APPELLATE CRIMINAL.

Before Newbould and Suhrawardy JJ.

MUHAMMAD YUNUS

v.

EMPEROR.*

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Dec. 12.

Unlawful Assembly—Power of police officer in charge of patrol boat to fire on the crowd—Sanction for his prosecution for such act—Misdirection to jury—Omission to put the proper issue on the question of the right of private defence, and to refer to the particular grounds of the right applicable to the case—Misdirection as to onus of proof—Meaning of onus of proof, and "proof"—Omission to place before the jury the deposition of the accused in a cross case as his defence—Duty to warn the jury not to treat statement of an accused, not being a confession, as admissible against the co-accused—Duty of the prosecution to call all important witnesses—Criminal Procedure Code (Act V of 1898) ss. 128, 132, and 297—Evidence Act (I of 1872) ss. 3, 30, 105—Penal Code (Act XLV of 1860) ss. 100, 101, 300, 304 and 326.

A police officer in charge of a patrol boat has no authority to act under Chapter IX of the Criminal Procedure Code; and no sanction under s. 132 is, therefore, necessary for his prosecution for firing on an unlawful assembly in order to disperse it.

It is a serious misdirection for the Judge, when the proper question for the jury in the case is whether the right of private defence exists or not, to refer to s. 300, Exception 2, of the Penal Code and to ask them to consider whether such right was exceeded.

There is a similar misdirection when the Judge, in explaining s. 100 of the Penal Code, omits mention of the apprehension of grievous hurt though the whole section is read out to the jury. Where there is a charge under s. 326 of the Penal Code against the accused, the omission to refer to the provisions of s. 101 thereof is a misdirection.

When the statement of the accused before the Magistrate is put in at the trial, his deposition in a cross case should also be put in if he considers it as his defence.

* Criminal Appeal No. 401 of 1922, against the order of P. C. De, Additional Sessions Judge at Dacca, dated June 12, 1922.

The Judge should warn the jury that the statement of an accused, not amounting to a confession, cannot be considered against the co-accused.

The incidence of the burden of proof of a fact means that the person on whom it lies must prove the same. But the meaning of "proof" in s. 3, of the Evidence Act, is not affected by the incidence of the burden of proof. When evidence has been given in support of an exception, the burden of proof is discharged if the evidence is believed, and the jury have only to decide the question of fact on the evidence. S. 105 of the Act is not applicable in such case.

It is the duty of the prosecution to place all the evidence before the Court, and the only valid excuse for not examining important witnesses is that no reliance can be placed on their evidence.

THE facts were as follows. Some time before the date of the occurrence, a *sadhu* appeared and claimed to be the second kumar of Bhawal who was believed to have died 12 years ago. The Collector of Dacca thereupon published a notice warning the tenants of the Bhawal Estate, which was under the Court of Wards, that the *sadhu* was an impostor. On 8th June 1921 the notice was being published in the Mirzapore *hât*, within the Estate limits, by the servants of the local *kutcherry* of the Estate, when several people assembled and objected to its proclamation, and a *fracas* resulted between them and the *kutcherry* servants. The appellant, Muhammad Yunus, who was an assistant sub-inspector entrusted with patrol duty in two local police areas, and also in charge of the patrol boat staff, then arrived at the *hât* with two constables in a patrol boat. An altercation sprung up between the constables and the crowd, which assumed a threatening attitude, and one Jamiruddin, a *panchayet*, had the police officers escorted to the *kutcherry* by Mohit Narayan. A large mob followed them to the steps of the *kutcherry* when the appellant came, and under his orders, two shots were fired on the crowd, one by the constable Adam Ali, and the other from the gun in the hand of the constable Kadam Ali, who alleged that the

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trigger had been pulled by the appellant. As the result one Jhumer Ali was mortally wounded, and three others grievously hurt.

