

## CRIMINAL REFERENCE.

*Before Jack and M. C. Ghose J.J.*

EMPEROR

v.

DWARAKANATH GOSWAMI.\*

1932

Aug. 4.

*Abetment—Abetment under s. 115, I. P. C., if need be of particular acts by particular persons—“Express provision,” meaning of—Indian Penal Code (Act XLV of 1860), ss. 115, 117—Reference—Code of Criminal Procedure (Act V of 1898), s. 307.*

When more than ten persons are instigated to commit an offence punishable with death, the offence clearly comes under section 115 as well as section 117 of the Indian Penal Code.

Section 117 of the Indian Penal Code is not an express provision for abetment of an offence punishable with death or transportation for life. It covers all offences and is a general provision for abetment by any number of persons exceeding ten. “Express provisions” in section 115 refer to sections in which specific cases of abetment of offences punishable with death or transportation for life are dealt with.

Abetment under section 115 of the Indian Penal Code need not necessarily be abetment of the commission of an offence by a particular person against a particular person.

On a reference under section 307 of the Code of Criminal Procedure, the whole case is open before the High Court, which may convict the accused even on a charge on which judge agrees with the finding of not guilty by the jury.

*Emperor v. Madan Mandal* (1) and *Emperor v. Profulla Kumar Mazumdar* (2) distinguished.

*Emperor v. Hasrat Mohani* (3) referred to.

### CRIMINAL REFERENCE.

The material facts appear in the judgment of the Court.

*The Advocate-General, N. N. Sircar* (with him *Anilchandra Raychaudhuri*), for the Crown. In this case there were two sets of alternate charges under sections 115/302 and 117/302 of the Indian Penal

\*Criminal Reference, No. 22 of 1932, by S. M. Masih, Sessions Judge of Sylhet and Cachar, dated March 21, 1932.

(1) (1913) I. L. R. 41 Calc. 662.      (2) (1922) I. L. R. 50 Calc. 41.

(3) (1922) 24 Bom. L. R. 885.

1932

*Emperor*  
v.  
*Dwarkanath*  
*Goswami.*

Code. With regard to the charge under section 115/302, the judge directed the jury to return a verdict of not guilty and they did so. With regard to the other they returned a verdict of not guilty with which he disagreed. In accordance with the provisions of section 307 (2) of the Code of Criminal Procedure, and by express words, the judge has referred the whole case to the High Court. The High Court can certainly go into that charge also and convict or acquit as it thiks fit : *Emperor v. Ekabbor* (1), *Emperor v. Wazira Mahto* (2), *Emperor v. Nawal Behari Lal* (3).

With regard to the merits of the case, even if the longhand notes of the first speech be left out of consideration, the resolutions and the shorthand notes are perfectly clear and leave no room for doubt that the accused was inciting people to follow the example of Dinesh and others and was inciting persons to commit murder of officials.

[Dealt with the facts and speeches.]

The judge is wrong in thinking that section 115 of the Indian Penal Code requires that it must be abetment of an offence by a particular person against a particular person. There is no such limitation. Instigation may be of the public or a large number of persons and against a class of individuals. Section 107 of the Indian Penal Code. *Emperor v. Ganesh Damodar Savarkar* (4). Both the offences are clearly made out.

*B. C. Chatterjee* (with him *Hemendrakumar Das*, *Pareshlal Ghosh*, *Priyanath Datta* and *Binayendra-nath Palit*) for the accused. It must be conceded that an offence under section 117/302 of the Indian Penal Code has been made out. But with regard to the charge under section 115/302, this Court cannot interfere when the judge and jury have agreed on that charge. *Emperor v. Madan Mandal* (5),

(1) [1926] A. I. R. (Calc.) 925.

(3) [1930] A. I. R. (All.) 489.

(2) [1928] A. I. R. (Pat.) 596.

(4) (1909) I. L. R. 34 Bom. 394.

(5) (1913) I. L. R. 41 Calc. 662.

*Emperor v. Profulla Kumar Mazumdar* (1). Moreover, section 115 has no application. It applies to cases where there is no express provision made by the Code. Section 117 of the Indian Penal Code is such an express provision and so section 115 has no application. The law may seem to be anomalous, but it is there. The accused should be acquitted of the charge under section 115/302.

*Sircar*, in reply. The expression "express provision" in section 115 of the Indian Penal Code means provision for abetment of offences punishable with death and transportation for life. Sections 121, 131 and 132 of the Code are such express provisions. Section 117 is a general provision for abetment of offences of all kinds.

As to the High Court's power under section 307 of the Code of Criminal Procedure, the cases cited by the other side have no bearing. *Emperor v. Hasrat Mohani* (2).

JACK AND M. C. GHOSE JJ. This is a reference by the Sessions Judge of Sylhet and Cachar under section 307, Code of Criminal Procedure, in a case, in which the accused was charged under section 115/302 of the Indian Penal Code or alternatively under section 117/302. The majority of the jury brought in a verdict of not guilty under section 117/302. As regards the charge under section 115/302, all of them brought in a verdict of not guilty. The learned judge came to the decided conclusion that the verdict regarding the charge under section 117/302 of the Indian Penal Code was perverse and was against the weight of the evidence, and that, as such, for the ends of justice, it was necessary that the whole case should be placed before this Court. The facts of the case shortly are that, on the 9th July, 1931, the accused Dwarkanath Goswami led a procession of young men and girls, consisting of about 40, carrying black flags and pictures of

1932

*Emperor*  
*v.*  
*Dwarkanath*  
*Goswami.*

(1) (1922) I. L. R. 50 Calc. 41.

