(1870) 04 CAL CK 0016

Calcutta High Court

Case No: None

Mukta Sing		APPELLANT
	Vs	
The Queen		RESPONDENT

Date of Decision: April 20, 1870

Judgement

Norman, J.
The prisoner has been tried by the Judge of Sylhet, and with the concurrence of the Assessors found guilty of giving false evidence on the trial of one Gaurkishor for dacoity. He was sentenced to rigorous imprisonment for four years. He appeals. The evidence given by the prisoner on the trial of Gaurkishor was translated into English, and taken down by the Judge in English. The statement alleged to be false was that he left the station of Sylhet on the 9th of Pash (December 23rd) got to a place Galled Dewadig on the 10th, left Dewadig on the 11th and returned to Sylhet on the 12th, Mr. Cook-burn, the Judge, having discovered that this evidence was false, made a complaint against the prisoner before the Magistrate, and was examined by him as a witness. The Magistrate committed the prisoner for trial before the Court of Session on a charge, u/s 193 of the Indian Penal Cole, of intentionally giving false evidence in a judicial proceeding. The case came on in due course for trial of before Mr. Cockburn, as Judge of Sylhet. On the trial of the prisoner in the Court of Session for giving false evidence, Mr. Cockburn, the Judge, was himself sworn and gave evidence as a witness, and pub in and proved the deposition taken by him. In that deposition the name of the month is not given. The prisoner, who is a Manipuri, in his defence; contended that he spoke of the 9th, 10th, 11th and 12th of some Manipuri month. The Judge, however, proved that though not mentioned in the deposition as taken down, the prisoner spoke of the month of Pash.

2. The only question is, and it is an important and a difficult one, whether a Sessions Judge sitting and trying cases without a Jury, himself the sole Judge of law and fact, can give evidence in a case which he is trying.

3. On the trial of Colonel Backer 5 State Trials, 1181 note, one of the regicides, for high treason, Mr. Secretary Morris and Lord Annesley, who were both in the commission for

the trial of the prisoners, came off the beach, and were sworn and gave evidence; it was agreed by the Court that they were good witnesses, They did not return to thy bench during the trial of the prisoners against whom they gave evidence. Mr. Taylor says : "A Judge before whom a cause is tried must conceal any fact within his own knowledge, unless be is first sworn; and, consequently, if he be the sole Judge, it seems that be cannot depose as a witness." Taylor on Evidence, Vol. II, 1197. For this position he cites Boss v. Buhler 2 Mart N.S. 312, a case decided before the Supreme Court of Louisiana. If a Judge be sitting with others, he may then be sworn and give evidence. In the last case, the proper course appears to be that the "Judge who has thus become a witness, should lave the bench, and take "no further judicial part in the trial, because be can hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or weighing it against that of another."

4. Mr. Taylor seems to consider that there may be some distinction between the case of a Judge, and that of Jurors and Peers of Parliament, who must be regarded as much in the light of Jurors as Judges.

5. It is undoubtedly a well established rule that a juryman may be sworn and examined as a witness, and is not disqualified, by reason of his having given evidence, from continuing to sit as a juryman, or taking part in delivering the verdict. A case of that sort is mentioned in Viner''s Abridgment, Title, Evidence H. And on the trial of Mary Heath 18 State Trials, 123 Proby, a juryman, was sworn to give evidence to the Court, and his fellow Jurors, and gave it accordingly. On trials before the High Court of Parliament, Peers, who have been examined as witnesses, have taken part in the verdict subsequently pronounced. See, for instance, Lord Stafford''s case 7 State Trials, 1384. Sir John Howell, Attorney-General in the reign of King William the third, says: "Every one knows that a Judge in a civil "matter tried before him has been enforced to give evidence, for in that particular a Judge ceases to be a Judge, and is a witness, of " whose evidence the Jury are to judge, though he afterwards reassume "his authority, and is a Judge of the Jury''s verdict" (5). Sir John Howell, in his remarks on the case of Cornish 11 State Trials, 459 already referred to further says; Would it not have been easy for Cornish to have got a witness to have said that he heard Rumsey swear at Lord Russell''s trials that he was not present at the reading of the declaration. Were "not all the Judges who sat upon him, and all the king''s counsels who were against him present at the Lord Russell''s trial, and might he not have subpoenaed them to have testified that matter. Nay, was it not their duty to have done it even without a subpoena?" But in that case even if all the Judges had been examined as witnesses in succession, there would still have been the Jury who would have decided on their evidence as judges of fact.

