APPELLATE CRIMINAL.

Before Suhrawardy and Panton JJ.

KABATULLA

v.

EMPEROR.*

1925

July 8.

Misdirection to Jury.—Direction that if recently stolen property is found in the possession of the accused, it is his duty to prove his claim to it—Proper direction in such cases—Evidence Act (I of 1872), s. 114, illustration (a)—Criminal Procedure Code (Act V of 1898), s. 297.

It is a serious misdirection vitiating the charge to tell the Jury that the finding of recently stolen property in the possession of the accused is sufficient to prove that they are thieves or dacoits, and that the rebuttable presumption arising in law is that they are either thieves or dacoits, until they succeed, by adducing sufficient *proof*, in establishing their innocence.

Where the evidence of guilt rests on the finding of recently stolen property in the possession of the accused, the proper course is to direct the Jury that they are entitled to take into consideration the explanation offered by the accused of the circumstances under which he obtained the same, that they may accept it, and it will then be their duty to acquit; and that it is not necessary that a claim to such property must be *proved* by him.

Reg. v. *Schama* (1), *Hathem Mondal* v. *King Emperor* (2), and *Satya Charan Manna* v. *Emperor* (3) followed.

THE appellants were tried by the Sessions Judge of Malda with a Jury on charges under ss. 395 and 412 of the Penal Code, and were found guilty of dacoity by a majority of four to one and sentenced to seven years' rigorous imprisonment. The facts of the case were as follows. On the night of the 9th April 1924, just as the complainant reached home, some 40 or 50 dacoits

* Criminal Appeal No. 188 of 1925, against the order of B. K. Basu, Sessions Judge of Malda, dated Jan. 11, 1925.

(1) (1914) 11 Cr. App. R. 45, 49.
(2) (1920) 24 C. W. N. 619.
(3) (1924) I. L. R. 52 Calc. 223.

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entered his house. The inmates thereupon fled, except one who offered some resistance. The dacoits then took away some boxes, broke them open just outside and removed their contents. None of the dacoits were recognized at the time, but some of the stolen property was found with the appellants 16 days after.

The material portions of the Judge's charge to the Jury were as follows :—

The evidence against the accused persons depends upon the finding of certain property with them, or rather finding at the houses of two of them (Kabatulla and Ishaq), and the production by Maju, the 3rd accused, who happens to be the wife of the 4th accused Saju.

The law regarding the finding of property is this, that if stolen or dacoited property is found in possession of any person soon after the commission of the theft or dacoity, you may presume him to be either the thief or dacoit or a receiver, unless he can account for their possession. Before this presumption can be made, it will be necessary to satisfy yourself of three things—

(a) That the property was found in possession of the accused.

(b) That the property is stolen property.

(c) That the property was found so soon after the theft or dacoity as to make it reasonable for you to make the presumption.

If these three conditions are satisfied, you may presume against the accused, until he proved his innocence, otherwise not.

Next thing to decide is whether you believe the evidence as to identification of the property.

Next, were they found so soon after the occurrence as to make the presumption warrantable. They were found on the 26th April. The dacoity was on the night between 9th and 10th April.

If you are satisfied that the presumption can be made, you will see how far the presumption has been rebutted. As to this you have—

(a) the statements of the accused claiming some of the articles,

(b) the deposition of Kabatulla's wife, and

(c) deposition of two witnesses stating that Kabatulla and Ishaq were at a different place on the night of dacoity.

You will consider how far this evidence is reliable, and if so, what it leads to. As to claim of the articles, allegation is not the same as proof. Of course, as stated above, unless the prosecution proves the properties to be stolen, there is no presumption. But if you make the presumption, it cannot be rebutted by mere denial.

Babu Jatindra Mohan Chakravarti, for the appellants. The statement of the Judge to the Jury that if recently stolen property is found with the accused, he must rebut the presumption arising therefrom by *proof* of his innocence, and that mere allegation of claim to property is not *proof*, is a serious misdirection. There is no *onus* on the accused to prove his innocence in such a case; the *onus* is always on the prosecution. The presumption under section 114, *illustration* (*a*), arises on all the facts of the case, including the explanation of the accused. The Jury has to decide on the whole case whether the presumption is to be given effect to: see *Satya Charan Manna* v. *Emperor* (1), *Hathem Mondal* v. *King-Emperor* (2). The Judge has not explained the nature of the possession giving rise to the presumption.

The Deputy Legal Remembrancer (*Mr. Khundkar*), for the Crown If the whole of the charge is read together, there is no misdirection and no prejudice to the accused. The Judge has not really placed the *onus* strictly so called on him. The charge in the first case cited was very different.

