APPELLATE CRIMINAL.

Before Rankin C. J., and C. C. Ghose J.

HAJI AYUB MANDAL,

v.

EMPEROR.*

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Jan. 31.

Approver—Evidence—Corroboration—Charge to the Jury.

At the opening of a Sessions trial the name of an approver, who had already been granted pardon, was still in the category of the accused by mistake; at the trial as soon as the mistake was found he was removed from the dock.

Held, that he was competent to give evidence in the case.

ON or about the 18th March 1923, there was a dacoity in the house of one Radhaballav Saha in the village Goas in the district Murshidabad. The next morning first information was lodged in the police-station, thereafter a police investigation followed, but no person could be traced. In July 1925, the police after further investigation sent up Ayub Mandal, the appellant, and three other persons for trial under section 395 of the Indian Penal Code. One of the accused was named Jorap. In the Court of the Committing Magistrate Jorap was tendered pardon and he accepted such pardon. Thereafter he was examined as a witness for the prosecution, but although he was examined as a witness for the prosecution after a pardon been granted to him, when the case came up before the Sessions Court, Jorap's name was still in the category of an accused. After the pleas of the accused had been taken, the attention of the learned Sessions Judge was drawn to the fact that although

*Criminal Appeals Nos. 626 and 668 of 1926, against the order of A. L. Blank, Sessions Judge of Murshidabad, dated Aug. 24, 1926.

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Jorap had been granted a pardon he was still in the dock. The learned Sessions Judge ordered him to be removed from the dock but to remain in custody till the end of the trial. Jorap gave evidence in the Sessions Court for the prosecution. The trial ended in the conviction of the three accused. From that they filed two appeals, one by Ayub and the other by the two other convicted persons.

Mr. Narendra Kumar Basu and *Babu Sukumar Dey*, for the appellant.

Babu Debendra Narayan Bhattacharjee for *the Deputy Legal Remembrancer* (*Mr. N. A. Khundkar*), for the Crown.

GHOSE J. In appeal No. 626, the appellant is Haji Ayub Mandal and in appeal No. 668 the appellants are Nityananda and Deresh. The last named persons have preferred Appeal No. 668 from jail, but the appeal of Haji Ayub Mandal (No. 626) has been placed before us at considerable length by Mr. Basu. The two sets of appellants were convicted by the learned Sessions Judge of Mursidabad and a Jury under section 395 of the Indian Penal Code and the learned Judge agreeing with the verdict of the Jury sentenced the appellant Haji Ayub Mandal to four years, the appellant Nityananda to five years and the appellant Deresh to two years' rigorous imprisonment.

It appears from the evidence on the side of the prosecution that on or about the 18th of March 1923 there was a dacoity in the house of one Radhaballav who resided in village Goas, police-station Raninagar in the district of Mursidabad. On the 19th of March one Jamini Kanta Saha, a nephew of Radhaballav, lodged the first information report at the Thana about the occurrence. Then followed a police investigation

but nothing came out of that because the police were unable to trace the persons who had taken part in the dacoity. In July 1925, however, the police, who had meanwhile been engaged in investigating into the circumstances leading to the occurrence, submitted a charge sheet against Ayub and three other persons and they were committed to the Sessions Court to take their trial for having committed an offence punishable under section 395 of the Indian Penal Code.

One of the accused was a man named Jorap. In the Court of the Committing Magistrate, Jorap was tendered a pardon under the provisions of section 337 of the Code of Criminal Procedure, and he accepted such pardon. Thereafter he was examined as a witness for the prosecution ; but although he was examined as a witness for the prosecution, after a pardon had been tendered to him and after the pardon had been accepted by him it appeared that when the case reached the Sessions Court his name was still in the category of the accused. On the first day of the trial in the Sessions Court there were, therefore, before the learned Sessions Judge and the Jury four accused, *i.e.*, Ayub, the two appellants in appeal No. 668 and Jorap. They were asked to plead and after their pleas had been taken the Public Prosecutor drew the attention of the learned Sessions Judge to the fact that the accused Jorap who was in the dock had been tendered a pardon, that he had accepted such pardon, and that in the events which had happened the case against this accused was to be deemed as having been withdrawn. The learned Sessions Judge's attention being drawn, he recorded the following order : " As it appeared from the order sheet of the Committing Magistrate, dated 23rd November 1925, that a pardon was tendered to and accepted by accused No. 4, Jorap Mandal, he was removed from the dock. He will

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remain in custody as before till the termination of the trial". The trial in the Sessions Court thereafter proceeded and the accused Jorap gave evidence on behalf of the prosecution. The trial ended, as stated above, in the conviction of the three accused whose names have already been stated.

