APPELLATE CRIMINAL.

Before Lort-Williams and Jack JJ.

ASHANULLA

v.

EMPEROR.*

1935

Feb 7.

Jury Trial—Charge to jury and the record thereof, what it should be.

The proviso to section 367, Criminal Procedure Code, provides that, in trials by jury, the court need not "write" a judgment, but the Court of Sessions shall record the heads of charge to the jury. Nevertheless this Court has held on several occasion that the record of the heads of charge to the jury must include such a statement on the part of the Sessions Judge as will enable the Appellate Court to decide whether the evidence has been properly laid before the jury or whether there has been any misdirection in the charge.

Fanindra Nath Banerjee v. *Emperor* (1), *Panchu Das* v. *Emperor* (2) and other cases referred to.

In the absence of any provision for taking a short-hand note of the charge verbatim, the result of these decisions is to put upon the shoulders of judges of subordinate courts an almost impossible task, and to militate seriously against the efficacy of trial by jury. A charge ought to be delivered extemporaneously. It ought not to be written out in extenso beforehand, nor is it generally possible to write it out afterwards in extenso from memory.

Explanations about the law applicable must be related to the particular facts as the explanation proceeds. Long, involved and unintelligible statements relating to charges of rioting and to "unlawful assemblies" and "common objects" without any clear explanation about what these terms mean, or how they apply to each individual accused, and statements of legal maxims, parts of decisions and judicial platitudes jumbled up together and left unrelated to any kind of context, are useless and will only have the effect of confusing the jury.

Directions about reasonable doubt, proof, the functions of judge and jury, discrepancies and all such matters should be introduced in the charge in appropriate places, as and when something occurs in the discussion of the evidence which gives rise to them and necessitates their application, not all together at the beginning of the charge. To attach a string of witness-numbers to each accused without any discussion of the evidence given by them is not the way to deal with the case of each accused separately.

*Criminal Appeal No. 622 of 1934, against the order of S. Rahaman, Third Additional Sessions Judge of Sylhet, dated July 28, 1934.

(1) (1908) I. L. R. 36 Calc. 281. (2) (1907) I. L. R. 34 Calc. 698.

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CRIMINAL APPEAL.

The material facts appear from the judgment.

Sureshchandra Talukdar and *Priyanath Datta* for the appellants.

Lalitmohan Sanyal for the Crown.

LORT-WILLIAMS J. In this case, twenty-six persons were charged with various offences, of whom seven were acquitted and nineteen convicted, and all those convicted have appealed. Of the charges, all were accused of offences under section 147 of the Indian Penal Code. No. 1 Ashanulla was also charged under section 304. The other twenty-five were all charged also under section 304/149. Nine of them were also charged under section 304/109. Of the appellants, Ashanulla was convicted under sections 326 and 148 and sentenced to four years and two years, respectively, to run concurrently. Sheikh Bhola *alias* Soifulla was convicted under sections 148 and 324 and sentenced to two years and three years, respectively, to run concurrently. Nos. 3 to 8 and 11 to 19 were convicted under section 147 and sentenced, each, to one year's rigorous imprisonment. Nos. 9 and 10 were convicted under sections 148 and 324 and sentenced to two years and three years respectively, to run concurrently.

Abdul Majid had a plot of land in Dundurpar Kitta of *mouzâ* Chandpur, in which he grew *boro* paddy. His servants Hanif and Montaj, and his day-labourers, Waris and Riyasat, were transplanting paddy with the assistance of two other servants, Sifat and Rushan, when the accused, numbering twenty-six in all, came in a body with *lâthis*, *sulfis*, *jathâs*, *kuchâsholâs*, *etc.*, to take possession of Abdul Majid's land. They were asked to go away and then, on the order of the accused Kalikumar, the accused Ashanulla hit Hanif on the head with a *sulfi*, and Hasmat, Wahab, Najib, Ramnath and Sashinath beat him with *lâthis* on different parts of his body. Bhola hit Waris in the belly with a *sulfi*. Taimus struck Waris on the side with a *kuchâ*. Injad, Sikandar, Asad and Kanai beat him with *lâthis* on different parts of

his body. Injad struck Montaj on the abdomen with a *kochâsholâ*. Husu, Hashu, Bhulai and Azamdi struck him with *lâthis* and Taimus Khan dealt a blow with a *kochâsholâ* on the hand of Riyasat, and Kazim, Yakub Tarik and Intaz struck him with *lâthis*.