On the 9th June one Momtajuddin laid an information at the *thana* against the appellant and the constables, and an investigation followed, resulting in their being sent up with a charge sheet, and in the institution of a cross case, under s. 147 of the Penal Code, by the police against Ram Saran Burman and others. The latter were tried by a Deputy Magistrate at Dacca and ultimately acquitted. In the course of the trial the appellant and the constables were examined as witnesses, and deposed to the circumstances under which the firing occurred. They were then placed before Maulvi Mahomed, Deputy Magistrate, and committed to the sessions, the constables on charges under ss. $\frac{304}{34}$ and $\frac{326}{34}$, and the appellant under ss. $\frac{304}{114}$ and $\frac{326}{114}$ of the Penal Code. They were tried before the Additional Sessions Judge of Dacca and a jury. Kadam Ali was acquitted, but Adam Ali was convicted under ss. 304 and 326 read with s. 34, and Muhammad Yunus under ss. 304 and 326 read with s. 109 of the Penal Code. Both were sentenced to five years' rigorous imprisonment. The former died in jail, but the latter appealed to the High Court.

Babu Manmatha Nath Mookerjee (with him *Babu Trailokhia Nath Ghose*), for the appellant. The appellant had power to act under s. 128 of the Criminal Procedure Code, and sanction was, therefore, necessary under s. 132. The Judge misdirected the jury in several important matters. He did not place before them the circumstances under which the right of private defence arises, nor the case of a police officer on duty faced with an unlawful assembly. The direction under s. 100 of the Penal Code omits mention of

grievous hurt. The whole statement of Kadam Ali should have been put to the jury, and they should have been warned not to consider his statement against the co-accused. It was the duty of the prosecution to have called several important witnesses.

Babu Dasarathy Sanyal, for the Crown. An officer in charge of a patrol boat is not "an officer in charge of a police station" within s. 128, and no sanction was necessary. Points of alleged misdirection dealt with. S. 100 of the Penal Code was read and explained. The *onus*, in the circumstances, was on the accused: see s. 105 of the Evidence Act. The deposition of Kadam Ali in the cross-case was put in at the trial.

Babu Asita Ranjan Ghose appeared for the complainant.

NEWBOULD AND SUHRAWARDY JJ. The appellant, Muhammad Yunus, has been convicted of abetment of the offence of culpable homicide not amounting to murder, and of abetment of voluntarily causing grievous hurt with a dangerous weapon punishable under sections 304 and 326 read with section 109 of the Indian Penal Code. He has been sentenced to five years' rigorous imprisonment on both counts, the sentences running concurrently.

The appellant, who was an assistant sub-inspector of police, was jointly tried with two constables, Adam Ali and Kadam Ali, who were charged with offences punishable under sections 304 and 326 read with section 34 of the Indian Penal Code. Adam Ali was convicted on both charges and concurrent sentences of five years' rigorous imprisonment for each offence were passed. We are informed that he has since died. Kadam Ali was acquitted.

The occurrence which led to this trial took place at the Mirzapur *hât* on Wednesday, the 8th June 1921.

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This *hât* is the property of the Bhawal Estate, which is under the management of the Court of Wards. Some time before the occurrence, a *sadhu* claimed to be the second kumar, one of the owners of the Estate who was said to be dead. A large number of tenants of the Estate believed the claims of the *sadhu* to be genuine. There was great excitement about this, and consequent difficulty about the management of the Estate. The Board of Revenue held an enquiry, and authorised the Collector of Dacca to publish a notice (Exhibit A) to the effect that the Board had got conclusive proof that the corpse of the second kumar of Bhawal had been burnt twelve years previously in the town of Darjeeling, and that the *sadhu* who was making himself known to be the second kumar was an impostor, and anybody paying any rent or subscription to him would do so at his own risk. On the day of occurrence this notice was being published in the Mirzapur *hât* by beat of drum by servants of the local *kutcherry* of the Estate. Then there was the following sequence of events which, as stated by the learned Sessions Judge in his charge to the jury, are more or less admitted by both sides. The people assembled at the *hât* objected to the proclamation of the notice, and there was a *fracas* between them and the *kutcherry* servants. The accused had come to Mirzapur in a police patrol boat, and there was an altercation between them and the crowd. Jamiruddin (P. W. 1), who is a past *ijaradar* of the *hât* and also a *panchayet*, interceded, and to prevent matters getting worse, had the two constables removed to the *kutcherry* under the protection of Mohit Narayan (P. W. 2), a former servant of the *kutcherry*. A large number of persons followed them up to the steps of the *kutcherry*. Then the appellant, the assistant sub-inspector, Muhammad Yunus, arrived. Shortly after his arrival, under his orders, two shots

