APPELLATE CRIMINAL.

Before Fforde and Tek Chand JJ.

1929

Oct. 30.

MAHLA—Appellant

versus

THE CROWN—Respondent.

Criminal Appeal No. 783 of 1929.

Criminal Procedure Code, Act V of 1898, section 337 (2) —Approver—production of, at subsequent trial, essential.

Held, that it is imperative that any person who has accepted a tender of pardon under section 337 of the Criminal Procedure Code must be examined as a witness in the Court of the Committing Magistrate and at the *subsequent* trial of *every* person tried for the same offence (provided it is physically possible for the Crown to produce the approver).

And, the fact that the Sessions Judge in the previous case had decided that the approver took no part whatever in the crime, did not disentitle the present accused to the production of that witness.

Held further, that non-compliance with the mandatory directions of section 337 rendered the trial illegal.

Appeal from the order of Lala *Chuni Lal, Sessions Judge, Hissar, dated the 5th August, 1929, convicting the appellant.*

B. A. COOPER, for Appellant.

SLEEM, for Government Advocate, for Respondent.

FFORDE J.

FFORDE J.—The appellant Mahla has been convicted by the learned Sessions Judge of Hissar of having murdered Jalal Din on the evening of the 11th of September, 1927, and has been sentenced to death.

Three persons, Mukhtara, Dhanna and Bakhtawar, were tried for this crime in February, 1928, and at that trial one Harnam Singh, who declared himself

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to be an accomplice, was granted a conditional pardon on turning approver. The result of that trial was that those three accused were acquitted, the trial Judge, who is the same Judge who tried the case now before us, having come to the conclusion that none of those persons, nor the approver, was present at the murder.

That more than one person took part in the crime is obvious as the victim was not only severely injured by gunshot wounds, but was hacked about the head, neck and shoulder with some sharp, heavy weapon. In the present trial the prosecution case was that the appellant Mahla fired the gun which caused certain of the injuries, and that Khema, who was tried with him, inflicted the incised wounds. Khema was acquitted.

After we had been taken through the whole of the evidence by Mr. Cooper, who appeared for the appellant, Mr. Sleem, who appeared on behalf of the Crown, very properly drew our attention to the fact that the approver, who had given his evidence at the trial of the other persons, who were charged with having participated in this crime, was not produced as a witness in the case against the present appellant either before the Committing Magistrate or before the Sessions Judge. The question that arises for determination is whether the present proceedings under those circumstances are not vitiated.

Section 337 (2) of the Code of Criminal Procedure provides that every person accepting a tender of pardon under that section shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any. This statutory provision is imperative, and it seems to me clear that non-compliance with the mandatory

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directions renders the trial illegal. It was suggested in the course of the arguments that if there has already been a trial in respect of a particular crime resulting in conviction or acquittal at which an approver has given evidence, at the conclusion of that trial the approver's obligations as a witness are concluded and he need not appear at any subsequent trial of other persons charged with having participated in the same offence.

This argument appears to me to be entirely fallacious. There is no reason why the approver should be required to give evidence at the trial of one of several individuals accused of an offence, and not at the trial of the others merely because the others are brought to justice at different intervals of time. Take, for instance, the case of two persons charged with having committed an offence where the Crown thinks fit to try them separately. One is tried one week and the other the next week. At the first trial the approver is called to give evidence. Can it be suggested that the Crown need not produce him at the trial of the other accused the following week?

The section obviously means that any person who has accepted a tender of pardon under the provisions of section 337 of the Code of Criminal Procedure must be examined as a witness in the Court of the Committing Magistrate and at the subsequent trial of every person tried for the same offence, provided of course that it is physically possible for the Crown to produce the approver. It is quite possible that an approver may die after giving his evidence before the Committing Magistrate, in which case, of course, that provision of the Act cannot be complied with.

In the present case, it was possible to produce the approver as he was available at the time this case

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was before the Committing Magistrate, and also when it was before the Sessions Judge, and the only reason that he was not produced was because the learned Sessions Judge had come to the conclusion that he had not taken any part in the crime and his story of participation in it therefore was a complete fabrication. The fact, however, that an approver appears to the Court to be an untrustworthy witness does not absolve the Court from complying with the statutory provisions. The conditional pardon granted to the approver has not been withdrawn, and he has not been proceeded against for the offence in respect of which he was given that pardon, for the simple reason that the learned Sessions Judge came to the conclusion, as I have already observed, that the man took no part whatsoever in the crime. The learned Sessions Judge's view of the evidence is, however, not conclusive, and the appellant in the present case is entitled to have an unsatisfactory witness put into the witness box when there is an unqualified statutory provision that such a witness shall be produced. As the failure to comply with the provisions of sub-section 2 of section 337 of the Code of Criminal Procedure is an illegality, and not a mere irregularity in procedure, the trial, in my judgment, is void, as are the proceedings before the Committing Magistrate, and we must accordingly set aside the conviction and sentence and leave it to the Crown, if so advised, to take such further proceedings as they may think fit.

TEK CHAND J.—I concur.

TEK CHAND J

N. F. E.

Appeal accepted.