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mortgage bond providing for increased interest in case of a breach as penal and to refuse the increase. Section 74 of the Contract Act was relied on. This section was enacted in 1899 but under the law as it stood in 1897 a stipulation in a mortgage bond providing for increased interest in case of a breach was not regarded as penal if it referred to future interest only and was not retrospective. This point, therefore, would not have been open and no other defence has been suggested.

In my opinion this appeal should be dismissed with costs to the respondents who have appeared.

FOSTER, J.—I agree.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mullick and Kulwant Sahay, JJ.

RAMJIT AHIR

v.

KING-EMPEROR.*

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Dec., 15.

Practice—prosecution, duty of, to call material witnesses—effect of omission to call some of the eye-witnesses.

Where there are eye-witnesses to an occurrence and the prosecutor does not call some of them the court is entitled to draw an inference adverse to the prosecution but if the witnesses called by the prosecution are otherwise worthy of credit the court is not entitled to disbelieve them simply on the ground that the others have not been called.

The police are not bound to send up as a witness a person whose statement they believe to be false or whose evidence they believe will be unnecessary at the trial.

Queen-Empress v. *Durga*(1), applied.

*Criminal Appeal No. 166 of 1922, from a decision of Phanindra Lal Sen, Esqr., officiating Sessions Judge of Shahabad, dated the 16th September, 1922.

(1) (1894) I. L. R. 16 All. 84, F.B.

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The facts of the case material to this report are stated in the judgment of Mullick, J.

S. M. Yusuf (with him *S. Bashiruddin*, *Guru Saran Prasad*, *Anand Prasad* and *Sant Prasad*), for the appellant.

H. L. Nandkeolyar, Assistant Government Advocate, for the Crown.

MULLICK, J.—The appellant, Ramjit Ahir, has been sentenced to rigorous imprisonment for eighteen months under section 325, Penal Code, for having, on the 4th May, 1922, struck Japit Ahir with a brick or a piece of a brick and thereby caused his death. The occurrence took place about an hour before sunset on the 4th May. Japit was taken to the Arrah Police-station about 4-30 *p.m.* on the 5th May. He complained of pain in the abdomen, but the Sub-Inspector in charge did not think it necessary to record a first information and after making an entry in the station diary sent him to the hospital. On the 6th May at 6-25 *p.m.* in consequence of a report made by the Assistant Surgeon, Japit's dying declaration was recorded by a Deputy Magistrate. On the 7th at 1 *p.m.* the Sub-Inspector having come to hear of Japit's condition recorded a formal first information. Japit died that evening in hospital and a *post mortem* report made on the following day disclosed the fact that his bowel was ruptured and that death had taken place owing to acute peritonitis. The appellant, Ramjit, was arrested on the 7th May. The record does not show on what date the remaining accused Deoraj Ahir, Ramdas Ahir, Lachmi Ahir, Sheobalak Ahir, Ramlopit Ahir, Chandrika Ramavatar and Mangal were arrested.

The learned Sessions Judge of Shahabad, agreeing with one assessor and disagreeing with the other, has acquitted all the accused except Ramjit. The latter assessor was of opinion that all the accused should be convicted of an offence under section 147.

The case made in the Session Court by the prosecution was that the appellant's party were drinking in the toddy shop of Ramlagan Passi when the complainant Nathuni Ahir and five other Ahirs of Badka Chanda arrived and purchased a pitcher of toddy for four annas; that when they sent Ramlagan's wife into the room, in which the appellant's party were drinking from a cup, Ramjit got angry with the woman for having sold toddy to men from Badka Chanda, who had the previous day impounded the cattle of the men of Chotka Chanda, and he came out and carried into the shop the pitcher of toddy which the complainant's party had purchased; that thereupon an altercation took place with the result that the ten men from Chotka Chanda, reinforced by Deoraj Ahir of the same village, who had been standing at his door close by, attacked the Badka Chanda men with bricks which they took from a stack near a well which was under repair. The complainant's party while retreating appear to have retaliated in like manner with the result that Japit, who had run up from his *kalihan*, was struck in the abdomen, as stated above, by Ramjit. On the same side were injured Jhulan, Nathuni, Sarwan and Sitaram. On the other side were injured Ramdas, Lachmi and Ramjit. The injuries of all, with the exception of Ramjit, were slight and are consistent with the allegation that they were caused by pieces of bricks. The evidence shows that Jhulan, who was Japit's cousin, ran up towards the end of the fight and struck Ramjit with a *lathi* on the head on finding Japit on the ground.

