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(1869) 06 CAL CK 0048

Calcutta High Court

Case No: None

The Queen

APPELLANT

Vs

Bishonath Pal

RESPONDENT

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**Date of Decision:** June 14, 1869

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### Judgement

Norman, J.

The prisoner has been convicted of dacoity by the verdict of a Jury and sentenced to transportation for life. There appears to have been a very serious irregularity in the mode of conducting the trial. The depositions of witnesses taken on the trial (in July 1867) of other persons charged with having been engaged in the same dacoity are put up with the record. The witnesses appear to have been re-sworn, and each in turn says in effect "I gave evidence before in this Court, and that evidence is true." Without going into the details of the dacoity which must have been taken by the Judge and the Jury entirely from the former depositions each witness in turn merely adds a few particular facts and details to show the connection of the prisoner with the dacoity. Even while making these statements the witnesses refer to their former depositions; as for instance thus "It is true that I recognized Bishonath Pal during the dacoity, &c. It is true that I saw the prisoner Bishonath strike two or three blows at Hira Lal."

2. The Judge's record does not clearly show in what order the evidence was laid before the Jury. But I am led to infer that the Judge probably in the first instance allowed the deposition on the former trial to be read in the presence of the Jury and then proceeded to question the witness. However that may be, the course of proceeding was most irregular. u/s 31 of Act II of 1855 the depositions containing the statements of a witness as to the commission of the dacoity taken on the trial in July 1867 would have been admissible, in order to corroborate his testimony given on the trial of the prisoner Bishonath.

3. The evidence of the witness whose testimony it was proposed to corroborate should have been first taken, and after such witness had finished his evidence and not before, the former deposition might have been put in; not to add to this testimony, but simply to

corroborate it, by showing that the statements made by him while the facts were still fresh in his memory, correspond with those made by him in the Court of Sessions in the present case. In the present case at the time when each deposition was put in, the evidence of the witness not having been given in the Court of Session, there was nothing on the record which made it admissible. There was nothing which was corroborated by it.

4. In the Attorney General of New South Wales v. Bertrand 36 L.J. P.C. 51 : 4 Moore's P.C.C.N.S. 460, on a second trial when the witnesses were before the Jury, the depositions taken on the first trial were read, and the witnesses were asked in turn whether what was read was true and they were then submitted to fresh oral examination and cross-examination. What was done, was done by the consent of the prisoner. Their Lordships remark they were not in a condition to say that any injustice to the prisoners resulted from it. But they add that no one called on to review the proceedings could be certain of the contrary. They disregard the consent of the prisoner, and speak of the wisdom of the common understanding that a prisoner on his trial can consent to nothing. They say it is essential that no unnecessary difficulty should be thrown in the way of the Jury's understanding or rightly appreciating the evidence, they point out the difficulty that a Jury must experience in sustaining their attention or collecting the value of different parts of the evidence when merely read out to them. They show that the most careful note must often fail to convey the evidence fully in some of its most important elements, those for which the open oral examination of the witnesses in the presence of the prisoner, Judge, and Jury, is justly prized; that it cannot give the look or manner, of the witness, his hesitation, his doubts, his variation of language, his confidence or precipitancy, his calmness or consideration. It cannot give the manner of the prisoner, when that has been important in the statement of anything of particular moment; nor could the Judge properly take upon himself to supply any of these defects, who indeed will not necessarily be the same on both trials. They say ""It is in short or it may be the dead body of the evidence without its spirit, which is supplied when given openly and orally to the ear and the eye of those who receive it." Their Lordships add that they do not hesitate to express their anxious wish to discourage generally the mode of laying the evidence before the Jury which was adopted in that trial.

