APPELLATE CRIMINAL

Before Mehar Singh and Gurdev Singh, JJ.

CHHOTA SINGH,—*Convict-Appellant.*

versus

THE STATE,—*Respondent.*

Criminal Appeal No. 388 of 1962

1963

April. 24th.

Code of Criminal Procedure (V of 1898)—Ss. 286 and 342—Tending of witness for cross-examination—Whether justified—Recording of statements of accused persons by magistrates before committing them to the Court of Sessions—Whether necessary—Examination of all witnesses in the commitment proceedings—Whether necessary—Powers of the Court to examine witnesses where prosecution does not produce them.

Held, that there is no meaning in tendering a witness for cross-examination for the simple reason that when a witness has not given statement in examination in-chief, there is nothing in relation to which he is to be cross- examined. Tendering a witness for cross-examination is almost tantamount to giving up a witness. There is nothing in law which justifies such a course and in many serious cases it is likely to lead to miscarriage of justice.

Held, that though technically a Committing Magistrate may be correct but from the practical point of view he is not justified in not taking the statements of the accused persons under section 342 of the Code of Criminal Procedure, for any such statement by an accused person is afterwards evidence against him at the Sessions trial. So, even if it is not the strict requirement of the law, it is always proper and expedient in the interest of justice that statements of an accused person should be taken under section 342 of the Code of Criminal Procedure at the stage of commitment.

Held, that some magistrates, at the stage of commitment proceedings, proceed to commit the accused for trial to the Court of Sessions on the examination of one eye-witness

only. This may be within the very letter of the law, but this is a dangerous practice because if an important witness like an eye-witness is not examined at the commitment stage and when he is examined in the Sessions Court at the trial, resiles and gives entirely a new version of the case, there is no statement of his at the stage of commitment proceedings which can be transferred to the file of the trial Judge in the Sessions Court under section 288 of the Code of Criminal Procedure.

Held (per Gurdev Singh, J.)—

(1) That the commitment proceedings are not a mere idle formality and the committing magistrates have a real and important function to perform. The amendments of the year 1955 are intended to simplify the procedure and avoid delay and not to do away with the necessity of conducting enquiry by a Magistrate into cases triable by a Court of Sessions or High Court.

(2) It is true that the prosecution is not bound to examine all the persons who may have been witnesses to the crime, but in cases where the number of such witnesses is not much and the evidence of some witnesses on whom the prosecution relies is open to criticism on account of interestedness or improbability of their having been present at the spot, it is of utmost importance that such witnesses as are available and are willing to tell the truth should be examined. Even if the prosecution, because of some oblique motive, or with a view to avoid possible discrepancies in the statements of witnesses, fails to examine material witnesses, the Magistrate conducting enquiry proceedings has ample power to summon and examine such witnesses if it is necessary in the interests of justice to take such evidence. This power is clearly conferred on him by sub-section (4) of section 207-A of the Code of Criminal Procedure. Similar powers vest in the trial Judge under section 540 of the Code of Criminal Procedure, and such powers should be exercised where the

interests of justice demand. It has been observed time and again that Presiding Officers of Courts entrusted with the enquiry or trial of cases are expected to take intelligent interest in the proceedings before them, and not to act merely as automatons. If a party is tempted to resort to unfair tactics, the Court should be vigilant enough to thwart such tactics to ensure a fair trial and to prevent failure of justice.

Appeal from the order of Shri Sukhdev Singh Sidhu, Additional Sessions Judge, Sangrur, dated the 17th March, 1962, convicting the appellant.

BIRINDER SINGH, ADVOCATE, for the Appellant.

SURINDER SINGH, ADVOCATE, for the Advocate-General,

JUDGMENT

Mehar Singh, J. MEHAR SINGH, J.—The two appellants, Chhota Singh and Gurbux Singh, real brothers, were along with their third brother Puran, tried by the learned Additional Sessions Judge at Sangrur of an offence of murder of Pali and of offences of voluntarily causing hurt with sharp and blunt weapons to Nikku P.W. 2 and Budhu P.W. 3. By his judgment and order of March 17, 1962, the learned trial Judge has acquitted Puran and convicted Chhota Singh appellant under section 302 of the Penal Code for the murder of Pali sentencing him to life imprisonment and also under section 323, read with section 34, of the Penal Code in connection with the injuries to Nikku, P.W. 2, sentencing him to four months' rigorous imprisonment and has also convicted Gurbux Singh appellant under section 326 of Penal Code for injuries caused to Pali deceased sentencing him to five years' rigorous imprisonment and under section 323 of the Penal Code for the simple injury to Nikku, P.W. 2 sentencing him to six months' rigorous imprisonment. The sentences of each appellant have been ordered to run concurrently.

