APPELLATE CRIMINAL.

Before Mr. Justice Broadway and Mr. Justice Fforde.

ALLU AND OTHERS—**Appellants**

versus

THE CROWN—Respondent.

1923

June 5.

Criminal Appeal No. 238 of 1923.

Criminal Procedure Code, Act V of 1898, *sections* 353, 537—*Trials of* 2 *sets of prisoners, opposite parties in a fight—Evidence for prosecution against one set being treated as defence evidence in the cross-case—consent of accused and their counsel—Illegality —whether cured by such consent or by section* 537.

On the 16th July 1922, a serious fight took place between two parties of Muhammadan *Jats*, the *Wahniwals* and the *Baghelas*, resulting in the death of one person and injuries to several others. Of the *Wahniwal* party Allu and others (seven in all) and of the *Baghela* party Hasta and 3 others were brought to trial and with the exception of Hasta all were convicted. The trial of Allu's party commenced on 16th January 1923, witnesses for the prosecution were examined on that day and on the 17th and 18th, two of these witnesses Agra and Hasta being persons returned for trial in the cross-case. On the 18th, on the conclusion of the prosecution case, Allu, accused, in reply to a question by the Judge said that he wanted the prosecution witnesses in the cross-case to be treated as defence witnesses in his case and the other accused said the same and so did their counsel who also asked that the opinion of the Assessors should not be asked till they had heard the cross-case. The cross-case was then taken up and as in the previous case only witnesses for the prosecution were called consisting of the seven already tried and some 12 other persons. After their evidence had been recorded Hasta, accused, was asked whether he wanted to call witnesses for defence and he said, no, but that he wanted the evidence of 3 prosecution witnesses in the cross-case to be treated as defence evidence in his case; the other accused also agreed to this. As a matter of fact of the 3 witnesses named only two had been examined. After hearing counsel's arguments and taking the opinion of the Assessors the two cases were decided by one composite judgment.

Held, that the procedure adopted in these cases was a serious departure from the usual and proper course and the fact that the prisoners and their counsel had consented to it

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could not give it a legal sanction. It is a well established principle of law that a prisoner can consent to nothing which is not authorized by law and the consent of counsel for an accused person cannot validate a course of procedure which the law does not authorize.

Held also, that section 537 of the Code does not apply to an infringement of statutory requirement, but only to errors, omissions and irregularities of a technical nature which may occur by accident or oversight in the course of proceedings conducted in the mode prescribed by Statute.

And as the trials were prohibited in the mode in which they were conducted they were therefore illegal.

Subrahmania Ayyar v. *King-Emperor* (1), followed.

Appeal from the order of A. L. Gordon Walker, Esquire, Sessions Judge, Montgomery, dated the 20th January 1923, *convicting the appellants.*

ABDUL AZIZ AND SHAHAB-UD-DIN, for Appellants.

DES RAJ, Sawhney, Public Prosecutor, for Respondent.

The judgment of the Court was delivered by—

FFORDE J.—Two sets of appeals are before us, one on behalf of Allu and six other persons, and the other on behalf of three persons Saadullah, Agra and Ibrahim, from the convictions and sentences of the Sessions Judge of Montgomery at Lahore under sections 302 and 147, Indian Penal Code, in cross-cases of riot.

We have been asked to hear the two sets of appeals together, but at the opening of the case counsel for both sets of appellants have raised the preliminary objection that the trials out of which these appeals have arisen have been conducted in a manner which is not in accordance with law. Before going into the merits of the case we, therefore, have to consider whether or not this objection is well founded and if so, what course we should take in regard to the convictions and sentences of the trial Court.

