APPELLATE CRIMINAL.

Before Mr. Justice Broadway and Mr. Justice Fforde.

1924

June 5.

LAL SINGH—Appellant

versus

THE CROWN—Respondent.

Criminal Appeal No. 183 of 1924.

Witness—in criminal trial—producing a document as containing his evidence—illegality of such procedure—value of evidence to the effect that a witness identified an accused person in the deponent's presence.

In the trial of the appellant in the Sessions Court a Magistrate was called to prove the identifications of the accused in Jail and the methods adopted. Instead, however, of stating in Court the details and the results, the witness merely referred to certain documents which were described as exhibits in which he stated that his evidence was to be found. The documents were put on the record as his evidence.

Held, that the attempt to record the evidence of the witness in this manner was not only contrary to law but violated the first principles of evidence, and such evidence must therefore be entirely ignored.

Held also, that even if the exhibits in question were to be accepted as a proper record of the witness' evidence it would not materially assist the Crown case as the mere fact that a witness is able to pick out an accused person from amongst a crowd does not prove that he has identified that accused person as having taken part in the crime which is investigated.

Appeal from the order of Rai Sahib Lala *Shibbu Mal, Additional Sessions Judge, Montgomery, at Lahore, dated the 21st January 1924, convicting the appellant.*

SAUNDERS, for Appellant.

DES RAJ SAWHNEY, Public Prosecutor, for Respondent.

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The judgment of the Court was delivered by—

FFORDE J.—Four persons, Sundar Singh, Lal Singh, Gudar Singh and Arjan Singh, have been tried by the Additional Sessions Judge of Montgomery under section 396, Indian Penal Code, for dacoity with murder. Sundar Singh and Lal Singh have been convicted, the former being sentenced to death and the latter to transportation for life. Gudar Singh and Arjan Singh have been acquitted. Sundar Singh and Lal Singh have appealed to this Court against their convictions and sentences.

The facts of the dacoity are shortly as follows :— On the night of the 7th or the early morning of the 8th March 1923, *Maulvi* Ghulam Nabi and his servant Samun were sleeping in a room of the former's house when about midnight, or shortly afterwards, Ghulam Nabi awoke hearing some one calling him by name from outside. He got up, lighted a lamp, and asked Samun to open the door to see who was calling. On the door being opened three men came inside and a fourth stood in the doorway. Two of the three men who came inside were armed with *chhavis* and *gandasas*, and the third had a pistol in his hand, and, according to Ghulam Nabi, was also holding a lighted wax candle. The witness was told by the persons in the rooms that they would murder him unless he handed over to them a considerable sum of money. The witness thereupon opened his cash box and told them to take what was in it, amounting to Rs. 400 in cash, and jewelry worth about Rs. 1,800 or more. The dacoits were not satisfied with this booty and demanded more. The witness thereupon told them to dig in the ground, which one of the dacoits who, the witness says, was Arjan Singh, proceeded to do. While Arjan Singh was engaged in digging, the witness heard a sound of a gun shot on the roof of his house

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followed by two or three more shots. The witness then heard his wife crying out. The man on the roof came to the door of the room and shouted out to his companions to leave, saying that the house had been surrounded by many people. Upon this the dacoits decamped with the cash and the jewelry, chaining the door from the outside.

The other witnesses state that on hearing a noise of gun-shots and shouting they came out of their houses to find a man on the roof of the *Maulvi's* house in the act of firing a gun. This man is alleged to be the appellant Sundar Singh. The persons who were inside the room are stated to have been Gudar Singh, Arjan Singh and the appellant Lal Singh.

When the villagers came out of their houses a short fight took place with the dacoits, in the course of which a villager named Musa received a bullet in the right groin from which he died almost immediately. Another, Ramzan, was wounded by a bullet in the left thigh and a third, Buta, received a gun-shot wound in the left knee and on the right leg. The dacoits then made good their escape. In each of these cases the wound in front of the limb was larger than the wound at the back, which would lead to the natural inference that the wound in front was the exit and the other the entry wound. The medical evidence, curiously enough, is to the effect that the larger wound is in each case the wound of entry. This I find hard to believe, and I am inclined to think the wounded men were shot from behind while running away, and not as they describe.

The case for the prosecution as regards the present appellants consists of the evidence of witnesses who claim to have identified them at the time these incidents took place, the evidence of trackers, and the evidence of certain witnesses who claim to have seen

them shortly after the occurrence. The main evidence upon which the Crown relies is of course the evidence of the eye-witnesses who profess to have recognised the appellants at the scene of the occurrence.

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Mr. Phailbus, a Magistrate of Montgomery, was called to prove the identifications in the Montgomery Jail and the methods adopted. Instead, however, of stating in Court the details and the results, he merely refers to certain documents which are described as exhibits, in which he states that his evidence is to be found. These documents are put on the record as his evidence. It is quite obvious that the procedure adopted in this matter offends against the most elementary principles of evidence, and Mr. *Sawhney* can only attempt to justify it by saying that it was done to save time. This is obviously no excuse for an attempt to record the evidence of a witness in a manner which is not only contrary to law but which violates the first principles of evidence. There is no doubt that it would shorten the labours of a trial Judge if he were to be permitted to record written statements of witnesses in the form of exhibits by the mere production of the witnesses and their testimony that the exhibits embody the details of their evidence. But any person with any knowledge of and regard for judicial procedure should know that such a method of recording testimony would if applied to all the witnesses reduce the trial to a mere travesty. I may add that these so-called exhibits were not even read out in Court. They are marked with the usual stamp certifying that they were " Read out, admitted in evidence and added to Sessions file," but the words " Read out " have in each case been deleted, and upon the

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printed Record the certificate is merely to the effect that the document has been "admitted in evidence and added to Sessions file."