There is an appeal by the appellants against their convictions and sentences. There is a revision application by the State seeking enhancement of sentence of life imprisonment to death in the case of Chhota Singh appellant for the murder of Pali deceased. There is no appeal or revision against the acquittal of Puran or the acquittal of Gurbux Singh appellant of the offence of murder.

The case is quite simple. The occurrence took place at about 7 a.m. on September 12, 1961, in village Jhaloor near the house of Pali deceased. Nikku P.W. 2 is the real brother of the deceased and Budhu P.W. 3 is the son of Pali deceased and thus the nephew of the first-named witness. The third eye-witness is Chhoto P.W. 4 who is the widow of Pali deceased. The report was lodged by Nikku P.W. 2 at 11 A.M. on the same day in a police station some 12 miles away from the village. It is obviously prompt. In this report as also in the testmony of the three eye-witnesses the facts stated are that Chhota Singh appellant and Budhu P.W. 3 were friends. Sometimes in the month of Baisakh, which should be about the month of April, they distilled illicit liquor which they then divided, and each had 2½ bottles of liquor. Budhu P.W. 3 consumed two bottles and kept concealed the remaining half bottle which was quietly taken away by Chhota Singh appellant. This led to Budhu P.W. 3 making demands for the return of the half bottle of illicit liquor from Chhota Singh appellant who promising to return the same put him off a number of times. A couple of days before the occurrence there was an altercation between these two at the shop of Sham Lal, P.W. 7 on this account because Budhu P.W. 3 demanded price of half bottle of illicit liquor from Chhota Singh appellant. Sham Lal P.W. 7 intervened and separated them. On the next day, that is to say, a day prior to the morning of the occurrence, there was

Chhota Singh
v.
The State

Mehar Singh, J.

again an altercation between the two in the presence of Piara P.W. 8 on the same matter, but this witness again stopped that altercation. It appears apparent that Budhu P.W. 3 was making a scene, and rather unpleasant scene, of the conduct of his friend Chhota Singh appellant in not either returning the half bottle of illicit liquor or giving back its price. On the early morning of September, 12, 1961, Budhu P.W. 3 started off with the bullocks of Kartar Singh with whom he was a *siri* or labourer engaged in cultivation. He had not gone far from his house when the two appellants and their brother Puran appeared on the scene. Chhota Singh appellant had a *Khurpa,* Gurbux Singh appellant a *gandasa* and their third brother Puran a *barchha.* The three of them challenged Budhu P.W. 3, who ran back towards his house. The two appellants and their brother pursued him. Alarm raised by Budhu P.W. 3 brought out his father Pali deceased and his mother Chhoto P.W. 4. Pali deceased intervened to stop the quarrel but Chhota Singh appellant said that he be dealt with first. Thereupon this appellant gave a *khurpa* blow on the head of Pali deceased, which brought the latter to the ground. Gurbux Singh appellant followed with a *gandasa* blow on the face of the deceased with a second blow on his chin. Intervention of Budhu P.W. 3 to save his father brought a thrust blow from Puran with a *barchha* in his chest and another blow with the blunt side of the *barchha* on his back. Nikku P.W. 2 and Chhoto P.W. 4 also intervened but Gurbux Singh appellant delivered a blow from the blunt side of his *gandasa* on the left thigh of Nikku P.W. 2 and Chhota Singh appellant pushed Chhoto P.W. 4 bringing her to the ground causing an injury on the left elbow. Wazir P.W. 5 also witnessed the occurrence. Budhu P.W. 3 did use a *gandasa* to save his father Pali deceased and this was against Gurbux Singh appellant but the latter was not hit. Hari Singh P.W. 6 arrived and to him the

witnesses gave the information of the occurrence. Budhu Ram P.W. 17 also arrived and to him also the witness gave the information of the occurrence. But the witnesses say that all they said to the witnesses was that the sons of Hira had caused injuries to Pali deceased, Nikku P.W. 2, Budhu P.W. 3 and Chhoto P.W. 4. The appellants and Puran are the sons of Hira.

