APPELLATE CRIMINAL.

Before Lort-Williams and S. K. Ghose JJ.

IFATULLA AKANDA

v.

EMPEROR.*

1931

Jan. 7, 8, 12.

Verdict—Amendment of verdict, when permissible—Misdirection to jury—Code of Criminal Procedure (Act V of 1898), ss. 303, 304.

Generally speaking, after the verdict has been recorded by the judge and the jury have left the box, it would be improper for the judge to listen to any application to amend the verdict.

Sections 303 and 304 of the Code of Criminal Procedure provide that, unless otherwise ordered by the court, the jury shall return a verdict on all the charges and that they should be cognizant of the record, as made by the judge, of the question put to them and the answers given by them. It is extremely desirable that such record should always be read over to the jury.

Rex v. *Wooller* (1) distinguished.

Emperor v. *Brian Bonham Carter* (2) and *Emperor* v. *Harkumar Barman Roy* (3) referred to.

CRIMINAL APPEAL.

The material facts appear from the judgment.

Gregory, Sureshchandra Talukdar, Sudhanshushekhar Mukherji and *Jaygopal Ghosh* for the appellant.

Nirmalchandra Chakravarti for the Crown.

Cur. adv. vult.

GHOSE J. The appellants in these two appeals were tried before the Additional Sessions Judge of Bogra and a jury of nine persons on charges under sections 302 and 147 of the Indian Penal Code. The case for the prosecution is briefly this. Ifat Akanda, who is appellant in appeal No. 595, with other persons, went to the paddy land of one Harmat and forcibly

*Criminal Appeals, Nos. 595 and 596 of 1930, against the order of S. K. Som, Additional Sessions Judge of Bogra, dated June 15, 1930.

(1) (1817) 18 R. R. 402 ; 2 Stark. 111.

(2) (1912) 17 Ind. Cas. 559.

(3) (1913) I. L. R. 40 Calc. 693.

reaped the paddy, and some of them gathered in the *khuli* or yard of one Amir Mandal, being all armed with *lâthis* and other weapons. Harmat, on his part, collected some people and went to his land. There was a quarrel and Kifat of the accused party said that Harmat's cattle had damaged their paddy and that they would take his paddy as compensation for the damage and he told Harmat to go back. Harmat was retreating, when Baser of his party said "Why should "we go back? We would take the bundles of paddy," and he advanced to seize the bundles. Thereupon, Ifat fired a gun from Amir Mandal's *khuli* and Baser, being hit, fell down and died immediately. The defence case is that Harmat's men, about 200 in number, had gone to the jute land of the accused party and harvested jute worth Rs. 400. The accused party offered resistance and there was a scuffle. A gun was fired and it was found that it was in the hand of one Kajem of the prosecution party. The jury returned a verdict which was recorded by the learned Judge as follows :—

Question : Are you unanimous ?
Foreman : Yes.
Question : What is your verdict ?
Foreman : We find Ifat guilty under 304, part I. We find all the accused except Ibra guilty under section 147. We find Ibra not guilty under section 147.

The learned judge agreed with this verdict and convicted the appellant Ifat under section 304, part I, and section 147 of the Indian Penal Code and, under the former section, he sentenced Ifat to transportation for life. He also convicted the other appellants under section 147 and sentenced them to undergo rigorous imprisonment for periods varying from 6 months to one year.

The grounds that are urged in support of these appeals are grounds Nos. 26, 27 and 28 in appeal No. 595. They are to the effect that the conviction has been invalidated by the fact that the verdict was not understood by the judge, that the judge had misapprehended the verdict, and that, at all events, he ought to have referred the case to the High Court.

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It is contended, though it is not specifically mentioned in these grounds, that the jury meant to find the accused Ifat guilty under section 304A of the Indian Penal Code. In support of this, we are referred to certain things which happened and of which a note was made on the order-sheet. Order No. X, dated the 15th June, 1930, states :—

Trial resumed. The court summed up the case and charged the jury, who retired at 8-15 a.m. to consider their verdict and returned at 9-10 a.m. They unanimously found Ifat guilty under section 304, part I of the Indian Penal Code and all the accused, including Ifat, guilty under section 147 except Ibra. The court agreeing with and accepting the unanimous verdict of guilty against Ifat Akanda under section 304, part I of the Indian Penal Code and also under section 147 sentenced him to transportation for life.

