1914

AYATUN-NESSA BIBI v. KULFU KHALIFA.

entitled to a certificate under section 13 of the Court Fees Act, 1870.

RICHARDSON, J. I agree. The rule of law governing the case is explained in *Budree Das Mukim* v. *Chooni Lal Johurry* (1).

S. K. B. *Appeal allowed.*

(1) (1906) I. L. R. 33 Calc. 789, 807.

CRIMINAL REVISION.

Before Holmwood and Sharfuddin JJ.

1914

Jan. 16.

MANINDRA CHANDRA GHOSE

v.

EMPEROR.*

Conspiracy—Constructive offence in furtherance of intention common to the accused on trial and another—Abetment by conspiracy—Conspiracy between two persons on trial, three others named and others unknown—Acquittal by jury, of conspirators on trial, effect of—Verdict not conclusive as to persons not on trial—Distinct evidence against latter—Character of verdicts in England and India—Evidentiary value of the same witness as to the identity of different persons—Opinion of the Judge as to the weakness of evidence of identity of persons under trial—Stay of trial against others—Warrant against one, withdrawn on acquittal of other alleged co-offenders—Re-institution of proceedings by the District Magistrate on the advice of law-officers of the Crown—Legality of proceedings.

Where two persons were charged under ss. $\frac{307}{34}$ and $\frac{326}{34}$ of the Penal Code, for offences committed in pursuance of an intention common to them and to the petitioner, and also under ss. $\frac{307}{114}$ and $\frac{326}{114}$ of the Penal Code, for

* Criminal Revision No. 1986 of 1913, against the order of S. C. Sen, Deputy Magistrate of Hooghly, dated Dec. 3, 1913.

abetment by conspiracy between themselves, the petitioner, two others named and others unknown, and were acquitted by jury :—

Held, that the acquittal on the conspiracy charges did not conclude the liability of the petitioner for conviction of the same offence, as there were two others named and others unknown who were also alleged to have been members of the conspiracy.

Held, also, that the acquittal did not affect the question of the petitioner's criminality, as the jury had not, and could not, have formed or expressed an opinion as regards him, as he was not then on trial, and that there was, besides, distinct evidence alleged against him in the case.

Technicalities of the English law based on the sacred character of jury verdicts cannot be imported so as to give such a character to verdicts in India where by the express provisions of the law it does not attach to them.

Ramesh Chandra Banerjee v. *Emperor* (1), per Beachcroft J., approved.

The evidence of the same witness as to the identification of one person may be quite different to that as regards the identification of others.

Where the Judge clearly stated that the identification of the two persons under trial was weak, and on that ground he accepted the verdict of acquittal, it would be unwarrantable for the High Court to stay the ordinary course of justice in the case of the petitioner.

Where, after the acquittal of the two persons on trial, the warrant against the petitioner was withdrawn, but proceedings were re-instituted against him by the officer in charge of the police station within whose jurisdiction the offence was committed, under the direction of the District Superintendent of Police who could not appear himself but had been instructed by the District Magistrate on the advice of the law officers of the Crown that the case could go on against the petitioner on the evidence :—

Held, that the District Magistrate was competent to take cognizance of the case, if on taking legal advice he thought that the evidence brought the accused within the purview of the law.

THE facts of the case were as follows. There was a long standing feud between Man Mohan Ghose, a vakil, and a family known as the "Satbhai" of British Chandernagore, consisting at present of the elder members, Koylash Ghose and Kanti Ghose, and the younger members, Lalu Mohan Ghose, Netai Chand Ghose, Manindra Chandra Ghose *alias* Binoo, the petitioner, and others. The ill feeling between

(1) (1913) I. L. R. 41 Calc. 350.