The facts of the case are briefly these :—

On the 16th July 1922 a serious fight took place between two parties of Muhammadan *Jats*, the *Wahniwals* and the *Baghelas*, resulting in the death of one person and injuries to several others. Of the *Wahniwal*

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faction seven persons, namely, Allu, Naman, Alia, Gara, Farid, Basra and Gahra, and of the *Baghela* faction four persons, namely, Hasta, Saadullah, Agra and Ibrahim have been brought to trial. With the exception of Hasta, all have been convicted. Allu and Farid have been sentenced to death under section 302 of the Indian Penal Code and the remainder have been sentenced under section 147, Indian Penal Code, to two years' rigorous imprisonment each. The mode in which the trial were conducted was as follows :—

The trial of Allu's party before the Sessions Judge commenced on the 16th January 1923. Witnesses for the prosecution were examined on the 16th, 17th and 18th, two of these witnesses, namely, Agra and Hasta, being persons returned for trial in the cross-case.

On the 18th January at the conclusion of the prosecution case, Allu was asked by the Sessions Judge whether he wished to produce any evidence in defence, to which he replied :

" I give up my defence witnesses in this case but I want the prosecution witnesses in the cross-case to be treated as defence witnesses in this case."

The same question was put to each of the remaining accused of the Allu faction ; and the reply to this question in each case was " I say the same as Allu."

Counsel for the seven accused addressing the Court then said " I close my case and do not call any defence witnesses in this case. But I would like the prosecution witnesses in the cross-case to be treated as defence witnesses in this case. I would also ask that the assessors should not give their opinion in this case until they have heard the cross-case."

Having arrived at this stage on the 18th January, the Sessions Judge then proceeded on the same day to take the evidence in the case of Hasta and others. As in the previous case, witnesses for the prosecution only were called, consisting of the seven already tried and some twelve others who were not among the accused of either party. These witnesses were all examined on the one day, *viz.*, the 18th January, and at the close of the evidence for the prosecution, the Sessions Judge asked Hasta, if he had any defence witnesses. The answer

was "No, except that I want the evidence of Waryam, Sadara and Balanda, prosecution witnesses in the cross-case to be treated as defence witnesses in this case." Each of the remaining three prisoners on being asked the same question, replied "No, I say the same as Hasta." No statement was made by counsel for the accused such as was made in the former case, and the defence was tacitly closed. It is important to note that of the three witnesses referred to by Hasta, only the first two had actually given evidence; the third, Balanda, not having been examined at all.

Nothing further in the way of examining witnesses or recording evidence was done in either of the cases, but on the following day, the 19th January, speeches by counsel for the prosecution and for the defence were delivered in both the cases. At the conclusion of the addresses by counsel, the assessors were asked by the Court to give their opinions as regards the innocence or guilt of all the accused and their opinions were recorded on the 19th. On the 20th January the judgment of the Court was delivered and sentences passed.

Now it is quite obvious to any one with any practical knowledge of the mode in which a criminal trial should be conducted, that the procedure adopted in these cases was a serious departure from the usual and proper course. The fact that prisoners and their counsel have consented to this course being adopted cannot give it a legal sanction, for it is a well established principle that a prisoner can consent to nothing which is not authorized by law. Nor can the consent of counsel for an accused person validate a course of procedure which the law does not authorize.

It is urged by counsel for the Crown that although the procedure adopted in these cases was irregular, such an irregularity is covered by section 537 (*a*) of the Code of Criminal Procedure, which provides that "no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial, or in any enquiry or other proceedings under this Code" unless such error, omission or irregularity has in fact occasioned

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a failure of justice. In my opinion this contention is not sustainable. This section only applies to errors, omissions or irregularities of a formal nature, and does not cover a substantial departure from the mode of conducting criminal trials laid down by law. This seems to be clear from the illustration given at the foot of the section, which shows the class of irregularity contemplated.

In my opinion the procedure adopted in the cases before us is wholly unauthorized by law in several particulars. In the first place, though the two sets of accused were intended to have been tried separately—as in law they were bound to be—the mode in which they were actually tried was in substance a joint trial. Only prosecution evidence appears on each record; speeches of counsel were reserved till the close of both cases, the assessors were not asked to give their findings until both cases had been closed, and only one set of findings was recorded in respect of both and, finally, one composite judgment was delivered. In fact the first two paragraphs of the judgment show conclusively that the whole matter was in substance dealt with as a single trial.

