APPELLATE CRIMINAL.

Before Rankin C. J., Mallik and Guha JJ.

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Jan. 22.

AMODE ALI SIKDAR

v.

EMPEROR.*

Abetment—Duty of prosecution to examine evidence as to "probable consequence" under the proviso to s. 111, Indian Penal Code, 1860—Substitution of sentence under s. 302 read with s. 115 for sentence under s. 302 read with s. 109—Code of Criminal Procedure (Act V of 1898), s. 374—Indian Evidence Act (I of 1872), s. 157.

The accused had given a large quantity of aconite to a young married girl, and the girl, under the impression that her husband would begin to love her and consent to send her to her father's house if he could be made to take the said substance with his food, had mixed the same with the midday meal of the whole family. On eating the food, the husband's father and an elder brother died. At the trial the prosecution failed to examine the girl as to the conversation she had with the accused at the time the poison had been handed over to her—whether or not the accused had cautioned her to keep the substance only for the husband—and the Sessions Judge failed to lay before the jury the consideration of this fact with reference to the proviso to section 111 of the Indian Penal Code.

Held that this was a question for the jury and it would be inadvisable for the appeal court to substitute a finding of its own upon the question of fact. And as, by reason of the said misdirection, the prosecution could not uphold the verdict as it stood, the best and the safest course was to substitute a conviction under section 302 read with section 115 for that under section 302 read with section 109 of the Indian Penal Code.

CRIMINAL REFERENCE AND APPEAL.

This was a Reference under section 374 of the Criminal Procedure Code, from the Sessions Judge of Bakharganj (Mr. T. H. Ellis) made on the 8th December, 1930, for confirmation of the sentence of death passed on the accused. The accused also preferred an appeal from the said conviction and sentence.

The facts of the case appear from the judgment.

Sureshchandra Talukdar, Mahendrakumar Ghosh and *Shaileshchandra Talukdar* for the accused.

*Criminal Appeal, No. 925 of 1930, and Death Reference, No. 16 of 1930, against the order of T. H. Ellis, Sessions Judge of Bakharganj, dated Dec. 6, 1930.

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Debendranarayan Bhattacharya and *Anilchandra Ray Chaudhuri* for the Crown.

RANKIN C. J. In this case, the accused Amode Ali Sikdar was put upon his trial before the learned Sessions Judge of Bakharganj and was charged with an offence under section 302 read with section 109, Indian Penal Code. The case against the accused was shortly this: In a village called Sankarpasha, some 4 miles south of Pirojpur police-station, there lived the family of one Hujjat Ali. With Hujjat Ali lived, first of all, his son Sona Ali and his son's wife Sahera Khatun, also another son Tojambar Ali, aged about 18, and his wife, Fatema, and also Hujjat Ali's third wife, Saju Bibi, and a small girl of some three years of age, named Samserannessa. It seems that, about half a mile from Hujjat Ali's house, there was the house of Fatema's father and that Fatema had an elder sister, called Meherannessa, who had originally been married to one Kasem Ali, but had been divorced from him and had subsequently married the accused Amode Ali Sikdar. There is evidence that the marriage of Meherannessa to the accused brought about or was accompanied by certain ill feeling between Hujjat Ali and his household and Meherannessa's father and his household and that, accordingly, Hujjat Ali and his son, Tojambar Ali, had not been allowing Fatema to go to her father's house. The prosecution case is that, on Friday the 1st August, 1930, the accused, with one Fatik, went to the house of Hujjat Ali, that Fatik went to a tank to wash his feet, so that the accused had an opportunity to talk with Fatema and that, on that occasion, he gave her certain white powder, which she had to use as a charm. According to the prosecution case, this matter had been mentioned between these two persons before and Fatema was under the impression that if she gave this powder to her husband, that would cause her husband to love her and allow her to go to her father's house. There is some discrepancy in the evidence upon the question whether between the accused and Fatema there had been any mention of

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Fatema's giving this powder to any one other than her husband, in particular, whether it was intended that she should give it to Hujjat Ali. The prosecution case is that, on the next day, Fatema was cooking the midday meal, which consisted of rice, fried eggs and fried *koi* fish, that her father-in-law, Hujjat Ali, and her brother-in-law, Sona Ali, came to the house and wanted their food, that Fatema placed their food on a bowl, mixed the powder with it and served it to Hujjat Ali, to Sona Ali, to her husband and also to the little girl, Samserannessa, that these people all took some food, that Saju Bibi and Sahera afterwards wanted their meal and that these two women were sitting down with Fatema to begin their meal, when the four persons, who had already partaken of the food, began to complain that their throats were on fire and that their bodies were burning. It seems plain enough that these four people all began to suffer from extreme pain, that they began to vomit and that Hujjat Ali and Sona Ali were much worse than Tojambar Ali or the little girl, Samsarennessa. Very soon Hujjat Ali and Sona Ali died. Tojambar Ali and the little girl were very bad, but did not succumb. A doctor came and afterwards another and a more highly qualified doctor, called Paresh, and, after a little time, quite a number of people came to the house, including one Meher Ali Talukdar, who was a member of the Union Board. It seems that Fatema, to begin with, would not give any story; but her story was taken down by one Mosser Ali Khan, a law student, the story being elicited by the doctor. The girl then said that, on the previous day, she had got this powder from the accused. She then said that it was given to her for the purpose of making her husband love her and in order that she might get permission to go to her father's house. A similar story was told by the girl on the 4th August before a magistrate. The girl, Fatema, as well the accused were brought up and charged and they both were committed to be tried at the Sessions. At the trial at the Sessions, Fatema, having pleaded not guilty, a pardon was tendered to

her and she was the chief prosecution witness. The medical evidence and the report of the chemical examiner leave no room for doubt that the powder, which was given to these people at their meal, on Saturday, the 2nd August, was aconite. Aconite was found in the intestines of Hujjat Ali and Sona Ali and the remains of the powder which were produced to the doctor on that day were also found to be aconite. In these circumstances, the accused was put on his trial and the jury, by a majority of 6 against 3, found that the accused was guilty under section 302 read with section 109, Indian Penal Code, and the learned judge, having sentenced him to death, the case comes before this Court both on appeal by the accused and also under section 374 of the Code of Criminal Procedure.