1914

MANINDRA CHANDRA GHOSE v. EMPEROR.

the parties had been accentuated by a disputed will propounded by Koylash Ghose whereby the testator, Troylukho Nath Ghose, one of the seven brothers, had partly disinherited his daughters and bequeathed the major portion of his estate to his surviving brothers, Koylash and Kanti, and the heirs of his deceased brothers, including Lalu, Netai and the petitioner. A probate proceeding was pending in the Court of the District Judge of Hooghly and the daughters of the testator had entered a *caveat*, and enlisted the services of Man Mohan. It was alleged that the latter had by his personal exertions secured evidence tending to prove that the will was a forgery.

On the night of the 25th March 1912, at about 9 or 9-30 P.M. Man Mohan Ghose was going from his house in British Chandernagore to his *pujabari*, where the *saptami puja* was being celebrated, accompanied by a servant, Rajendra Mahapatra, who carried a hurricane lamp. When Man Mohan arrived close to the house of one Narendra Nath Ghose he saw three men, whom he was alleged to have recognized as Lalu, Netai and the petitioner, approaching him. The petitioner, it was said, was smoking a cigarette, and puffed it hard as they passed him. He turned slightly round when two shots were fired at him wounding him in the left hand and the side, whereupon he fell down and the assailants ran away to the West.

On the same night one Sripati Kumar, a servant of Man Mohan, lodged an information at the Hooghly thana charging the three abovenamed with grievous hurt under s. 326 of the Penal Code. There was also evidence that one Gopal, Kanti and the petitioner had been seen, later, going towards Hooghly Station. The police, after holding an investigation, sent up a charge sheet against them under s. 307 of the Penal Code. Lalu and Netai had been arrested before that,

but the petitioner was alleged to have absconded and a warrant was issued for his arrest.

They were committed to the Sessions on the 17th June 1912, on charges under ss. $\frac{307}{34}$ and $\frac{326}{34}$ of the Penal Code, in (i) that they "in furtherance of the common intention of all of them did an act, *viz.*, shot Man Mohan Ghose by a firearm . . . . with such intention or knowledge and under such circumstances that, if by that act they had caused the death of the said Man Mohan, they would have been guilty of murder, and that they caused hurt to the said Man Mohan by the said act (ss. $\frac{307}{34}$ I. P. C.); and (ii) that they, in furtherance of the common intention of all, voluntarily caused grievous hurt . . . . . (ss. $\frac{326}{34}$ I. P. C.)".

The two accused were tried on these charges and found unanimously guilty by the jury under ss. $\frac{307}{34}$ on the 14th August 1912. The Judge accepted the verdict and sentenced them each to 10 years' rigorous imprisonment. On appeal the High Court set aside the verdict and sentence for misdirection, on the 26th November, and directed a re-trial by the Sessions Judge of the 24-Parganas.

The accused were accordingly re-tried, and the following charges drawn up against them by the Judge.

(i) That you . . . in furtherance of the intention to kill Man Mohan Ghose, common to both of you and Manindra Nath *alias* Binoo Ghose, some one of you did an act, *viz.* shot Man Mohan Ghose by a firearm with such intention or knowledge and under such circumstances that, if by that act you had caused the death of the said Man Mohan Ghose, you would have been guilty of murder, and that you caused hurt to the said Man Mohan Ghose by the said act, and thereby committed an offence under ss. $\frac{307}{34}$, Indian Penal Code.

(ii) That you . . . in furtherance of the intention to kill Man Mohan Ghose, common to both of you and Manindra Nath *alias* Binoo Ghose, some one of you voluntarily caused grievous hurt to the said Man Mohan Ghose punishable under ss. $\frac{326}{34}$, Indian Penal Code.

1914

MANINDRA CHANDRA GHOSE v. EMPEROR.

(iii) that you . . . . being present abetted the commission of the offence of attempt at murder by engaging with each other and Manindra Chandra *alias* Binoo Ghose, Kanti Ghose, Koylash Ghose and others unknown, in a conspiracy to kill the said Man Mohan Ghose, and in pursuance of the said conspiracy and in order to the killing of the said Man Mohan Ghose, some one shot him with such intention etc. (as in the first head) and thereby committed an offence punishable under ss. $\frac{307}{114}$, Indian Penal Code.

