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operation the same day, are repugnant to each other, that which last received the Royal assent must prevail and be considered pro tanto a repeal of the other."

Again in *Daw, Clerk of the Commissioner of Sewers of the City of London* v. *The Metropolitan Board of Works* (1), it was held—

"Where two statutes give authority to two public bodies to exercise powers which cannot consistently with the object of the Legislature co-exist, the earlier must necessarily be repealed by the later statute."

In that case the conflict was between s. 145 of the City of London Sewers Act, 1848 and s. 141 of the Metropolis Local Management Act, 1855, and the later was held to prevail. The principle of these cases will apply to the present circumstances, and if the words "town area committee" are not held to be a translation of the words "town panchayat", the result is that a Town Area Committee being vested with power under s. 26 (a) to regulate offensive trades or callings, the power of the Town Area Committee must prevail over the power of the District Board under s. 174 (1)(k) of the District Boards Act. We, therefore, allow the appeal, set aside the order of the High Court and order the acquittal of Asa Ram appellant.

Appeal allowed.

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December 4.

NARAIN AND TWO OTHERS

v.

THE STATE OF PUNJAB

(GAJENDRAGADKAR and A. K. SARKAR, JJ.)

Criminal Trial—Material witness, who is—Failure to examine—Effect of—If amounts to rejection of evidence—Indian Evidence Act, 1872 (1 of 1872), s. 167.

Several persons attacked and seriously injured one M. After assaulting him the assailants were carrying him away when M's brother R came to rescue him and in self defence shot dead one of the assailants and carried M away. For the assault on M eight persons, including the appellants, were tried for offences under

(1) (1862) C.P. 12 C.B.N.S. 161; (1862) 133 R.R. 311.

ss. 148, 307 and 364 both read with ss. 149 and 34 of the Indian Penal Code. At the trial R was cited as a witness by the prosecution, but R refused to give evidence claiming protection under Art. 20 of the Constitution. The Sessions Judge upheld R's objection and the prosecution gave him up as a witness. After trial, the Sessions Judge acquitted four of the accused but convicted the appellants and one other person. In appeal before the High Court the appellants urged that the Sessions Judge was wrong in holding that R was entitled to the protection of Art. 20 and that the trial was vitiated by this decision whereby the accused had been deprived of the benefit of R's evidence. The High Court was of the view that if R had been compelled to give evidence he would not have supported the prosecution but whatever he would have stated would not have rebutted the convincing testimony of the other witnesses and that therefore the failure to examine R did not in any way affect the ultimate decision of the case. The High Court apparently had s. 167 of the Evidence Act in view. In the result the High Court upheld the convictions. The appellants appealed and contended that the view of the High Court was not justified by s. 167 and that the trial was not fair as R, a material witness, had been kept out of Court.

Held, that the trial was not vitiated by the failure of the prosecution to examine R as a witness. Section 167 did not help the appellants as it was not a case in which evidence could be said to have been rejected within the meaning of that section. Further, R was not a witness material to the prosecution inasmuch as he arrived on the scene after the assault was over and it was not necessary for the prosecution to examine him to ensure a fair trial. Where a material witness has been deliberately or unfairly kept back, a serious reflection is cast on the propriety of the trial and the validity of the conviction resulting from it may be open to challenge. The test whether a witness is material is whether he is essential to the unfolding of the narrative on which the prosecution is based and not whether he would have given evidence in support of the defence.

Habeeb Mohammad v. *The State of Hyderabad*, [1954] S.C.R. 475; *Stephen Seneviratne* v. *The King*, A.I.R. 1936 P.C. 289.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 186 of 1956.

Appeal by special leave from the judgment and order dated February 18, 1955, of the Punjab High Court in Criminal Appeals Nos. 389 and 406 of 1954, arising out of the judgment and order dated June 16, 1954, of the Court of the Additional Sessions Judge, Ferozepur, in Sessions Case No. 5 of 1954 and Trial No. 5 of 1954.

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Jai Gopal Sethi, Vidya Dhar Mahajan and *K. L. Arora*, for the appellants.