We have been carefully taken through the evidence by Mr. Talukdar, on the part of the accused, and Mr. Talukdar has intimated certain exceptions to the charge of the learned judge and to the procedure which was adopted at the trial. With the exception of one passage, which is upon a very important point, it does not seem to me that there is any objection which can reasonably be taken to the charge of the learned judge. The statement of the girl and her confession before the magistrate are admissible in evidence under section 157 of the Evidence Act and it does not seem to me that we are concerned to regard these documents from the standpoint of confession of a co-accused. Their admissibility in law is admissibility as evidence which confirms or tends to confirm the story which Fatema gave in the witness-box and which the jury had an opportunity of estimating for themselves as they saw her give evidence before them. It does not seem to me, therefore, that any difficulty arises on that; nor does it seem to me that this charge is open to exception on the ground that the learned judge has not fairly and sufficiently marshalled the facts before the jury. Mr. Talukdar made a somewhat unusual complaint that the learned judge has put the considerations on either side without giving his own

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view of the respective weights before the jury: but it appears to me that the learned judge was quite entitled not to express his own view upon a disputable matter and to leave it to the jury to come to their own conclusion.

It has been suggested that the learned Judge in one passage in the charge has not fairly put to the jury the question whether the intention with which the accused acted could have been something different from the intention to cause death. No doubt, if a person gives aconite to another with a view to that being administered to a human being, cases are conceivable in which it is given with a different intention owing to ignorance of the nature of the substance or otherwise, but I cannot say that this objection appears to me to be made out. However, the real criticism that has impressed us upon this charge is that the learned judge has not properly laid before the jury the considerations which arise if the accused person is to be rightly convicted of abetment of the offence of murder. The evidence of Fatema in the Sessions Court was not to the effect that the accused was given this substance with a view to her administering it to the father-in-law or the brother-in-law, but only that he had given it with a view to it being administered to the husband. Now, the husband did not die. The persons who died were Hujjat Ali and Sona Ali and, accordingly, if the accused man, upon the prosecution case, was to be convicted of the offence of which he has been convicted, it was incumbent upon the learned judge to lay before the jury the considerations which are indicated by section 111, Indian Penal Code, "When an act is "abetted and a different act is done, the abettor is "liable for the act done in the same manner and to the "same extent as if he had directly abetted it, provided "the act done was a probable consequence of the "abetment and was committed under the influence of "the instigation which constituted the abetment." It was, therefore, very important that the learned judge should have left as a question of fact to the

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jury the question whether the giving of this poison to the father-in-law and brother-in-law was a probable consequence of the accused having given Fatema the substance with a view to her administering it to her husband. That matter has not been put before the jury at all and there can be no doubt that, upon an element of very great importance the learned judge's exposition of the constituent elements of this offence is defective. Apart from that criticism, to which Mr. Bhattacharya most fairly says that there is no sufficient answer, I am of opinion that the view taken by the majority of the jury is entirely the right view on the evidence in this case and we have to consider what the position is upon the footing that this question of probability that the girl would administer this substance to the father-in-law and the brother-in-law was not dealt with by the jury. I quite see that there is a very strong argument in favour of the view that it was very probable indeed upon the facts within the knowledge of the accused that this quantity of poison would be administered in a way which would not be limited to the husband. It has to be remembered that the object was that the girl should be allowed to go to her father's house. To get the necessary permission to do that, one would distinctly suppose that the permission of Hujjat Ali would be as important, if not far more so, than the permission of the girl's husband, who was a boy of 18 years, living in the father's house. On the other hand, the evidence has not been examined from that point of view. The girl and her conversations with the accused person ought, of course, to have been subjected to the most careful examination before the consequence could be drawn that nothing whatever was said as regards caution that she was to keep the substance only for the husband. Looking at the matter broadly, I do not think it is a self-evident proposition that this girl, in the circumstances, would proceed to administer this substance in the somewhat wholesale way in which she did at the midday meal of the family. I think the sounder view is to say that that was a fairly disputable

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question upon which, in a case of this gravity, the opinion of the jury ought to have been taken; and while it may be that the jury would have had very little difficulty had this matter been laid before them in coming to a contrary view, I think it would be on the whole inadvisable for this Court to substitute a finding of its own upon a question of fact, which depends really upon the probabilities of the case considered broadly. We have, therefore, it appears to me, to consider whether, for the conviction, which has been passed upon the accused under section 302 read with section 109, Indian Penal Code, we ought not to substitute a conviction under section 302 read with section 115, Indian Penal Code. On the whole, it seems to me that it is very undesirable that this case should be tried again for a second time and that, as the prosecution have by reason of this misdirection been put to a position in which they cannot uphold the verdict as it stands, the better course—and it is a completely safe course—is to proceed under section 115.

In my judgment, the appeal should be allowed in the sense that the conviction under section 302 read with section 109, Indian Penal Code, should be set aside and a conviction should be entered under section 302 read with section 115, Indian Penal Code, and I am of opinion that the maximum punishment under the second clause of section 115 should be inflicted upon the accused and that the sentence of the court should be that he do suffer rigorous imprisonment for fourteen years.

MALLIK J. I agree.

GUHA J. I agree with the learned Chief Justice.

O. U. A.

Appeal allowed.