CRIMINAL REFERENCE.

Before Mookerjee and Chatterjea JJ.

EMPEROR

v.

AKBAR MOLLA AND OTHERS.*

1923

Sep. 19.

Jury Reference—Common object—Function of High Court on such reference —Criminal Procedure Code (Act V of 1898), s. 307.

If the common object assigned in the charge as framed to support a case under s. 147 of the Indian Penal Code has not been sustained, the High Court on a reference under s. 307 of the Criminal Procedure Code cannot invent another common object in order to support a conviction.

Fateh Singh v. *Emperor* (1), *Poresh Nath Sircar* v. *Emperor* (2) and *Pachkauri* v. *Queen Empress* (3) followed.

On a reference under s. 307, Criminal Procedure Code, the High Court which has not the opportunity to see the witnesses must act with great caution and, therefore, it will not ordinarily interfere with the unanimous verdict of the Jury, which has been accepted by the Judge with regard to some of the accused.

Queen v. *Sham Bagdee* (4) and *R.* v. *Bertrand* (5) referred to.

TEN accused persons were charged under ss. 147, $\frac{326}{149}$ and $\frac{304}{149}$ of the Indian Penal Code for committing a riot at Homra with the common object of enforcing a right or supposed right on a piece of land at Walimbaria belonging to the prosecution party.

* Jury Reference No. 47 of 1923.

(1) (1913) I. L. R. 41 Calc. 43.
(2) (1905) I. L. R. 33 Calc. 295.
(3) (1897) I. L. R. 24 Calc. 686.
(4) (1873) 20 W. R. 73; 13 B. L. R. App. 19.
(5) (1867) L. R. 1 P. C. 520, 535.

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The prosecution alleged that the accused made an attempt to take forcible possession of the disputed land and injuries were caused on both sides. The defence was that the disputed land was in possession of the accused and that the prosecution party were the aggressors.

The accused were tried by the Assistant Sessions Judge of Alipore with the aid of a Jury. The Jury unanimously found all the accused not guilty. The Sessions Judge accepted the verdict in respect of four of the accused and acquitted them, but he rejected the verdict in respect of the remaining six accused and referred their cases to the High Court under section 307 of the Criminal Procedure Code.

The Offg. Deputy Legal Remembrancer (Mr. Camell), for the crown. The determination of the charge under section 147, Indian Penal Code, will depend on the party who had actual possession of the disputed land at the time of the occurrence. The prosecution has succeeded in establishing that they were in possession. In the examinations of the accused persons before the Magistrate and the Sessions Judge, they relied upon their joint written statement. There nothing has been shown to justify their shooting. In this country the opinion of a Judge is to be weighed in the same way as that of a Jury: *Manindra Chandra* v. *Emperor* (1). I rely upon section 307, Criminal Procedure Code. Your Lordships sit as a Court of Appeal and consider the whole case.

Babu Birbhusan Dutt, for the complainant.

Babu Manmatha Nath Mukerji (with him *Babu Pannalal Chatterjee*), for the accused. I submit no case has been made out to interfere with the verdict of the Jury. No case under section 307, Criminal Procedure Code, should be referred to this Court unless

(1) (1914) I. L. R. 41 Calc. 754, 762.

it is a clear case. Your Lordships will give due weight to the verdict and the opinion of the Judge. The foundation of the verdict would be that the Jury believed the defence case, that the accused were in possession of the disputed land and that whatever injuries were caused to the prosecution party, were caused in the exercise of their right of private defence. Refers to *Queen* v. *Sham Bagdee* (1), *Emperor* v. *Nrityagopal* (2) and *Emperor* v. *Swarnamoyee* (3). The trend of the decisions shows that the powers of a Sessions Judge and the principles under which he makes a reference to this Court are still the same as before. It is inconceivable why the Judge referred this case, although he disbelieved the prosecution evidence in so far as four of the accused were concerned. Sometimes more weight has been given to the opinion of the Judge than the verdict of the Jury by this Court, but I submit it is not proper.

MOOKERJEE AND CHATTERJEA JJ. This is a reference under section 307 of the Criminal Procedure Code in respect of six accused persons; they were tried jointly with four others who have been acquitted by the Court below.

The circumstances antecedent to the prosecution may be briefly stated. There was a long standing dispute with regard to the possession of a tract of land whereof the Chowdhuries were the Zemindars. The case for the prosecution is that on the 9th August, 1922, the party of the accused made an attempt to take forcible possession of the land with the result that violence was used on both sides. Two persons named Sariat and Sarafat were shot. Sariat died in hospital on the 11th August, 1922; Sarafat survived

(1) (1873) 20 W. R. 73; 13 B. L. R. App. 19.

(2) (1922) 38 C. L. J. 1.

(3) (1913) I. L. R. 41 Calc. 621.

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and has given evidence at the trial in support of the prosecution. The case for the defence is that the land was in the possession of the party of the accused and that the complainants were the aggressors. It is further asserted that the complainants in their desire to obtain forcible possession requisitioned the services of Sariat and Sarafat.

There was thus a clear-cut divergence between the two sides upon a pure question of fact and evidence was adduced in great detail upon the subject of possession. That evidence was fully summarised by the Sessions Judge in his charge to the Jury and has also been placed before us on behalf of the Crown. The Sessions Judge in the course of his summing up clearly analysed the points which required decision, and he correctly stated that the fundamental question was, which side was in possession of the disputed property The Jury evidently accepted the view that the complainants were the aggressors and that they endeavoured to obtain forcible possession of the property which was in the occupation of the accused party. The result was that they brought in a unanimous verdict of not guilty upon all the charges against all the accused persons.

