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Now there is a long line of authorities in India, *e. g.*, *Kylasa Goundan* v. *Ramasami Ayyan*[1], *Vithal Janardan* v. *Vithojirav Putlajirav*[2], *Ishwardas Jagjivandas* v. *Dosibai*[3] and *Devidas Jagjivan* v. *Pirjada Begam*[4], whereby it is established that where an imperative duty of the character we have described is imposed upon a Court, then the Limitation Act has no application.

In the light of these authorities no case is made for our interference. We must accordingly discharge the rule with costs.

G. B. R. *Rule discharged.*

ORIGINAL CRIMINAL.

Before Mr. Justice Batty.

EMPEROR *v.* BHASKAR BALWANT BHOPATKAR*.

1906. *February* 12.

Criminal Procedure Code (Act V of 1898), section 292—Act X of 1882, sections 289, 292—Adducing evidence—Documents put in during cross-examination by the accused of witnesses for the Crown—Right of reply.

During the cross-examination of a witness for the Crown certain documents were put in evidence by Counsel for the accused which were not part of the record sent up to the Court by the Committing Magistrate. No witnesses were called for the defence. The Crown claimed the right of reply.

Held, that as the documents put in during the cross-examination of a witness for the Crown were tendered and relied upon by the defence as distinct from the evidence actually tendered by the prosecution and submitted for cross-examination, they must be regarded as evidence adduced by the accused, and that therefore the Crown had the right of reply.

CASE tried before Batty, J., and a Special jury. The accused who was the editor and publisher of a Maráthi newspaper called the "Bhala," was charged under section 124-A of the Indian Penal Code, in connection with the publication in his newspaper of an article entitled "A Durbar in Hell," with attempting to bring the Government into hatred or contempt, and with

* Case No. 5, First Criminal Sessions, 1906.

(1) (1881) 4 Mad. 172.
(2) (1882) 6 Bom. 586.
(3) (1882) 7 Bom. 316.
(4) (1884) 8 Bom. 377.

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attempting to excite feelings of disaffection against the Government established by law in British India. During the cross-examination of a witness for the Crown Counsel on behalf of the accused put in certain articles from the "Bhala" as evidence in the case. The articles in question had not been previously tendered by the prosecution, nor did they form part of the record sent up to the High Court by the Committing Magistrate. The case for the prosecution having been closed, Counsel for the accused stated he did not intend to call any witnesses. Counsel for the Crown thereupon claimed the right of reply.

Raikes, Acting Advocate-General, with him *Lowndes* and *Weldon*, for the prosecution.

We claim a right of reply under section 292 of the Code of Criminal Procedure (Act V of 1898). The former Code (Act X of 1882) provided that if the accused stated that he meant to adduce evidence, the prosecution should be entitled to reply, and the different High Courts took different views of the effect of sections 289 and 292 of the former Code: *Queen-Empress* v. *Krishnaji*[1] dissented from in *Queen-Empress* v. *G. W. Hayfield*[2], *Queen-Empress* v. *Moss*[3], *Queen-Empress* v. *Venkatapathi*[4]. The only reported case under the new Criminal Procedure Code is *Emperor* v. *Stewart*[5]. From this case it appears that the view we are contending for is now adopted by the Calcutta High Court: see Mr. Justice Geidt's judgment. The right of reply is frequently waived by the Crown where the evidence adduced by the accused does not seriously affect the question and where the Crown is not at a disadvantage in summing up the case. Here the case at the close of the evidence stands where it stood when we opened our case. We have very little more idea of the line of defence to be adopted by Counsel for the accused than we had at the commencement, and as the defence rely on the articles put in during the cross-examination of our witness, we submit we are entitled to hear what the other side have to say with regard to them before we put our case to the jury.

Davar with *Gadgil* for the accused.

(1) (1890) 14 Bom. 436.
(2) (1892) 14 All. 212.
(3) (1893) 16 All. 88.
(4) (1888) 11 Mad. 339.
(5) (1904) 31 Cal. 1050.

The accused has not lost the right of reply. In spite of repeated attempts to snatch that privilege from the accused the Bombay Court has constantly ruled against such attempts. We are not aware of a single case before the High Court Sessions in which the accused person, having put in documentary evidence in the course of the cross-examination of the Crown's witnesses, has forfeited his right of reply.