The complainant, Abdul Majid, stood at a little distance and then ran away out of fear while he was chased by the accused on the order of Kalikumar. The wounded persons were taken to the hospital on the evening of the same day, and dying declarations of Hanif and Waris were recorded by a magistrate. Hanif died in hospital, as a result of these injuries, on the 17th January, the occurrence having taken place on the 1st January.

The learned advocate for the appellants has argued that the convictions ought to be set aside owing to misdirection by the learned judge. He has not been able to point to any specific misdirection, but says that the charge is confused and unintelligible.

This case is a striking instance of the impossibility of the task which the Code of Criminal Procedure, as construed and elaborated by the decisions of this and other High Courts, has placed upon the shoulders of judges of subordinate courts, and it causes one almost to despair of trial by jury, under the conditions which have been imposed by the legislature.

A charge to a jury ought to be delivered extemporaneously, immediately after the conclusion of the final speeches of the lawyers engaged in the trial, or of the evidence in the absence of such speeches. Obviously, it ought not to be written out beforehand in *extenso*, and equally obviously, it is not humanly possible, except perhaps in isolated and very exceptional cases, to write it out afterwards in *extenso* from memory. In the absence of a shorthand-writer, no *verbatim* report of the charge is, or can be, available. Those who drafted the Code of Criminal Procedure and the amendments thereof recognised this difficulty, and provided in the proviso to section 367 that, in trials by jury, the court need not write a judgment, but the Court of Session shall record the heads of the charge

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to the jury. Even this must be a somewhat difficult feat to perform with regard to an extemporaneous oral statement, but even so, such a provision, if followed literally, would have the effect practically of nullifying the powers given to High Courts on appeal.

The result has been that from time to time High Courts have declared that these words must be construed reasonably, and must be held to include such a statement on the part of the Sessions Judge as will enable the appellate court to decide whether the evidence has been properly laid before the jury or whether there has been any misdirection in the charge. Compare the decision in *Queen* v. *Kasim Shaikh* (1), which was followed in other cases. In the case of *Biru Mandal v. Queen-Empress* (2), the Judges said :—

> We should observe that as a rule we expect some statement in the record to show that the law has been explained to the jury,

and in the case of *Panchu Das* v. *Emperor* (3) :—

> We are not unmindful of the fact that the law requires only the heads of the charge to be recorded. At the same time, since the law allows an appeal on grounds of misdirection, it is not only desirable but necessary that the charge should be recorded in an intelligible form and with sufficient fullness to enable the Appellate Court to satisfy itself that all points of law were clearly explained to the jury in reference to the facts and the evidence in the case.

In the case of *Fanindra Nath Banerjee* v. *Emperor* (4), referring to circular orders of the Calcutta High Court, Chapter I, Order 59, it was stated that—

> The heads of the charge should represent with absolute accuracy the substance of the charge, and be such as to enable the High Court on appeal to see distinctly, whether the case was fairly and properly placed before the jury.

The judges of subordinate courts have, therefore, been placed in an impossible position, and faced with an insoluble dilemma. The only possible alternative ways in which they can satisfy the requirements of the High Court are equally wrong, and equally

(1) (1875) 23 W. R. (Cr.) 32.
(2) (1897) I. L. R. 25 Calc. 561, 563.
(3) (1907) I. L. R. 34 Calc. 698, 704.
(4) (1908) I. L. R. 36 Calc. 281.

disingenuous. Either they must write out their charge in *extenso* in anticipation of the end of the trial, or they must compile afterwards from memory what they believe or hope that they said to the jury. Either production then masquerades before the High Court as the record of what the judge actually said.

