in the absence of a receiver it was the duty of the Court to institute proceedings under S. 4 against the appellants who were in actual possession and, if necessary, to attach the property before judgment. But as this would lead to complications, the more convenient course was clearly to authorize one of the creditors to conduct the proceedings on its behalf under Sec. 28 (2). Now, this is what should have been done and in substance what has been done, though it is clear that neither of the Courts below has applied its mind to these facts or issued any express order of authority to the respondent firm of Shrikishan Radhakrishan to act on behalf of the Court. But defects or irregularities of procedure which do not affect the merits can be cured or waived under S. 99, Civil P. C., and in any case it is a cardinal rule of justice that no party should suffer for an error or omission of the Court when a duty is cast on the Court itself for acting or refraining from acting. Therefore, what I now have to see is whether prejudice has been caused to any party or whether there has been a miscarriage of justice.

It appears from the proceedings that the firm of Shrikishan Radhakrishan is the principal creditor. It also appears that this firm is the only creditor who has been attending the hearings with any attempt at regularity and who has been taking any real interest in the insolvency. In the circumstances had the law been present to the mind of the learned trial Judge, there is no other creditor whom he could more suitably have selected for conducting the proceedings on behalf of the Court. I am satisfied that the rights of the remaining creditors were safe in this firm's hands. In the circumstances since this firm has actually been conducting the proceedings its actions must be deemed to have been with the requisite authority and permission. That being so, when the case reached the stage of appeal the only person who need have been joined as a party to the appeal was the creditor who has been permitted to conduct the proceedings in the lower Court and who in the eye of law was only an agent of the Court itself. The other creditors had no locus standi and were unnecessary parties to the appeal. The appeal is allowed and the order of the lower Appellate Court set aside. It will now proceed to hear and determine the appeal before it and decide it according to law. In view of the fact that the appeal here was not opposed and that all that both sides wanted was a clear pronouncement as to the correct procedure, and also in view of the fact that the respondent firm was acting on behalf of the Court in place of a receiver, I direct that the appellant's costs of this appeal be paid from the insolvent's estate. Counsel's fee Rs. 30.

N.S./R.K. *Appeal allowed.*

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NIYOGI AND GRUER JJ.

Muktawandas Ajabdas and others Appellants.

v.

Emperor.

Criminal Appeal No. 64 of 1938, Decided on 19th May 1938, from order of Sess. Judge, Raipur, D/- 18th February 1938.

(a) Criminal Trial—Duty of prosecution to call witnesses—Eye witnesses when not numerous must all be examined.

Witnesses essential to the unfolding of a narrative on which the prosecution is based must be called by the prosecution whether in the result the effect of their testimony is for or against the case for the prosecution. [P 16 C 1]

Where there are not numerous eye-witnesses all of them must be examined by the prosecution and none of them can be treated as redundant because being eye-witnesses each of them is likely to throw some light on the facts of the case : *A I R 1936 P C 289, Rel. on; A I R 1915 Cal 545 ; A I R 1934 All 908 ; A I R 1923 Pat 413 ; A I R 1922 Cal 461 and A I R 1922 Cal 382, Ref.* [P 16 C 1]

(b) Evidence Act (1872), Ss. 155 (3) and 145—Oral statements made to witnesses by others — Questions to witnesses about those statements are legally admissible.

Section 145 does not control S. 155. Hence questions proposed to be put to prosecution witnesses about oral statements made to them by other witnesses are legally admissible, although the Court may refuse to place any reliance on them on the ground that they had not been put to these witnesses for explanation. To disallow such questions may therefore be prejudicial to the accused: *A I R, 1934 Sind 100, Not foll.; A I R 1928 P C 2, Ref.* [P 16 C 1, 2]

Dr. B. R. Ambedkar and T. G. Chobles — *for Accused No. 1.*

T. J. Kedar, R. K. Rau, R. G. Rau, S. W. A. Rizwi and W. C. Dutt — *for Appellants Nos. 2 to 14.*

W. R. Puranik, Advocate-General — *for the Crown.*

Order.—The fourteen appellants have all been convicted of rioting and sentenced to four months' rigorous imprisonment.

