

APPELLATE CRIMINAL.

Before Mukerji, Bartley and Roy JJ.

SADEK MANDAL

v.

EMPEROR.*

1933

Nov. 24, 27.

*Verdict—Question to the jury, when proper—Reference—Reasons for the verdict—
Code of Criminal Procedure (Act V of 1898), ss 303, 307.*

A verdict of guilty under section 304 of the Indian Penal Code is not a complete verdict when it does not indicate under which of the two parts of that section the case, in the opinion of the jury, falls. It is therefore open to the judge, under section 303 of the Code of Criminal Procedure, and it is his duty, under rule 74(b) of Chapter I of Volume I (Criminal) of the Rules and Circular Orders of the High Court, to put questions to the jury to ascertain exactly what their verdict is—but only to find out whether it was under the first or the second part of section 304 of the Indian Penal Code. General questions, the effect of which may be to enable the jury to travel outside section 304, should not be asked.

If, while trying to get a special verdict as regards the particular part of section 304 of the Indian Penal Code, the judge comes to be of opinion that the jury have not properly understood the law as to the offence of culpable homicide not amounting to murder, he would be justified in explaining the law to them again and it would be his duty to do so, but such explanation will have to be confined to that offence only.

King-Emperor v. Nga Tin Gyi (1) distinguished.

For the purpose of making a reference under section 307 of the Code of Criminal Procedure, the judge may question the jury in order to find out their reasons for the verdict that they brought in.

CRIMINAL APPEAL AND REFERENCE.

The facts of the case and the arguments appear sufficiently from the judgment.

Maneendranath Mukherji for the accused.

The Deputy Legal Remembrancer, Khundkar, for the Crown.

Cur. adv. vult.

MUKERJI, BARTLEY AND ROY JJ. This case is before us on a Reference under section 374 of the Criminal Procedure Code and an appeal by the prisoner, Sadek Mandal, who has been sentenced to

*Criminal Appeal, No. 728 of 1933, and Death Reference, No. 23 of 1933, against the order of F. S. Simpson, Session Judge of Rajshahi, dated Sep. 1, 1933.

(1) (1926) I. L. R. 4 Ran. 488.

death on a verdict under section 302 of the Indian Penal Code.

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The prisoner was charged with an offence under section 302. The Sessions Judge, in the course of his charge to the jury, explained the offences of murder, culpable homicide not amounting to murder and grievous hurt, as he had to do. What transpired when the jury brought in their verdict would appear from the following record made by the learned judge :—

The jury retired at 4-50 p.m. The jury returned at 5-15 p.m.

To foreman of the jury :—

Q.—Are you unanimous ?

A.—Yes.

Q.—What is your verdict ?

A.—We find the accused, Sadek Mandal, guilty under section 304 of the Indian Penal Code.

Q.—With what intention was the act committed ?

A.—We have not considered the question of intention.

Q.—With what knowledge was the act committed ?

A.—We have not considered the question of knowledge.

Q.—Would you care to be charged again in respect of the law ?

A.—Yes.

(The jury is charged once again in respect of the law.)

The jury retired at 5-45 p.m. The jury returned at 5-52 p.m.

Q.—Are you unanimous ?

A.—Yes.

Q.—What is your verdict ?

A.—We find the accused guilty under section 302 of the Indian Penal Code.

The learned judge has made a note that the questions, which he put to the jury after the verdict had been brought in under section 304 of the Indian Penal Code, were asked by him in accordance with the instructions laid down in the Rules and Circular Orders of the High Court, Volume I (Criminal), Chapter I, Rule 74 (b), page 28. That Rule is in these terms :—

The Sessions Judge shall invariably record their opinion whether the act, by which death was caused, was done with the intention of causing death, or of causing such bodily injury as was likely to cause death or with the knowledge that it was likely to cause death but without any intention to cause death or to cause such bodily injury as was likely to cause death. And in cases tried by jury they should be careful to obtain a specific verdict on these points.

As already stated, as the result of the questioning, the learned judge was able to get from the jury a

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fresh verdict, namely, one under section 302 of the Indian Penal Code.

The question which has to be determined at the outset is whether the fresh verdict is one which may be regarded as a verdict obtained in accordance with law.

