

APPELLATE CRIMINAL.*Before Rowland and Madan, JJ.*

KING EMPEROR

v.

BAHARUDDIN.*

Code of Criminal Procedure, 1898 (Act V of 1898), section 512—evidence recorded at the trial when admissible against absconding accused—separate proceeding, if necessary—procedure.

When an accused person is tried and other accused persons are absconding proper steps ought to be taken at the time of the trial of the first accused in accordance with section 512 of the Code of Criminal Procedure to prevent necessary evidence from being lost by death of the witnesses or otherwise.

It is not necessary to start a separate proceeding under section 512 of the Code. It will suffice if at the commencement of the inquiry or trial the prosecutor proves that a certain person is absconding and gets an order from the court that the evidence about to be taken is being taken for the purpose of being used against the absconder.

Ghurbin v. Queen Empress(1) and *Sheoraj v. Emperor*(2), referred to.

Reference under section 374 of the Code of Criminal Procedure, 1898.

The facts of the case material to this report are set out in the judgment of Rowland, J.

S. A. Manzar, for the appellant.

Jafar Imam, Assistant Government Advocate, for the Crown.

ROWLAND, J.—This is a reference by the Sessions Judge of Santal Parganas for confirmation of the

*Death Reference no. 26 of 1936 and Criminal Appeal no. 241 of 1936. Reference made by S. Bashiruddin, Esq., Sessions Judge of Santal Parganas, Dumka, in his letter no. 28/D.B., dated the 22nd September, 1936.

(1) (1884) I. L. R. 10 Cal. 1097.

(2) (1926) I. L. R. 48 All. 375.

1936.

October, 11.

sentence of death passed under section 302 of the Indian Penal Code on Baharuddin *alias* Bahardi Shaikh, convicted of the murder of Noor Muhammad. The prisoner has also appealed from his conviction.

1936.

 KING-
EMEROR

 v.
BAHARUDDIN.

ROWLAND, J.

The crime is said to have been committed on the evening of Monday, 23rd May, 1932, by the accused and two other persons Bara Raju and Chhota Raju. Of these Bara Raju was arrested not long after the crime and was tried and convicted. Chhota Raju has not yet been arrested. The prisoner was arrested on the 27th April, 1936.

The deceased was son of Samardi or Samaruddin Momin of village Gaganpahari, police-station Pakaur, and was living in his father's house. He was in the habit of going out in the evenings to music parties in company with Bara Raju, Chhota Raju and the prisoner with whom he was outwardly at least on good terms. It is the prosecution case that on the 23rd May at about candle-light time Chhota Raju called Noor Muhammad who went with him, a drinking party had been arranged consisting of the two Rajus, the prisoner and Noor Muhammad. Toddy was brought for them by the witnesses Jerat and Waris, and the party all drank together. Then a scuffle arose, Bara Raju, Chhota Raju and the prisoner attacking Noor Muhammad. The prisoner cut the throat of Noor Muhammad. Subsequently the body was thrown in the river Katasi about a mile away to the north. It is certain from the evidence of Samaruddin and other witnesses that Noor Muhammad was not seen alive after 23rd May. The family were apparently not particularly anxious on the Tuesday, but serious inquiries were made on Wednesday, May 25th, which did not lead to any clue. On Thursday, 26th May, Samaruddin accompanied by chaukidar Parbati went to the police-station and reported the absence of his son. He again went to the police-station the following day, the 27th May, and informed the Sub-Inspector of a clue that he had obtained from Mohar