The investigating Officer soon reached the place of the occurrence but he did not succeed in arresting the appellants and their third brother until they were produced before him by Sarpanch Bachan Singh of Khetala on the night between September fourteen and fifteen, 1961. Thereafter each one of the three made a statement that he was prepared to produce a weapon and pursuant to that statement he actually produced his weapon and the handle of the weapon. To those statements of the appellants and their brother Puran and the recoveries made by each one of them Wazir Chaukidar P. W. 11 is a witness. This witness says that "the Sub Inspector had asked me to wait as he stated that the accused were going to make disclosure statements. He also told me that the accused would tell about the place where they had placed their respective weapons. He had also said that the accused had already told him about the places of concealment of the weapons and he would like to take down their statements in my presence." Among other reasons given by the learned trial Judge one reason is that it is evident from the statement of this Chaukidar that the Investigating Officer made no discovery in fact from any statement by either of the appellants or their brother Puran made under section 27 of the Evidence Act, he already having knowledge where the weapons were lying. The evidence with regard to the recoveries of the weapons has been discarded by the learned trial Judge and apparently on sound ground. Nothing need more be said about that.

Chhota Singh
v.
The State

Mehar Singh, J.

On September thirteenth, 1961, at about 7.30 A.M. Dr. P. C. Roy P.W. I performed the *post mortem* examination of the dead body of Pali deceased who died sometime after the assault. He found three incised wounds and one stab wound on the dead-body. The first incised wound was on the left side of the head with frontal and parietal bones, membranes and brain cut throughout under the injury, the second incised wound was situate in between the lower lip and the chin with mandibular bone under the injury cut, the third incised wound was transverse on the mouth and right side of the cheek with the tongue cut, and the fourth stab wound was inside the upper lip with maxillary bone cut. The doctor found the first injury fatal and individually sufficient to cause death in the ordinary course of nature though he was of the opinion that the 2nd, 3rd and 4th injuries combined were also sufficient to cause death in the ordinary course of nature. The first three injuries were caused with a sharp-edged weapon and the fourth with a piercing weapon. He examined on the same day, some hours after, Budhu P.W. 3 and found four simple injuries on his person, one caused with a sharp-edged weapon and the remaining with blunt weapon. He also examined the injury of Nikku P.W. 2 and found it a *lathi* mark on the left thigh the injury being simple in nature and caused with a blunt weapon. On the person of Chhoto P.W. 4, he found one abrasion above the elbow. The injury was simple and caused with blunt weapon.

The learned Judge has not accepted the evidence of the witnesses against Puran because no injury with a piercing weapon like *barchha* has been found in the chest of Budhu P.W. 3 as deposed to by the witnesses, and though blunt weapon injuries have been found on the person of this witness but the learned Judge has not believed that if Puran came armed with a *barchha*

and once used it in a piercing manner he would have been disposed thereafter to use it like a stick as a blunt weapon. He has, therefore, given benefit of doubt to Puran and acquitted him on this ground. Apart from this the medical testimony is completely consistent with the version of the occurrence in the report as also in the consistent testimony of the three eye-witnesses.

The appellants have denied their participation in the incident and their main theme is that they have enmity with Kartar Singh, with whom Budhu P.W. 3 was employed and thus they have been involved in this case falsely. There is no evidence in defence.

The report was lodged at the earliest possible opportunity. The facts given in it are consistently deposed to at the trial by Nikku P.W. 2, Budhu P.W. 3 and Chhoto P.W. 4. The first is the brother, the second is the son and the third is the widow of Pali deceased. The witnesses are interested. There is, however, no enmity or subsisting ill-will on their part with the appellants so as to render their testimony suspicious in any manner. No doubt there was quarrel between Budhu P.W. 3 and Chhota Singh appellant about the half a bottle of illicit liquor as is without question proved by the evidence of Sham Lal P.W. 7 and Piara P.W. 8, apart from the three eye-witnesses, but that cannot possibly be taken as a motive operating with the eye-witnesses to make false allegations against the two appellants. There is nothing in the cross-examination of the witnesses that throws any possible doubt on their veracity. No doubt it is in the evidence of Nikku P.W. 2 and Chhoto P.W. 4 that when challenged Budhu P.W. 3 had a *gandasa* with him and this last named witness says that he did not have a *gandasa* with him but that when his father was attacked he went inside and brought out a *gandasa*. He was questioned whether he attacked Gurbuux Singh appellant

Chhota Singh
v.
The State

Mehar Singh, J.

with a *gandasa* and he replied that he did but unsuccessfully. This does not in any way advance the case of the appellant.

