

## CRIMINAL REFERENCE.

*Before Sanderson C. J. and Panton J.*

EMPEROR

v.

PROFULLA KUMAR MAZUMDAR.\*

1922

May 26.

*Trial by Jury—Disagreement by Judge—Reference to High Court—Re-opening case as to verdict accepted though not agreed with by the Judge—Criminal Procedure Code (Act V of 1898) s. 307—Criminal act done by one of two persons—Liability of the other—Penal Code (Act XLV of 1860) ss. 34, 114 and 302.*

Where, on charges under ss. 302 and 303 of the Penal Code, the Judge agrees with the Jury that it is doubtful whether the accused committed the offence by his own hand, and refers the case, under s. 307 of the Criminal Procedure Code, on the ground that he disagrees with the verdict as to whether the accused acted together in furtherance of the common intention, the High Court should not, even if it has jurisdiction to do so, deal with the question whether the accused committed the offence personally.

Section 34 of the Penal Code does not create an offence, but is a rule of law and applies only when a criminal act is done by several persons, of whom the accused charged thereunder was one, and not where the act is committed by other persons and not by the accused so charged.

*Emperor v. Nirmal Kanta Roy* (1) followed.

An accused charged under ss. 303 of the Penal Code cannot be convicted under ss. 302 when not charged thereunder.

Re-trial ordered under s. 313 of the Penal Code.

ONE Mukunda Lal Goon, a police inspector of the Tipperah State, went to Dacca in July 1921. On the 23rd September he was returning from the Mitford Hospital, at about 12-15, p. m. when he was waylaid by two men on the road one of whom stabbed him in

\* Criminal Reference No. 29 of 1922 by R. F. Lodge, Additional Sessions Judge of Dacca, dated March 16, 1922.

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the neck with a dagger. They were pursued but one escaped and the other, the accused Profulla Kumar Mazumdar, was seized by the villagers and taken to the thana. In the meantime the wounded man was removed to Hospital, and his dying declaration was recorded by B. M. Ghose, a Deputy Magistrate. He stated that he was met on the road by two men one of whom stabbed him, and he described the latter. Just as the dying declaration was recorded, Profulla was brought to the hospital and identified by Mukunda as the man who had stabbed him. Profulla thereupon made a statement to the same Magistrate, in consequence of which one Manindra Kumar Sen was arrested. Mukunda died the same day at 6 p.m.

Profulla and Manindra were committed to the sessions and tried before the Additional Sessions Judge of Dacca with a Jury, the former on charges under ss. 302 and  $\frac{302}{34}$  of the Penal Code, and Manindra under the latter sections. The Jury unanimously found Manindra not guilty, and the Judge accepted the verdict. Their verdict as to Profulla is stated below. The Judge referred the case under s. 307 of the Criminal Procedure Code.

The material portions of the Letter of Reference were as follows :—

The Jury were also unanimous that there is not sufficient evidence to find Profulla guilty under s. 302 without the aid of s. 34. This verdict too I accept, though I do not agree with it. But the Jury also found unanimously that there was a doubt that Profulla was guilty under ss.  $\frac{302}{34}$ ... Though I personally am satisfied that Profulla struck the fatal blow, I accept the verdict that there is a doubt in the matter. But they also held that there is a reasonable doubt that the two acted in furtherance of a common intention. This I consider perverse. To my mind

the admitted circumstances are wholly inconsistent with the view that either of them could be ignorant of his companion's intention . . . I am of opinion that Profulla is clearly guilty under ss.  $\frac{302}{34}$  of the Penal Code and the verdict of the Jury is perverse . . .

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*Babu Manmatha Nath Mookerjee* and *Babu Narendra Kumar Bose*, for the accused.