6. Referring to the case of Colonel Hacker, Serjeant Hawkins, in Pleas of the Crown, Book I, Chapter 46, section 17, says: "It seems agreed that it is no exception against a person giving evidence for or against a prisoner, that he is one of the Judges who are to try him."-- This passage is cited in Burn''s Justice Title Evidence 4; Bacon''s Abridgment, Evidence D 2; Russell on Crimes, Volume I, page 988, 3rd Edition; Chitty''s Criminal Law,

7. Best, in referring to the same case, says the conduct of Secretary Morris and Lord Annesley may have been a matter of taste and good feeling rather than of right. But even if that is so, in every one of the cases mentioned it must be admitted that the testimony of the Judge-giving evidence would have been submitted to the judgment of some person other than the person giving such testimony. They go, undoubtedly, to this extent that a person having to exercise judicial functions may give evidence in a case pending before him, when such evidence can, and must be submitted to the independent judgment of other persons, exercising similar judicial functions, sitting with him at the same true.

8. By section 14 of Act II of 1855, it is enacted that the following persons only shall be incompetent to testify:

Children under seven years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly; 2nd, persons of unsound mind, who at the time of their examination appear incapable of receiving just impressions of the facts respecting which they are examined, or relating them truly.

9. No exception is made as to a Judge testifying in a case before himself, I find that, after passing of this Act, in the case of Tarapersaud Bhuttacharjee N. A, Rep. 1857, Part II, 83, where the Sessions Judge himself was cited as a witness by a prisoner, and gave his evidence accordingly, it was held that the Judge''s jurisdiction was not affected. It should be observed that the trial in this case took place with the assistance of the Mahomedan law officer, who might have given a Fatwa acquitting or convicting the prisoner. If the Judge disapproved of that Fatwa, and thought that the prisoner should have been convicted when the law officer''s Fatwa was for an acquittal, he could not himself have sentenced the prisoner, but must have referred the case to the Nizamut Adawlut. See Regulation XXII of 1817, section 2.

10. The cases seem to establish two points: first, that the Judge is a competent witness; secondly, that the giving of evidence does not preclude him from dealing judicially with the evidence of which his own forms a part.

11. I think it pretty clear that a prisoner has a right to ask to have the evidence of a Sessions Judge who is trying him taken on a point, which he thinks makes in his favour.

12. Prior to the enactment of the Code of Criminal Procedure, when a Sessions Judge was trying a case with the assistance of a Mahomedan Jaw officer, it would seem from the case cited, and from the analogy of the English cases referred to, that the Judge might have given evidence in a case tried before himself. By the substitution of a system of trials with Assessors, a different species of cheek was introduced. The Assessors give their opinions which the Judge is bound to record. The Judge must transmit an abstract of the trial to the High Court, and on perusal of such abstract, the Court may call for and examine the record. Or again on appeal, the decision of the Judge on the evidence may

be considered or reversed by the High Court.

13. It may be said in the present case that the complaint in the Magistrate"s Court was preferred by the Sessions Judge. It should be observed, however, the complaint is one which could hardly be made, except with the sanction of the Judge, u/s 169, Code of Criminal Procedure. The offence charged is triable only before the Court of Session, and, therefore, as such could only be tried before the Judge, Mr. Cockburn; the evidence being recorded in the Court of Session in English, it is almost certain that cases must occur in which the Judge would be a necessary witness, without whose evidence the case could not proceed.

14. No doubt, it is extremely inconvenient, that a Judge sitting without a Jury should try a case in which he himself is the complainant and principal witness. I should have no doubt that if he has any personal or pecuniary interest in the subject of the charge, be is disqualified from trying it. But if that is not the case, if the Judge in making the complaint has merely acted in the discharge of his duty as a public officer, I think we must say that he is not incompetent to try the case.

15. The only question remaining for us on appeal is, whether the conviction is warranted by the evidence, and we may say that we have not the least doubt of the correctness of the conviction. We dismiss the appeal.