SUHRAWARDY AND PANTON JJ. This appeal is by three appellants who have been convicted under section 395 of the Indian Penal Code and sentenced to seven years' rigorous imprisonment each, with the direction under section 565 of the Criminal Procedure Code, to notify the address to the police in case of accused No. 1. Four Jurors found the accused guilty under section 395, while the 5th Juror found them guilty under section 412 of the Indian Penal Code. The learned Judge has accepted the verdict of the majority of the Jury, and convicted and sentenced the accused as

(1) (1924) I. L. R 52 Calc. 223. (2) (1920) 24 C. W. N. 619.

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aforesaid. In appeal several grounds have been taken pointing to the misdirections alleged to have vitiated the learned Judge's charge to the Jury. It is enough for our present purpose to refer to only one of them. The evidence, it appears, rested mainly upon the recovery of the stolen articles from the possession of the accused. With regard to the explanation of the law on this head, the learned Judge made the following observations: "The law regarding finding of property is this, that if stolen or dacoited property is found in possession of any person soon after the commission of the theft or dacoity, you may presume him to be either the thief or dacoit or a receiver unless he accounts for their possession." Then he proceeds to state the three necessary elements which give rise to the presumption under the law, namely, (*a*) that the property was found in possession of the accused, (*b*) that the property is stolen property, and (*c*) that it was found soon after the theft or dacoity. Then the learned Judge adds that if these three conditions are satisfied, "you may presume against the accused until he proved his innocence, otherwise not." As to what is meant by the learned Judge by the word "proved" in a subsequent part of his judgment he says: "If you are satisfied that the presumption can be made, you will see how far the presumption has been rebutted. As to the claim of the articles, allegation is not the same as proof. But if you make the presumption, it cannot be rebutted by mere denial." Reading these passages together, it is evident that what the learned Judge meant to hold, and which the Jury understood, is that if the articles are stolen properties and were found in possession of the accused, it is sufficient to prove that they were thieves or dacoits, and the rebuttable presumption that arises in law is that the accused are either thieves or

dacoits until they succeed, by adducing sufficient proof, in establishing their innocence. This direction has been considered to be serious misdirection in several cases decided by this Court. In *Hathem Mondal* v. *King-Emperor* (1) the learned Chief Justice quoted a portion of the judgment of the learned Chief Justice of England in the case of *Reg.* v. *Schama* (2) where it is said that in a case like the present the charge to the Jury should be to this effect: "Where the prisoner is charged with having recently stolen property, when the prosecution has proved the possession by the prisoner, and that the goods had been recently stolen, the Jury may be told that they may, not that they must, in the absence of any reasonable explanation, find the prisoner guilty. But if an explanation is given which may be true, it is for the Jury to say on the whole evidence whether the accused is guilty or not; that is to say, if the Jury think that the explanation may reasonably be true, though they are not convinced that it is true, the prisoner is entitled to an acquittal because the Crown has not discharged the *onus* of proof imposed upon it of satisfying the Jury beyond reasonable doubt of the prisoner's guilt. That *onus* never changes; it always rests on the prosecution." In a case where the evidence of the guilt of the accused rests upon discovery of stolen property in his possession and which is tried by the Jury, the proper course is to direct that the Jury are entitled to take the explanation offered by the accused of their possession. It is not necessary that such claim by the accused must be *proved*. There may be a case in which it is impossible for the person who is in possession of the property to prove how he obtained possession of it, and if he states the circumstances under which he obtained it, the Jury as court of fact may

(1) (1920) 24 C. W. N. 619. (2) (1914) 11 Cr. App. R. 45, 49.

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accept it, and in that case it will be their duty to acquit the accused. The statement of the law made by the learned Judge in his charge to the Jury leaves no such option to the Jury. He insists that if the prosecution succeeds in proving possession by the accused of recently stolen goods, it is his duty to prove his innocence, and he emphasises it by explaining that mere allegation is not proof and that the presumption raised under the law cannot be rebutted by mere denial. We think that this explanation of the law is not correct, and amounts to a misdirection which vitiates the charge. This view is in accord with that taken in *Satya Charan Manna* v. *Emperor* (1). Though there is difference in the language of the charge under consideration in that case from that in the present case, the law as laid down there is equally applicable to the present case. We are, accordingly, of opinion that this charge is vitiated by the misdirection referred to, and that the trial must be held to be not according to law. There are other objections taken, but it is not necessary to consider them. In the view above stated, the conviction of and the sentences passed upon the appellants must be set aside.

We, accordingly, order that the conviction of and the sentences passed upon them be set aside, and that they be retried according to law.

They will remain in jail until further orders by the trying Court.

E. H. M. *Appeal allowed.*

(1) (1924) I. L. R. 52 Calc. 223.