Appellant 1, Muktawandas, has also been sentenced to transportation for life under S. 302, I. P. C. The decision is attacked on the merits, and it is also argued that it is vitiated, firstly, because of the failure of the prosecution to examine certain eye-witnesses and secondly, because certain questions which it was proposed to put to court witnesses 1 and 2, Ghoundul and Asaram, have been wrongly ruled out as inadmissible by the Sessions Judge, thereby causing prejudice to the appellants. In this order we shall deal with these points of law, but first we propose to consider the merits of the conviction for rioting.

The conviction under S. 147, I. P. C., is said to be wrong, firstly, because the rice crop in that field belonged to and was in the possession of Muktawandas and his bataidar Hiraman, so that its removal by Muktawandas and his servants was justified, and secondly, because the prosecution has not made out that the assembly of the accused was guided by any common unlawful object or did any unlawful act. The transactions which resulted in the exchange of this field [No. 1564/2 (c)] for other land out of Muktawandas's block of 55 acres is not disputed. It is also common ground that through the mediation of the Chakbandhi Inspector accused Muktawandas agreed to pay Rs. 11-4-0 to Firanta as compensation for 30 cartloads of manure which he had spread on this field. This sum was not paid. Muktawandas says that the reason was that Firanta had removed the manure himself while Firanta denied that. This point has not been cleared up. The Consolidation Officer, Mr. Mishra (P. W. 1), has stated that the point as to who should be in possession in case the price of the manure was not paid was neither raised nor decided. According to law, the exchange scheme would come into effect on 1st June 1938, but the tenants voluntarily agreed that they would start their possession from the date of the scheme according to the allotments made. Bodhrai (P. W. 3) has admitted that he cultivated all the land allotted to him in the Chakbandhi, which he got in exchange. He also admits that accused Muktawandas had given this Munshi Newar field on adhia to Hiraman. He says that there was a quarrel between him and Hiraman over the sowing of this field. He also says: "All the tenants know that I had sown Munshi Newar field and that I did all the other operations."

The case of the prosecution is that in spite of taking the field in exchange Firanta determined to retain possession of this field for that year and appropriate the crop in lieu of the sum of Rs. 11-4-0, which had not been paid to him. We need not discuss whether Firanta was right or wrong in taking up this attitude. The question is how far the prosecution has made out that the rice crop which Firanta and his son were reaping that day was in their possession and belonged to them. The evidence on the point seems to us to be of somewhat inconclusive nature. Ex. P-17 is a copy of the roznamcha embodying a complaint made to the police station by Firanta on 2nd July 1937. This report is admissible under S. 32 (3), Evidence Act, so far as it contains a statement against the pecuniary or proprietary interest of Firanta. Such a statement is the one that Muktawandas had rooted out the dhan sown by Firanta and sowed other dhan in its place. There being no allegation or proof that this sowing of Muktawandas was again uprooted and replaced by Firanta it would seem that the crop which was reaped that day had been sown by Muktawandas. Apart from Bodhrai's statement there is no good evidence about who looked after the crop between sowing and reaping times. It is said that the bataidar Hiraman at least has not come forward, and he may have decided to leave this field alone. Mr. Mishra (P. W. 1) stated that the said field was found recorded in the jamabandi in the name of Firanta so far as he remembers, but as the jamabandi has not been produced nor has the patwari been questioned about it, this statement is useless as evidence. That Firanta was by no means sure about his rights over this dhan is, according to the defence, to be deduced from the fact that he arranged to reap it when it was barely ripe. His son Bodhrai says that it was ready for cutting being an early variety, although dhan in other fields was not ready. But Hirabai admits that it was a little unripe so that it does look as if the reaping was begun hastily in order to checkmate the other side.