The authorities are conclusive as far as Bombay and Calcutta are concerned. Section 292 in the amended Code makes the law and procedure more favourable to the accused than the corresponding section in the Code of 1882. Section 289 does not differ in the two Codes.

As to section 292 there is a difference. In the former Code the Court calls upon the accused to say whether he wishes to call any evidence, and if he said he intended to adduce evidence the prosecution got the right of reply. Under the present Code the prosecution does not get that right unless the accused does as a matter of fact adduce evidence.

The meaning of the word "adduce" here is "Are you going to call any witnesses?", or "Are you going to put in any documentary evidence which you have not been able to put in during the case for the prosecution?" It seems to take it for granted that what has taken place before is not adducing evidence: *Hurry Churn Chuckerbutty* v. *The Empress*[1].

[BATTY, J.—Everything turns on the word "Adduce".]

Davar:—Mere formally putting on the record an exhibit in cross-examination is not adducing evidence. It is a distinction which has been the matter of judicial consideration.

Adducing evidence means leading evidence. We could lead evidence independently of the prosecution. The present is not evidence which we adduce.

We are not taking the prosecution by surprise. We put these articles in for the purpose of showing that the accused is no disloyal or disaffected subject of the Crown, but that he has been an impartial critic of Government. *Queen-Empress* v. *Krishnaji*[2] is in our favour, and that ruling has been followed in every case as far as we know in these Courts.

(1) (1883) 10 Cal. 140.

(2) (1890) 14 Bom. 436.

1900.

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As far as reported cases are concerned we can remember no case in the Bombay High Court where the prosecution have been given the right to reply when documents only have been put in by the defence.

It has been laid down that when during the cross-examination of witnesses for the prosecution certain documents were put in on behalf of the accused this did not entitle the prosecution to the right of reply. That procedure has been followed in this case. The legislature does not intend by the word "Adduce" to include documents merely put in. It is not substantial evidence and the Crown is not entitled to a reply unless we give substantial evidence.

The section means that evidence has to be adduced on behalf of the accused with a view to shatter the evidence given by the prosecution witnesses.

Raikes in reply.

In this matter one must be guided by the Code and we submit that by the Code we have the right to reply. Compare the new with the old section. Under the old section the test was whether the accused when asked said that he was going to adduce evidence. Under the new section it says: "If the accused adduces any evidence." That very significant word "any" has been introduced into the new Code. Can it be said that putting in documents is not adducing "any" evidence? The legislature has done its best to make the matter clear by putting in that word. If merely a formal document were put in that would not take from the accused the right of reply. When a substantial mass of documents is put in which have not been read to the jury, it amounts, we submit, to adducing evidence. The only reported case bears out our contention.

BATTY, J.:—The original provision of the legislature was to make the right of reply dependent, not upon the actual adducing of evidence, but upon the accused's statement that he intended to adduce evidence. The ruling in *Hurry Churn Chuckerbutty* v. *The Empress*[1] with reference to that provision laid down the principle, that both sides should have the opportunity of com-

(1) (1883) 10 Cal. 140.

menting upon the evidence of the other, so that no additional advantage should be given to either. I think that unless the phrase "adduces any evidence" applies to and includes the production and recording of documentary evidence which the defence places before the Court, it has no definite meaning at all. And evidence, therefore, which has been put in or is tendered and relied upon by the defence as distinct from the evidence actually tendered by the prosecution and submitted for cross-examination, must be regarded as evidence adduced by the accused. I think therefore that the amended section is intended to give a right of reply whenever at any stage, evidence is recorded for the defence which is not part of that adduced for the prosecution. The section makes the right of reply dependent upon the fact of evidence having been adduced. Earlier decisions relate only to a state of law which made the right of reply dependent on accused's statement as to his intention to adduce evidence, and those decisions have now no application. To adduce evidence is to lead evidence, and while the legislature recognized it as a hardship that the accused should be deprived of a right of reply by merely stating that it was intended to adduce evidence which eventually was not adduced at all, it clearly expressed its intention to give the prosecution the right of reply whenever evidence has actually been put in for the defence, which was not led by the prosecution. The words of the present section suggest that the legislature approved and adopted the principle laid down in I. L. R. 10 Calcutta[1], that each side should have an opportunity of commenting upon the evidence of the other side. I therefore hold that the Crown has in this case the right of reply.

W. L. W.

(1) (1883) 10 Cal. 140.