[COURT OF CRIMINAL APPEAL]

1941 *Present :* **Soertsz, Keuneman, and de Kretser JJ.**

THE KING *v.* CHALO SINGHO

4—M. C. Chilaw, 12,555.

Evidence—Witness named on back of indictment—Failure of Crown to call or tender for cross-examination—No presumption under Evidence Ordinance, s. 114.

Prosecuting Counsel is not bound to call all the witnesses named on the back of the indictment or tender them for cross-examination. In exceptional circumstances the presiding Judge may ask the prosecuting Counsel to call such a witness or may call him as a witness of the Court.

There is no misdirection by the Judge when he omits to refer to the presumption under section 114 (*f*) of the Evidence Ordinance in cases in which the Crown does not call or tender for cross-examination on the request of the prisoner's Counsel a witness, whose name appears on the back of the indictment and whom the prisoner's Counsel had himself an opportunity of calling.

APPEAL from a conviction by a Judge and jury before the Western Circuit.

J. A. P. Cherubim, for the accused appellant.

E. H. T. Gunasekera, C.C., for the Crown.

Cur. adv. vult.

March 7, 1941. SOERTSZ J.—

This case came before us by way of an appeal on questions of law, and of an application for leave to appeal on the facts. After hearing Counsel for the prisoner on the application, we refused it because, assuming a proper charge by the Judge, there was ample evidence to support the conviction.

The questions of law raised in the notice of appeal were :—

(1) Is the Crown bound to call or, at least, to tender for cross-examination every witness whose name appears on the back of the indictment ?

(2) If any of these witnesses are not called, or tendered for cross-examination, on the request of the accused or his pleader, or otherwise, is there non-direction if the Judge fails, in the course of his charge to the jury, to direct them under section 114 (*f*)

of the Evidence Ordinance, that they are entitled to presume that the witnesses who were not called or tendered, would have been unfavourable to the case for the Crown if they had been called ?

Counsel for the appellant did not press the point involved in the first question with much enthusiasm probably because he, very properly, felt deterred by the opinion of the Privy Council delivered in the case of *The King v. Seneviratne*[1]. That opinion put an end to a controversy which had long vexed the Bench and the Bar of this country, and we should have thought that it would not arise to trouble us any more. But the frequency with which this matter continues to make appearance in our Assize Courts in some form or other, and the fact that it has been definitely raised in this notice of appeal, show that the Dragon is not quite dead, and it would, therefore, perhaps, be useful to take a brief survey of the history of this question in England, and here.

In England, the view on this matter has undergone a complete metamorphosis. In 1823, in the case of *Rex v. Simmonds*[2], it was held that "though Counsel for the prosecution is not bound to call every witness . . . . on the back of the indictment, it is usual for him to do so, and if he does not . . . . the Judge will call the witness that the prisoner's Counsel may have an opportunity of cross-examining him". Fifteen years later, in the case of *R. v. Holden*[3], the ruling was that "every witness present at a transaction . . . ought to be called . . . . even if they gave different accounts". But in the year 1847 in *Reg v. Woodhead*[4] a very different view was taken by Alderson B. who declared that the Judges had laid down the rule "that a Prosecutor is not bound to call witnesses merely because their names were on the back of the indictment", and the learned Baron went on to add that witnesses whose names were on the indictment should be brought to Court by the Prosecutor because the prisoner might, otherwise, be misled into relying on their presence, and neglect to bring them himself, "but they are to be called by the party who wants their evidence", and they become the witnesses of the party calling them. This view was adopted by Erle J. in 1848 in *R. v. Edwards et al*[5] and when Counsel for the prisoner in that case requested the Judge to call a witness whom the Prosecutor was not calling, as a witness of the Court, the learned Judge said: "No, I do not think I ought to do so. There are, no doubt, cases in which a Judge might think it a matter of justice so to interfere but, generally speaking, we ought to be careful not to overrule the discretion of the Counsel who are, of course, more fully aware of the facts of the case than we can be". Again in 1876, in *R. v. Thompson*[6] Lush J. said "the prosecution are not bound to call . . . . witnesses because their names happen to be on the back of the indictment", and in 1927 the Court of Criminal Appeal upheld these views in the case of *R. v. Harris*[7]. There can, therefore, be no doubt in regard to the view that has prevailed in England for nearly a century.