The three eye-witnesses say that when Hari Singh P.W. 6 came they told him that the sons of Hira had caused injuries to them and the deceased and this much is clear from the evidence of Budhu Ram P.W. 17, who further says that on his enquiring the names of the three sons of Hira were given. However, Hari Singh P.W. 6 says that as he was coming to the place of occurrence on hearing the noise of the quarrel, he saw Chhota Singh appellant, with a *gandasa* in his hand, going to his house. *Khurpa* Exhibit P. 1 was shown to him in the Court and he said that that was the *gandasa* that this appellant had with him. He then went to the place where Pali deceased was lying injured and met all the four eye-witnesses but they, he says, did not name the assailants to him though the persons gathered there were saying that Chhota Singh appellant had caused injuries to Pali deceased. The witness was cross-examined with regard to his statement before the police where he had stated that the eye-witnesses had informed him that the two appellants and their third brother Puran had caused injuries to them and Pali deceased. He admitted that he made the statement but explained that he did so being afraid of the police lest the police should disgrace him if he did not make that type of statement. The investigating Officer has not been questioned on this point that he thus compelled Hari Singh P.W. 6 to make any such statement. The witness is unsatisfactory and though he was the first to arrive immediately as the occurrence came to an end and his evidence cannot be accepted because he is discredited by his earlier statement. Budhu Ram P.W. 17 says that Nikku P.W. 2 approached him at his house and informed him that the sons of Hira had inflicted injuries on his person

of his brother, Pali, deceased, his nephew Budhu as also on the person of the wife of Pali deceased. If Nikku P.W. 2 went to the house of this witness and gave him this information it is not conceivable that he should have withheld that information from Hari Singh P.W. 6 who immediately after the occurrence arrived at the spot. So the evidence of Hari Singh P.W. 6 is not helpful to the appellants. There is nothing to show any enmity on the part of Kartar Singh, with whom Budhu P.W. 3 was *siri*, with the appellants.

The learned trial Judge has held each one of the two appellants responsible for his own acts with regard to the death of Pali deceased on the ground that the arrival of Pali deceased was not within their contemplation and they neither had nor could have common intention to murder him in the circumstances of the case. This is correct approach on the facts as established by the evidence of the eye-witnesses.

As already pointed out there is no sufficient reason not to accept the testimony of the three eye-witnesses with regard to the two appellants supported as it is by the medical testimony and the evidence of Budhu Ram P.W. 17 but even if there was no support from a witness of the type of Budhu Ram P.W. 17 there is no reason why the three witnesses should not be believed.

It is surprising that in the present case Wazira P.W. 5, who to all appearances is an independent witness, was tendered for cross-examination by the Public Prosecutor and it is extraordinary that the learned Additional Sessions Judge permitted such a practice which is apparently contrary to law. There is no meaning in tendering a witness for cross-examination

Chhota Singh
v.
The State

Mehar Singh, J.

for the simple reason that when a witness has not given statement in examination-in-chief, there is nothing in relation to which he is to be cross-examined. Tendering a witness for cross-examination is almost tantamount to giving up a witness. There is nothing in law that justifies such a course. The trial Courts adopt this manner of examining witnesses simply to lighten their burden, but it is not realised that in a serious case like the present murder case when the learned trial Judge failed to examine Wazira P.W. 5, he was very seriously remiss in his duty. Another matter that we have observed in this case is that, though technically the learned Committing Magistrate may be correct but from the practical point of view having regard to the serious nature of the charge against the accused persons in this case he was not justified in not taking the statements of the accused persons under section 342 of the Code of Criminal Procedure, for it may be pointed out that any such statement by an accused person is afterwards evidence against him at the Sessions trial. So, even if it is not the strict requirement of the law, it is always proper and expedient in the interest of justice that statements of an accused person should be taken under section 342 of the Code of Criminal Procedure at the stage of commitment. The learned Magistrate, at the stage of commitment proceedings, only seems to have proceeded, as appears from his order, on the examination of one eye-witness. No doubt, again this may be within the very letter of the law, but this is a dangerous practice because if an important witness like an eye-witness is not examined at the commitment stage and when he is examined in the Sessions Court at the trial, resiles and gives entirely a new version of the case, there is no statement of his at the stage of the commitment proceedings which can be transferred to the file of the trial Judge in the Sessions Court under section 288 of the Code of Criminal Procedure.

These defects it has been necessary to point out because they lead sometime to serious consequences and to injustice in important and serious cases as the present case.