Then order No. XI, dated the 15th June, 1930, states as follows :—

The sentence was passed at about 9-30 a.m. and I left court after passing the sentence. At about 11 a.m., the defence pleader came to me and informed me verbally that the jurors are expressing their regret that they have committed a great blunder in bringing in a verdict of guilty against Ifat Akanda under section 304, part I of the Indian Penal Code. At about 12, I was informed that some of the jurors wanted an interview with me. But I refused to come out and see them at that hour. At about 3 p.m., the foreman, Maulvi Mahammad Alimuddin Ahmad, who is a graduate and headmaster of some school, accompanied by seven jurors, came to me with a petition saying that they have committed a great blunder in giving their verdict. They filed the petition before me at 3 p.m. in my bungalow. Let the petition be kept with the record. I will pass necessary orders on a date after hearing the Public Prosecutor and the defence pleaders.

Then in order No. XII, dated the 18th June, 1930, the learned judge, having "heard the defence "pleaders as well as the Public Prosecutor and looked "into the law for himself," held that there was nothing in the Criminal Procedure Code to enable him "to "report this mistake of the jury to the High Court" and he, accordingly, considered that the matter was finally settled. Mr. Gregory, who argued the case for the appellant, has also drawn our attention to the aforesaid petition of the jurors. It was stated there that the jury had found Ifat guilty under section 304A of the Indian Penal Code, that the foreman had delivered that verdict, that, after the verdict had been delivered, the court had discharged the jury, and that the jurors were not present in court when the sentence was actually passed. This petition was filed by eight out of nine jurors. Relying mainly on this petition, Mr. Gregory has contended that the verdict recorded by the learned judge was not in accordance with the true intention of the jury. On the merits of this contention, it is contended that the defence had suggested a case of accidental shooting and also that it was not possible for the jury to find out that the judge had made a mistake in recording the verdict, because the sentence was passed after the jurors had dispersed. On the other hand, in his charge, the learned judge never made mention of section 304A and it does not seem probable that the jury would at all think of this section for themselves. Further, it is also not probable that the learned judge could have made a mistake in recording the verdict, which was one of guilty under section 304, part I. This is also corroborated by the order No. XI, dated the 15th June, 1930, in the order-sheet in which the learned judge noted that the jurors said that they had committed a great blunder in bringing in a verdict of guilty under section 304, part I. It seems to me, therefore, that, on the merits of the contention, it is not made out that the jury really returned a verdict of guilty under section 304A, as is contended by Mr. Gregory.

But, conceding that the jury really meant what eight of them stated in their petition, the question is whether such a request or intimation by the jurors for amendment of their verdict, under such circumstances, namely, after the verdict had been recorded and the jurors had dispersed, should at all be considered by the court. Mr. Gregory has not referred us any authority and he says that, in fact, there is none. There is, however, section 304 of the Code of Criminal Procedure, which provides that when, by accident or mistake, a wrong verdict is delivered, the jury may, before or immediately after it is recorded, amend the verdict and it shall stand as ultimately amended. This section was introduced for the first time in the Criminal Procedure Code of 1882. The words of the section are clear enough, but, before

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dealing with it, I may refer to an English case which may appear at first sight to support Mr. Gregory's contention, though he did not cite it. This is the case of *Rex* v. *Wooller* (1). This case was tried in the year 1817 before Abbott J. and a jury. What happened was this. After the case had been gone through, the jury retired from the court to consider their verdict and another case was taken up for trial. Subsequently, the jury re-entered the court room, after considering their verdict, and the foreman answered that the jury found the defendant guilty. In answer to further question, the foreman said that all the jury had agreed in that verdict. At that time, some of the jurors, who were behind the foreman, did not dissent. The situation was, however, such that all the jury not having come into the view of the judge from the room behind the Bench, it was not altogether impossible (in the opinion of Abbott J.) that some mistake or misapprehension might have taken place and that some of the jury might not have heard distinctly what had been said. Then the jury, having retired and the door by which they entered being closed, the learned judge proceeded to sum up the other case and when he had concluded, it was suggested by a gentleman at the bar that some of the jury in *Rex* v. *Wooller* (1) had not concurred, and did not intend to concur, in the general verdict which had been delivered. This case was referred by Abbott J. to the Court of the King's Bench. It was found that the verdict as erroneously announced by the foreman was "guilty," and the Court of King's Bench, on being satisfied through affidavits of two bystanders that certain of the jurors had not heard the verdict as so announced, ordered a retrial of the defendant, but by a different panel. Lord Ellenborough, however, remarked as follows: "The "Court think that they are precluded from the means "of acquiring that knowledge through an affidavit of "any of the jurors; if they cannot agree in their "verdict, they ought to express dissent at the time.