N. S. Bindra, R. H. Dhebar and *T. M. Sen*, for the respondent.

1958. December 4. The Judgment of the Court was delivered by

SARKAR, J.—Eight persons were tried for offences under ss. 148, 307 and 364 both read with ss. 149 and 34 of the Indian Penal Code, by the Additional Sessions Judge, Ferozepur. The learned Sessions Judge acquitted four of the accused, namely, Het Ram, Teja Ram, Manphul and Surja Ram as he did not think that their presence at the occurrence had been proved beyond reasonable doubt. He convicted the remaining four, namely, Narain, Jot Ram, Gheru and Jalu under ss. 307 and 364 read with s. 34. He sentenced Narain, Jot Ram and Gheru to rigorous imprisonment for three years under s. 307 and two years under s. 364. He sentenced Jalu to two years' rigorous imprisonment under each section. On appeal by the convicted persons the High Court of Punjab maintained the convictions but reduced the sentences passed on Jot Ram and Gheru to one year's rigorous imprisonment and Jalu to the term of imprisonment already undergone. It maintained the sentence passed on Narain and dismissed his appeal. Narain, Jot Ram and Gheru have appealed to this Court from that judgment.

The prosecution case is that one Sultan was the proprietor of a field described in the proceedings as plot No. 97. Sahi Ram had been a tenant of the land. The land had not been cultivated in the year preceding the occurrence with which this case is concerned and the owner had thereupon resumed possession of it. On June 14, 1953, Mani Ram a son of the proprietor, arrived at the field on a tractor accompanied by a labourer, Moola Ram, with the object of ploughing it and found Sahi Ram actually ploughing. Mani Ram turned Sahi Ram out of the field. Sahi Ram raised a protest but eventually left abandoning his plough on the field. Mani Ram then began to plough the field

with his tractor. A little later the tractor developed mechanical trouble and Mani Ram stopped ploughing and started attending to it. While Mani Ram was so engaged, Sahi Ram arrived at the spot accompanied by seven persons, being the accused earlier named other than Narain, variously armed. Jalu had come on a horse. They fell upon Mani Ram and assaulted him. Moola Ram who ran to his rescue was also assaulted. Moola Ram then attempted to run away whereupon Sahi Ram and his party chased him. While Sahi Ram and his party had their attention on Moola Ram, Mani Ram got into his tractor and began to drive away from the field. At this point of time Narain arrived on a horse with a gun in his hand. He told the pursuers of Moola Ram to leave him as he was merely a hired man and pointed out that the real culprit Mani Ram was about to escape in the tractor. The party then turned round and pursued Mani Ram. Narain on his horse soon overtook Mani Ram and fired at him while he was still on the tractor in the driver's seat. Mani Ram fell down from the tractor which, being in motion, proceeded on its own and ran into a tree and stopped. Narain's horse fell against the cultivator of the tractor and was injured. Mani Ram picked himself up and staggered for shelter into the hut of one Mukh Ram, which was nearby. The pursuers then came up and Jot Ram fired a shot at Mani Ram inside the hut and so did Gheru. Mani Ram fell down in the hut. Mukh Ram threw himself on the body of Mani Ram to protect him. Gheru and Narain then said that they would burn the hut with Mani Ram inside it. Sahi Ram suggested that it would be better to carry Mani Ram to their house and there kill him and burn his body. Mukh Ram was then dragged away and Mani Ram's body was put on a horse and Jalu mounted it. The party then proceeded towards the village by a foot path with Mani Ram, who was then unconscious, as their captive. After they had gone some distance Raghbir, the younger brother of Mani Ram, having heard of the incident came to rescue Mani Ram. He met Jalu on the horse with Mani Ram and Sahi Ram walking close behind,

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the rest of the party being at some distance. Raghbir asked Jalu to put down Mani Ram on which Jalu threatened to kill, and Sahi Ram pointed his sela at Raghbir. Raghbir then shot at Sahi Ram with the pistol he was carrying and the latter fell down and died soon after. Jalu got off the horse and ran away. Before the others could arrive Raghbir carried Mani Ram to the house of one Birbal from where he was later taken to the hospital.

The defence was that the prosecution case was wholly false and the real facts were as follows: On the date of the occurrence Sahi Ram was ploughing the field when Mani Ram and Raghbir came there and tried to stop him. There was an altercation. Jot Ram and Gheru who were in a field nearby came up and advised Sahi Ram not to dispute over the matter with Mani Ram but have it decided by Panchayat. Sahi Ram, Jot Ram and Gheru then left the field and proceeded towards the village. While going Jot Ram noticed that Sahi Ram was carrying a pistol and took it away from him to prevent him from using it in his excitement. Mani Ram and Raghbir also went towards the village but by a different route. The parties again met at the village Shamlat. Raghbir abused Sahi Ram and fired a shot at him killing him outright. Jot Ram apprehending that he might also be shot at, fired the pistol which he had taken from Sahi Ram and might have injured Mani Ram. There were two unknown persons with Raghbir and Mani Ram at this time and they also used their fire arms. Mani Ram might have received injuries from these firings also. The accused denied that any of them except Jot Ram and Gheru were present at the incident.

