

HEADNOTE: 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 725 ss 148, 307 and 364 both read with ss 140 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.