Now, it must be conceded that, when the jury brought in a verdict under section 304 of the Indian Penal Code, that was not an unambiguous or complete verdict, because the verdict did not indicate under which of the two parts of that section the case, in their opinion, fell. The ambiguity or incompleteness, such as it was, however, was in respect of this matter only. Under section 303 of the Code of Criminal Procedure, therefore, it was open to the learned judge to put questions to the jury to ascertain what exactly their verdict was, but only to find out whether it was under the first or the second part of section 304, and, under the Rule quoted above, it was his duty to put such questions to the jury as would enable him to obtain specific verdict on the points enumerated in the Rule. The Rule comes under a heading "Remarks to be made in reference to convictions under section 304 of the Indian Penal Code," and can only be used for the purpose of recording a proper verdict under that section. The Rule cannot possibly have any other meaning, for if it bears any other interpretation it would militate against section 303 of the Code of Criminal Procedure and so would be *ultra vires* the statute.

This being the position, the question that has to be considered is, was the first question, which the learned judge put to the jury, namely, "With what intention was the act committed?", a proper question which the judge was entitled to put under the law? In our opinion, it was not. The question, apart from being a leading one, presupposes that there was an "intention" which formed an ingredient of the offence of which the prisoner was

guilty, while it is true that, for an offence of culpable homicide not amounting to murder, intention is not a *sine qua non*. The question was not one which may be regarded as justified either by section 303 of the Code of Criminal Procedure or by the Rule under which the learned judge purported to act. The proper way to question the jury for the purpose of finding out under which part of section 304 of the Indian Penal Code the prisoner was guilty, was to put to them the elements enumerated in the Rule, either one by one or as a whole, and to get their special verdict thereon. As the verdict under section 302 of the Indian Penal Code was obtained as the result of questioning which cannot be justified as being in accordance with law, we are unable to regard that verdict as one on which a conviction could be based.

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The learned judge made it perfectly plain, in his summing up, that, in his opinion, the prisoner's intention was to cause death, though he very properly and fairly warned the jury that they were at liberty to come to a different opinion. In one part of his summing up he said :—

A person, who inflicts an injury upon another which almost separates the head from the body and who inflicts another injury that cuts through a bone, can have but one intention, and a ruthless intention, that is, an intention to cause death. In my opinion, which you may neglect, to hold otherwise would be merely ridiculous. You, however, are the sole judges of the facts and I leave it to you.

If, upon a verdict under section 304 of the Indian Penal Code being brought in, a judge thinks that the verdict is not correct, but that it should be under section 302 and questions the jury to find out whether the question of intention has been duly considered, such questioning would not be warranted either by section 303 of the Code of Criminal Procedure or by the Rule referred to above. If he disagrees with the verdict under section 304 of the Indian Penal Code, being of opinion that it should be under section 302, his proper course would be to make a reference to this Court under section 307 of the Code of Criminal Procedure, and, for that purpose,

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it would be open to him to question the jury in order to find out their reasons, for the verdict that they brought in. If, while trying to get a special verdict as regards the particular part of section 304 of the Indian Penal Code, under which the jury desired to find the prisoner guilty, a judge comes to be of opinion that the jury have not properly understood the law as to the offence of culpable homicide not amounting to murder, he would be justified in explaining that law to them again and indeed it would be his duty to do so. But such summing up will have to be confined to that offence only and the questions to be put to the jury should be carefully framed to elicit from them their special verdict only. General questions, the effect of which may be to enable the jury to travel outside section 304 of the Indian Penal Code, should be avoided.

We are of opinion that, in the present case, the questioning after the record of the verdict under section 304 of the Indian Penal Code was not proper and that the second verdict under section 302, therefore, was not one on which a conviction could be based. We have also reasons to suspect that the jury had not applied their mind in understanding the law to be applied, and for that reason too their verdicts are not such as can be relied on.

Amongst the cases which the learned Deputy Legal Remembrancer has referred to, in support of the procedure adopted by the learned judge, the one that has a resemblance to the present case is the case of *King-Emperor v. Nga Tin Gyi* (1). In that case in a High Court Sessions trial for murder, the jury at first brought in a verdict of "culpable homicide not amounting to murder", the Judge then put questions to the jury to ascertain what degree of that offence they intended and their answer revealed the fact that they had not understood the law on the subject. The Judge then explained the law to them over again

(1) (1926) I. L. R. 4 Ran. 488.

and ultimately they brought in a verdict of guilty of murder. On a Reference under the Letters Patent, it was held that the verdict of murder was proper and could be accepted. One main point of difference between that case and the present case is that in that case it was held that the questions that were put were such as could properly be asked.

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In our judgment, the verdict of the jury, on which the prisoner's conviction is founded, cannot be acted upon. We, accordingly, without expressing any opinion on the merits of the case, set aside the verdict and order that the prisoner be tried again.

Retrial ordered.

A. C. R. C.