It would therefore appear that this crop was sown by or on behalf of Muktawandas and it is uncertain how it was looked after when it was growing. The prosecution then has not made out satisfactorily that this crop belonged to and was in the possession of Firanta. We are inclined to hold that it was in the possession of Muktawandas. It

follows that it would be unsafe to conclude that Muktawandas's party would be committing a wrongful act in removing it. That being so they should not have been convicted of rioting. On the second point urged our decision must also be in favour of appellants 2 to 14. Even taking it that the crop belonged to Firanta, had these servants good reason for thinking that their master had not a bona fide claim to it? They knew that the land had been given to him in exchange and that possession had been taken all round in accordance with that exchange. They may also have known that he had succeeded in making the final sowing of the land. It would not then be obvious to them that they would be committing theft in removing the crop. Then too their attitude as a whole was not violent. The first batch of them which came with the kotwar did nothing against Firanta, who was merely advised to stop the reaping. They quietly sat down on the boundary of the field. Then according to the prosecution, the rest of the appellants who were ploughing in a neighbouring field were brought up by Muktawandas. Unless they knew definitely that they were to be ordered to commit an offence were they not bound as servants to follow their master, and when they got there what illegal act did they do? According to the prosecution, two of them, Ghendram and Fundwa, caught hold of Firanta's arms when ordered to do so. Unless this was done in pursuance of a common object it would not turn the others into rioters. At the most, Ghendram and Fundwa could be convicted of simple assault.

It is said however that after Muktawandas had attacked Firanta he was surrounded by all the appellants. Bodhrai says so, but he does not say that even then these appellants did anything against Firanta, while his wife Hirabai does not mention this surrounding of Firanta at all. The preparations to remove the dhan were also not continued, and it was left where it was. It thus appears that the body of the appellants took up a passive attitude and are at least entitled to the benefit of the doubt on the question of their being animated by a common illegal object. We conclude then that the charge of rioting has not been satisfactorily made out. It may be said that Ghendram and Fundwa were guilty of assault, but we think that they have already been sufficiently punished, and there is no need to record a conviction against them under a different Section. We set aside the conviction of all the appellants under Sec. 147, I. P. C., and direct the release of all of them except Muktawandas in whose case alone the appeal has yet to be determined on the charge of murder.

We now turn to the points of law which were said to undermine the whole prosecution case. Undoubtedly, according to the prosecution, both the wives of the chief witness Bodhrai were present in the field when Bodhrai's father Firanta was attacked. One wife, Hirabai, is examined as P. W. 4; the other, Ruhi, is not examined. Her name does not even appear in the police challan and there is no explanation why she was not called. It is now suggested by the learned Advocate-General that the prosecution may have thought her evidence redundant. The other two alleged eyewitnesses are Mawa, daughter of Bodhrai, and a boy Bhunesar. It is not clear from the record how much, if any, of the marpit they saw. According to Mt. Hirabai (P. W. 4) they were grazing cattle about 200 yards away. Still they may have seen something or might be able to state who came to the spot. Certain cases have been quoted to us about the duty of the prosecution to examine eyewitnesses. In 42 Cal 422[1] it was held that all available eyewitnesses, even though they give different accounts, should be brought before the Court. In 57 All 267[2] the Court went even further in holding that a witness who had given evidence supporting a plea of alibi taken by one of the accused ought, beyond all doubt, to be produced by the prosecution. On the other hand, in 2 Pat 309,[3] it was ruled that the police are not bound to send up as a witness a person whose statement they believed to be false or whose evidence they believed to be unnecessary. Rulings to the same effect are to be found in 49 Cal 277[4] and 49 Cal 358.[5] The point has recently been considered by their Lordships of the Privy

1. Ram Ranjan Roy v. Emperor, (1915) 2 A I R Cal 545=27 I C 554=42 Cal 422=19 C W N 28=16 Cr L J 170.
2. Emperor v. Nem Singh, (1934) 21 A I R All 908=1934 Cr C 1167=152 I C 741=57 All 267=36 Cr L J 152.
3. Ramjit Ahir v. Emperor, (1923) 10 A I R Pat 413=74 I C 705=24 Cr L J 801=2 Pat 309.
4. Emperor v. Reed, (1922) 9 A I R Cal 461=69 I C 630=49 Cal 277=23 Cr L J 742.
5. Emperor v. Balaram Das, (1922) 9 A I R Cal 382=71 I C 685=49 Cal 358=24 Cr L J 221.