A still graver objection to the mode in which these cases were dealt with by the trial Court lies in the manner in which the Court dealt with the evidence for the defence. In the case of Allu and others, the Court acquiesced in the request by the prisoners on trial that witnesses who had not yet given evidence, but who were to be examined as witnesses for the prosecution in the cross-case, should be treated as witnesses for the defence in the case at hearing. If this request had in fact been given effect to, the result would have been that the evidence of each prisoner, and of each of his co-accused would have appeared subsequently on the record as evidence in his defence. In other words, each of a number of prisoners jointly tried would have been treated as a competent witness for his co-accused and also as a competent witness on his own behalf. Moreover, the only way in which the evidence could legally be given—assuming the witnesses to be competent—would be to put each witness in the box and examine him orally at the close of the prosecution case. This,

needless to say, was not done. What was in fact done was to take the written record of the prosecution evidence in Hasta's case and treat it without further formality as evidence for the defence in Allu's case after both cases had been concluded. In the case of Hasta and his co-accused, the matter was somewhat different. Here the accused asked that three specific persons, Waryam, Sadara and Balanda, who were described as prosecution witnesses in Allu's case, should be treated as defence witnesses for Hasta and his fellow prisoners. That is to say, the statements given in evidence by Waryam, Sadara and Balanda for the Crown at the prosecution of Allu and others were without any further formality to be regarded as evidence duly recorded on behalf of Hasta and his co-accused. Not only is such a method of recording evidence hopelessly and entirely illegal, but in fact it resulted in one witness for the defence in the Hasta case being omitted altogether, as Balanda did not appear as a witness at all at any stage of the proceedings.

A further objection to the method adopted in dealing with the defence evidence, is this :—Such evidence apart from all other infirmities, would be evidence given in the absence of the accused. This is in violation of the provisions of section 353 of the Criminal Procedure Code, and is, therefore, not only irregular but illegal.

It is unnecessary to multiply reasons why the various infringements of the law governing criminal trials which have occurred in these cases should not be countenanced.

In all penal matters the utmost strictness in procedure must be observed. Where the mode in which a criminal trial is to be conducted is, as it is in India, regulated by statute, a departure from the authorized procedure can itself only be sanctioned by a statutory provision. There is no such sanction for any of the illegalities which have taken place in the course of the trial of these two cases. Section 537 of the Code of Criminal Procedure does not apply to an infringement of statutory requirement. It only applies to errors, omissions and irregularities of a technical nature which may occur by accident or oversight in the course of proceedings conducted in the mode prescribed by statute. To use

the words of the Lord Chancellor in delivering the judgment of the Privy Council in *Subrahmania Ayyar* v. *King-Emperor* (1) " These trials were prohibited in the mode in which they were conducted," and were, therefore, illegal.

For the reasons given above I am of opinion that these appeals must be accepted and that the convictions and sentences of the Court below should be set aside, and new trials ordered.

BROADWAY J.—I concur in the proposed order. The appeals are accepted, the convictions and sentences are set aside and the cases are returned to the Court of Sessions to be retried in accordance with law.

C. H. O.

Appeals accepted.

APPELLATE CRIMINAL.

Before Mr. Justice Eforde.

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June 19.

LYME—Appellant

versus

THE CROWN—Respondent.

Criminal Appeal No. 417 of 1923.

Criminal Procedure Code, Act V of 1898, *sections* 304, 537—*Evidence of witnesses previously recorded by the Court subsequently read out and not recorded again in trial by a jury—Illegality or irregularity—Verdict of jury once given is final—second verdict, after hearing further evidence,* ultra vires.

The appellant was tried before the District Magistrate of Bannu for certain offences under the Indian Penal Code. On the 12th March 1923, 7 witnesses for the prosecution were examined and the Public Prosecutor then closed the case for the Crown, the cross-examination of these witnesses having been reserved. The case was then adjourned to the 14th, when the accused claimed as an European British subject, to be tried by a jury. The proceedings were accordingly stayed and a jury appointed, and on the 22nd two witnesses were duly examined by the prosecution and cross-examined by counsel for the defence. As

(1) (1901) I. L. R. 25 Mad. 61, 98 (P. C.)