The defence at the trial was that the occurrence had taken place not at the toddy shop but in the sugarcane field of Jeobodhan about one hundred yards to the south-east of the shop because some cattle belonging to Nathuni and four others of Badka Chanda had been seized by the accused for trespass and were rescued by Kobari, Jhulan and other men of that village. A complaint to this effect was lodged before a Deputy Magistrate at Arrah on the 5th and there is evidence

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that the village *chaukidar*, Gotahul, gave certain information to the Officer-in-charge of the police-station at 10-30 *a.m.* on the 5th. The contents of the police officer's memorandum are not legal evidence in this case.

The learned Sessions Judge has accepted the case put by the defence and disbelieved the whole story as to the occurrence over the pitcher of toddy. It is difficult in the circumstances to understand why he has, while acquitting nine of the accused, convicted Ramjit. His finding seems to be that Ramjit did strike Japit in the course of the cattle rescue. He does not find whether the blow was inflicted with a brick or with a *lathi*, nor whether there was any right of self-defence. There is also no finding as to the circumstances under which Japit's death was caused, and it is difficult to understand how the sentence under section 325 can be sustained in the absence of a decision on these essential points.

But in my opinion the learned Sessions Judge is wholly wrong in the view he took of the evidence. The story told by the prosecution appears on the face of it to be more natural than that told by the defence. It is impossible to conceive that the scene would have been laid at the *pasi khana* if there had not been some occurrence there. The bricks were found by the police on the morning of the 8th, scattered about over an area of $5' \times 5'$. The defence give no explanation for the death of Japit; the bricks certainly corroborate the prosecution. The prosecution witnesses have no doubt made contradictory statements as to the exact place where Japit fell, but it seems quite clear, on a careful examination of the whole evidence, that Japit fell in a *bujra* field about ten yards from the verandah of the toddy shop. A *bujra* crop had been grown upon the site, but at the time of the occurrence it was waste and on the evidence it is spoken of either as *parti* or a path-way. There is no substance in the suggestion that the prosecution have laid the scene at a place two or four *rassis* from the shop.

Then, as regards Japit's presence, it is clear that he was not there when the quarrel originated but arrived when it was going on.

The learned Sessions Judge has been considerably influenced by the discrepancies as to the course of the earlier part of the quarrel. It appears that on the 7th May, when examined by the Sub-Inspector, Nathuni stated that he and four others were drinking below the verandah when Ramjit came and joined a number of his co-villagers who were drinking inside the shop and that Ramjit straightaway began to abuse the Badka Chanda men for having come to drink there. This story is certainly inconsistent with that told at the trial which was to the effect that Ramjit was in the inner room from the beginning and that the complainant's party had not begun to drink but had merely asked for a cup when Ramjit began the abuse. In my opinion no very great importance ought to attach to this discrepancy. There was no object in telling a different story in Court and it may well be that the statement recorded under section 161, Criminal Procedure Code, by the Sub-Inspector was in no sense exhaustive and that the more detailed and accurate sequence of events has been elicited in the trial. If the case had been a concocted one, I should have expected no variation in this part of the story.

Then as to the weapon with which Japit was struck, Ramkishun said to the Sub-Inspector that Ramjit struck Japit with a *lathi* and Jhulan states that Japit had a *lathi* in one hand and was throwing bricks with the other. The balance of evidence is entirely in favour of the witnesses who state that Japit was struck with a brick. Jhulan may be right in saying that Japit had also a *lathi*, but it is certain that the injuries upon Japit and those on his side were inflicted not with *lathis* but with bricks.

The learned Sessions Judge next draws attention to the fact that neither Ramlagan Passi nor his two

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brothers nor his wife, nor some strangers from other villages who were proved to have been present in the shop, have been called by the prosecution.