1936.
 KING-
 EMPEROR
 v.
 BAHARUDDIN.
 ROWLAND, J.

Shaikh. This Mohar was not available as a witness in the present proceedings, it being in evidence that he died about two years ago. The police took no action beyond making an entry in the station diary on Samaruddin's report of 27th. Thereafter Samaruddin obtained a further clue from Munshi Momin in consequence of which he went to the police-station again on Sunday, 29th May, and laid a first information of the murder against Turag, Chhota Raju, Bara Raju and Baharuddin. The Munshi who gave the clue referred to in this first information, died before the trial of the prisoner but had been examined in the Committing Magistrate's Court. His deposition has been taken in evidence under section 33 of the Indian Evidence Act. The substance of his deposition is that late at night on the Monday he saw Turab Biswas, Bara Raju, Chhota Raju, the prisoner and Sulaiman going towards the river Katasi and that Turab was carrying a heavy bundle on his head. There was no cross-examination in the commitment proceedings, and we have, therefore, no material on this record for testing the veracity of Shaikh Momin. It may, however, be significant that from the day that Munshi made that statement to Samaruddin the accused was missing from the village. The Sub-Inspector took up investigation and on the same day obtained the statement of Jerat, one of the witnesses put forward by the prosecution to prove the crime. It was on the 30th May that chaukidars found the body lying in the bed of the river Katasi, which suggests that it had in fact been taken in the direction previously indicated by Munshi. The discovery was reported to the Sub-Inspector who held inquest on the 31st. The dead body was tied up in a black striped chadar, cloth twisted twice round the neck, the throat was cut, and there were two marks of injury on the chest. These latter injuries are described by the Sub-Assistant Surgeon who held the post-mortem examination, as confusion marks and lacerated wound, both superficial; but the injury to the neck was a wide gaping wound

right across the throat separating all the structures up to the vertebral column and was the cause of death. The other eye-witness Waris was not examined till the 10th June. He left the village on Saturday (28th May) and explains his absence by saying that he had gone to Pindatola in search of employment. The direct evidence of the crime is only that given by Jerat and Waris.

1936.

KING-
EMPEROR
v.
BAHARUDDIN.
ROWLAND, J.

[His Lordship then referred to the evidence in the case.]

We have it from Leta Bibi (p.w. 2), mother of the deceased, that on the night of occurrence Chhota Raju called at her house for Noor Muhammad and they went away together. Similar evidence is given by Heytan Bibi, widow of deceased's brother Bahalin and by Kismat Bewa, sister of Samaruddin.

But it is suggested that Samaruddin was unable to tell the Sub-Inspector the name of the person with whom Noor Muhammad had gone out, till 27th May when he made his second report after getting a clue from Mohar Shaikh.

The reports of 26th and 27th May are not on the record of this case, having apparently by some mistake been destroyed: but they are summarised in the judgment of the earlier trial which has been exhibited, and in the interests of accused we have allowed Mr. Manzar to make use of what is there stated. Chhota Raju's name does not appear to have been mentioned on 26th May but there was a reference in the report of that date to music parties and Samaruddin appears to have been at the time of making that report under the impression that deceased had gone to such a party though it is not expressly stated.

The evidence of the women is therefore not altogether discredited by the absence of the name of Chhota Raju in the report of 26th May; and I believe they

1936.
 KING-
 EMPEROR
 v.
 BAHARUDDIN.
 ROWLAND, J.

have deposed truthfully. It is unfortunate that we have not the evidence of Mohar Shaikh from whom Samaruddin got the clue which led to his second report on 27th May: Mohar was examined at the trial of Bara Raju in 1932, but his depositions cannot be used, the procedure laid down in section 512 of the Code of Criminal Procedure not having been taken; see *Ghurbin v. Queen Empress*⁽¹⁾ and *Sheoraj v. Emperor*⁽²⁾. It is regrettable that so often in cases where an accused person is tried and other persons accused are absconding, it is subsequently found that no proper steps have been taken at the time of the former trial to prevent necessary evidence from being lost by death of the witnesses or otherwise. I do not understand it to be laid down by the Judges in *Sheoraj's* case⁽²⁾, nor is it in my view the law that for the purpose of being used under section 512 the depositions of witnesses must be recorded over again in a separate proceeding. It will suffice if at the commencement of the hearing the prosecutor brings to the notice of the court the fact that such a person is absconding, examines a witness or witnesses to prove that fact and obtains a direction of the court that the evidence about to be taken is being taken for the purpose of being used if necessary against the absconder under section 512 as well as against the person present and under trial.

[The rest of the judgment is not material for the purposes of this report.]

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I would affirm the conviction, dismiss the appeal, accept the reference and confirm the sentence of death.

MADAN, J.—I agree.

Appeal dismissed.

Sentence confirmed.

J. K.

(1) (1884) I. L. R. 10 Cal. 1097.

(2) (1926) I. L. R. 48 All. 375.