(1957) 08 BOM CK 0017

Bombay High Court

Case No: Criminal Appeal No''s. 236, 304 and 305 of 1957

The State		APPELLANT
	Vs	
Ranganath Raoji		RESPONDENT

Date of Decision: Aug. 26, 1957

Acts Referred:

- Evidence Act, 1872 - Section 114
- Penal Code, 1860 (IPC) - Section 34, 392

Hon'ble Judges: Shelat, J; Miabhoy, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Shelat, J.
His Lordship after stating the facts of the case and dealing-with points not material to this report, proceeded : The contention most strenuously urged by Mr. Samant was the omission of the prosecution to examine Godavaribai who, according to the evidence on record, was present at the time of the incident in question and who, therefore, would have been as important a witness as witness Saraswatibai. There is no doubt that, if Godavaribai had been examined, she could have corroborated the evidence of the other eyewitnesses. It is also clear that no explanation was furnished as to why Godavaribai was not examined. Mr. Samant, in these circumstances, called upon us to draw an adverse inference u/s 114 of the Evidence Act and to hold that if Godavaribai had been examined by the prosecution, she would have given evidence adverse to the prosecution. For this submission, Mr. Samant has relied upon the decision in Habeeb Mohammad v. State of Hyderabad AIR [1945] S.C. 51. Relying upon certain observations therein contained, Mr. Samant has contended that it was the duty of the prosecution to examine all material witnesses. that Godavaribai was undoubtedly a material witness, and that, since she has not been examined, an adverse inference would arise against the prosecution ease from the non-production of such an important witness.

2. The question, therefore, is whether it is the bounden duty of the prosecution to examine each and every witness who has knowledge of the incident in question and who is available. It has been said over and over again that the object of a criminal trial, as was observed by Jenkins C.J. in Ram Ranjan Roy Vs. Emperor, , is not to support at all costs a theory, but to investigate the offence and to determine the guilt or the innocence of an accused person. The duty of a public prosecutor is also equally clear and that is to represent not the police, but the State, and this duty he has to perform with fairness, without fear and with a full sense of responsibility attached to his office. But the view expressed by Jenkins C.J. in this ease that all available eye-witnesses especially in a capital ease, even if brought in Court by the defence and although they give different accounts, should be examined, was not fully accepted by their Lordships of the Privy Council in the case reported in Stephen Seneviratne v. The King AIR [1936] P.C. 289. Their Lordships there expressed the view that it was the duty of the prosecution to examine all material witnesses who could give an account of the narrative of the events upon which the prosecution is essentially based, and that the question whether a witness is material and ought to have been called depends upon the circumstances of each case. In Malak Khan v. King-Emperor (1945) 48 Bom. L.R. 132 . an argument was advanced that two witnesses who saw the articles recovered should have been called by the prosecution. That contention was put in a two-fold way (1) u/s 165 of the Criminal Procedure Code and (2) that the two witnesses were Crown witnesses and should have been called. Their Lordships disposed of the first contention on the ground that Section 165 of the Criminal Procedure Code did not apply to a case where articles were produced by an accused person. But, in dealing with the second part of the contention, Lord Porter, while doubting whether such witnesses could be said to be Crown witnesses, stated as follows (p. 137):
...It is no doubt very important that, as a general rule, all Crown witnesses should be called to testify at the hearing of a prosecution, but important as it is, there is no obligation compelling counsel for the prosecution to call all witnesses who speak to facts which the Crown desire to prove.

Utimately it is a matter for the discretion of counsel for the prosecution and though a Court ought, and no doubt will, take into consideration the absence of witnesses whose testimony would be expected, it must judge the evidence as a whole and arrive at its conclusion accordingly taking into consideration the persuasiveness of the testimony given in the light of such criticism as may be levelled at the absence of possible witnesses.

3. Sir John Beaumont, who was a party to the judgment of their Lordships of the Privy Council, had also taken a similar view in a Full Bench decision of this Court in Emperor v. Kasamalli Mirzalli (1941) 44 Bom. L.R. 27. In this case, a certain witness was examined before the committing Magistrate but the prosecution did not examine that witness at the trial presumably believing that the story that he

narrated was false. Beaumont C.J. observed in this connection (p. 41):

...In our opinion their (prosecution''s) proper course in such a case was, not to call him themselves, but to give his name to the defence, see that he was present in Court, and tell the defence, if they did not already know it, what he was prepared to say. ...In our opinion, the duty of the prosecution in criminal cases is clear. It must always be perfectly fair. It has been said over and over again that it is not the function of the Crown to procure the conviction of an innocent person. That is obvious. But the Crown is not bound to call before the Court a witness who, it believes, is not going to speak the truth.

3. Mr. Samant''s argument, however, is that the view expressed in Habeeb Mohammad''s case by their Lordships of the Supreme Court is somewhat different from that taken in. these eases, and that the view of the Supreme Court is clear that the prosecution is bound to examine all material witnesses who are available and are in a position to depose to facts upon which the prosecution is based. We have with some care gone into the report of the decision, but we find that the proposition so widely put by Mr. Samant is not borne out by that decision. Since this decision is often quoted, we propose to go into a few details in order to clarify as to what exactly their Lordships of the Supreme Court have laid down.