were fired from the guns held by the constables. Adam Ali admitted having fired his gun. Kadam Ali admitted that the gun was in his hand, but set up the defence that the trigger was pulled by the appellant. The jury acquitted Kadam Ali on the ground that they doubted whether he fired the gun. In consequence of the firing of these two guns one Jhumer Ali received a mortal wound of which he died a few hours later. Srinath (P. W. 4) had his finger blown off, the wrist of Kemu (P. W. 5) was lacerated, and Ram Saran (P. W. 6) had his lower jaw and cheek lacerated and his eye injured.

The main issue in the case is whether accused were justified in firing in exercise of the right of private defence. The principal contention in this appeal is that the verdict of the jury should be set aside on the ground of misdirection by the learned Sessions Judge on this main issue. Before discussing this point it will be convenient to first deal with a preliminary objection that the trial was without jurisdiction by reason of the provisions of section 132 of the Criminal Procedure Code. This section provides that no prosecution against any person for any act purporting to be done under Chapter IX of the Code shall be instituted in any criminal Court except with the sanction of the Governor-General in Council. It is contended that the act of the appellant in ordering the constable to fire was justified by the provisions of section 128, or at any rate the act purported to be done under that section, so as to render the provisions of section 132 quoted above applicable. But this contention fails because the power to disperse an unlawful assembly by force is not given by the Code to any police officer below the rank of an officer in charge of a police station. An examination of the Police Manual shows that the powers of an officer in charge

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of a patrol boat are no higher than those of an officer in charge of an outpost. From such an officer the power to investigate cognizable cases has been withheld, and this is a power which he would necessarily have under section 156 of the Criminal Procedure Code if he were in charge of a police station. As an officer in charge of the patrol boat the appellant had no power to act under Chapter IX of the Code of Criminal Procedure, and he cannot even have purported to act under that section.

But on the main issue we hold that there has been positive misdirection on certain points of law and also that, reading the charge as a whole, the case on the facts has not been fairly placed before the jury. In the first place the learned Judge has not realized that on the case set up for the prosecution a charge of murder should have been framed. The case as stated by him is that "the constables were never in danger of their life and property; at the first stage in the *hât* the two constables might have been threatened by the mob, but when, under the protection of Mohit, they were taken into the *kutcherry*, the apprehension of violence ceased. Facts which happened after they were taken into the *kutcherry* and Yunus (the appellant) appeared were not such as to make them reasonably apprehend serious violence". But if guns loaded with ball were fired under these circumstances directly at a crowd of people at close quarters, the person or persons who were directly responsible for the act would be guilty of murder of Jhumer Ali. The act was so imminently dangerous that it must in all probability cause death, and this came within clause 4th of section 300 of the Penal Code. The heads of charge to the jury do not show how the law was explained to the jury so as to render an act, which the learned Judge himself described as "imminently

dangerous", punishable under section 304 of the Penal Code If, as seems probable from another portion of his charge, the jury were told that the case fell within Exception 2 of section 300, which relates to exceeding the right of private defence, this was a serious misdirection, since the case for the prosecution was that there was no right of private defence at all. That the right of private defence was exceeded was neither party's case, and it should have been put clearly to the jury that the question they had to decide was whether or no the right of private defence came into existence, and not how far it extended.

The learned Judge's remarks on the burden of proof were likely to mislead the jury. As the accused had examined witnesses to prove their plea of the right of private defence, there was no necessity to refer to the provisions of section 105 of the Evidence Act. The incidence of the burden of proof means that the person on whom it lies must prove that fact. But the meaning of "proved", as defined in section 3 of the Evidence Act, is in no way affected by the incidence of the burden of proof. When, as in the present case, evidence has been given to support the defence of an exception, the burden of proof is discharged if the evidence is believed, and the jury have their ordinary duty of deciding a question of fact on the evidence before them. But the learned Judge's remarks seemed to suggest, and were probably understood by the jury to direct, as a matter of law, that the defence set up required a higher standard of proof. In dealing with the law as to the right of private defence, there are omissions of important points which amount to serious misdirection. In explaining section 100 of the Penal Code, the learned Sessions Judge told the jury: "If there be reasonable apprehension of killing or robbing, the attacks may be met by killing",

