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SHIVLAL MULCHAND v. MANEKJI MANCHERJI

Blackwell J.

v. *Trevillion*.[1] There the learned Judge said this (p. 204) :—

"In *Turner* v. *Goldsmith*[2] the Court, in considering *Rhodes* v. *Forwood*,[3] relied on certain expressions in the contract. Lindley L. J., in giving judgment in *Turner* v. *Goldsmith*,[2] said, 'In the present case we find an express contract to employ him.' The distinction seems to be that if it is a mere contract of agency with no service or subordination, the Court will hold that there is no implied contract that the agent is to be supplied with the means of earning his commission. If the contract is one of service, then the commission is merely intended to be instead of salary, and the contract cannot be determined without compensation."

Inasmuch as, according to the view which I take of the present contract, it was not one of service but of mere agency, and further as there was no express term that the defendant would continue his business for any length of period at all, I would hold that that agreement came to an end in December 1927 when the mortgagee took possession of the factory and the defendant thereafter ceased to carry on the business.

[His Lordship then discussed the question of damages and concluded :—]

I agree with the learned Chief Justice that this appeal should be dismissed with costs.

Attorneys for appellant: Messrs. *Thakoredas & Co.*

Attorneys for respondent: Messrs. *Craigie, Blunt & Caroe.*

Appeal dismissed.

B. K. D.

ORIGINAL CRIMINAL.

Before Mr. Justice K. Kemp.

1929

November 26.

EMPEROR *v.* WAHIDUDDIN (No. 1).*

Indian Evidence Act (I of 1872), sections 9, 11, 14, 54—Dacoity—Conspiracy to commit dacoity—Object of association, proof of—Admissibility of evidence.

At the trial of several persons for the offence of committing or conspiring to commit a dacoity, the prosecution desired to lead evidence to the effect that some of the accused were closely associated with the approver, and that

*Case No. 2 : Criminal Sessions No. 4 of 1929.

(1) (1902) 7 Com. Cas. 201. (2) [1891] 1 Q. B. 544.

(3) (1876) 1 App. Cas. 256.

the object of that association for a long time prior to the dacoity in question, was the commission of thefts and other disreputable acts. On an objection being raised to the admissibility of such evidence :—

Held, (1) that the mere fact that the evidence tendered would show the commission of crimes other than those charged, would not render it inadmissible, if such evidence is otherwise relevant to any issue properly before the Court;

(2) that, in so far as such evidence is tendered with a view to show the character of the accused, it was irrelevant under section 54 of the Indian Evidence Act, as their bad character was not a fact in issue;

(3) that, such evidence was not relevant under section 14 as showing the existence of any relevant state of mind, inasmuch as the tendency to commit thefts generally, would not throw any light on the existence of an intention to commit or to engage in a conspiracy to commit a particular dacoity;

(4) that, in so far as the evidence of close association with the approver was concerned, such evidence was admissible under section 9 of the Act, for what it was worth, in support of the approver's statement that a conspiracy existed in fact;

(5) that, in so far as such evidence related to the nature and the character of the association, it was inadmissible under section 11 of the Act.

As a result of these considerations the evidence tendered was disallowed.

TRIAL before K. Kemp J. and Jury.

Eleven persons were charged with the offences of committing a dacoity in Bombay on August 17, 1928, and with conspiring to commit the dacoity. Accused Nos. 1 to 7 and 9 to 12 were charged under section 120B read with section 395 of the Indian Penal Code, accused Nos. 1, 10 to 12 were charged with an offence under section 395 : and accused Nos. 2 to 7 and 9 were charged under sections 109 and 395 of the Code.

One of the associates of the accused, Shirajuddin Hafizuddin, was tendered a pardon under section 337 of the Criminal Procedure Code.

At the trial it was sought to prove that one of the accused introduced to the approver, a certain person, who was being examined as a witness, and the other persons who were the accused in the case, and suggested that he should be employed to take "satta" bets for their mutual advantage : that the witness said he did not know how this satta betting business was done. On this, one of the accused said that he would teach him

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that business; that thereupon the witness was initiated into the business by that accused; that the witness laid some satta bets and handed over the profits resulting therefrom to one of the accused or the approver. It was also sought to prove that the accused had also taken part in several thefts and other acts of a disreputable character.

An objection was raised by the defence to the admissibility of this and other evidence of a similar nature.