On behalf of the appellant Ayub, the first point that has been taken before us by Mr. Basu is that the evidence of Jorap in the Sessions Court was not admissible in evidence. The argument is put in this way: It is argued that although a pardon had been tendered to and had been accepted by Jorap in the Committing Magistrate's Court, apparently what happened was that he was still considered as an accused who was to take his trial. His name was in the category of the accused and at the opening of the trial in the Sessions Court his plea was taken by the learned Sessions Judge. The plea of the accused Jorap having been taken (the plea being one of guilty) and no sentence having been passed, he could not in law be treated as a person who was entitled to give evidence on behalf of the prosecution. In support of Mr. Basu's contention our attention has been drawn to a number of cases; but the point for decision does not really depend upon the decisions to which our attention has been drawn, but on the facts of this particular case; and when one examines the facts of this particular case it is abundantly clear from the record that owing to a mistake on the part of some one the name of the accused Jorap had not been removed from the category of the accused and that as soon as the learned Sessions Judge's attention was drawn to the fact that this man Jorap had been tendered a pardon and that such pardon had been accepted by him in accordance with the terms of section 337 of the Code of Criminal Procedure the learned

Sessions Judge at once directed that he should be removed from the dock. The effect of that was that, so far as this case was concerned, at the Sessions Court there was really in the dock no accused of the name of Jorap ready to take his trial. He was, therefore, treated having regard to what had gone before, a witness who was entitled to give evidence on behalf of the prosecution. The only thing that had to be observed was that he was not, until the orders of the Sessions Judge had been obtained in that behalf, to be released from custody. Therefore, so far as the facts of this case are concerned, I am satisfied that the point urged by Mr. Basu is without any substance whatsoever and that no prejudice of any description has been caused to the accused by reason of the procedure which has been adopted in the learned Sessions Judge's Court.

The second point that has been urged by Mr. Basu is that the charge delivered by the learned Sessions Judge to the Jury is defective and misleading because the attention of the Jury has not been drawn in a sufficiently pointed manner to the requirements of the law and to what has been observed as the practice for many years past in dealing with the evidence of an approver. The argument is put in this way: It is pointed out that the main witness on behalf of the prosecution was Radhaballav. Radhaballav was giving his evidence two years after the date of the occurrence—a circumstance which by itself would detract to some extent from the weight to be attached to his evidence. It is further said that although the learned Sessions Judge did draw the attention of the Jury as to whether the evidence of Radhaballav derived sufficient support from the evidence of Jorap he did not pointedly draw the attention of the Jury that there was no independent evidence corroborating

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the evidence of the approver. In dealing with a contention of this nature it is desirable to bear in mind what exactly the learned Sessions Judge said to the Jury in the course of his charge. After referring to the fact that the prosecution placed evidence before the Jury in confirmation of the different parts of the account as to how the dacoity took place and after referring to the evidence of Radhaballav who was the only surviving witness of the events which had taken place in his house the learned Sessions Judge proceeded to deal with the considerations which affected the value of the evidence of Radhaballav; and his observations were as follows: "In the circumstances "of this case, there is only one eye-witness of undis- "puted good character. There is no law forbidding a "conviction on the evidence of a single witness, but "you will naturally, as prudent men, hesitate to do "so. I am not exceeding my duty when I tell you my "opinion (which, however, is not binding on you), "that the evidence of Radhaballav is not so abso- "lutely clear and convincing that in the circumstan- "ces of the present case it would be safe for you to "return a verdict of guilty only on that evidence". If I may pause here for one second and if I may say so with respect to the learned Sessions Judge, that was a singularly proper observation to make in the circumstances of this case He then proceeded to refer to the direct confirmation of the evidence of Radhaballav such as existed on the record and he pointed out that the principal corroboration of the evidence of Radhaballav lay in the confession of the accused Deresh. He then dealt with the confession of Deresh and pointed out in clear and unambiguous language that that confession having been retracted could only be used as evidence against Deresh only and that it should not be taken into

consideration as against any of the other accused. Having said that he then proceeded to refer to the evidence of the approver Jorap and his observations on this point were as follows:—"As to this, the "question is, what is the value of his evidence as "against the accused persons? There is no question "here as to its effect as against himself, for he is not "accused before us, nor of his statement having been "withdrawn, but only of the reliance which you, as "judges of fact, are prepared to place on it. On the "one hand, he is a self-confessed criminal, and "therefore a man whose word you may well be "unwilling to rely on; he has accepted a conditional "offer of pardon, and is therefore interested in the "success of the prosecution; he confesses himself "to be one of a gang, and is therefore interested in "making his own share of the transaction appear "small, and that of the others concerned appear "large."

