CRIMINAL REFERENCE.

Before Richardson and Suhrawardy JJ.

1923

Aug. 8.

EMPEROR

v.

JAMALDI FAKIR AND OTHERS.*

Jury Reference—Uncorroborated testimony of an accomplice—Verdict to stand unless it is wrong—Criminal Procedure Code (Act V of 1898), s. 307.

The uncorroborated evidence of an accomplice is admissible in law. But it has long been a rule of practice for the Judge to warn the Jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the Judge, to advise them not to convict upon such evidence ; but the Judge should point out to the Jury that it is within their legal province to convict upon such unconfirmed evidence.

R. v. *Baskerville* (1) referred to.

On general principles when the process, which s. 307 of the Criminal Procedure Code directs, has been carried out, and the opinions of the Judge and Jury have been measured, the verdict of the Jury should stand unless the evidence and the opinion of the Judge show clearly that it is wrong and that in the interests of justice it ought to be reversed.

NINE accused were charged under section 395 of the Indian Penal Code, for committing dacoity and under section 396 of the Indian Penal Code for committing dacoity with murder at the house of Isarat Sarkar, the deceased, at midnight of the 19th of February, 1923.

The prosecution alleged that while the deceased Isarat and his wife Khabiran Bewa were asleep, the nine accused and the approver came with covered faces and lighted torches and demanded key from

*Jury Reference No. 41 of 1923.

(1) [1916] 2 K. B. 658.

Khabiran and asked her where the money was. On her saying that the key was not with her and that there was no money in the house, the accused gave her several kicks, tied her and gagged her mouth. Isarat was thrown out of his bed and killed. The accused then opened the iron safe and took away the contents and the other valuables of the house. After the dacoits had left, Khabiran with the help of her teeth untied herself and informed her relatives of the dacoity.

The defence was that the accused were not guilty and that the evidence of the approver could not be relied upon without sufficient corroboration in all material particulars.

The Sessions Judge of Pabna and Bogra tried the accused with a Jury with the result that the Jury unanimously found three of the accused guilty and six, by a majority of three to two, guilty under both the charges. The Judge accepted the verdict as to four of the accused and sentenced them to eight years' rigorous imprisonment each. As to the remaining five accused, the Judge rejected the verdict and referred their cases to the High Court under s. 307, Criminal Procedure Code, and recommended for their acquittal.

Babu Heramba Chandra Guha for the accused. As the evidence of the accomplice has not been corroborated in essential particulars by independent evidence, there should not be any conviction. The view taken by the learned Sessions Judge is correct.

Babu Surendra Nath Guha (*Junior Government Pleader*), for the Crown. It is true that no incriminating article was found in the houses of these five accused and that the only evidence against them

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is the evidence of the approver. Even then I submit that when the Jury found them guilty by a majority, a conviction will be perfectly legal.

RICHARDSON J. In this case nine accused persons were tried by the Sessions Judge of Pabna and Bogra and a Jury on charges of dacoity under sections 395 and 396 of the Indian Penal Code. The Jury in some cases unanimously and in some cases by a majority found all the accused guilty of the offences charged.

The learned Judge accepted the verdict in the cases of four accused whom by his judgment he convicted and sentenced. In these cases there is no ground for our interference and the appeal from the convictions and sentences must be dismissed.

As regards the other five accused, Jamaldi Fakir, Kafiraddi Fakir, Kudratulla Mallik, Hakoo Mandal and Ainulla, the learned Judge disagreed with the verdict of the Jury on the ground that as against these accused the only evidence was the uncorroborated testimony of an accomplice who had accepted a tender of pardon and was examined as a witness at the trial. Being of opinion that these five men should be acquitted, the learned Judge referred their cases to the High Court under section 307 of the Criminal Procedure Code. Now, the learned Junior Government Pleader appearing for the Crown has conceded that the evidence against these men is confined to that of the approver. No stolen property was found in their houses, nor is there any independent testimony which implicates or tends to implicate them individually in the commission of the offences charged.

In his letter of reference the learned Judge says that the evidence of the approver "is not legally sufficient "for the conviction of these accused." That is not an accurate statement. It is clear, however, from the

learned Judge's charge to the Jury that the law on the subject was well known to him and that he explained it to the Jury fully and correctly. He gave them the usual and proper warning as to the danger of acting on the uncorroborated testimony of an accomplice. He told them that the approver was an accomplice, that he was a *ganja* smoker, that he came before the Jury under a promise of conditional pardon and that his interest would be to secure the conviction of the accused. But he also and rightly told the Jury that a conviction even upon the evidence of the approver alone would not be illegal. There is no fault to be found with the charge. The learned Judge clearly had in mind the illustration to section 114 of the Evidence Act, according to which the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars; but he did not forget the express provision in section 133 of the Act that an accomplice shall be a competent witness against an accused person and that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

The English law on this topic has recently been reviewed by the Court of Criminal Appeal in an authoritative judgment delivered by Lord Reading C. J., in *R.* v. *Baskerville* (1), and I think it is satisfactory to find that in a matter of this sort the law and practice in England and in India run upon precisely the same lines. Lord Reading says at page 663 of the Report "There is no doubt that the uncorroborated evidence "of an accomplice is admissible in law. But it has long "been a rule of practice at common law for the Judge "to warn the Jury of the danger of convicting a "prisoner on the uncorroborated testimony of an "accomplice or accomplices, and, in the discretion of

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"the Judge, to advise them not to convict upon such "evidence; but the Judge should point out to the Jury "that it is within their legal province to convict upon "such unconfirmed evidence."