There were thus two conflicting versions of the same incident and there were two cross cases based on these separate versions. We are concerned with the case started on the complaint of Mani Ram and concerning the injuries suffered by him and his abduction. The other case was against Mani Ram, Raghbir, Sultan and Dalip also a son of Sultan and was based on what the defence version of the incident in the present case was. In that case Raghbir and Mani

Ram were charged under s. 302 read with s. 34 of the Indian Penal Code for having caused the death of Sahi Ram and Sultan and Dalip were charged under s. 302 read with s. 109 of the same Code in the same connection.

The learned Sessions Judge who heard both the cases, acquitted Mani Ram, Raghbir, Sultan and Dalip of the charges brought against them and convicted the appellants and Jalu in the present case accepting the prosecution version of the incident. As we have earlier stated, the conviction was upheld by the High Court.

In view of the concurrent findings of fact in the Courts below, the learned Advocate for the appellants confined himself in this Court to a question of law which we now proceed to discuss. It has to be remembered that we are concerned only with the case in which the appellants had been tried for offences against Mani Ram. With the other case we are not concerned.

In the trial Court, the prosecution had cited Raghbir as a witness. Raghbir however refused to give evidence claiming protection under Art. 20 of the Constitution. The learned Sessions Judge held that Raghbir could not be compelled to give evidence and rejected the contention of the accused that he was not entitled to the protection. The prosecution in the end did not offer Raghbir as a witness and dropped him.

When the matter came up before the High Court in appeal, it was said on behalf of the appellants, that the learned Sessions Judge was wrong in holding that Raghbir was entitled to the protection of Art. 20 and that the trial had been vitiated by this decision as a result of which the accused had been deprived of the benefit of Raghbir's evidence.

The High Court however held that the fact that Raghbir was not examined did not vitiate the trial in any way. It is this part of the High Court judgment that has been challenged before us by the learned Advocate for the appellants. The High Court observed as follows: "We may assume that Raghbir would

not have supported the prosecution story or that he would have admitted to having shot Sahi Ram. The fact that he was unwilling to make a statement does not constitute an irregularity in the trial. Had he been compelled to say something, he would, in all probability, not have told the truth, and the question is how the case would have been affected by his statement? In my view, whatever he had stated would not have rebutted the convincing testimony of the other witnesses in the case and therefore the failure of the Court to examine him does not in any way affect the ultimate decision of the case."

The learned Advocate contended that the High Court had in view the provisions of s. 167 of the Evidence Act though the section was not in terms referred. We think this is a fair view to take. The learned Advocate said that what the High Court has done is to say that even assuming that Raghbir's evidence did not support the prosecution story, that would not have made any difference to the result, because, whatever he stated would not have rebutted the convincing testimony of the other witnesses. According to the learned Advocate, this view was not justified by s. 167. It seems to us that the expression of the opinion of the High Court on this matter has not been happily worded. The question under s. 167 is not so much whether the evidence rejected would not have been accepted against the other testimony on the record as whether that evidence "ought not to have varied the decision." It is clear that if what Raghbir had said in his evidence had gone to support the defence version, then a serious question would arise as to whether the decision of the trial Court would have been in favour of the accused instead of against them, as it happened to be.

It seems to us however that s. 167 does not help the appellants. It is clear from the record that the prosecution, though it had cited Raghbir as a witness, was not very keen to examine him. When Raghbir objected to give evidence, the prosecution dropped him. Therefore it seems to us that this is not a case in which evidence can be said to have been rejected

within s. 167 of the Evidence Act. The prosecution did not in fact tender Raghbir as a witness. Nor have we any idea as to what he would have said had he given evidence. Nor is it a case where the defence wanted to call him as a witness.