(2) (1922) 24 Bom. L. R. 885, 898.

1932

*Emperor*  
v.  
*Dwarkanath*  
*Goswami.*

Dinesh Gupta and Bhagat Singh in front of the procession, to the Sylhet Town Hall. At about 6 o'clock in the evening, a meeting was held at the Town Hall of about 200 people, in which the accused moved a resolution and delivered a speech. The resolution was:—

The people of Sylhet, both male and female, admire the noble example shown and left by Dinesh Gupta in the service of the mother country and request all to follow that example.

This was followed by a speech, exhorting the people in accordance with the terms of the resolution. Then, on the 26th July, the accused supported a similar resolution, namely, that—

Bhagat Singh, Shukdeb, Rajguru, Dinesh Gupta, Harkishen and other hero-martyrs of Young India have set brilliant examples of self-sacrifice with a view to overthrowing Imperialism and this conference invites the youths of the Surma Valley to be inspired with that ideal of fearless self-sacrifice ;

with a speech, in which he exhorted the youth of the Surma Valley to follow the examples of those persons. Charges were framed in respect of the conduct of the accused on both these occasions, namely, the two alternative charges, one under section 115 read with section 302 of the Indian Penal Code and the other under section 117 read with section 302. It is obvious and it is not disputed that the accused was guilty under section 117 read with section 302. But it is argued that the learned judge was right in holding that section 115 of the Indian Penal Code did not apply in this case. On the other hand, on behalf of the Crown it is urged that the whole case is open to us and that section 115 does in fact apply. Section 115 of the Indian Penal Code is as follows :

Whoever abets the commission of an offence punishable with death or transportation for life, shall, if that offence be not committed in consequence of that abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of either description for a term which may extend to seven years.

It is argued that the words "no express provision "is made by this Code for the punishment of such

“abetment” exclude the application of section 115, inasmuch as section 117 is an express provision for cases of abetment of the kind which was committed in this case. The learned Advocate-General urges that the cases referred to by the words “express provision” refer to sections such as 121 and 131, Indian Penal Code, where there is an express provision for abetting an offence punishable with death or transportation for life; and this seems to be the proper interpretation of the section. Section 117 is not an express provision for abetment of an offence punishable with death or transportation for life. It covers all offences and is a general provision for abetment by any number of persons exceeding ten. “Express provisions” seems to refer to sections in which specific cases of abetment of offences punishable with death or transportation for life are dealt with. It is not disputed that the learned judge is not correct in holding that abetment under section 115 of the Indian Penal Code must be abetment of the commission of an offence by a particular person against a particular person. It may include abetment of the commission of an offence by unspecified persons against a class or number of other persons described generally and not particularly specified. In this case, when the people who gathered together in these meetings were instigated to commit an offence punishable with death,—in fact, the offence of murder,—they clearly come under section 115 as well as under section 117 of the Indian Penal Code.

The only other point urged is that, inasmuch as the judge and the jury agree as regards the finding that the accused is not guilty of the offence charged under section 115 of the Indian Penal Code, it is not open to us to find him guilty on that charge. Under section 307 of the Code of Criminal Procedure, in dealing with the case submitted, this Court may exercise any of the powers which it may exercise on an appeal and, subject thereto, it shall, after considering the entire evidence and after giving due weight to the opinions

1932

*Emperor*  
v.  
*Dwarkanath*  
*Goswami.*

1932

*Emperor*  
v.  
*Dwarkanath*  
*Goswami.*

of the Sessions Judge and the jury, acquit or convict the accused. From the letter of reference, it is quite clear that the whole case is open for consideration, and all we are to do is to give due weight to the opinions of the judge and the jury and then acquit or convict the accused. In support of the argument to the contrary we have been referred to two cases *Emperor v. Madan Mandal* (1) and *Emperor v. Profulla Kumar Mazumdar* (2). But admittedly neither of these two cases supports entirely a proposition that this Court cannot interfere where the whole case is referred under section 307 of the Code of Criminal Procedure. In the latter case, the judge has expressly found that it was not necessary to decide that question; and in the former case, although there is a statement that the judge has no power to interfere with the unanimous verdict of the jury with which the judge agrees, the facts were entirely different and this dictum must not be taken to apply in general. In support of this, reference may be made to the case of *Emperor v. Hasrat Mohani* (3). But the words of the section are quite clear and they obviously entitle this Court to exercise any of the powers which it may exercise on an appeal; and in clause (2) it is laid down that

Whenever the judge submits a case under this section, he shall not record judgment of acquittal or of conviction on any of the charges on which such accused has been tried.

In this case, therefore, the whole case has been referred and it is open to us to find the accused guilty under section 115/302 or 117/302 of the Indian Penal Code. Accordingly, we find the accused has committed the offences with which he has been charged. Evidence shows that the offences charged were committed on both the occasions with deliberate intention of instigating a large number of young persons of Sylhet to commit murder and we think we should not be justified in passing a sentence of less than three years'

(1) (1913) I. L. R. 41 Calc. 662.

(2) (1922) I. L. R. 50 Calc. 41.

(3) (1922) 24 Bom. L. R. 885, 898.

rigorous imprisonment on account of each of the two sets of offences under section 115/302 of the Indian Penal Code, to run concurrently, no separate sentences being passed under section 117/302.

1932  

---

Emperor  
v.  
Dwarkanath  
Goswami.

The accused should be put in division B. He must surrender to his bail and serve out the sentence.

*Reference accepted, accused  
convicted.*

A. C. R. C.