[1] *38 N. L. R. 221.*
[2] *1 Car. & P 82 ; 171 Eng. Rep. 1111.*
[3] *8 Car. & P 606 ; 173 Eng. Rep. 638.*
[4] *2 Car. & K 520 ; 175 Eng. Rep. 216.*
[5] *3 Cox Cr. C. 82.*
[6] *13 Cox Cr. C. 181.*
[7] *28 Cox Cr. C. 432.*

Counsel for the appellant, however, referred to certain local cases in support of his contention. In *The King v. Perera*[1], Wood Renton C.J., whilst stating that "the Crown is under no obligation to call witnesses whose evidence it regards as unnecessary in view of evidence which has already been given. Nor while it has no right to withhold a witness merely because his testimony may help the case for the defence, is it bound to adopt as its own, witnesses whom it alleges to be dishonest", went on to say that "in a criminal prosecution the Crown should, as an ordinary rule, call the attention of the Court and of Counsel for the accused to the fact that it does not propose to call certain witnesses as its own, should state the reason why this is considered undesirable *and should tender the witnesses in question for cross-examination*". For this *dictum* the learned Chief Justice relied on *Rex v. Simmonds*[2]; *Queen Empress v. Tulla*[3]; *Queen Empress v. Durga*[4], and *Rex v. Fernando*[5]. In *Queen Empress v. Tulla,* Tyrrell J. expressing himself in terms similar to those in the passage I have quoted from the judgment of Wood Renton C.J., merely stated his own opinion without reference to any authority. The case of *Queen Empress v. Durga* was heard by a Full Bench including Tyrrell J., and although it is quoted by Wood Renton C.J. in support of his view, it is really opposed to that view. The Bench in that case ruled: "*We can find nothing in the Code of Criminal Procedure which imposes an obligation to call all the witnesses entered in the Calendar as witnesses for the prosecution* . . . . It appears obvious to us that it cannot be the duty of the Public Prosecutor acting on behalf of the Government and the country *to call or put into the witness box* for cross-examination a witness whom he believes to be a false or *unnecessary witness*". This Bench followed the rulings of Alderson B. in *Reg. v. Woodhead*[6] and of Parke B. *Reg. v. Cassidy*[7] *Rex v. Simmonds,* and *Reg. v. Holden* were not referred to. So that the Indian foundation upon which Wood Renton C.J. based himself is really non-existent. The local case of *Rex v. Fernando* referred to by Wood Renton C.J. is not of much assistance. Hutchinson C.J. having said: "It has always been *my practice* to require the prosecution to submit for cross-examination any witness whose name is on the indictment if the defence wishes to cross-examine him", went on to add: "But I find that *that practice has not been uniform in Ceylon,* and *there is no law prescribing it,* although it seems to be right".

It will thus be seen that the principal local case upon which the Counsel for the appellant relied to support his contention that witnesses whose names appear on the back of the indictment should be examined by the Crown or, at least, tendered for cross-examination, rests upon much slighter authority than at first sight appears to be the case.

The King v. Amerdeen[8] is an earlier judgment of Wood Renton J. in which he expresses an opinion similar to that in *King v. Perera* without which reference to authority. The other local case cited by appellant's Counsel, namely, *The King v. Kennedy*[9] deals with a different point.

[1] *18 N. L. R. 215.*
[2] *1 Car. & P 84 ; 171 Eng. Rep. 1111.*
[3] *(1885) I. L. R. 7. All. 904.*
[4] *(1893) 16 Cal. 84.*
[5] *(1908) 2 Leader L. R. 81.*
[6] *2 Car. & K 520 ; 175 Eng. Rep. 216.*
[7] *1 F. & F. 79 ; 175 Eng. Rep. 634.*
[8] *3 Bal. Rep. 127.*
[9] *36 N. L. R. 303.*

With the case law in this condition, our Courts did not follow a uniform course in this matter, and with no Court of Criminal Appeal to settle the point, it may be said that the position was "*quot judices, tot sententiae*" till the ruling by the Privy Council in the case referred to. That ruling must now be regarded as the final pronouncement on the question. Lord Roche after dealing with a matter of hearsay evidence to which the attention of the Board had been asked, went on to say:—"It is said that this state of things arose because of a *supposed obligation* on the prosecution to call every available witness on the principle laid down in *Ram Ranjan Roy v. The King Emperor*[1], to the effect that all available eye witnesses should be called by the Prosecution even though, as in the case cited, their names were on the list of the defence witnesses. Their Lordships do not desire 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 the idea that a prosecutor must call witnesses irrespective of considerations of number and of reliability, or that a prosecutor ought to discharge the functions both of prosecution and defence".