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but no mention was made of an apprehension of grievous hurt. It is pointed out on behalf of the Crown that the heads of charge show that section 100 of the Penal Code was read and explained, but this section contains a list of six heads of offences, several of which could have no application to the case they were trying, and the jury would naturally disregard those to which their attention was not specially directed by the Judge. A second important omission is that no reference appears to have been made to the provisions of section 101 of the Penal Code which relate to the right to cause any harm other than death. It was necessary that the jury should understand this section also before giving a verdict on the minor charges of causing grievous hurt.

There are other points in respect of which the learned vakil for the appellants has satisfied us that there was misdirection. When the statement of Kadam Ali before the Magistrate was put in, his deposition in the trial in the cross case should have been put in with it, since Kadam Ali then wished it to be considered as his defence. The jury should have been warned that the statement of Kadam Ali in the Sessions Court not being a confession, could not be considered as against his co-accused. Exhibits 2 and 5, the first information lodged by Momtazuddin, and a report of Mainuddin Sarkar, who were not examined as witnesses, were not admissible as evidence. It is not necessary to dwell on these points as the misdirection was not such as is likely to have occasioned a miscarriage of justice, apart from the general misdirection in the charge considered as a whole. There is another point urged on behalf of the appellant that the jury should have been directed to draw an inference adverse to the prosecution because a number of persons who could have given important information

were not examined as witnesses for the Crown. The more important of these were the Bhawal Estate jamadar, peon and drummer, who were publishing the notice that led to the disturbance, Momtajuddin who laid the first information (Exhibit 2), and who is the brother-in law of Jhumer Ali who was killed, Mainuddin, the President panchayat who wrote the report (Exhibit 5), Radha Khan and Ahmadulla who were admittedly present. It was the duty of the prosecution to put all the evidence before the Court, and the only valid excuse for not examining these witnesses would be that no reliance could be placed on their evidence. By discarding these witnesses the prosecution emphasized the fact that the case for the Crown was a total denial of any right of self defence, and not that the right of private defence was exceeded. As stated above, we hold that the learned Sessions Judge erred in not putting this issue clearly before the jury. But we also hold that he was unfair to the accused in his remarks on the restrictions to the right of private defence and his suggestions that that right was exceeded. If the three policemen were in danger of attack from an angry mob, it could not be said that "the injury apprehended may be warded off by inflicting harm, less grievous than death." Experience teaches us that in such a case the only remedy is the drastic one of shooting to kill in the first instance, and that anything less is likely to increase the fury of the crowd. There are also several points in favour of the accused to which the attention of the jury should have been drawn. It is admitted that at the commencement of the occurrence there was great excitement, the peon was assaulted and the constables had to be taken under protection. We find it hard to believe that the excitement should have at once subsided when the constables were taken to the *kutcherry*,

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when the grievance the mob had was that the constables were siding with the *kutcherry* servants. The jury should also have been reminded of the fact that an angry crowd is the more dangerous because the persons composing it will commit crimes jointly that they would never have committed individually. The learned Judge, in his order passed after the jury had given their verdict, referred to the tendency of juries now-a-days not to be lenient to policemen, still less police or military officers who fire upon an unarmed or even an armed crowd. But nowhere in his charge did he warn the jury against being prejudiced in this way, or point out the difficulties and dangers of police officers when confronted by an excited mob. Nor did he remind the jury, as he might have done, that the accused were men of Eastern Bengal like themselves who would have probably been unwilling to cause the death of a fellow creature unless they felt compelled to do so.

For the above reasons we hold that there has been serious misdirection which has occasioned a failure of justice. On a full consideration of the case we do not think it would serve any useful purpose to order a re-trial.

We accordingly allow this appeal. We set aside the conviction and sentence passed on the appellant, and direct that his bail bond be discharged.

E. H. M.

Appeal allowed.