APPELLATE CRIMINAL.

Before Dalip Singh and Abdul Qadir JJ.

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March 13.

BACHATTAR SINGH AND ANOTHER—Appellants

versus

THE CROWN—Respondent.

Criminal Appeal No. 1115 of 1930.

Criminal Procedure Code, Act V of 1898, section 292 (a) (as amended by Act XVIII of 1923). Reply by defence—right of—whether lost—by proving certain documents in cross-examination of a prosecution witness. Section 537—erroneous decision as regards right of reply—whether curable—in a trial with assessors and not by jury.

In a case under section 302 of the Penal Code, the defence did nothing which could amount to the adducing of evidence, beyond putting certain questions to a prosecution witness (the *Patwari*) in the course of which, documents, which had been prepared by that witness, were placed before him with a view to being proved. The Sessions Judge held that the Crown had consequently the right to reply, whereupon the defence Counsel declined to argue the case, which was decided against the accused after hearing Crown arguments only. On appeal it was pleaded that the accused were entitled to use the cross-examination of prosecution witnesses to their advantage without losing their right of reply and that the refusal of that right had vitiated the trial.

Held, that in view of the insertion in section 292 (*a*) of the Criminal Procedure Code, of the words "adduces any *oral* evidence" (in place of the words "adduces any evidence") the right of reply depends, under the present law, on the accused adducing oral evidence in defence after the close of the prosecution case, and the mere fact of accused having proved certain documents through a prosecution witness in cross-examination did not deprive them of their right of reply.

Emperor v. *Abdulali Sharfali* (1), and *Emperor* v. *Sreenath Mahapatra* (2), referred to.

(1) (1909) 1 I. C. 280. (2) (1916) I. L. R. 43 Cal. 426.

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But, that although the erroneous decision by the Sessions Judge was an irregularity, it was not so material or substantial as to justify the setting aside of the trial, even from the stage at which the error arose. A trial with assessors is on a different footing from a trial by jury in this respect.

Jairam Kunbi v. *Emperor* (1), and *Subrammania Ayyar* v. *King-Emperor* (2), distinguished.

Appeal from the order of Khan Bahadur Sheikh *Din Muhammad, Sessions Judge, Lyallpur, dated the 4th December 1930, convicting the appellants.*

C. BEVAN-PETMAN, SARDARI LAL, M. L. PURI, and SAPURAN SINGH, for Appellants.

D. R. SAWHNEY, Public Prosecutor, for Respondent—SAUNDERS, for complainant.

ABDUL QADIR J.—On the 14th of April 1930 Shangara Singh and Sadhu Singh of *Chak* 36-J. B. in Lyallpur District were injured by seven men, including the six appellants and one Kirpal Singh who is still absconding. They are said to have formed an unlawful assembly with the common object of causing the death of the two persons already named. Shangara Singh died at the spot and Sadhu Singh was taken to the house of Tara Singh P. W. in the village, but he too could not survive the injuries and died before the arrival of the police. The appellants Kundan Singh, Bhagat Singh, Bachattar Singh, Sewa Singh, Banta Singh and Sundar Singh were challaned after investigation and were eventually committed to the sessions. The learned Sessions Judge has convicted all of them under section 302, Indian Penal Code, read with section 149, Indian Penal Code, and has sentenced them to death, with the exception of Bachattar Singh, who has been given the lesser penalty

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(1) (1923) 77 I. C. 811. (2) (1902) I. L. R. 25 Mad. 61 (P.C.).

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of transportation for life as he is of advanced years. Their appeal has been argued before us at great length by Mr. C. Bevan-Petman and he has raised several contentions of law as well as fact.

The question of law raised on behalf of the appellants is that they were entitled to a right of reply in the Court of Session of which they were erroneously deprived and therefore the opinions expressed by the assessors against them in the Sessions Court and the conclusions arrived at by the learned Sessions Judge are practically *ex parte*, and that they have been condemned without their having had the chance of being heard. It is urged by learned counsel that this has vitiated the trial and the convictions of the appellants should be set aside and a retrial ordered.