This view is in accordance with the views taken in *Reg. v. Woodhead; R. v. Edwards; R. v. Thompson;* and *R. v. Harris;* and is contrary to those in the earlier cases *Rex. v. Simmonds* and *R. v. Holden.* In regard to the case of *Ram Ranjan Roy* mentioned by Lord Roche, Jenkins C.J. bases his judgment that "it was undoubtedly the duty of the Public Prosecutor . . . . to have placed before the Trial Court the testimony of all available witnesses" on the ruling in *R. v. Holden.* His attention does not appear to have been drawn to the decisions given in the later cases.

It must, therefore, be regarded as well-established now, that a prosecutor is not bound to call all the witnesses on the indictment, or to tender them for cross-examination. That is a matter in his discretion, but in exceptional circumstances, a Judge might interfere to ask him to call a witness, or to call a witness as a witness of the Court. It must, however, be said to the credit of prosecuting Counsel to-day, that if they err at all in this matter, they err on the side of fairness.

In regard to the second question raised in the Notice of Appeal, appellant's Counsel adduced a considerable volume of Indian case law in support of it. An independent examination of a great number of other Indian cases has only served to reveal a bewildering variety of view on this question, and very little assistance can be derived from that quarter.

But it is due to Counsel that we should examine briefly the cases he relied on. In *Nayan Mandel et al v. Emperor*[2], on objection taken that the Judge should have told the jury that if material witnesses are not called by the Crown, they are entitled to presume that they would not have supported the prosecution, Graham J. disposed of it by saying "the charge does, however, contain a direction of this nature". Lort-Williams J. observed, "*the latter part* of the learned Judge's statement

[1] *16 Cr. Law Journal India 172.*

[2] *(1930) A. I. R. Cal. 134.*

about the presumption which may be drawn is, of course, correct. If the prosecution, in their discretion, do not choose to call *such* a witness, then the presumption may be drawn that his evidence, if given, would be unfavourable to the case". Unfortunately the report does not disclose, what "the latter part of the learned Judge's statement about the presumption" was, nor does it provide a clue as to what was meant by "*such* a witness". In the absence of that information the case is of no assistance to us. Then there is the case of *Hachani Khan v. Emperor*[1] in which the Court (Pearson & Patterson JJ.) said "it is pointed out that Sir Charan, one of the occupants of the boat, was not examined as a witness and it is urged that the Judge was guilty of a misdirection in not telling to the jury that it might and *indeed should* be presumed from the fact of his non-examination that if he had been examined his evidence would not have supported the case for the prosecution. This contention is perfectly correct so far as it goes. The Judge should in our opinion have given the jury a direction on these lines". All that need be said at present on this dictum is that it is clearly opposed to section 114 of the Evidence Act when it says that the Judge should have told the jury that they *should* presume. So far as telling the jury that they *may* presume is concerned, comment will presently be made upon it. The next case cited is that of *Nababali and others v. Emperor*[2], but it would be more convenient to examine it with the case of *Girischandra v. Emperor*[3]. In the latter case, Lort-Williams J. said that the presumption under section 114 might be drawn by the jury if, as a condition precedent, they were satisfied "that the person who was being kept back, in fact knew the facts, and was a willing and truthful witness, and, therefore, willing and able to give relevant evidence at the trial". In our view, this is an unattainable state of things. We cannot imagine how jurors could decide that a witness who has not been called, and whom, therefore, they could not have seen, knew the facts, was a willing witness, was a truthful witness, was able to give relevant evidence and was willing to give that evidence. The learned Judge goes on to say "the next point is that the learned Judge did not direct the jury properly that in the absence of these witnesses they might draw the presumption in section 114 (*g*). What he said was that if they accepted the contention of the Public Prosecutor that these witnesses were not called because their evidence was valueless, then they ought not to draw the presumption. But, on the other hand, if they did not *believe* his explanation, they were at liberty to draw the presumption if they thought fit. That was a proper direction". We find it impossible to endorse these statements of the Sessions Judge and of the Appeal Judge. It seems wrong that a Sessions Judge should direct the jury that their drawing or not drawing the presumption depends on whether or not they were satisfied of the veracity of the Public Prosecutor when he declared that the evidence he is not leading is valueless.

In our opinion, a prosecutor is not entitled to declare to the jury that witnesses not called although valuable, have not been called for some

[1] *A. I. R. (1930) Cal. 481.* [2] *A. I. R. (1930) Cal. 708.*
[3] *A. I. R. (1932) Cal. 118.*

reason, or that they are valueless and, therefore, not called. If occasion should arise for such matters to be considered, that should be done in the absence of the jury.