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

SANDERSON C. J. This is a Reference under section 307 of the Criminal Procedure Code by the second Additional Sessions Judge of Dacca in a case in which two persons, Manindra Kumar Sen and Profulla Kumar Mazumdar, were charged with murder. The name of the man who is alleged to have been murdered was Mukunda Lal Goon, and I do not suppose that any one, who has read the evidence in this case, has any doubt that Mukunda Lal Goon was, in fact, murdered. The Jury were unanimous in their verdict which runs as follows:—

“We think Manindra not guilty: but we think there is a doubt in the case of Profulla, and that he should get the benefit of the doubt.”

The learned Judge accepted the unanimous verdict of the Jury that Manindra was not guilty: he found that this accused was not guilty and he directed him to be acquitted and released from custody.

With regard to Profulla, the learned Judge disagreed with the verdict of the Jury, and referred the case for the decision of the High Court under section 307 of the Criminal Procedure Code. The letter of reference sets out the reasons, which actuated the learned Judge to refer this matter to the High Court, and he stated the offence of which he considered

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Profulla to be guilty, *viz.*, under section 302 of the Indian Penal Code.

Mukunda was stabbed in the neck, and when assistance came to him, he asserted that he had been stabbed by two men, whom he pointed out, and who were at that time running away. The two men were pursued. One of them was caught and taken into custody. This was Profulla whose case is the subject of this reference. The case of Manindra turned to a large extent upon the question of identification, and the learned Judge, in a charge, which is conspicuous for its clearness and fairness, dealt with the evidence relating to this question, and I gather from his charge that the reason why he accepted the verdict of the Jury as to Manindra was that the learned Judge, having regard to the evidence as to the identification of Manindra, could not say that the verdict was unreasonable.

In his letter of reference the learned Judge dealt with the verdict of the Jury with regard to Profulla as follows:—"The Jury were unanimous that there is not sufficient evidence to find Profulla Kumar Mazumdar guilty under section 302 without the aid of section 34. This verdict too I accept, though I do not agree with it. But the Jury also found unanimously that there was a doubt that accused Profulla was guilty under section 302. I am clearly of opinion that it is necessary for the ends of justice to refer the case. I have the honour to submit the records for the orders of the High Court under section 307 of the Criminal Procedure Code." A later passage in the reference is as follows:—"Though, I personally am satisfied that Profulla, accused, struck the fatal blow, I can accept the Jury's verdict that there is a doubt on the matter." I understand the learned Judge to mean that, although he himself was

satisfied that Profulla was the man who struck the blow, the Jury evidently had a doubt on the matter, and that he was not able to say that, that doubt was unreasonable; consequently, he could accept the verdict of the Jury as to that part of the case. He then went on to say, "But the Jury also held that "there is a reasonable doubt that the two youths "acted in furtherance of a common intention. This I "consider perverse. To my mind the admitted "circumstances are wholly inconsistent with the view "that either of the two youths could be ignorant "of his companion's intention." He then set out the reasons for that conclusion; and continued, "I am of opinion that accused Profulla is clearly "guilty under sections  $302$ , of the Indian Penal Code, "and the verdict of the Jury is perverse due to "reluctance to find any one guilty of a capital crime."

The learned counsel for the Crown contended that, having regard to the form in which the verdict regarding Profulla Kumar Mazumdar was given, and to the fact that the learned Judge recorded his disagreement with it and referred the case under section 307 of the Criminal Procedure Code, it was open to this Court to examine the evidence and to hold that it was Profulla Kumar Mazumdar who stabbed the deceased man. But we must have regard to the letter of reference, and it is clear therefrom that the learned Judge accepted the Jury's verdict as to this part of the case. That being so, in my judgment, we ought not to consider that question on this Reference. It is not necessary for me to decide the question whether upon this Reference we have jurisdiction under section 307 of the Code of Criminal Procedure to enter upon the enquiry as to whether the accused Profulla did strike the fatal blow, because, having regard to the terms of the letter of reference, I am clearly of opinion that we

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ought not to do so. The Jury found that there was a doubt whether Profulla struck the blow and the learned Judge has clearly accepted the verdict of the Jury on that part of the case. Consequently, in my judgment, this Court ought not to enter upon the consideration of the question involved in that part of the case.