In my opinion then it cannot be said that the learned Judge made this reference because he misapprehended the law. Nor can the verdict of the Jury be attributed to any misdirection, or any failure to direct the Jury, on the part of the learned Judge. It may well be that if he had accepted the verdict and the five accused had appealed, the appeal, regard being had to section 423(2) of the Code, would have been unsuccessful. But the learned Judge has not accepted the verdict of the Jury. On the contrary his opinion is that the verdict is erroneous and should be set aside, and the matter comes before us not under section 423 but under section 307 of the Code. Now section 307 lays down that, in dealing with a case submitted thereunder, the High Court "may exercise "any of the powers which it may exercise "on an appeal" and that "subject thereto, it shall, "after considering the entire evidence and after giving "due weight to the opinions of the Sessions Judge "and the Jury, acquit or convict the accused of any "offence of which the Jury could have convicted him "upon the charge framed and placed before it." Our duty accordingly is to consider the evidence on the record as it stands, to weigh the respective opinions of the Sessions Judge and the Jury and then to form our own conclusion. It still remains that the verdict of the Jury is first in the field and that the Code section 299, makes it primarily the function of the Jury "to decide which view of the facts is true and "then to return the verdict which under such view "ought, according to the direction of the Judge, to "be returned" and "to decide all questions which

"according to law are to be deemed questions of "fact." On general principles, therefore, it appears to me that when the process which section 307 directs has been carried out, and the opinions of the Judge and Jury have been measured, in the result the verdict of the Jury should stand unless the evidence and the opinion of the Judge show clearly that it is wrong and that in the interests of justice it ought to be reversed. It is sometimes thought that the expressions of learned Judges in such cases as *R.* v. *Sham Bagdee* (1) and *R.* v. *Sheikh Neamatulla* (2) are not wholly reconcilable in respect of the powers of the High Court under section 307 or rather as to the mode in which those powers should be exercised. As each case however must so largely depend on its own facts, I doubt whether there is any real inconsistency. Neither the Sessions Judge nor the High Court would wish to interfere with the verdict of a Jury unless in his or their opinion there were strong reasons for so doing.

In the present case I have no difficulty in holding that the verdict of the Jury is unreasonable.

One incident in the occurrence was the brutal murder of the owner of the house, Isarat Sarkar. His widow, Khabiran Bewa, is, apart from the approver, Sadhu, the only eye witness, who has been examined. She does not speak to having seen or identified any of the accused, but her evidence invites attention in two respects.

In the first place she mentions Sadhu's name in this way. "Shortly" she says "before the dacoits left "one said that my husband was still alive and that "something must be done to put an end to his life; "after that I heard some gurgling sound from my

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

(2) (1913) 17 C. W. N. 1077.

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"husband. One of the dacoits then addressing another "said: 'Sadhu, this wicked woman must be tied down "else she would give an alarm before we left.' On this "one again caught me and another tied me with my "cloth which was on me. Then the dacoits left." Sadhu's own account of the part he played is as follows:— "We went into the *bari*. I was asked to "stand guard in the south-east corner of the south-"facing hut and the others entered into the inner "compound. Hearing some *golmal* within the house "I left the place where I was and went into the "verandah of the north facing hut. From there I "saw that a woman was in the verandah caught "hold of by Ainull accused and a boy. Entering the "house I saw that there was a dead-body lying "on the floor. Jamaldi had a lighted torch "in his hand. Seeing the dead-body, I got frightened "and sat down. Seeing me thus seated, Jamaldi asked "Meher who the man was who was seated. Meher "said 'Sadhu was seated'. Jamaldi on this got enraged "and said why Sadhu who was deputed to stand guard "came there. On this Kope who had a knife in his "hand wanted to give me slaps. I then came out and "stood again in my appointed place." Comparing Khabiran's evidence and Sadhu's it will be seen that the learned Judge had grounds for suggesting to the Jury that Sadhu was reluctant to admit that he played any prominent or active part in the dacoity.

The second matter to which I wish to refer is what Khabiran says about the accused Jamaldi: "I "know Jamaldi among the accused. He is a disciple "of my father-in-law. He was indebted to us. He "now and then used to come to our *bari*. My husband "secured a decree against him and his brother. They "tried to compromise the claim. They offered Rs. 400 "or Rs. 500. My husband demanded Rs. 800. So the

"compromise could not be effected. That was some "eight days before the occurrence. They saw my "husband once or twice even after that. On the date "of last visit they went away in angry mood". It appears therefore that Khabiran knew Jamaldi, and had, or thought she had, reason for suspecting him.

Now, it is not mere pedantry, it is common prudence, to say that an unprincipled rogue or ruffian like Sadhu should not be implicitly trusted and that it is dangerous to convict any person on his uncorroborated testimony. His own account of the occurrence does not bear on the face of it the impress of truth in all its details and it is so easy in the course of such an account to slip in the name of some one against whom the injured party or his or her friends may have cause of suspicion or a grudge.

In this case, I come to the clear conclusion that the opinion of the Sessions Judge should prevail over that of the Jury and that the five accused who are the subject of this reference should be acquitted. If they are in custody, they will be released. If on bail, they will be discharged from their bail bonds.

SUHRAWARDY J. I agree.

B. M. S. *Reference accepted.*