Council in a case in 164 I C 545.[6] Their Lordships, observing that no rule can be laid down to fetter the discretion of the prosecution to call witnesses which is dependent on the particular circumstances of each case, go on to say that they do not in general approve of the idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, but that witnesses essential to the unfolding of a narrative on which the prosecution is based must of course be called by the prosecution whether in the result the effect of their testimony is for or against the case for the prosecution.

Applying these principles to the present case we observe that the eyewitnesses are certainly not numerous. Mt. Ruhi should not have been treated as a redundant witness. There is also nothing to show that she is unreliable, although possibly the prosecution may be afraid that she has been influenced by her father Ghoudul (C. W. 1). We think that the evidence of this Ruhi should certainly have been taken. The two children were probably not examined as it was thought they were not eyewitnesses, but it appears that they too may be able to throw some light on the facts. We are of opinion that the evidence of these three witnesses should now be recorded so that we may have it before us in deciding the case on the merits.

It was proposed to question the two court witnesses about certain statements said to have been made to them by Bodhrai, Hirabai and Ruhi. These questions were disallowed as the questions had not been put to these three persons themselves. So far as Ruhi is concerned, we think that the objection is sound. As she is not a witness no question of contradicting her arose and to repeat what she said would be merely hearsay. The questions would not be admissible under S. 32, Evidence Act, as there was nothing to prevent Ruhi from being called. We must also hold S. 6 inapplicable including Illus. (a) to that Section, as the questions were not with regard to what these witnesses said so shortly before or after the marpit as to form part of the same transaction.

The admissibility of the statements made by Bodhrai and Hirabai depends on whether S. 155 (3), Evidence Act, is governed by S. 145 of the same Act. Prima facie it does not appear to be so, as S. 145 speaks only of previous statements in writing whereas the statement with which we are concerned was an oral one. There are some cases in which it is said that there can be no distinction in principle on this point between a statement in writing and an oral statement, and hence a witness cannot be contradicted by his previous oral statement if his attention has not been drawn to it as required by S. 145, Evidence Act. In Sarkar's Evidence Act, Edn. 5, page 1141, the analogy of the English Statute, 28 & 29 Vic., Ch. 18, S. 3, is quoted. In A I R 1934 Sind 100[7] such a statement was ruled to be not admissible but no reasons were given. We agree with the learned counsel for the appellants that the question is not one of admissibility but of the weight to be attached to such a statement if it is not put to the witness to whom it is ascribed. In a very recent Privy Council case reported in 55 I A 18[8] at p. 23 their Lordships dealing with the construction of Indian Statutes said that it was the duty of the Court

> to examine the language of the statute and to ascertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law or of the English law upon which it may be founded.

We must take S. 145 as we find it. It makes no mention of oral statements. It therefore cannot control S. 155. Hence the proposed questions about statements made by Bodhrai and Hirabai were legally admissible, although the Court might have refused to place any reliance on them on the ground that they had not been put to these two witnesses for explanation. We agree that the procedure adopted may have been prejudicial to the accused. For instance, if Bodhrai had admitted making a statement inconsistent with what he now states in the witness-box, the accused might argue that he is unreliable. For these reasons also we consider that the record should be sent back to the lower Court to have these gaps in the case filled up. The two court witnesses be recalled and the defence be permitted to put the disallowed questions to them with reference to statements made by Bodhrai and Hirabai. As Ruhi is also to be examined similar questions about her may

6. Ceylon Stephen Seneviratne v. The King, (1936) 23 A I R P C 289=1936 Cr C 900=164 I C 545 = 37Cr L J 963 (P C).

7. Mt. Misri v. Emperor, (1934) 21 A I R Sind 100=1934 Cr C 825=151 I C 437=35 Cr L J 1332.

8. Ramanandi Kuer v. Kalawati Kuer, (1928) 15 A I R P C 2=107 I C 14=7 Pat 221=55 I A 18 (P C).

now be put. The defence will also be given an opportunity to cross-examine Bodhrai, Hirabai and Ruhi on the answers to these questions, and if they fail to do so an inference may be drawn against them. The record with this extra evidence be returned to this Court within two months when a fresh date will be fixed for further hearing of the appeal of Muktawandas against his conviction under S. 302, I. P. C.