With regard to Ramlagan and members of his household, it is scarcely likely that they would give evidence against their own customers. Their inclination would be to say that nothing disorderly had taken place at their shop which they hold under a license from Government. With regard to the men from other villages, it has not been shown that the police had information as to who these persons were.

The seven eye-witnesses called for the prosecution are certainly men of the same party and all of them have a feud with Ramjit's party and the Court was entitled to take this fact into consideration in weighing their evidence and to draw an inference adverse to the prosecution on the ground that independent eye-witnesses had not been called; but I do not think that if the witnesses called by the prosecution are otherwise worthy of credit, the Court was entitled to disbelieve them simply because some persons, who could have thrown light upon the case, have not been put before the Court by the prosecution. It has sometimes been said that it is the duty of the prosecution to call all the witnesses who prove their connection with the transactions connected with the prosecution and who must be able to give important information; if such witnesses are not called without sufficient reason being shown the Court may properly draw an inference adverse to the prosecution. But this statement of the rule is, in my opinion, too wide and has been qualified by a Full Bench of the Allahabad High Court in *Queen-Empress* v. *Durga* (1). The Court there observed as follows:

"In our opinion a Public Prosecutor should not refuse to call or put into the witness-box for cross-examination a truthful witness returned in the calendar

(1) (1894) I. L. R. 16 All. 96, F.B.

as a witness for the Crown merely because the evidence of such witness might, in some respects, be favourable to the defence. If a Public Prosecutor is of opinion that a witness is a false witness or is likely to give false testimony if put into the witness-box, he is not bound to call that witness or to tender him for cross-examination." It would seem also to follow that if the police consider a witness to be a false witness or that his evidence is unnecessary, they would be justified in not sending up that witness as a witness for the prosecution and his absence at the trial ought not to be a reason for disbelieving the prosecution witnesses if they are otherwise worthy of credit. It is of course not for the police or for the Public Prosecutor to champion a particular theory and to suppress the evidence of a reliable witness simply because his testimony is inconsistent with it; but that proposition does not, in my opinion, affect the present case. The sole question is whether the witnesses called can be believed on the main points and, in my opinion, the answer should be in the affirmative. The learned Sessions Judge has drawn attention to Japit's delay in lodging information. The explanation given by the prosecution is that Japit was waiting for the return of Kobari, the head of the family, who was absent from home that night. The defence allege that Japit was in his house all along and that he took part in the cattle rescue which is the subject of their counter case; but there is no reliable evidence on the record to support these allegations. On the following day Japit was started off in a cart just before Kobari returned and Kobari overtook him before Japit had left the village. In the circumstances I do not think the omission to go straightaway to the *thana* immediately after the occurrence is evidence that a false story was being concocted.

Having regard to the fact that no external injury was visible and that Japit was only complaining of pain in the abdomen, the probability is that if the

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accused's party had not set out for Arrah for the purpose of lodging a complaint, Japit would not have gone to the police at all. Even the Sub-Inspector who saw him did not consider the case serious and declined to record a first information. The absence of any external mark of injury is not necessarily destructive of the case that the injury was caused by a brick. The Medical Officer was not examined upon this point and it is possible that a blow in the abdomen is less likely to leave a mark than one on a less elastic and resilient part of the anatomy.

I think, therefore, on a careful review of the evidence, that the appellant should have been convicted of the charge of rioting with the common object of beating Nathuni and others. But as he has been acquitted of that charge, the only question is whether the conviction under section 325 can be sustained. Now, having regard to the fact that the brick was hurled from a distance of a few paces there could have been no difficulty in recognizing the person who hurled it. There was no doubt a free fight, both sides using bricks, but for all that there does not seem to be any reason for disbelieving the allegation that Japit fell on being struck by Ramjit in the stomach. There is no evidence, however, as to the size of the missile and it is difficult to believe that Ramjit acted with the knowledge that he was likely to cause death.

An offence under section 325, however, has been made out, but having regard to the circumstances and to the fact that each party was pelting the other with whatever they could pick up, I think a sentence of six months' rigorous imprisonment will meet the ends of justice. The sentence is accordingly reduced to that period.

KULWANT SAHAY, J.—I agree.

Sentence reduced.