot find any reason either. For example, in the case of the accused Sarangi, whom the learned Sessions Judge has acquitted, the witnesses are Imam Bakhsh, Ali Husain, Ismail, Sita Ram and Jhuri. None of these witnesses are, according to the Judge, first class witnesses, and some have been severely criticised, and therefore he states that there is doubt about Sarangi having taken part in the riot and he gives this accused the benefit of the doubt. In considering the cases of some of the other accused, however, the learned Judge has relied upon the evidence of these same witnesses and has recorded a conviction. This is only one example. There are others.

For the sake of convenience we append to our judgment a chart prepared at our request, showing the criticisms of the learned Sessions Judge of the witnesses in this case. On the evidence of these witnesses the learned Sessions Judge has acquitted in some cases but convicted in others.

The result is that we are compelled to allow all the appeals and set aside all the convictions and sentences. No doubt some guilty persons are thus set free and some murderers go unpunished, but to find any particular person guilty in this case upon such evidence would be a sheer gamble.

In view of the circumstances of this case and of the decision at which we have arrived we consider it expedient to make certain general observations with regard to the administration of justice :—

(1) The duty of the police in the investigation of any crime is to discover the truth and not simply to obtain evidence for the purpose of securing a conviction.

(2) It is the duty of the prosecution to bring out in evidence everything in favour of an accused person and to lay before the court all the evidence even though some of that evidence may result in an acquittal.

1933

EMPEROR v. SHUKUL

(3) It is the duty of the committing Magistrate and the trial Judge to be solicitous in the interests of the accused. This is especially so in riot cases where the accused are generally humble and ignorant people unable to defend themselves, and often inadequately represented in the courts. (Under Indian law they are not even allowed to give evidence for themselves. If Shukul could have been put in the witness-box the whole aspect of the case for the prosecution would have been changed.) Had the committing Magistrate and the learned Sessions Judge in this case observed this rule the accused Shukul Pandey would never have been committed for trial or convicted. We recognize the difficulties of the Judges in the lower courts, especially in cases such as the present where there is a large number of accused. But it is just in these cases that Judges should take great pains to examine the evidence minutely in considering the prosecution case, with a view to protecting the accused. We would state further that it is emphatically the duty of the Magistrate who commits or the Judge who convicts to see each of the accused before he commits or convicts and passes sentence. If the learned Sessions Judge had appreciated the condition of Shukul Pandey, we are convinced he would never have convicted him and sentenced him to death. It is to be noted that in the lower courts counsel for Shukul never drew the attention of the court to the condition of his client. The point was taken for the first time in this Court. This is one of the amazing facts of this case.

(4) We are of opinion that in many cases sufficient importance is not attached to the identification of accused by witnesses in the trial court. In the present case it appears that in certain instances a witness was unable to pick out a particular accused he had named from amongst the accused. When this occurred, the accused person or persons whom it was desired that the witness should identify were asked to stand up, and in one case, at any

rate, made to give their names. The witness then identified the accused.

This procedure reduces identification to an utter farce. Identification by a witness thus obtained is worthless. We note here some examples of the method that has been adopted in the sessions court :

(i) "(Picks out all except Dangai and Saggam's brother, Hira Lal, and Saggam. Also at first he picked out Mahesh for Sadhu but then picked out Sadhu correctly. *Dangai, Saggam and Hira Lal made to stand up.*) 'These are Dangai, Saggam and Saggam's brother.' (Picks them out correctly.)"

(ii) "(Picks out Morahu only.) 'Before the lower court I recognized only Morahu and Baijnath. Now I only *recognize Morahu.*' (*Baijnath made to stand up.*) 'This is Baijnath.' "

(iii) "(Witness fails to identify accused. Panaru, Misri and Banwari made to stand up *and give their names.*)

Q.—Do you recognize these men?

A.—Yes."

We are amazed that such procedure was tolerated by the Sessions Judge or allowed to pass without objection or comment by counsel for the accused.