In the present case, the record of the charge covers 35 closely type-written pages, and I refuse to believe that the judge was able, afterwards, to recall to memory all the words and phrases with which he addressed the jury, and to reproduce them thus in *extenso* for our edification. When, therefore, the learned advocate asks us to scrutinise closely the phraseology contained in this document, and minutely examine and criticise the exact words recorded, as if they were those actually used by the judge, I decline to accede to such a suggestion. Undoubtedly, the record discloses much involved and almost unintelligible verbiage, and I can only hope and trust that nothing like it was ever actually addressed to any jury. I assume that it is but a compilation of what this and other High Courts have led the judge to think that this Court will expect and require.

It begins with a reference to a number of sections of the Indian Penal Code and some explanation of the provisions therein contained, but without relating them to the particular facts of the case as the explanation proceeds. Then follows a very long and most involved and unintelligible statement, covering several pages and relating to the charge of rioting and to "unlawful assemblies" and "common objects," without any clear explanation about what these terms mean, or how they apply to each of the accused. Equally involved explanations follow about other charges, for another five pages, to which the same kind of criticism applies.

Then comes the first head of charge—

"Caution," in which a number of legal maxims, parts of decisions, and judicial platitudes (including, I observe sadly, some of my own) are jumbled up together and left, so to speak, in the air unrelated to any kind

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of context, either of the case under trial, or any other. A direction about reasonable doubt appears here in a kind of vacuum, instead of at the end of the charge, or in its appropriate place in the body of the charge, and this head is concluded with an academic disquisition on the subject of proof, fit only for a lecture to a body of legal students. Such a method of charging a jury is not only useless and a waste of time, but will certainly have the effect of filling their minds with confusion. All such matters should be introduced in the charge in appropriate places, as and when something occurs in the discussion of the evidence which gives rise to them, and necessitates their application.

Next follows a good and concise statement of the prosecution and defence cases and the points for determination and, afterwards, the learned judge deals with the evidence. The faults so often found in this part of a charge are here in profusion. There is little, if any, attempt to sift or weigh the evidence, or guide the jury to some clear conclusion. The marshalling of the evidence is but a travesty of what it should be, and consists of attaching a string of witness-numbers without name or other distinction to the name of each accused. It covers four pages, and is worse than useless and, presumably, is designed to meet the frequent declarations of this Court that the case of each accused must be dealt with separately. To hang a lot of witness-numbers round the neck of each accused, without any discussion of the evidence given by these witnesses, is not the way in which to carry out the instructions of this Court. Then follow long separate disquisitions on circumstances discrediting, and discrepancies in the evidence, again in *vacuo* and totally unrelated to the main discussion, instead of being pointed out as and when they find their place appropriately in the story. These and a final reference to the case for the defence occupy another fourteen pages.

As I have said, there is no specific misdirection in this charge, and I am hopeful that the record does not accurately represent what the judge really said

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to the jury. If he said a tenth part of it, in simple and direct language which the jury could understand and appreciate, it would be sufficient.

Whatever criticism may be justified, the result has been very fortunate for the accused, about whose very serious offences the jury and the judge have taken a very lenient, and probably a quite unjustifiably lenient, view. So far as the interests of the accused are concerned, the less said about this case the better. The appeal is dismissed.

Such of the appellants as are on bail will surrender to their bail bonds, and serve out the remainder of the sentences imposed upon them.

JACK J. I agree that this appeal should be dismissed. It is true that the learned judge's charge must have been confusing to the jury, but I have no doubt that they well understood the legal points involved in the charge of rioting and that the facts and the evidence against each of the accused were sufficiently clearly explained to them. The sentences are extremely lenient.

Appeal dismissed.

A. C. R. C.