4. The facts before their Lordships were that the appellant in that case and two others were charged with offences of murder, attempt to murder and arson in that the appellant, a Subedar of Warangal, went on December 9, 1947, to Gurtur with a posse of police for the purpose of arresting certain bad characters. At Gurtur, it was said that he met 60 to 70 villagers who came forward with a view to make certain representations. The appellant, however, ordered the policemen to fire at them and as a result of the firing two died and several persons were injured. The appellant, it was said, then, gave match boxes and directed the constables to set fire to the houses in the village. The consequence was that, as many as 191 houses, were destroyed by fire. What was somewhat important in that ease was that, in the first information report, lodged on January 29, 1949, it was said that, amongst other officers present at the time of the firing, there was one Biabani, Deputy Commissioner, District Police, Warangal. In a chalan prepared subsequently, the whole burden for the crimes committed on December 9, 1947, was sought to be thrown upon the appellant, in spite of the fact that, in the documents prepared and accompanying the first information report, the burden had been thrown upon Biabani. The prosecution had also mentioned the name of Biabani in the list of prosecution witnesses, but, for some unexplained reason, did not examine him during the trial and no explanation was given for withdrawing him. On March 24, 1950, the appellant made an application before the Special Judge, who was dealing with this case, that Biabani and certain other officers were present at the time of firing but Biabani was not produced as a witness. The learned Special Judge making his order upon this application observed:

And in this case the said Biabani is not challaned only because he is a police officer. This should not be construed in this sense that as the police left Biabani scot-free, because they favoured him, so also the Court should leave Habeeb Mohamed. A strange logic that ''you left one, therefore I leave the other'' will continue.

Their Lordships of the Supreme Court stated that it was difficult to support these observations made by the learned Special Judge behind the back of Biabani and that such observations could only be made after giving an opportunity to Biabani to explain his conduct. Before the High Court of Hyderabad, the learned Counsel for the appellant also had stressed the point that the police ought to have produced Biabani as a witness to prove the fact that it was the appellant who had ordered the firing or in the alternative the Court should have summoned him as a Court witness. This argument was disposed of by a reference to the decision of the Privy Council in Adel Muhammed v. A.G. Palestine AIR [1945] P.C. 42, where it has been said that there was no obligation on the prosecution to tender witnesses whose names were upon the information but who were not called to give evidence by the prosecution for cross-examination by the defence and that the prosecutor has a discretion as to what witnesses should be called for the prosecution and the Court will not interfere with the exercise of that discretion unless it can be shown that the prosecutor had been influenced by some oblique motive. Dealing with this decision Mahajan C.J. observes that the point considered in that case was different from the one before them, and held that it was difficult to hold on the record before them that there was no oblique motive of the prosecution in not producing Biabani as a witness. In their Lordships'' opinion, it was clear that the object of not producing Biabani was to shield him, who possibly might have been a co-accused in the case, and also to shield other police officers and men who formed the raidiner party. What is important for our purpose is that their Lordships laid down in this case that the true rule on the question as to the duty of the prosecution in producing the witnesses was the one laid down by their Lordships of the Privy Council in Stephen Seneviratne v. The King AIR[1936] P.C. 289. The observations of the Privy Council quoted with approval by Mahajan C.J. were (p. 299):

It is said that the state of things above described arose because of a supposed obligation on the prosecution to call every available witness on the principle laid down in such a case as Ram. Ranjan Roy v. Emperor, to the effect that all available eyewitnesses should be called by the prosecution even though, as in the case cited, their names were on the list of ''defence witnesses''. Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candour and fairness on the part of those conducting prosecutions; but at the same time they cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence. If it does so, confusion is very apt to result, and never is it

more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination. Witnesses essential to the unfolding of the narrative on which the prosecution is based, may be, of course, called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution.

It is clear from the report of the ease of Habeeb Mahammad that the rule laid down in the case of Stephen Seneviratne v. The King by the Privy Council had the approval of their Lordships of the Supreme Court, and, therefore, the rule to he found in the ease of Stephen Seneviratne still holds good. In our view, therefore, there is no warrant for the wide proposition submitted before us by Mr. Samant presumbly basing that proposition upon the observations of Jenkins C.J. which, as we have already pointed out, did not find complete approval from the Privy Council. In our opinion, considering the facts before us, there is no analogy between the facts in the case before the Supreme Court and the case before us. Prom the facts before their Lordships of the Supreme Court it was clear and it was so held that Biabani, though a material witness, was withheld by the prosecution with an oblique motive, that motive being to shield Biabani as also other police officers. No such motive could be alleged against the prosecution in this case nor did Mr. Samant venture to make such a suggestion in respect of Godavaribai. It seems to us that Godavaribai was probably not examined by the prosecution because as many as four witnesses from that very house had been examined and the public prosecutor must have thought that her evidence would merely be a repetition of what the other eyewitnesses had already stated. In our view, the proposition submitted to us by Mr. Samant would be contrary to the observations made by the Privy Council by which they declined to approve the idea that the prosecution must call witnesses irrespective of considerations of number and reliability. This disposes of the last contention of Mr. Samant.

5. In the circumstances, we find that there was sufficient evidence before the learned Sessions Judge to convict the appellants of the offence of robbery. We might make one more observation before we finally part with this case. From the charge, as framed by the learned Sessions Judge, if is clear that Section 34 of the Indian Penal Code has not been availed of. The evidence makes it obvious that accused No. 1 was all throughout outside the house of witness Ganpatrao. It is no doubt true, as the evidence of Bhujangarao and other witnesses show, that he was firing with his gun while standing as a guard outside Ganpatrao''s house. But then there is no evidence that he either entered that house or did any act of robbery. In these circumstances, it would have been better if the learned Judge, so far as accused No. 1 was concerned, had invoked the aid of Section 34 in the charge that he framed. But since there was a substantive charge against all the accused including accused No. 1 u/s 392, we find no difficulty in modifying the order of conviction passed by the learned Sessions Judge so far as accused No. 1 is concerned, and we hold that accused No. 1 is guilty of the offence u/s 392 read with Section 34. Except for this

modification, we confirm the order of conviction and the sentences passed by the learned Sessions Judge. In the view we take, the appeals of the three appellants fail and are, therefore, dismissed.