The Sessions Judge accepted the verdict of the Jury with regard to four of these persons, namely, Abdul Mollah, Moniruddi Mollah, Moniruddi Jamadar and Mantoo *alias* Amrita Lal Roy. The Sessions Judge, however, expressed the opinion that he could not on the evidence accept the verdict of the Jury in respect of the other six accused persons and has made this reference for the ends of justice.

It is obvious that in a case of this description where the Sessions Judge has accepted the verdict of the Jury with regard to some of the accused persons and declined to accept the verdict with regard to

others, this Court as a Court of Reference under section 307, Criminal Procedure Code, is placed in a situation of some difficulty. The evidence which has been placed before us leaves no room for doubt that the witnesses who have spoken to the participation of the four acquitted persons in the occurrence are the very witnesses who have spoken as to the complicity of the six persons whose cases are now under consideration. We have not been able to appreciate the ground why these witnesses should be believed as to four of the accused and disbelieved as regards the other six persons. Mr. Mookerjee has pointed out that in respect of some at least of the persons who have been acquitted the statements of these witnesses are as clear and as emphatic as those made in respect of the six persons whose cases have been referred.

We need not set out in detail the evidence of possession, but we may state our conclusion that it is of such a character that the Jury would be amply justified in the view that the case for the prosecution was untrue, and the case set up for the defence was true, in other words, that the defence party was in occupation and that the party of the complainant constituted the aggressors. This inevitably leads to the position that the common object assigned in the charge as framed to support a case under section 147, Indian Penal Code, has not been sustained, and we cannot at this stage invent another common object in order to support the conviction. This view has been taken in a series of decisions of this Court, such as *Fateh Singh* v. *Emperor* (1), *Poresh Nath Sircar* v. *Emperor* (2), and *Pachkauri* v. *Queen Empress* (3). The charge under section 147 and consequently the charges under

(1) (1913) I. L. R. 41 Calc. 43. (2) (1905) I. L. R. 33 Calc. 295.
(3) (1897) I. L. R. 24 Calc. 686.

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sections 304 and 326 read with section 149 must, therefore, fall through.

There remains the question whether the specific charge against the principal accused Akbar Molla can be sustained. It may be assumed for the purpose of the present reference that it was his shot which ultimately led to the death of Sariat. The question arises whether he acted in exercise of the right of private defence, and if so whether he exceeded his right. In respect of this question there is a conflict of testimony as to what happened. The case for the prosecution is that Akbar Molla came prepared for a fight with a gun in hand. This is consistent with the theory that the party of the accused constituted the aggressors and not with the case that the party of the complainant were the aggressors. The case for the defence on the other hand is that Sariat and Sarafat who had been requisitioned for the express purpose of taking forcible possession of the disputed land, came armed with lathis determined to use violence for the attainment of the object in view. The defence witnesses further assert that it was only after one of the accused persons namely, Abdul, who has been acquitted by the Sessions Judge, had been struck on the head that Akbar used his gun. There is, as we have stated, a conflict of testimony on this point. The Jury in our opinion were fully justified if they believed, as they appear to have done, that what happened was correctly stated by the defence. If that story is believed, there is no question that Akbar acted in exercise of his right of private defence and did not exceed that right.

There has been some discussion at the bar as to the function of this Court under section 307, Criminal Procedure Code, and our attention has been invited to the cases of *Emperor* v. *Nritya Gopal Roy* (1) and *Emperor*

(1) (1922) 38 C. L. J. 1.

v. *Swarnamoyee Biswas* (1) which emphasise the well known pronouncement by Mr. Justice Macpherson in the case of *Queen* v. *Sham Baydee* (2). In the case last mentioned the following observation was made: "If we are to interfere in every case of doubt, in every case in which it may with propriety be said that the evidence would have warranted a different verdict, then we must hold that real trial by Jury is absolutely at an end, and that the verdict of a Jury is of no more weight than the opinion of assessors". We see no reason to doubt the soundness of this principle. We need not, however, in the present case, fairly simple on its own facts, embark upon a discussion of the scope of section 307, Criminal Procedure Code, with reference to all the judicial decisions which may be difficult to reconcile. But this much is clear that in a case under section 307, Criminal Procedure Code, this Court which has not the opportunity to see the witnesses must act with great caution. The Judge in the Court below saw the witnesses and watched their demeanour. So also did the five Jurors. The Jurors unanimously held that the case for the prosecution should not be believed as regards all the accused persons. The Sessions Judge has accepted that opinion of the Jurors in respect of four of the accused. He has, however, declined to accept the verdict with regard to the other six persons. The position consequently is that we have the unanimous opinion of five Jurors as to the value of the testimony of the witnesses whom they had the opportunity to see. We have the fact that that opinion is shared by the Judge himself in respect of four of the accused persons. We have the final fact that the Judge has taken a different view of the reliability of the witnesses in respect of six of the accused.

(1) (1913) I. L. R. 41 Calc. 621. (2) (1873) 20 W. R. 73; 13 B. L. R. App. 19.

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This is precisely a case where we may usefully recall the observations of Sir John Coleridge in *Reg.* v. *Bertrand* (1). "The most careful note must often fail to convey the evidence fully, in some of its most important elements, to those for which the open oral examination of the witness in presence of prisoner, Judge, and Jury, is so justly prized. It cannot give the look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; it cannot give the manner of the prisoner, when that has been important, upon the statement of anything of particular moment; it is, in short, or it may be, the dead body of the evidence, without its spirit, which is supplied, when given openly and orally, by the ear and eye of those who receive it".

In the case before us we are not able to accept the recommendation of the Sessions Judge that the verdict of the Jury in respect of the six persons whose cases have been referred, should be set aside.

We direct accordingly that the reference be discharged and the accused be released from custody.

B. M. S. *Reference discharged.*

(1) (1867) L. R. 1 P. C. 520, 535.