N.S./R.K. *Appeal partly allowed.*

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VIVIAN BOSE J.

Gowardhan Shewaram Marwari — Appellant.

v.

Hargovind Sitaram Marwari and another — Respondents.

Misc. Appeal No. 92 of 1937, Decided on 15th September 1938, from order of Addl. Dist. Judge, Amraoti, D/- 17th February 1937.

*** Civil P. C. (1908), O. 21, R. 53—For attachment of decree to be effective notices to judgment-debtor and decree-holder are imperative.**

When a decree-holder seeks to execute his decree by attachment of another decree, in order that the attachment may be effective notices to the decree-holder and judgment-debtor of the attached decree are imperative and the mere order communicating the fact of attachment to the Court passing the decree is not enough: *A I R 1927 Mad 728, Disting.* [P 18 C 2]

V. V. Kelkar and M. R. Bobde — *for Appellant.*

E. M. Joshi — *for Respondent No. 1.*

Judgment. — The appellant Gowardhan Shewaram, who opposes the recording of an adjustment in these proceedings, obtained a decree against respondent 1, Hargovind, in Civil Suit No. 20-B of 1934, for something over Rs. 6000. In Civil Suit No. 89 of 1931, Hargovind obtained a decree against respondent 2, Gowardhan Hajarimal, for Rs. 1600 and it was attached in execution of the appellant's decree. The order of attachment was made on 22nd November 1935 and notice was issued to the Court which passed the decree on 2nd December 1935. It was received on 4th December 1935. Notices were also issued to the two respondents to this appeal, the order being passed on 4th January 1936. The notice to respondent 1 was served on him on 27th February 1936 but he refused to accept it. Respondent 2 was out when the process server arrived and the notice was affixed to his house on 3rd March 1936. A second notice was then issued and was served on him personally on 9th April 1936. In the meanwhile, namely on 27th December 1935, the decree in Civil Suit No. 89 of 1931 was, according to the two respondents, adjusted and they applied on 2nd January 1936 to have the adjustment certified and satisfaction recorded. They filed Ex. A-1 which embodies the terms of the adjustment. Its genuineness was attacked in the lower Courts by the appellant but both Courts hold it was genuine and made in good faith. There is evidence on which the finding can be based and so that question is now concluded.

We are left then with a question of law, namely whether the attachment becomes effective the moment the order is communicated to the Court passing the decree or whether notices to the decree-holder and judgment-debtor are also necessary. It will be observed that the order was served on the Court on 4th December 1935, that is to say before the adjustment, whereas notice of the attachment was not received by the parties to the decree till later, namely on 27th February 1936 in the one case, and on 9th April 1936 in the other. Both the lower Courts hold that notices to the parties are necessary and therefore hold that the adjustment can be certified and satisfaction of the decree recorded. O. 21, R. 53, Civil P. C., governs this case. It states (omitting the local amendment which does not apply) that the attachment in such cases shall be made by

> the issue to such other Court of a notice by the Court which passed the decree sought to be executed, requesting such other Court to stay the execution of its decree unless and until, etc.

Sub-rule (6) then states:

> On the application of the holder of a decree sought to be executed by the attachment of another decree, the Court making an order of attachment under this rule shall give notice of such order to the judgment-debtor bound by the decree attached; and no payment or adjustment of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through the Court or otherwise, shall be recognized by any Court so long as the attachment remains in force.

It is clear that the order must be read as a whole and that sub-r. (6) cannot be ignored. It makes the issue of notice to the