APPELLATE CRIMINAL.

Before Walmsley and Shams-ul-Huda JJ.

1919

May 20.

HEMANTA KUMAR PATHAK

v.

EMPEROR.*

Trial by Jury—Charge to the Jury—Misdirection—Omission to explain the law as to abetment—Uncertainty in the meaning of the Judge's direction relating to a confession—Omission to direct the Jury upon the evidentiary value of a retracted confession.

Where one accused was charged under s. 52 of the Post Office Act (VI of 1898), and s. 380 of the Penal Code, and the other under s. 52 read with s. 70 of the Post Office Act and ss. 114 of the Penal Code, and the Judge omitted to direct the Jury to consider what evidence there was of abetment and to explain the law in connection therewith :—

Held, that the law was not adequately explained, and that the omission of any explanation with regard to the charge of abetment constituted a misdirection.

Abbas Peada v. *Queen-Empress* (1) referred to.

Where it did not appear clear in the charge to the Jury whether the Judge intended to require them to consider how far the statements of the accused amounted to admissions of guilt or how far they believed them to be true :—

Held, that the uncertainty in the meaning of the charge, lwhen the statements formed a large part of the evidence against the accused, was a misdirection.

The omission to direct the Jury that a retracted confession should have practically no weight as against a person other than the maker, and that the very fullest corroboration was necessary, far more than was required for the sworn testimony of an accomplice on oath, *held* to be a serious misdirection.

Yasin v. *King Emperor* (2) followed.

* Criminal Appeals Nos. 216 and 217 of 1919, against the order of J. Macnair, Sessions Judge of Faridpur, dated Feb. 18, 1919.

(1) (1898) I. L. R. 25 Calc. 736, 738. (2) (1901) I. L. R. 28 Calc. 689, 690.

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THE appellants were tried before the Sessions Judge of Faridpur and a Jury—Pramatha Nath Bagchi on charges under s. 52 of the Post Office Act (VI of 1898) and s. 380 of the Penal Code, and Hemanta Kumar Pathak under ss. 52, 70 of Act VI of 1898 and ss. $\frac{380}{114}$ of the Code. The Jury found Pramatha guilty under s. 52 and Hemanta of abetment thereof. They also found Hemanta guilty of theft under s. 380, and Pramatha of abetment of the same. The Judge convicted the appellants and sentenced Pramatha to 7 years' rigorous imprisonment, which he commuted to transportation for the same period, and Hemanta to 18 months' rigorous imprisonment including solitary confinement for 2 months.

It appeared that Pramatha was employed as a probationer in the post office at Rajbari. On the 11th October 1918, the post master's kitchen took fire at about 6 P.M. whereupon the employees of the post office rushed to the place, and Pramatha was ordered to take charge of the office. About the same time Hemanta, in whose house Pramatha lodged, called at the post office to take him home for his meals. It was alleged that Pramatha gave Hemanta five insured and registered covers which the latter took away and secreted in the shop of one Shyama Charan Madak through a hole in the mat wall.

The appellants were arrested a few hours later, and made statements to a Sub-deputy Magistrate about midnight. After a preliminary enquiry they were committed to the Court of Session and tried and convicted as stated above. They appealed separately to the High Court.

Babu Dasarathi Sanyal (with him *Babu Phanindra Lal Moitra*), for Hemanta. The statement of the accused was not a confession at all. Refers to

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Stephen's Digest of the Law of Evidence, Art. 21. The definition was followed in *Queen-Empress* v. *Babu Lal* (1) and *Queen-Empress* v. *Nana* (2): see also *Queen-Empress* v. *Meher Ali Mullick* (3) and Monnier's "Law of Confession," Chap. I, pp. 1—14, and particularly pp. 3, 5 and 12. The direction to the Jury that it was a "confession" was misleading and prejudicial. The statement is quite consistent with innocence. The charge to the Jury on the point is not clear in its meaning. On the prosecution case there was no allegation of conspiracy or abetment before the commission of the offence. Hemanta may have been an accessory after the fact. There is no direction in the charge on this point. The explanation of the law was confusing. It did not refer to the question of abetment. This is a misdirection: see *Abbas Peada* v. *Queen-Empress* (4). Hemanta's statement was retracted, but there is no direction to the Jury as to the necessity of corroboration. Further Pramatha's statement was also retracted. There is no direction in the charge as to the value of retracted confessions: see *Yasin* v. *King Emperor* (5).

Babu Prabodh Chandra Chatterjee, for Pramatha Nath. The statement of Hemanta is not a confession; and is not, therefore, admissible against Pramatha. The Judge misdirected the Jury on the point. He did not instruct the Jury on the law as to retracted confessions or statements. Refers to *Yasin* v. *King Emperor* (5).

The Deputy Legal Remembrancer (Mr. Orr), for the Crown. The statement of Hemanta was voluntary and amounted to a confession and was admissible.

Cur. adv. vult.

(1) (1884) I. L. R. 6 All. 509.
(2) (1889) I. L. R. 14 Bom. 260.
(3) (1888) I. L. R. 15 Calc. 589.
(4) (1898) I. L. R. 25 Calc. 736.
(5) (1901) I. L. R. 28 Calc. 689.