(1) (1817) 18 R. R. 402; 2 Stark. 111.

"But if the jurors, at the time when their verdict was "delivered by the foreman, had not the means of "hearing what was propounded for them, there is no "need of their affidavits upon that point. If the "verdict had been given under such circumstances as "ordinarily occur, the Court would infer their "consciousness of what was propounded by their "foreman. But the danger would be infinite from "allowing such affidavits to be received; and this has, "doubtless, in former times deterred the Court from "yielding to such applications. I do not know that "an application of this kind has ever been made." This case was followed in *Ellis* v. *Deheer* (1).

Wooller's case was considered very carefully by a Full Bench of the Punjab Chief Court in the case of *Emperor* v. *Brian Bonham Carter* (2). In that case, section 304 of the Code of Criminal Procedure came up for decision and there was a clear decision on the point. The facts of that case are that, in a trial by jury before a Judge of the Chief Court, the foreman publicly announced the verdict of not guilty as the unanimous verdict of the jury, in the hearing of all the jurors and without dissent on the part of any of them. The verdict was recorded and the prisoner was acquitted. From information received some days afterwards, the trying Judge was led to believe that, as a matter of fact, the jurors were not agreed as regards the verdict. The Judge summoned the foreman of the jury and examined him on oath. It was held that the power of amendment of a verdict provided by section 304 of the Code of Criminal Procedure must be exercised, before or immediately after the verdict had been recorded and could not be exercised after the jurors had dispersed. In interpreting section 304, Rattigan J. made certain observations, which are worth quoting: "This section "thus provides for an amendment of a wrong verdict "delivered by accident or mistake, but it clearly "contemplates that such a verdict can be amended only "before or 'immediately after' it is recorded, in other

(1) [1922] 2 K. B. 113. (2) (1912) 17 Ind. Cas. 559.

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"words, before the jurors have left the court and "while they are still under the observance of the "presiding judge. And the reason for this restriction "upon the powers of amendment is obvious, for once "the jurors have left the court, they are liable to "outside influences, and it would be in the highest "degree dangerous thereafter to accept statements or "affidavits on the part of individual jurors to the "effect that a verdict, publicly announced by the "foreman of the jury, in the hearing of all the jurors "and without dissent on the part of any of them, as "the unanimous verdict of all the jurors, was in fact "not their verdict but the verdict of other members of "the jury. A mistake of this kind may, no doubt, "lead to a failure or miscarriage of justice, but, while "such a result is to be deplored, I am decidedly of "opinion that it would be far more disastrous to the "course of justice if the courts allowed verdicts, "openly given, to be disturbed in consequence of "individual jurors subsequently coming forward to "depose that such verdict, by accident or mistake, "did not really represent their opinions. A mistake "of the kind now under consideration is not likely to "occur very frequently, and would be, perhaps, "impossible if in practice the ancient formula used in "the courts of England were to be adopted. This was "for the Clerk of the Court to say 'Gentlemen of the " 'jury, hearken to your verdict while the court " 'records it. You say that the prisoner is (guilty; " 'not guilty); and that is the verdict of you all.' " Rattigan J. distinguished the case of *Rex* v. *Wooller* (1) and remarked "I am of opinion that the "courts in India cannot travel beyond the scope of "section 304, even in cases where the facts were similar "to those in *Rex* v. *Wooller* (1)."

I may remark here that section 303 provides that, unless otherwise ordered by the court, the jury shall return a verdict on all the charges. The provisions of this section, as well as those of section 304, imply that the jury are cognisant of the record, as made by

(1) (1817) 18 R. R. 402 ; 2 Stark. 111.

the judge, of the questions put to them and the answers given by them. It is extremely desirable that such record should be read over to the jury immediately, and this should always be done. To ensure the practice some amendment of section 303 may be necessary, and meanwhile a general order of the High Court will be useful for guidance.