5. The observations of their Lordships apply in all their force to the present case. There are moreover many objections to the course of proceeding in the cases now before us which did not apply to that before the Privy Council. There the depositions read had been taken on the former trial of the prisoner himself. The prisoner had been present and had the fullest opportunity of cross-examining the witnesses. Here the depositions read were taken in the absence of the prisoner on the trial of other persons. There the prisoner was represented by Counsel, who no doubt had copies of the depositions, and not only took no objection, but actually consented to their being read on the second trial. Here the prisoners appear not to have been defended. To read evidence from written depositions must place a prisoner who is defending himself at a disadvantage. If the evidence is given slowly and taken down sentence by sentence in the usual way, the prisoner can follow

each witness without difficulty. He has time to observe and reflect on each point that appears to make against him, and when his turn comes he has at least an opportunity of cross-examining or answering in his defence, with reference to each of scab points in detail. The disadvantage at which he will stand if the evidence of each witness is read out, without pause as a connected story in enormous. Probably of slow apprehension at beat, having lost what little presence of mind he ever possessed from the terror and confusion produced by the new and alarming position in which he finds himself, his thoughts necessarily diverted from the words of the reader by the noise and bustle about him, the prisoner would find himself incapable of fixing his attention closely on the several facts, the hurried recital of which gives him no time to appreciate their importance, or consider their bearing on the case made against him. If he does understand their significance at the moment his mind will not have dwelt on them long enough to enable him to fix and arrange them in his memory, so that when his time comes to defend himself he can cross-examine or make answer in reference to them in detail in his address to the Jury. All that will be present to his mind when he comes to his defence will be a blurred and most imperfect impression of the case which he has to meet. But that is not all. The course we suppose to have been taken of reading his deposition to one of the witnesses against the prisoner, and putting the question to him whether or not the deposition is true is not only open to the objection that it is putting a leading question in the most objectionable of all possible forms; prompting the witness as to all the details of the story which he is expected to tell, in a great degree therefore depriving the prisoner of the means of testing the veracity, or the recollection of the witness by cross-examination; but to the witness himself it is a dangerous snare. He is reminded that on a former occasion he deposed to circumstances tending to establish the prisoner's guilt and it is impliedly intimated to him that the same story is expected from him again.

6. To illustrate further the injury to the prisoner that may result from this course of proceeding, suppose on the former occasion the witness spoke positively to having recognized three or four prisoners then under trial amongst a body of dacoits and also named one or two other persons not before the Court. Suppose the witness to be speaking quite honestly, and to the best of his knowledge; he could not as regards such other persons speak under the same sense of responsibility as he would with respect to a prisoner under trial. He might have felt some doubt, hesitation. or uncertainty as regards the absent person which he might not have thought it necessary to express. No one would be there to cross-examine, to check his statements as regards such persons, or to induce him to consider whether on reflection he really was quite as sure of their identity as he supposed and represented himself to be. If at the end of two years the deposition is put into the band of the witness it would at once occur to him to think that having when the facts were quite fresh in his memory spoken positively to the identity of the person he was no doubt then right. Doubts and hesitation would be forgotten or cast away and we would feel sure that what he then said was correct.

7. In the present case the facts are few and simple, and it may be that the prisoner has sustained little or no actual injury by the course adopted at the trial. But I would say with their Lordships of the Privy Council in the case I have cited that the object of a trial is the administration of justice in a course as free from doubt or chance of miscarriage as merely-human administration of it can be.

8. A prisoner defending himself against a charge of an offence alleged to have been committed a long time previously, if he has any defence must always be under a great difficulty in substantiating it, by proof, and therefore in such cases it is peculiarly necessary to see that the case for the prosecution is not conducted so as further to prejudice him. It is impossible to say that the prisoner may not have been injured in his defence by the course adopted in the present case.

9. As the evidence has not been legally taken, this Court has not before it materials on which it can properly form a correct judgment as to the guilt or innocence of the appellants, and therefore according to the opinion of the Full Bench upon an analogous point, in *Elahi Buksh's* case, it is necessary that there should be a new trial. This is a Jury trial in which the Court has not the power to reverse the finding of the Jury on a question of fact. The prisoner has a right to the opinion of the Jury or of this Court on evidence duly and legally taken against him. I am therefore of opinion that the conviction must be quashed, and that a new trial must take place.

E. Jackson, J.

I concur with Mr. Justice Norman that the mode in which this trial was conducted was irregular. The evidence of witnesses given and taken down in the absence of the prisoner is no evidence against the prisoner. The irregularity alluded to is one which has been frequently animadverted upon by this Court, and upon which numerous trials have been set aside even in the time of the late Sudder Court. The conviction of the prisoners is quashed, and a new trial will be held.