(iv) That you . . . . being present abetted the commission of the offence of voluntarily causing grievous hurt . . . by engaging with each other and Manindra Chandra *alias* Binoo Ghose, Kanti Ghose, Koylash Ghose and others unknown, in a conspiracy to kill the said Man Mohan Ghose, and in pursuance of the said conspiracy and in order to the killing of the said Man Mohan Ghose, some one of you voluntarily caused grievous hurt to the said Man Mohan Ghose . . . and thereby committed an offence punishable under ss. $\frac{326}{114}$, Indian Penal Code.

The prisoners were unanimously acquitted by the jury of all the charges, and the Judge accepted the verdict remarking—"The evidence of identification showing that the crime was committed by these two accused appears to me to be weak. I acquit them".

The District Magistrate of Hooghly, thereupon recalled the warrant against the petitioner. Later, the Legal Remembrancer, after having taken the advice of the Advocate-General, wrote to the District Magistrate and requested him to issue a warrant for the arrest of the petitioner. The latter directed the District Superintendent of Police to attend to the matter, and accordingly an application was made, on the 20th November 1913, by the Sub-Inspector of the Hooghly police station, under instruction from the District Superintendent of Police, to the senior Deputy Magistrate, Babu S. C. Sen, in the following terms.

In the marginally noted case* a warrant against the absconder Manindra *alias* Binoo Ghose was withdrawn. But now, in accordance with instructions from the Legal Remembrancer, I have the honor to request the favour of your re-issuing the warrant.

*Emperor *v.* Manindra Nath Ghose *alias* Binoo Ghose.

The Magistrate thereupon issued a warrant against the petitioner under s. 307 of the Penal Code on the

next day. He was said to have absconded again. He surrendered on the 2nd December, and moved the High Court and obtained the present Rule in the terms set forth in the judgment of the High Court.

The Deputy Legal Remembrancer (*Mr. Orr*) showed cause on behalf of the Crown.

Mr. *Eardley Norton*, *Babu Manmatha Nath Mukerjee* and *Babu Jyotish Chandra Hazra*, for the petitioner.

HOLMWOOD AND SHARFUDDIN JJ. This was a Rule calling upon the District Magistrate of Hooghly to show cause why further proceedings for conspiracy to commit murder against the petitioner, Manindra Chandra Ghose *alias* Binoo, should not be stayed on the ground that the two alleged co-conspirators having been acquitted there is no possibility of a conviction being obtained against the alleged conspirator who now stands alone, and upon the other grounds mentioned in the petition.

As regards the specific ground which is first mentioned in this Rule, it has not been argued before us, and it is clear that there is no charge of conspiracy at present against the petitioner, and the fact that there was an acquittal of the other two would not conclude the matter, inasmuch as there are two persons named as conspirators who have not yet been tried, and it is stated that others unknown also conspired, so that the ground that the petitioner is the only alleged conspirator remaining, can no longer be sustained.

We, therefore, turn to the grounds which were actually taken by the learned counsel in the petition. The first was that the warrant against the petitioner having been recalled and there being no fresh materials or enquiry in the matter, the issue of warrant

1914

MANINDRA CHANDRA GHOSE v. EMPEROR.

again against the petitioner was illegal, that is to say, that the proceedings are without jurisdiction. The answer to that is that the proceedings are not, as the petitioner appears to have imagined from paragraph 14 of the petition, re-instituted by the complainant, Man Mohan Ghose, but they were re-instituted by the officer in charge of the Hooghly police station under the direction of the District Superintendent of Police, who could not appear himself, but who had been instructed by the District Magistrate, on the advice of the law-officers of the Crown, that this case can go on on the evidence. We do not desire to express any opinion upon this evidence, whether it is sufficient or not, but it certainly gave jurisdiction to the District Magistrate to take cognizance of the case if on taking legal advice he was of opinion that the evidence brought the accused within the purview of the law. Of the jurisdiction of the District Magistrate to take these proceedings, there can be no doubt, and it is the District Magistrate and not the complainant who has re-instituted these proceedings.