"On the other hand, he has given his evidence "before you in open Court, and has been subjected "to minute cross-examination. You should be able to "decide how far you are prepared to believe his "evidence. You should also note carefully that you "should not accept his evidence as against the accused "except so far as it is corroborated by independent "evidence as against such accused. You should make "up your minds definitely whether you do or do not "think his evidence consistent enough in itself, and "sufficiently supported by independent evidence to "persuade you of its substantial truth. It should be "clear to you that the answer to this question, "yes" "or "no" may very materially effect your decision "on this case. If Jorap's evidence goes, the whole "case goes; except as against Deresh, as I shall "explain in due course."

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The extracts I have given above from the learned Sessions Judge's charge to the Jury are, in my opinion, a sufficient refutation of the contention which has been put forward before us. The learned Judge, if I may repeat, has said that the evidence of Radhaballav required to be corroborated; such corroboration was to be found by the Jury on the evidence on record, namely, the evidence of the approver Jorap; but before the evidence of the approver Jorap could be used as corroborating the evidence of Radhaballav they were first of all to see whether the evidence of the approver Jorap in itself was corroborated by the other evidence on the record, namely, evidence from independent and reliable sources. In giving these cautions to the Jury the learned Sessions Judge has done nothing more or less than what has been laid down by this Court in a series of cases [see in this connection *Queen Empress* v. *Jadub Das* (1) and *Siar Nonia* v. *The King Emperor* (2)]. Bearing, therefore, in mind what has been said by the learned Sessions Judge, can it be said that sufficient attention had not been paid by the learned Sessions Judge to this aspect of the case when he summed up the case to the Jury? In my opinion, the answer to the question can only be in the negative. It is said, however, that when after giving these cautions to the Jury the learned Judge proceeds to deal with the cases of the individual accused and, in particular, of the accused Ayub before us, he has not summarized in that portion of his charge what the other evidence, *i.e.*, independent evidence on the record consisted of. A charge of this description has got to be read and taken as a whole. The learned Sessions Judge, in my opinion, gave a fair summary of the evidence when he addressed the Jury. It was not to be expected

(1) (1899) I. L. R. 27 Calc. 295. (2) (1913) 18 C. W. N. 550.

that he would go on repeating what he had already said in a previous part of the charge when he was dealing with the cases of the individual accused. He has at least in three places distinctly told the Jury the points of view from which the cases of the individual accused are to be regarded. As I have said, taking the charge as a whole, I think the learned Sessions Judge has not only complied with the law in this behalf but has placed the cases of the individual accused before the Jury in a sufficiently lengthy and satisfactory manner.

There now remains the third point to be noticed which was taken by Mr. Basu. It is said that at the first identification of the suspects Ayub was not identified at all. In the second place, it is said that the complainant stated to the police that he could recognize three men only as having taken part in the dacoity and that Ayub was not one of them.

Now, so far the first contention under this head is concerned, it really depends upon the evidence of investigating officer P. W. 26. It is true that there was fairly long delay before the suspects could be brought forward for identification, but that was because of the fact that the police were not able to submit a charge-sheet till July 1925.

With reference to the second of Mr. Basu's contentions under this head, the only comment that need be made is that the evidence of the prosecution witness the investigating officer must be read as a whole, and if one turns to an earlier portion of that evidence it is clear that Radhaballav did mention to the police, in addition to the three men of whom particulars had been given by him, that there was another man who broke open the iron chest. It is also clear from the evidence of P. W. No. 26 that a description of the man who had broken open the iron

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chest was supplied by Radhaballav on the following day. That being so, it is impossible to contend that only three men were spoken of by Radhaballav and that there was no mention whatsoever of Ayub. It may be that the evidence such as I have referred to was not prominently brought forward in the concluding portion of the learned Judge's charge to the Jury; but it is not to be supposed for one second that this evidence was not in the minds of the Jury at the time when they were considering the whole case; and, indeed, there is internal evidence in the charge itself that the evidence of prosecution witnesses must have been referred to when the learned Sessions Judge was addressing the Jury. In these circumstances, it being a Jury trial, we cannot lightly interfere with or set aside the verdict of the Jury unless we are satisfied that there has been such misdirection as, in our opinion, has occasioned a failure of justice. In my opinion, there has been no such misdirection and there has been no failure of justice.

With these observations, I am of opinion that these appeals should stand dismissed.

RANKIN C. J. I agree.

N. G.