However, on he evidence in the present case the learned Judge has been, from any angle, justified in convicting the appellants and sentecing them as he has done. It has been stated that the State has not filed any appeal or revision with regard to the acquittal of Puran or of Gurbux Singh appellant of the offence of murder but it has filed a revision application to obtain enhancement of the sentence of life imprisonment passed on Chhota Singh appellant in regard to the murder of Pali deceased. No adequate ground has been shown to support that application. The appellants did not come to attack Pali deceased. He appeared on the scene unexpectedly and got involved in the occurrence. In the circumstances there is no sufficient ground for taking a different view in the matter sentence so far as this appellant is concerned in regard to the death of Pali deceased than the one that has prevailed with the learned trial Judge. So this appeal of appellants and the revision application of the State are dismissed.

Gurdev Singh, J.

GURDEV SINGH, J.—I entirely agree with my learned brother that both the Criminal appeal and the petition for revision, be dismissed and with the reasons recorded for this decision, I further endorse his observations disapproving of the practice of tendering material witnesses by the prosecution and the failure of the trial Court and the Committing Magistrate to examine an important witness of the occurrence. The modification of the procedure for commitment of cases for trial by the Court of Session affected by the Code of Criminal Procedure (Amendment) Act XXVI of 1955 has created an erroneous impression in the minds of some of the Magistrates that they are merely to act as post offices for transmitting case of serious nature,

Chhota Singh
v.
The State

Gurdev Singh, J.

which they are themselves not competent to try, to a superior Court. This is a fallacious view. On a careful perusal of the various provisions contained in Chapter XVIII of the Code of Criminal Procedure relating to commitment proceedings, it will be evident that the Committing Magistrates have a real and important function to perform and commitment proceedings are not a mere idle formality. The amendments of the year 1955 are intended to simplify the procedure and avoid delay and not to do away with the necessity of conducting enquiry by a Magistrate into cases triable by a Court of Session or High Court. If the intention of the legislature was otherwise, it could have been achieved by merely deleting the provisions of Chapter XVIII of the Code.

It is true that the prosecution is not bound to examine all the persons who may have been witnesses to the crime but in cases where the number of such witnesses is not much and the evidence of some witnesses on whom the prosecution relies is open to criticism on account of interestedness or improbability of their having been present at the spot, it is of utmost importance that such witnesses as are available and are willing to tell the truth should be examined. Even if the prosecution, because of some oblique motive, or with a view to avoid possible discrepancies in the statements of witnesses, fails to examine material witnesses, the Magistrate conducting enquiry proceedings has ample power to summon and examine such witnesses if it is necessary in the interests of justice to take such evidence. This power is clearly conferred on him by sub-section (4) of section 207-A of the Code of Criminal procedure. Similar powers vest in the trial Judge under section 540 of the Code of Criminal Procedure, and such powers should be exercised where the interests of justice demand. It has been observed time and again that Presiding Officers of Courts entrusted with the

enquiry or trial of cases are expected to take intelligent interest in the proceedings before them, and not to act merely as automatons. If a party is tempted to resort to unfair tactics, the Court should be vigilant enough to thwart such tactics to ensure a fair trial and to prevent failure of justice.

B.R.T.

CIVIL MISCELLANEOUS

Before S. B. Capoor and Prem Chand Pandit, JJ.

SONA RAM AND OTHERS,—*Petitioners*

versus

CENTRAL GOVERNMENT AND OTHERS,—*Respondents.*

Civil Writ No. 39 of 1960

1963

April, 24th.

Code of Civil Procedure (Act V of 1908)—S. 411—Provisions of the Code—Whether apply to petitions under Article 226 of the Constitution—High Court Rules and Orders, Volume 5—Chapter 4-F(b)—Whether makes the privisions of the Code inapplicable to writ proceedings.

Held, that if in a petition under Article 226 of the Constitution civil rights are involved, then the proceedings would be civil proceedings, but, on the other hand, if the proceedings do not involve such rights, then they cannot be termed as such. It follows, therefore, that in writ petitions, where civil rights are involved, the proceedings are in the nature of a suit and by virtue of the provisions of section 141, the procedure provided in the Code in regard to suits shall apply, as far as it can be made applicable. A petition for a writ to the effect that the property in dispute ought to have been transferred to the petitioners by the Rehabilitation Department and the same should not have been put to auction is a civil proceeding in the nature of a suit and by virtue of the provisions of section 141, the procedure provided in the Code of Civil Procedure in regard to suits shall apply, as far as it can be made applicable. The fact that certain rules have been framed by the High Court does not change the position, because they are in addition to, and not in substitution of, the provisions of the Code.