WALMSLEY J. These two appeals have been heard together as the two appellants were tried and convicted in the same trial.

The facts are as follows. Pramatha Nath Bagchi (appellant in Appeal No. 217) was employed in the post office at Rajbari. He boarded with the family of Hemanta Kumar Pathak (appellant in Appeal No. 216). On the evening of October 11th while the post office staff was still at work, there was a cry of "fire" and smoke was seen coming from the post master's kitchen. There was a rush to the place, and Pramatha was ordered to remain in charge of the office. Shortly afterwards it was discovered that several insured and registered covers were missing. The same evening the missing covers or their contents were found in the shop of Shyama Charan Madak. The two appellants were arrested, and about midnight they made statements to the Sub-Deputy Magistrate; the general effect of those statements was that Hemanta went to the office that evening to call Pramatha to his meal, that when the outcry of "fire" was raised Pramatha gave the covers to Hemanta, that Hemanta took them away, and pushed them through a hole in the mat wall of Shyama Charan Madak's shop.

Upon these facts the two appellants were committed for trial to the Court of Session. The charges framed against Pramatha were under section 52 of the Post Office Act, and under section 380 of the Penal Code, while against Hemanta they were under section 52, read with section 70, of the Post Office Act, and under section 380, read with section 114, of the Penal Code. The verdict of the Jury was that Pramatha had committed an offence under section 52 of the Post Office Act, and that Hemanta had abetted him; that Hemanta had committed theft in a building and Pramatha had helped him in doing so.

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It is urged on behalf of both the appellants that the charge delivered by the learned Judge is vitiated by numerous misdirections, and these misdirections led the Jury to wrong conclusions.

The first point for criticism is as to the manner in which the Judge laid down the law by which the Jury were to be guided. The Judge has recorded these words in his heads of charge. "The sections of the charge are read and explained. Really there is no great dispute as to sections of the law here; the real question is whether these two people, or either of them, had a hand in dishonestly causing disappearance of the things." So far as the charges against Pramatha are concerned I think these words show that there was sufficient compliance with the provisions of section 297 of the Criminal Procedure Code. But it is very different in the case of Hemanta. He was charged with abetment of the offence, not with receiving stolen property, and on the facts stated the question arises whether he was more than an accessory after the fact. The learned Judge does not appear at any stage to have asked the Jury to consider what evidence there was to warrant the view that Hemanta abetted the offence within the meaning of the Penal Code. Whatever he may have said, the verdict shows that he did not succeed in making the matter clear to the Jury, for the verdict was to the effect that each of the appellants was principal in regard to one offence and accessory in regard to the other. I think it is clear that the law was not adequately explained to the Jury, at any rate in regard to abetment, and I would invite the attention of the learned Judge to the case of *Abbas Peada* v. *Queen-Empress* (1).

The next subject for consideration is the learned Judge's treatment of the statements made by the

(1) (1898) I. L. R. 25 Calc. 736, 738.

appellants on the night of the occurrence. In the first place it is urged that he was in error in calling them confessions, and that by the use of that word he led the Jury to attach undue importance to them. On this matter the learned Judge chose a metaphor by which to express his meaning, and I find it very difficult to understand exactly what view he did intend to convey to the Jury. He may have intended to ask the jury to consider how far the statements amounted to an admission of guilt, but it seems equally possible that he intended to ask the Jury how far they believed the statements to be true. These statements form such a large part in the evidence against the appellants that the uncertainty as to the Judge's meaning is very serious, especially in the case of Hemanta. I think the objection must be sustained, and that we ought to hold that there was a misdirection, that is to say, that the learned Judge ought to have invited the Jury to consider carefully what each of the appellants said in his statement with reference to the charges framed against him.

The second objection affects Pramatha. It is that Hemanta's statement has been used against him, although it was retracted at the trial. In enumerating the points against Pramatha, the learned Judge mentions "Hemanta's confession." He asked the Jury to consider carefully whether the part implicating Pramatha can have been put into Hemanta's mouth, and then he goes on to give reasons for discounting its value, the first being that the utmost use to be made of it is to lend assurance to other evidence, the second that it has been retracted, and the third that Pramatha never had any opportunity of cross-examining Hemanta on it. I find it impossible to understand what advice the learned Judge meant to give the Jury. When he speaks of Hemanta's statement

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"lending assurance," he appears to be thinking of the provisions of section 30 of the Evidence Act. It is true that he referred to Hemanta's subsequent denial, but he ought to have gone further, and to have pointed out the attitude to be taken towards a retracted confession as evidence against a co-accused. His attention is invited to the case of *Yasin* v. *King Emperor* (1). This admission is a most serious defect in the charge as affecting Pramatha.

Other criticisms of the charge were made, but these appear to me to be the most important. The defects noticed are grave : the material on which the question of the appellants' guilt is to be decided was not properly placed before the Jury, and the appellants are entitled to ask that the verdict should be set aside. For both of them it is urged that the case should not be retried, but I do not think we ought to take that view.

The conviction and sentence passed on each of the appellants are set aside, and it is ordered that the case be retried.

SHAMS-UL-HUDA J. I agree.

E. H. M. *Retrial ordered.*

(1) (1901) I. L. R. 28 Calc. 689, 690, 691.