Then as regards the second ground, that the case for the prosecution in the previous trial was one of conspiracy between two youths who have been acquitted and the present accused, and that charge having failed, the present proceeding ought not to be allowed to go on. This has been argued by the learned counsel from the point of view that the opinion of the jury in this country necessarily covers the whole of the indictment and has the same *sacro-sanct* character that such a verdict has in England. This doctrine has very recently been dealt with by Woodroffe and Beachcroft JJ. in *Ramesh Chandra Banerjee* v. *Emperor* (1), and we may express our concurrence with

(1) (1913) I. L. R. 41 Calc. 350.

the view expressed by Mr. Justice Beachcroft where he says :—"The repugnancy in the verdict of a jury in India is not in itself sufficient to justify the quashing of a conviction and that the technicalities which are borrowed from the English law and founded on ideas as to the sacred character of a verdict by a jury whose findings of fact are unknown, cannot be imported so as to give such a character which by the express provisions of law does not attach to jury verdicts in this country." However that may be, the jury certainly did not and could not have formed any opinion, much less expressed it, as regards the case of the present petitioner who was not before them. But it is argued that the evidence is precisely the same against him as against the others. The learned Deputy Legal Remembrancer appearing for the Crown has shown us that this is not so. There is distinct evidence against the present petitioner, and the fact that the wounded man did not satisfactorily identify the two youths does not, in our opinion, in any way affect the identification which he may or may not have made of the present petitioner, because that was a matter which was not in any way before the jury and has never been adjudicated upon. It may be, as the learned Deputy Legal Remembrancer has told us, that he had better knowledge of the present accused or he had better opportunities of seeing him. We have not purposely gone into the evidence because we do not wish in any way to prejudge the case. But it is clear that the evidence as regards identification of one person may be quite different to that as regards the identification of two others, even although it proceeds from the mouth of the same witness ; and the learned Judge clearly stated that the identification of these two youths showing that the crime was committed by these two youths appeared to him to

1914

MANINDRA CHANDRA GHOSE. v. EMPEROR.

be weak, and on that ground he agreed with the jury in acquitting the accused. In this country the opinion of the Judge is to be weighed by this Court in exactly the same balance as the opinion of the jury. Where the Judge has expressed a clear opinion and the jury has expressed none, it would be in our opinion an unwarrantable thing for us to interfere with the ordinary course of justice in a case of this nature.

Then the further ground that is taken is that there being no suggestion at any stage of the two previous trials that any particular accused was responsible for the offence, the present poceeding ought not to be allowed to go on. This particular ground has not been urged before us by the learned counsel, but it is necessary to glance at it, for this reason that at present the proceedings against the petitioner to which he has to answer come under section 307 read with section 34 of the Indian Penal Code, and section 34 does not involve abetment, and, therefore, does not imply any conspiracy and does not require proof that any particular accused was responsible for the commission of the actual offence.

The fourth ground stated in the petition refers to the unanimous verdict of the jury of not guilty on all charges against the two youths who were formerly on their trial, and the judge having held that the evidence of identification was weak and there being no suggestion that any new or further evidence would be available, the proceedings are fit to be quashed. We have already dealt with this above and there is no need to say anything further.

The last ground is as to the nature of the evidence which we decline now to go into, and also upon the opinion of the Civil Surgeon which is referred to in the petition, and which we may at once say relieves the petitioner of any necessity of showing that he

had not certain marks of injury on his person which might have been caused by the explosion of a gun. That portion of the evidence, if it was ever seriously put forward, seems to have entirely broken down, and no doubt will not again be revived; but this is a very minor point and has nothing to do with the other considerations which we have already set out.

Having given this case our most careful consideration, we are of opinion that it would not be in any way justifiable to interfere with the ordinary course of justice at the present stage of the proceeding. We, therefore, direct that this Rule be discharged and the proceedings do continue from the point they had already reached. The petitioner will remain on the same bail.

E. H. M. *Rule discharged.*