APPELLATE CRIMINAL.

Before Jack and Panckridge JJ.

NABAB ALI

v.

EMPEROR*.

1930

July 8, 9.

Charge—Misdirection—Omission to direct jury as to the inference they are entitled to draw if not satisfied with the explanation suggested for the absence of material witnesses.

There should be a substantial direction on the part of the Judge as to the view of the prosecution case, which the jury are entitled to adopt if they are not satisfied with the explanation offered for the absence of a material witness. The omission to give such direction is a non-direction amounting to a misdirection.

Tenaram Mondal v. *The King-Emperor* (1) and *Fanindra Nath Banerjee* v. *Emperor* (2) relied on.

Hachuni Khan v. *King-Emperor* (3) distinguished.

APPEAL from conviction by the accused.

The material facts are set out in the judgment.

Sureshchandra Talukdar for the appellant.

The Offg. Deputy Legal Remembrancer, B. M. Sen, and *Anilchandra Ray Chaudhuri* for the Crown.

PANCKRIDGE J. This is an appeal on behalf of three accused persons, Nababali, Bishwanath Das and Rameshwar, who have been convicted by the Assistant Sessions Judge of Mymensingh and sentenced to various terms of imprisonment under sections 221, 388 and 342 of the Indian Penal Code. The jury returned a unanimous verdict of guilty against all the accused in respect of the charge under section 342, a unanimous verdict of guilty against Rameshwar in the case of the charge under section 221 and a majority verdict of 3 to 2 of guilty in the

* Criminal Appeal, No. 30 of 1930, against the order of Kunjabihari Ghosh, Assistant Sessions Judge of Mymensingh, dated Dec. 16, 1929.

(1) (1920) 25 C. W. N. 142. (2) (1908) I. L. R. 36 Calc. 281.
(3) (1930) 34 C. W. N. 390.

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case of the charge under section 388, Indian Penal Code, against all the accused. The Judge accepted these verdicts and sentenced the accused to various terms of imprisonment.

A preliminary and technical point is taken on behalf of the accused persons, namely, that the convictions are bad because the jury have returned a verdict of guilty against Rameshwar both under section 342 and section 221, whereas the charge was framed in the alternative. No one could suppose from reading the charge of the learned judge that the charges had been framed in this way, and indeed the only fact that supports this is the word "or" appearing at the beginning of the charge under section 342 against Rameshwar. Logically, there was no justification for charging Rameshwar in the alternative, as will appear from the facts of the case, when we come to deal with them. We think that the form of the charge was a mere slip and that none of the accused was in any way prejudiced by the fact that in form the charge was in the alternative, whereas in substance two quite distinct offences were charged, and, in the view of the jury, proved against the accused.

There is, however, another point which we consider is of some importance. The story for the prosecution was that the complainant Jogendra met the first two accused Nababali and Bishwanath, in a certain *bâzâr*, where it is the practice of persons so disposed to gamble. A dispute arose owing, according to the prosecution, to the fact that Nababali tendered to the complainant Jogendra a counterfeit currency note in payment of a gambling loss. Thereupon, Jogendra called on the third accused Rameshwar to take Nababali and Bishwanath into custody. This Rameshwar refused to do and at the instigation of the first two accused proceeded to apprehend Jogendra. Thereafter, Jogendra was removed to a place which has been referred to as the *bârhi* of one Santosh, where by threats of violence a sum of Rs. 105 was extorted from him, as the price of his release.

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This is the story of the prosecution, in respect of which the charges were brought and the accused persons were convicted.

Now the passage in the learned Judge's charge, to which exception is taken, is that which deals with the stage when the gambling was going on. It is evident that the place where the occurrence is alleged to have happened is as one would expect not unfrequented, and it is also evident that some of the prosecution witnesses spoke to the presence of other persons at the scene of the occurrence in addition to those who were directly concerned. Prosecution witness No. 5, for example, said that 10 or 12 elderly men were present at the time of the occurrence, and in the complaint Jogendra said that Dwijendra, Gurudayal, Phanindra and Narendra Sukladas saw the occurrence. None of these persons was called in support of the prosecution case. This aspect of the matter is dealt with in the following manner. The learned Judge says that Jogendra said that Gurudayal belonged to the party of gamblers and that another prosecution witness said that Dwijendra and Phanindra are cousins of Bishwanath, the second accused, and he adds that as it was not likely that they would depose against their uncle the prosecution did not call them. He goes on as follows: "It is "for you to consider if you will accept this explanation "for the non-production of those witnesses." Then he proceeds to observe that the occurrence admittedly took place near the shop of one Kunja Saha and he alludes to the fact that Kunja Saha has not been called nor any other person frequenting the *bâzâr*. Then he proceeds to make some general observations as to the likelihood of the persons engaged in the gambling being desirous of assisting the prosecution. With regard to Kunja and the witnesses who are described as "the *bâzâr* people" we do not think that any harm has been done by the omission of the learned Judge to carry the matter further. But we do consider that the learned Judge failed to direct the jury properly as regards the absence of those persons

who, according to the complainant's case, were witnesses to the occurrence. He does, it is true with regard to 3 out of the 4, draw their attention to the explanation which is suggested by the prosecution for their absence, and he says that it is for the jury to accept or reject it. But what he does not say is that the jury would be at liberty to draw an inference adverse to the prosecution story if the explanation suggested by the advocate for the prosecution is not acceptable to them.

With regard to the 4th witness, apparently no explanation was offered but the learned Judge does not call the attention of the jury specifically to this fact. Our attention has been directed to the case of *Tenaram Mondal* v. *The King-Emperor* (1), where in circumstances, which we do not feel justified in distinguishing from the present, the omission of the trial Judge to direct the jury as to the inference they were entitled to draw, if they were not satisfied with the explanation suggested for the absence of material witnesses, was held to be a non-direction amounting to a misdirection, and to be a good reason for setting aside the conviction of the accused persons. A previous decision of this Court was referred to in that case, namely, the case of *Fanindra Nath Banerjee* v. *Emperor* (2), in which it was said that it is not necessary that the actual word "presumption" should be used. But the two cases taken together seem to indicate that it is necessary that there should be a substantial direction on the part of the learned Judge as to the view of the prosecution which the jury is entitled to adopt if they are not satisfied with the explanation offered for the absence of a witness who is material. We have also been referred to the case of *Hachuni Khan* v. *King-Emperor* (3). But this in our opinion merely shows that there may be a case where this omission in the particular circumstances is unimportant. In that case, it does not seem that it was clearly established that the witness who, it is

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alleged should have been called was really a material witness at all. That case differs from the present case. As I have pointed out, from the evidence of the complainant himself, there were at least 4 eye-witnesses to the beginning of the transaction in respect of which the prosecution was eventually launched who were not called. It has been urged that this omission only affects the case so far as some of the charges are concerned, and that with regard to the charge of extortion the convictions can stand inasmuch as it cannot be suggested that the witnesses could have testified as to the subject matter of that charge. We do not agree. Although the charges are concerned with different incidents, yet all the incidents are parts of one transaction and we think that it is quite possible that if the jury under a proper direction of the learned Judge were not disposed to accept the prosecution evidence with regard to the commencement of the transaction, they would have been equally loathe to accept the prosecution story with regard to the subsequent stages.

In the circumstances, we direct that the convictions and sentences of the appellants be set aside and that the case be retried.

Pending the retrial the appellants will be released on bail to the satisfaction of the District Magistrate.

JACK J. I agree.

Appeal allowed; retrial ordered.

M. M.