The result of the mode adopted in the present case is that there is no evidence before us of the details of the identification parades held by Mr. Phailbus. But even if the exhibits in question were to be accepted as a proper record of his evidence it would not materially assist the Crown case. The mere fact that a witness is able to pick out an accused person from amongst a crowd does not prove that he has identified that accused person as having taken part in the crime which is being investigated. It might merely mean that the witness happens to know that accused person. The principal evidence of identification is the evidence of a witness given in Court as to how and under what circumstances he came to pick out a particular accused person and the details of the part which that accused took in the crime in question. The statement made by such a witness at an identification parade might be used to corroborate his evidence given in Court, but otherwise the evidence of identification furnished by an identification parade can only be hearsay except as to the simple fact that a witness was in a position to show that he knew a certain accused person by sight.

As to the evidence of the trackers it does not appear to me to be satisfactory. The principal track witness is Malla, P. W. 34. He says that he saw footprints of shoe feet on the roof from which the shot was fired as well as in the lane. He says that there were two foot-marks on the roof and six footprints in the lane. The tracks of the six footprints led out of the village to a distance of one *kos*, and there in a wheat field were found hoof marks of four horses and one camel. Of these animals the tracks of two mares were

followed to the village Jagowal and the tracks got lost in the land of a square near the village. The owner of the squares turned out to be Bahal Singh and on being questioned he admitted the ownership of one of the horses and stated, after some hesitation, that he had lent it to Sundar Singh (about 9 or 10 months ago in *Phagan* or *Chet*) and he also added at the same time that Sundar Singh had borrowed a mare from Sajjan Singh. Sajjan Singh, however, stated at the trial that it was Bahal Singh who had borrowed his mare for a relation of his. This evidence, in my opinion, is not sufficient to prove that Sundar Singh was in fact the man who rode this mare out of the village on the day of the dacoity. The identification of the footmarks is still less satisfactory. The witness Malla says that after over two months Sundar Singh was brought to Rukanpur with Gudar Singh where they were made to walk with 15 or 16 other men. He says that he and the other trackers picked out their footmarks because they resembled the original tracks, by which I presume he means the footprints on the roof and in the lane. But this witness added in cross-examination that the "footmarks on the roof were not distinct and visible as the floor of the roof was mud plastered." As to the footmarks in the lane it seems to me that he is asking us too much to believe that the footprints of six could be singled out in view of the fact that according to a number of witnesses this lane had been trampled by a large crowd of villagers at the time in question.

The remaining evidence is that of persons known as *waj-takkar* witnesses, namely, Sewana (P. W. 18), Gokal Chand (P. W. 22), Dina (P. W. 25) and Isa (P. W. 28). Counsel for the Crown, however, does not rely on these witnesses, and, I, therefore, need not analyse their evidence which, on the face of it, is worth-

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less. The Sessions Judge himself says :—" The evidence of Ismail and Sewana, *waj-takkar* witnesses of village Khokhar, is unreliable because they contradict each other on all the material points. Dina's evidence carries little weight since Fazl Din, shopkeeper, himself has not been produced." I entirely agree with this criticism of the Sessions Judge, but I do not agree that Gokal Chand's evidence is entitled to any more weight than that of the others whose testimony the Sessions Judge has rejected.

The learned Sessions Judge seems to have been influenced in coming to his decision as regards the appellant Sundar Singh by the evidence of Sub-Inspector Fazl Karim. The Sessions Judge says " Sundar Singh himself brought out from the *Niwar* fold of his bed a sum of Rs. 45 alleging that it was his share of the cash booty." This evidence was objected to at the trial by counsel for the defence as is shown by the note on the record which is as follows :—" Objection by defence counsel :—The portion of the witness's statement so far as it relates to the confession of Sundar Singh that the money produced by him was a portion of the booty, is inadmissible, *vide Adu Shikdar* v. *Regina* (1). Order :—Objection allowed. S. M."

It appears, therefore, that this evidence having been ruled out, and quite properly so, was subsequently utilised by the Sessions Judge in coming to his decision.

On the whole of the evidence I am unable to come to the conclusion that the participation of the appellants in the crime in question has been established beyond a reasonable doubt. I think it is obvious that the witnesses as to identification were only able to pick out the appellants after their attention had been

(1) (1885) I. L. R. 11 Cal. 635.

drawn to the scar marks on their faces, and their evidence, in my opinion, is worthless. The remaining evidence though it raises a strong suspicion is not sufficient to ground a conviction. I would accordingly accept the appeals, set aside the convictions and direct that the appellants be released.

BROADWAY J.—I agree.

C. H. O.

Appeals accepted.