In Nababali's case (*supra*) Panckridge J. proposed a similar test to the jury when they are considering whether or not they would draw the presumption—did they accept the explanation of the prosecutor? In both these cases it was held that the omission of the Judge to tell the jury that, if the condition referred to were satisfied, they may apply the presumption, amounted to non-direction and vitiated the conviction. We are unable to agree with the views taken in these cases. As we have already observed there are Indian authorities to the contrary, *e.g.*, *in re Muthaya Thevan* [1] and *Hari Mahto* [2].

An answer to the question raised must be sought in section 114 itself. It enacts "The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case". In this context the word "Court" must bear the meaning given to it in the definition clause of the Ordinance, namely, section 3:—"Court" includes all Judges and Magistrates, and all persons, except arbitrators, *legally authorized to take evidence*. Jurors obviously fall outside these classes, and therefore, in strict law, it is not open to them to draw a presumption as to the existence of any fact independently, but only when their attention is called to the matter by the Judge, and they are directed that they may apply the relevant presumption if they thinks fit. The Judge himself will first consider the question whether there is occasion for any of the presumptions mentioned in section 114 and when he is considering the matter he is required to have regard "to the common course of natural events, human conduct, and public and private business", &c. Consequently, it is a matter in the discretion of the Judge to say whether occasion has arisen in a particular case to call the attention of the jury to the presumptions arising under section 114.

This view is supported by a passage in *Phipson on Evidence, 1921 ed., p. 12*:—"It is the duty of the Judge to explain, and of the jury to observe any legal rules which regulate *the production or effect of evidence*, *e.g.*, which side has the burden of proof; *what presumptions apply*", &c. Explanation of the presumptions that arise presupposes that the Judge is satisfied that some presumption or other arises.

But, of course, if in the opinion of an Appellate Tribunal the Judge ought to have referred to any presumption under section 114 in the circumstances of a particular case, it would interfere on the ground that there has been non-direction. That can hardly happen in a case such as we have before us for the reason that before inviting the attention of the jury to the presumption in illustration (f), the Judge must be satisfied that the evidence of witnesses is being withheld, and it would

[1] *A. I. R. (1927) Mad. 475.*

[2] *A. I. R. (1936) Patna 46.*

not be possible for him to be so satisfied when it lies in the power of the defence to lead that evidence. In *Woodroffe and Ameer Ali's Evidence, ninth ed., p. 811, note 7,* it is stated on the strength of the authorities cited in support that for the presumption to arise "the evidence must be available; there is no presumption if it is not within the control of the party failing to produce it, *nor from the failure to call as a witness one whom the other party had the same opportunity of calling, nor one whose evidence would be simply cumulative*". In other words, section 114 of the Evidence Ordinance is a reproduction of the "best evidence" rule, which according to *Taylor on Evidence, 12th ed., sec. 391,* "does not demand the greatest amount of evidence which can possibly be given of any fact, but its design is to prevent the introduction of any, which, from the nature of the case, supposes that better evidence is in the possession of the party. It is adopted for the prevention of fraud, for, when better evidence is withheld, it is only fair to presume that the party has some sinister motive for not producing it".

The Indian view in the cases cited that where witnesses whose names appear on the indictment have not been called, the trial Judge is bound to refer to the presumption under section 114, and to ask the jury to consider whether they would apply it, is the logical outcome of the other view taken in the Indian cases—that the Prosecutor is bound to call or, at least to tender such witnesses, for if a party fails to do what it is bound to do, occasion, necessarily, arises for adverse comment. But for the reasons given by us, we are unable to agree with the rulings in the Indian cases. They cannot be supported in face of the English cases we have referred to and of the opinion of the Privy Council in *The King v. Seniveratne.*

We, therefore, rule on the second question that there is no non-direction by the Judge when he omits to refer to the presumption under section 114 (*f*) of the Evidence Ordinance in cases in which the Crown does not call or tender for cross-examination on the request of the prisoner's pleader a witness whom the prisoner's pleader had himself an opportunity of calling. Indeed, it would be a misdirection for a Judge, in those circumstances, to tell the jury that they may apply the presumption.

Those, exactly, are the facts in this case as disclosed by the following notes of the trial: "Counsel for the defence submitted that Crown Counsel is bound to call Elmia whose name is on the back of the indictment and that if he is not calling him, he is at least bound to tender him for cross-examination. Court informs Counsel that he could call him if he so desires and refers him to the latest decisions. Counsel for the defence states he does not wish to call him as his witness."

We are of opinion that the appeal fails on both matters of law submitted to us. We dismiss it.

Appeal dismissed.