It is not necessary for us, nor have we been asked, to decide the question whether Raghbir was entitled under Art. 20 of the Constitution to refuse to give evidence. It is amply clear from the record that the prosecution did not offer him as a witness upon his claiming protection under Art. 20. The learned Advocate for the appellants then argued that in this view of the matter, it must be held that a material witness had been kept out of court by the prosecution and that would give rise to an adverse inference against the prosecution case and cast serious reflection on the fairness of the trial. We were referred by learned Advocate to *Habeeb Mohammad* v. *The State of Hyderabad* (1) in this connection. We agree that if a material witness has been deliberately or unfairly kept back, then a serious reflection is cast on the propriety of the trial itself and the validity of the conviction resulting from it may be open to challenge,

The question then is, was Raghbir a material witness? It is an accepted rule as stated by the Judicial Committee in *Stephen Seneviratne* v. *The King* (2) that "witnesses essential to the unfolding of the narrative on which the prosecution is based, must, of course, be called by the prosecution." It will be seen that the test whether a witness is material for the present purpose is not whether he would have given evidence in support of the defence. The test is whether he is a witness "essential to the unfolding of the narrative on which the prosecution is based". Whether a witness is so essential or not would depend on whether he could speak to any part of the prosecution case or whether the evidence led disclosed that he was so situated that he would have been able to give evidence of the facts on which the prosecution relied. It is not however that the prosecution is bound to call all witnesses who may have seen the occurrence and

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so duplicate the evidence. But apart from this, the prosecution should call all material witnesses.

Was Raghbir then a witness essential to the unfolding of the prosecution case? That clearly Raghbir was not. The prosecution case, as we have seen, was concerned with the injuries caused to Mani Ram and his abduction. According to the prosecution case, Raghbir arrived after these offences had been committed; after Mani Ram had been assaulted and shot at and after he had been put on a horse and had been carried some distance. The prosecution no doubt admits that Raghbir shot Sahi Ram but says that he did so in self defence. This incident is an entirely separate incident. It is not necessary to prove it in order to prove the offences with which the appellants were charged. Raghbir therefore was not a witness whom the prosecution was bound to call to establish its case. The fact, assuming it to have been so, that Raghbir would have said in his evidence that the incidents did not happen as the prosecution stated, may no doubt have established a good defence. But if it was so, then he would have been only a witness material for the defence and not a witness essential to the unfolding of the narrative on which the prosecution case is based. The prosecution is not bound to call witnesses to establish the defence but only witnesses who are material for proving its own case. Indeed, since according to the prosecution case Raghbir arrived after the alleged offences were committed, he could not have given any evidence about the prosecution case. We, therefore, think that the contention of the learned Advocate for the Appellants that the prosecution should have called Raghbir to ensure a fair trial or that he was a witness material to the prosecution case, is unfounded. We do not think that the trial has at all been vitiated by the failure to call Raghbir. It may be pointed out that the appellants had not sought to produce Raghbir as a witness on their behalf.

The learned Advocate then addressed us on the question of the sentence passed on Narain. He said that the High Court passed a higher sentence on him

because it was under the impression that he had caused the only grievous injury that was found on the body of Mani Ram. The learned Advocate pointed out that there was no evidence to show that the grievous injury had been caused by Narain. It seems to us that this contention is justified. There is however evidence to show that Narain merited the higher sentence. It was he who directed the attack against Mani Ram. He called the other members of the attacking party to desist from pursuing Moola Ram as Mani Ram was the real enemy and should be dealt with. It is upon that, that the serious injuries on Mani Ram came to be inflicted. We, therefore, think that the higher sentence imposed on the appellant Narain was justified.

No other question arises in this appeal.

The result is that the appeal fails and is dismissed.

Appeal dismissed.

CHAUBE JAGDISH PRASAD AND ANOTHER

v.

GANGA PRASAD CHATURVEDI

1958

December 5.

(JAFER IMAM, S. K. DAS and J. L. KAPUR, JJ.)

Revision—Revisional powers of High Court—Jurisdiction of subordinate court dependent on existence of fact—Erroneous finding as to such fact—Competence of High Court to interfere—Code of Civil Procedure (Act V of 1908), s. 115.

Landlord and Tenant—Accommodation—Agreed monthly rent—New construction—Enhancement of rent—House Allotment Officer's findings—Power of the civil courts to interfere—U. P. Temporary Control of Rent and Eviction Act, 1947 (U.P. 3 of 1947), ss. 2(a)(f), 3A, 5(4), 6.

In 1938 the respondent took on rent from the appellant the accommodation in dispute on a monthly rent of Rs. 21-4as. On January 28, 1950, the appellant made an application to the House Allotment Officer under s. 3A of the U.P. Temporary Control of Rent and Eviction Act, 1947, for an increase in rent, on the allegation that according to the instruction of the respondent he had made a new construction in January, 1949. The