The only question we have to decide on this Reference is whether the learned Judge was right in his conclusion that the admitted circumstances were wholly inconsistent with the view that either of the two youths could be ignorant of his companion's intention, and we have to consider that part of the case upon the assumption that one of the two men, who were present, struck the fatal blow, and on the further assumption that it is not proved which of the two men struck the fatal blow. The learned Judge with respect to this part of the case directed the Jury as follows:—"By section 34 of the Indian Penal Code "when a criminal act is done by several persons, in "furtherance of the common intention of all, each of "the persons is liable for that act in the same manner "as if it were done by him alone. If, therefore, the "man who accompanied the stabber had a common "intention with the stabber, *viz.*, the causing the death "of Mukunda, then such companion is liable for the "stabbing as if he had actually stabbed," and he concluded his charge to the Jury as follows:—"If you "are of opinion that the two men had a common object "in view, *viz.*, to cause the death of Mukunda, then "both are equally guilty. If, however, you are of "opinion from the evidence and circumstances that "one of the two might reasonably have been ignorant "of his companion's intention then only the man who "struck the fatal blow can be found guilty; and if "supposing that you are of opinion that one of the

“two men only is guilty and you are unable to decide which of them struck the fatal blow, then it is your duty to find both not guilty”.

Here, in my judgment, arises a difficulty. Assuming that this Court has to approach the case on the basis that it is not proved which of the two men stabbed the deceased man and that one of them only undoubtedly did, I have considerable doubt whether the provisions of section 34 are applicable. It must be remembered that section 34 does not create an offence. The provisions thereof merely lay down a rule of law. The meaning of that section was considered by Mr. Justice Stephen in the case of *Emperor v. Nirmal Kanta Roy* (1), and I need not do more than to refer, for my present purpose, to the decision of the learned Judge in that case. The deceased man was killed by one blow with the dagger, which was left sticking in his neck. The defence of the accused, Profulla Kumar Mazumdar, was that the fatal blow was struck by the man who was with him; it seems to me, therefore, that the charge which should have been preferred against the accused as an alternative to the main charge under section 302 of the Indian Penal Code was a charge under section 302 read with section 114 of the Penal Code.

The learned vakil for the accused has argued that the accused was not charged under section 114 with abetment, and that he cannot now be convicted by this Court under section 114, inasmuch as the charge was not framed against him in the trial Court. We are of opinion that we must accede to that argument. The result is that we accept the reference to this extent that we direct that this case be remanded in order that the accused Profulla Kumar may further be placed upon his trial. We desire to make it clear,

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however, that, inasmuch as the Jury have given a verdict in his favour upon the question whether Profulla struck the fatal blow, and the learned Judge has clearly accepted that verdict, we do not consider it right that he should be put upon his trial in respect of that part of the case again. It may be said that strictly speaking, inasmuch as the learned Judge has not registered an acquittal in respect of Profulla, he could be tried again on the basis that it was he who stabbed the deceased man. In our judgment, however, it would not be right, for the reasons already stated, to put Profulla Kumar Mazumdar on his trial again in respect of that matter. Consequently, we direct that the further trial be confined to a charge under section 302 combined with section 114 of the Indian Penal Code.

I conclude my judgment by saying that I do not feel that the course which we are directing is altogether a satisfactory one, but no other option is left to us by reason of the way in which the matter has been referred to us by the learned Judge. The learned Judge, apparently, was satisfied that Profulla had struck the fatal blow, and it might have been better if he had referred the whole case against Profulla to this Court, instead of dividing the verdict of the Jury in the manner in which he did, and accepting part and disagreeing with part. At the same time we desire to express our recognition of the great care with which the learned Judge dealt with the case, which was by no means free from difficulty.

The result, therefore, is that the case must be sent down to the lower Court for re-trial in the limited way which I have indicated.

PANTON J. I agree.

E. H. M.