The controversy over the right of reply arose because the counsel for the defence in the Court of Session put certain questions to Nihal Chand, *Patwari* (P. W. 14) in cross-examination, in the course of which he placed before the witness certain documents prepared by the latter from the revenue papers and asked him if they had been so prepared. With the exception of this it is admitted on both sides, the defence did nothing which could amount to the adducing of evidence. When the time for arguments came, the counsel for the defence contended that the Crown should first sum up the case and he would reply. The Crown counsel objected that, by proving certain documents through Nihal Chand P. W. in cross-examination, the defence had lost the right of reply and that the Crown was, therefore, entitled to a reply under section 292, Criminal Procedure Code. The Court was referred to certain decided cases, cited in its order, dated 1st November 1930, printed at page 51

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of the printed record, and it gave the Crown the right of reply. Thus counsel for the defence did not argue the case at all and the case was decided after the arguments of the Crown were heard. Before the pronouncement of judgment, a petition for revision was filed in this Court on behalf of the defence, on the question of the right of reply, but that petition was disposed of by Mr. Justice Tek Chand on 28th November 1930 without going into the merits of the question in dispute, as a preliminary objection was raised before him that the order of the learned Sessions Judge was an interlocutory order and could not be interfered with at that stage. This objection was held to be correct and the revision was dismissed.

Mr. Bevan-Petman contends that the accused were entitled to use the cross-examination of prosecution witnesses to their advantage without losing their right of reply and relies upon *Emperor* v. *Abdulali Sharfali* (1), where it was held that "nothing which the accused can fairly get in to his own advantage by the legitimate employment of cross-examination, while the case is in the hands of the prosecution, deprives him of his right to the last word, and his mere putting in papers through a witness for the prosecution, in the course of ordinary cross-examination, is not 'adducing any evidence,' within the meaning of section 292 and does not give the prosecution the right of reply." He also refers to *Emperor* v. *Sreenath Mahapatra* (2), where it was laid down that "the prosecution has no right of reply when the counsel for the accused has, during the cross-examination of a prosecution witness and before the close of the case for the Crown, put certain letters, which do not form part of the record,

(1) (1909) 1 I. C. 280. (2) (1916) I. L. R. 43 Cal. 426

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to such witness, and then tendered and had them admitted in evidence." It is also urged that the rulings expressing an opinion to the contrary, relied upon by the Sessions Judge in his order, dated 1st November 1930, were all under the old Code of Criminal Procedure before the amendments made in 1923, and that the conflict between various Courts had been set at rest by the Legislature by using the words "adduces any *oral* evidence" in the present Act in section 292 (*a*) instead of the words "adduces any evidence" which were used in the previous enactments. I think this contention is correct and the right of reply depends, under the present law, on the accused adducing oral evidence in defence after the close of the prosecution case and the mere fact of their having proved certain documents through a prosecution witness in cross-examination did not deprive them of their right of reply.

Having accepted the argument of the learned counsel for the appellants, so far as the decision on the right of reply given by the Court below is concerned, I am afraid I cannot agree with the second contention emphasized by him in this respect, that an erroneous decision as to the right of reply may be treated as an illegality or such a substantial irregularity as to vitiate the whole proceedings and to call for a retrial, at least from the stage at which the error arose. Mr. Bevan-Petman admits that he cannot cite any authority which bears directly on the question before us, but that there are certain decisions from which he wants us to infer by analogy, that the error in question was so substantial as to justify a retrial. He refers to *Jairam Kunbi* v. *Emperor* (1), in which the Nagpur Judicial Commissioner's Court held that

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where a Sessions Judge tried a case with the aid of assessors, it is the Judge plus the assessors who constitute the Court and where a Sessions Judge tried a case with the aid of a lesser number of assessors than provided by law, it was not a trial at all and the defect was not such as could be cured by section 537, Criminal Procedure Code. He also refers to *Subramania Ayyar* v. *King-Emperor* (1) where the provisions of section 233 and section 234 of the Criminal Procedure Code had been contravened and offences that should have been tried separately had been tried together against the express provisions of law. That procedure was rightly condemned by the Judicial Committee of the Privy Council and it was declared that the defect was not curable by section 537, Criminal Procedure Code. The Privy Council also held that the illegal procedure could not be amended by arranging afterwards what might or might not have been properly submitted to the jury. This case referred to a trial by jury, which is on a different footing from a trial by assessors. In my opinion, notwithstanding the fact that the decision of the learned Sessions Judge as to the right of reply was not correct, according to the law as it now stands, no case has been made out in favour of the view, that where a matter of this kind is erroneously decided, it creates such a defect which cannot be remedied by section 537, Criminal Procedure Code. I regard this as an irregularity, but by no means so material or substantial as to justify the setting aside of the trial.

(*The remainder of the judgment is not required for the purpose of this report, Dalip Singh J. agreeing. Ed.*)

N. F. E.

Appeal dismissed, save in part.

(1) (1902) I. L. R. 25 Mad. 61 (P.C.).