(5) It was argued by counsel for the Crown that even though the "Shukul" witnesses had committed perjury in their evidence against Shukul their evidence ought to be taken into consideration against other accused. It was contended that this was in accordance with the general practice in the courts in India; that in most criminal cases false evidence was given on one side or the other or even on both; that if prosecution witnesses were discredited as against all the accused because they had committed perjury in the case of some accused, prosecutions in India would seldom be successful and criminals would escape punishment.

It is unfortunately true that in India it is often the practice for complainants to implicate their enemies

1932

EMPEROR v. SHUKUL

falsely in criminal cases. This, of course, makes the trial of accused persons a matter of great difficulty and anxiety to all Judges. We think, however, that the argument of counsel is too broadly stated. It is seldom that the court can come to a definite conclusion that perjury has been *proved* to have been committed by particular witnesses. The correct procedure, in our opinion, is that in cases where there is reason to believe that certain accused, on the ground of enmity or otherwise, *may* have been falsely charged, then the evidence of those witnesses who have reasons falsely to implicate the particular accused should not be relied on as against that particular accused; on the other hand, the same witnesses might be relied upon against other accused where there is no reason to suspect enmity on the part of the witnesses. Where, however, perjury has definitely been brought home to a witness, it would be extremely dangerous to rely on his evidence against any one. This proposition is frequently stated as follows: "If a witness lies as against *A* his evidence against *B* should not be relied upon without corroboration." We do not think there is much difference in this way of stating the proposition. The *effect* is the same; the evidence of the witness is in reality *not* relied upon. We cannot see why such a witness should be believed on oath at all.

This case brings into sharp relief the futility of the oath as at present administered to Indian witnesses. We have frequently been assured by Indian counsel of great experience that this oath is, in the case of many Indian witnesses, of no binding effect; and indeed that is our own experience. There is a common phrase in this province which clearly illustrates this: "*Sach bolo; adalat men nahin ho*", that is, "Speak the truth; you are not now in a court of law." There is behind the present oath no religious sanction. Further, witnesses know that courts hesitate to put the law in motion against perjurers. The courts in India are so greatly in arrear with work as it is, and the increase of work, if prosecutions for perjury

1933

EMPEROR v. SHUKUL

were regularly instituted, would be extensive. There is thus little penal sanction behind the oath either. A binding oath with religious sanction behind it is one of the foundations of the administration of justice. We think if there were such an oath in India, especially in the case of villagers who provide 90 per cent. of the witnesses in criminal cases, perjury would be no more prevalent than elsewhere; and the difficulty in trying such cases would largely disappear. The pressure on the courts of justice of the mass of litigation of all kinds would also be reduced. Fewer false cases would be brought, and, if brought, fewer witnesses would be found to support them.

We now deal with the cases of individual appellants.

* * * * *

In the result, for the reasons given, we set aside the convictions and sentences of all the appellants and direct that they be set at liberty forthwith.

APPELLATE CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice Kisch

ADYA PRASAD SINGH (JUDGMENT-DEBTOR) *v.* LAL GIRJESH BAHADUR (DECREE-HOLDER)*

1933 *January*, 19

Civil Procedure Code, order XXI, rule 2(1)—*Decree-holder certifying payment—No "application" involved—Application to take a step in aid of execution—Limitation Act (IX of* 1908), *article* 182(5)—*Application by judgment-debtor filing a letter of decree-holder agreeing to give time—Acknowledgment—Limitation Act (IX of* 1908), *section* 19.

The terms of order XXI, rule 2(1) of the Civil Procedure Code involve no application, and the mere certification by the decree-holder of a payment of money under the decree is not an application to take some step in aid of execution of the decree within the meaning of article 182(5) of the Limitation Act, even if an "application", in the form of a

*First Appeal No. 57 of 1932, from a decree of Muhammad Junaid, Subordinate Judge of Basti, dated the 16th of January, 1932.