

CRIMINAL REFERENCE.*Before Fletcher and Beachcroft JJ.*

EMPEROR

v.

BABAR ALI GAZI.*

1914

Oct. 14.

Reference—Jury Trials—Power of Judge to refer the case of an accused as to whom he agrees with the verdict—Legality of procedure—Criminal Procedure Code (Act V of 1898) s. 307(2)—Confessions of co-accused—Corroboration—Sufficiency of circumstances raising a mere suspicion.

Section 307(2) of the Criminal Procedure Code contemplates a reference only in the case of those accused as to whom the Judge declines to accept the verdict of the Jury. When he agrees with them in respect of any particular accused he ought to acquit or convict and sentence the latter as the case may be.

Confessions of the co-accused can be taken into consideration, but the Court requires corroboration before acting on them.

THE accused No. 1, Babar Ali Gazi, and five others were tried before the Sessions Judge of Jessore and a Jury, on a charge of dacoity with murder under s. 396 of the Penal Code. The facts of the case were as follows. Sona Bibi, a widow, lived by herself in a hut in the village of Saikhpura, in the district of Jessore. The accused, Messer Sheikh, an agnatic cousin of hers, used to cultivate her lands at produce rent. It was alleged that she had latterly tried to let out a portion of her land to others, and that her relations with Messer had, in consequence, become strained. On the night of 28th April 1914, the six accused were

* Criminal Reference, No. 26 of 1914, by P. K. Chatterjee, Sessions Judge of Jessore, dated Aug. 17, 1914.

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said to have broken into her hut, strangled her to death, and carried away some moveables. A skeleton alleged to have been that of the deceased woman was found in the river on the 1st May. The accused No. 4, Pyar Molla, was arrested on the 2nd May and confessed before the Magistrate on the 4th, but retracted the confession on the 15th of June on examination before the Committing Magistrate. Babar Ali also made a confession, which he adhered to before the committing officer, but which he retracted at the sessions trial.

The Jury returned a unanimous verdict of guilty under s. 396 of the Penal Code against the accused Nos. 3 and 6, Messer Sheikh and Seyamuddi Shana and under s. 395 against the others. The Judge accepted the verdict as to Babar Ali, but was of opinion that the others should be acquitted. He however, referred the whole case, including that of Babar Ali, to the High Court under s. 307 of the Criminal Procedure Code.

Babu Hira Lal Sanyal, for the accused.

The Deputy Legal Remembrancer (Mr. Orr), for the Crown.

Cur. adv. vult.

FLETCHER J. This case comes before us on a reference made by the Sessions Judge of Jessore under the provisions of section 307 of the Code of Criminal Procedure. The accused were tried before the learned Sessions Judge and a Jury on a charge of dacoity with murder under section 396 of the Indian Penal Code.

The Jury by a unanimous verdict found the accused Nos. 3 and 6 guilty of an offence under section 396 of the Indian Penal Code, and the other four accused guilty of an offence under section 395 of the Indian Penal Code.

The learned Sessions Judge agreed with the verdict as against the accused No. 1 Babar Ali, but failed to pass sentence on him, being of opinion that, as he disagreed with the verdict as regards the other accused, he was bound to refer the whole case to this Court. The learned Judge, however, was in error in the view that he took and it was clearly his duty to pass sentence on the accused No. 1 Babar Ali. As against the accused No. 1 Babar Ali the case must go back to the learned Judge for him to pass sentence on this accused. The charge against all the accused under section 396 of the Indian Penal Code had reference to the dacoity perpetrated in the house of one Sona Bibi, a widow, when it is alleged that she was murdered. The skeleton that was subsequently found may not have been that of Sona Bibi. The evidence, however, leaves no doubt that a dacoity took place in the house of Sona Bibi, and her disappearance amply supports the charge of murder.

The view that seems to have commended itself to the learned Judge that, as a period of seven years had not elapsed since the disappearance of Sona Bibi, the Court could not presume her death, is fallacious.

There was in the present case evidence before the Court from which the Court could infer that Sona Bibi had been murdered on the night in question, and it is not necessary to rely on the presumption mentioned by the learned Judge. As I have already stated the learned Judge agrees with the verdict of the jury as against Babar Ali. He was a confessing prisoner, and the learned Judge believed the confession to be true. The accused No. 4 was also a confessing prisoner. But the learned Judge did not believe his confession to be "quite voluntary," and he further states in the letter of reference that the accused No. 4 retracted his confession at the first opportunity

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before the Committing Magistrate on the 15th of June. There is no reason to think the learned Judge is correct in his first assumption; his second is incorrect. I see no reason to differentiate between the confessions made by Babar Ali and the accused No. 4, Pyar Molla. I think, therefore, that we ought to convict the accused No. 4, Pyar Molla, of an offence under section 396 of the Indian Penal Code and sentence him to transportation for life. As against the remaining four accused, the confessions can be taken into consideration, but the Court requires corroboration before it will act upon the confessions of co-accused. The corroboration in the evidence in this case, although it raises a case of suspicion, falls far short of what is required to support a conviction. It consists principally of statements of witnesses as to seeing the accused or some of them together on the night of the occurrence, and as against one of the accused, as to the identification of certain ornaments found with one of the accused which had sometime or other been pledged with the deceased woman. These statements, though giving rise to suspicion, are consistent with the innocence of these four accused.

I, therefore, think that we ought to accept the reference made by the learned Judge as regards the accused No. 2 Jamadar Mandal, the accused No. 3 Meser Sheikh, the accused No. 5 Panchu Shana, and the accused No. 6 Seyamuddi Shana, and that they ought to be acquitted.

BEACHCROFT J. I agree. Sub-section (2) of section 307 of the Code of Criminal Procedure does not intend, as the learned Judge seems to think, that when the Judge is not prepared to accept the verdict of the Jury in its entirety the whole case is to be referred to this Court. It only contemplates a

reference in the case of those persons in respect of whom the Judge declines to accept the verdict. When the Judge agrees with the Jury in respect of any particular accused, the Judge ought to convict and sentence, or acquit that accused as the case may be.

E. H. M.

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CRIMINAL REVISION.

Before Jenkins C.J., and Twinn J.

GULLI SAHU

v.

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Nov. 20.

Revision—Extradition warrant issued by Resident in Nepal—Proceedings thereon by District Magistrate in British India, and order of surrender of fugitive—Power of High Court to interfere in revision, with such order—Nepal, whether a "Foreign State"—Criminal Procedure Code (Act V of 1898) ss. 435, 439, 491—Extradition Act (XV of 1903) ss. 7, 15.

Nepal is not a "Foreign State" within the meaning of the Indian Extradition Act (XV of 1903).

Where a warrant has been issued by the Political Agent, under s. 7 of the Act, its execution by the District Magistrate in British India, in accordance with the Act, is an executive act, and the High Court cannot interfere in revision with the proceedings of the Magistrate and the order to surrender the fugitive criminal, but if the latter considers himself aggrieved thereby, he can invoke the action of the Government under s. 15.

The power of the High Court, however, to interfere under s. 491 of the Criminal Procedure Code, which applies whatever be the occasion of the deprivation of the liberty of the subject, remains untouched by the Extradition Act.

Criminal Revision No. 1701 of 1914, against the order of A. H. Vercede, District Magistrate of Darbhanga, dated July 19, 1914.