Then there is the case of *Emperor* v. *Harkumar Barman Roy* (1), in which, however, the facts were not so much to the point. There it was alleged that the verdict of the jury was arrived at by casting lots and the judge held an enquiry into the matter, in the course of which, he examined besides other persons all the jurors. The verdict was given on a Saturday and the judge intimated that he would pass orders on the following Monday. On Sunday following, the Sessions Judge was informed by two pleaders of his court that the jury had arrived at their verdict by casting lots and so the trouble arose. It was held that the statement of a juror as to what had happened in the jury room was inadmissible and reference was made to certain English cases.

The trend of decisions in English cases may be summarised as follows: "On grounds of public policy, "the law excludes the testimony of *traverse* or *petty* "*jurors,* when offered to prove *mistake* or *misbehaviour* "by the jury in regard to the verdict. Thus, when a "motion was made to amend the *postea* by increasing "the damages, the court refused to admit an affidavit "sworn by all the jurymen, in which they stated their "intention to have been to give the plaintiff such "increased sum. So, also, on several occasions, "affidavits that verdicts have been decided by lot have "been rejected on motion for new trials, whether such "affidavits were sworn by individual jurymen or by "strangers stating the subsequent admissions of jurors "to themselves, or even that a declaration had been "made by one juror in the hearing of his fellows in "open court after the verdict had been pronounced." See Taylor on Evidence, 11th edition, at page 645,

(1) (1913) I. L. R. 40 Calc. 693.

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where the cases are all collected. "The jury may, "before the verdict is recorded [or even promptly "after the verdict is recorded, *Rex* v. *Parkin* (1)] "rectify their verdict," and "even after the defendant "has been discharged out of the dock (in pursuance "of a supposed verdict of acquittal), if it is done "before the jury have left the box: *Regina* v. "*Vodden* (2)." See Archbold's Criminal Pleading, Evidence and Practice, 27th Edition, page 226. Having regard to these decisions and bearing in mind the express words of section 304 of the Code of Criminal Procedure, and the rule of public policy on which that provision of law is based, I should say that, generally speaking, after the verdict has been recorded by the judge and the jury have left the box, it would be improper on the part of the judge to listen to any application to amend the verdict. Therefore, in the present case the petition of the eight jurors cannot be entertained for the purpose of amending the verdict.

On the merits of the case, however, I consider that there is good ground for directing a retrial. The appellant Ifat was charged under section 302 of the Indian Penal Code. The learned judge referred to the two parts of section 304 and he proceeded to give the following explanation: "The first part relates to "death which is caused without any intention of "causing death or causing such bodily injury as is "likely to cause death. The second part relates to "death which is caused without any intention to "cause death or to cause bodily injury as is likely to "cause death, but with the knowledge that such "injury may lead to death." This explanation of section 304 is obviously wrong; the first part applies where there is guilty intention and the second part applies where there is no such intention, but there is guilty knowledge. The mistake is so palpable that the learned advocate for the Crown contended that it was probably a slip. But we must take the charge

(1) (1824) 1 Mood. 45; 168 E. R. 1179.

(2) (1853) Dears 229; 169 E. R. 706.

as it stands. It is a good ground for holding that the jury were under the impression that, in returning a verdict of guilty under section 304, part I, they were finding that the accused acted without guilty intention, but with guilty knowledge; in other words, what they really meant was to find a verdict of guilty under the second part of section 304. In another place, the judge remarked as follows: "If you believe "the prosecution witnesses, you cannot avoid bringing "in a verdict of guilty under section 302 of the Indian "Penal Code." That may be one view. But on the facts as deposed to by the witnesses, it cannot be said that section 304 is altogether excluded. The weapon used was a shot gun and it was charged with small shot and not bullets and, according to the prosecution case the gun was fired from a distance. The manner in which the gun was held by Ifat and the distance from which he fired are told differently by different witnesses. If the evidence at all suggests an inference that the gun was with the accused, but that the shot might be due to rashness or negligence on his part, then the learned judge would have acted properly in explaining section 304A to the jury. But of this there is no mention in the charge. We think, therefore, that the appeal of Ifat Akanda should be allowed. In his case, the verdict of the jury and the order of the learned judge are set aside and a retrial is directed.

In appeal No. 596, the case of the twenty-four appellants stands on a different footing. In fact, the learned advocate for the appellants does not press their appeal and he concedes that no good ground can properly be urged in their favour. This appeal, therefore, stands dismissed. The appellants if they are on bail, must surrender to their bail and serve out the unexpired portions of their sentences.

LORT-WILLIAMS J. I agree.

Appeal No. 595 allowed, retrial ordered; appeal No. 596 dismissed.

A. C. R. C.