Azad, for accused No. 10, referred to section 14, Indian Evidence Act, explanation 1 and illustration (0). The evidence sought to be tendered also offends against section 54 of that act, and is irrelevant and inadmissible. At most it is evidence of bad character.

Velinker, for the Crown :—This evidence is admissible under sections 9 and 11 of the Indian Evidence Act. It is not intended to prove and does not prove bad character. Its aim is merely to prove the close and intimate association of all the accused with one another. As such it will support the inference that the accused must have conspired together to commit this dacoity. It will be relevant under section 9 of the Act. It will also be relevant under section 11 (2) of the Act, as these facts make the existence of a conspiracy to commit the particular dacoity, which is a fact in issue, highly probable.

K. KEMP, J. :—In the course of the evidence for the Crown, a question has arisen as to whether the prosecution is entitled to prove not only that accused Nos. 2, 3, 4, 5, 6, 7 and 9 were closely and intimately associated with the approver Haji Sirajuddin but that the object of that association during a period of several months prior to the dacoity in question had been the commission of thefts and other discreditable acts. The mere fact that the evidence adduced would tend to show the

commission of crimes other than that charged does not of course render it inadmissible, if it is in fact otherwise relevant to any issue properly before the Court. But having regard to the prejudice which must inevitably be introduced by such evidence, especially in a jury trial, I think the Court should be careful to see that its relevancy is clearly made out. The accused above referred to are not in this case charged with belonging to any gang but are charged with committing, or conspiring to commit, a particular dacoity—a transaction entirely unconnected with any of the aforesaid thefts. It is, I think, clear, in the first place, that, in so far as such evidence may be tendered with a view of showing the character of the accused concerned, it would be irrelevant under section 54 of the Indian Evidence Act, their bad character not being in itself a fact in issue. Nor would it, to my mind, be relevant in this case under section 14 as showing the existence of any relevant state of mind, etc., inasmuch as the tendency to commit thefts generally could not fairly be deemed to throw any light on the existence of an intention to commit, or to engage in a conspiracy to commit, this particular dacoity.

Mr. Velinker has in fact given up this contention, but has argued that a conspiracy can in the nature of things ordinarily only be proved by inference, and that the evidence he tenders would show the closeness of the association alleged to have existed, and would therefore be relevant under section 9 of the Indian Evidence Act as supporting the inference suggested and/or under section 11 as making the existence of the conspiracy highly probable. As far as the evidence of close association with the approver is concerned, there could, I think, be no objection to the admission of such evidence, for what it is worth, in support of the approver's statement that a conspiracy in fact existed.

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K. Kemp J.

But as far as regards the nature and character of the association, I am unable to see that there is any substantial difference in the distinction thus attempted to be drawn between evidence tending to show the character of the accused himself, and evidence tending to show the character of the persons with whom he is alleged to have associated, and the nature of the association. It seems to me that in each case the inference is one against which the law sets its face. To take what is perhaps an extreme case, it would, I think, be highly unreasonable to argue that proof of association with the express object of committing petty thefts renders highly probable the existence of a conspiracy to commit murder; and yet it seems to me to be a conclusion that would follow from the acceptance of the contention here put forward. I, therefore, disallow the evidence tendered on this point.

B. K. D.

ORIGINAL CRIMINAL.

Before Mr. Justice K. Kemp.

1929

November 26.

EMPEROR *v.* WAHIDUDDIN HAMIDUDDIN (No. 2).*

Indian Evidence Act (I of 1872), section 157—Witness—Former statements made before police—Corroboration—Proof—Criminal Procedure Code (Act V of 1898), sections 1 (2), 162—City of Bombay Police Act (Bom. Act IV of 1902), section 63.

During the course of the case the facts of which are reported at page 525, the prosecution tendered in evidence oral statements which were recorded in a panchnama, of what a witness said before a competent police officer on the occasion of an identification parade held by the police in the course of investigation of the offence. The statements were tendered in corroboration of what the witness had deposed at the trial. On an objection being raised as to the admissibility of those statements :—

Held, that, in the City of Bombay, such statements were admissible in evidence by virtue of provisions of section 63 of the Bombay City Police Act (Bom. Act IV of 1902).

THE facts of the case are set out in the report of the case at page 525. The facts relevant to this report are set out in the head note.

*Case No. 2 : Criminal Sessions No. 4 of 1929.