## JURY REFERENCE.

*Before Derbyshire C. J., Mukerji and Costello JJ.*

1934

*Dec.* 6, 7, 10, 11.

# EMPEROR

*v.*

# RAFIQUE-UD-DIN AHMAD.*

*Reference—Retrial, if can be ordered in a Reference—Statements accompanying conduct, if relevant—Material exhibits, how to be marked—Code of Criminal Procedure (Act V of 1898), s. 307—Indian Evidence Act (I of 1872), s. 8.*

Under section 307(*3*) of the Code of Criminal Procedure, the High Court has ample power, in a case referred to it under section 307, in which there has been no proper or adequate trial, to make an order that the accused persons should be retried.

*Queen-Empress* v. *Anga Valayan* (1) referred to.

Under section 8 of the Indian Evidence Act, the production of articles by an accused person is relevant as evidence of conduct. Statements accompanying or explaining conduct are also relevant as part of the conduct itself. If such statements do not appear on record, the evidence remains incomplete or imperfect.

When articles are said to have been jointly produced by two accused persons, evidence should be led in such a way, that it may be possible for the court to draw the necessary inference from the conduct of each one of the persons concerned in the act.

*Queen-Empress* v. *Babu Lal* (2) referred to.

Where there are several search lists, in each of which several items of property are mentioned, the prosecution ought to prove their case with regard to the different items severally, and the different items of property or different groups thereof, mentioned in a search list, ought to be separately numbered either by letters or figures or some other distinguishing marks, and the same numbering should be followed while recording the evidence of witnesses relating to the search.

CRIMINAL REFERENCE.

The case for the prosecution *inter alia* was that, on the night of the 16th May, 1934, one Gobindaram Marwari, a money-lender and grocer, was murdered in his shop, where he used to sleep, by some men who took away money and ornaments belonging to the

*Jury Reference, No. 51 of 1934, made by P. C. De, Sessions Judge of Rangpur, dated Aug. 30, 1934.

(1) (1898) I. L. R. 22 Mad. 15. (2) (1884) I. L. R. 6 All. 509.

deceased or pawned with him. Next morning, his servant found him lying murdered, informed the neighbours and went with them to the police station and lodged an information. During the investigation, the Sub-Inspector arrested the four accused persons. Two of them, Jyotish and Jatin, took the Sub-Inspector and some other gentlemen to the former's house. There Jyotish pointed out a spot under a mango tree and from there Jatin dug up a bundle containing gold and silver ornaments and some cash. The accused Bhangra took the police to a ditch about half a mile from his house and from there produced an earthen pot containing some ornaments and cash. The accused Rafique took the police to a place north-east of his house and from there produced a *kherua* bag containing ornaments and cash. Later, Jatin took the police to several places and produced some clothing and a suit case containing money. The ornaments recovered were identified by the owners thereof, who had pawned them with the deceased.

All the four accused were produced before a magistrate before whom they made confessional statements. These confessions were subsequently retracted by them. Tracings of certain foot-prints found in the shop were taken by the Sub-Inspector, which the expert stated tallied with the foot-prints of Jatin, Bhangra and Rafique. The accused were tried by the Sessions Judge of Rangpur with aid of a jury who by a majority of 6 : 3 gave the accused the benefit of the doubt. The learned judge, disagreeing with the said verdict, made a reference under section 307 of the Code of Criminal Procedure.

*The Deputy Legal Remembrancer, Khundkar*, and *Nirmalchandra Das Gupta* for the Crown.

*Charuchandra Biswas, Haridas Gupta, Basantakumar Mukherji* and *Nirmalchandra Chakrabarti* for the accused.

*Cur. adv. vult.*

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MUKERJI J. The four accused persons Rafique-ud-din Ahmad, Jyotishchandra Ghosh, Jatindranath Ray and Bhangra *alias* Hasimuddin Mahmud were tried by the Sessions Judge of Rangpur with the aid of a jury. The charges on which they were tried were for offences under sections 302 and 392 of the Indian Penal Code—a charge of murder, for having caused the death of one Gobindram Marwari, and a charge of robbery, for having stolen away some valuables and cash, which were in the possession of the said Gobindram Marwari in the room in which he was murdered. The jury at first brought in a divided verdict of 5 to 4. The judge, thereupon, asked them to retire and to see if they could be unanimous. They retired and, after a deliberation for over fifteen minutes, they came back and said that they were still divided,—this time in the proportion of 6 to 3: six of the jurors were of opinion that the case against the accused was reasonably doubtful, so that they should be held not guilty and the other three were of opinion that all the four accused persons were guilty under both the charges on which they had been tried. The learned judge, being of opinion that the verdict of the majority of the jury was unreasonable and that the verdict of the minority should be accepted, has made this Reference to this Court under the provisions of section 307 of the Code of Criminal Procedure.

For our present purposes, it is not necessary to recapitulate the facts of the case; they will be found set out in sufficient detail in the learned judge's charge to the jury, and a summary thereof is also to be found in his letter of reference addressed to this Court. It will be enough to state, for the purposes of the present case, that the evidence adduced on behalf of the prosecution, in order to establish the charges against the accused persons, roughly speaking, falls under three heads :—first, the confessions which were made by the four accused persons but were subsequently retracted by them; second, the production of

some articles, which were alleged to be the proceeds of the crime, at different times and from different places by the accused persons severally with the exception of one occasion when some articles are said to have been produced by two of them jointly; and third, the identity of foot-prints of three of the accused persons found in the room in which the crime was committed.

After we had heard the arguments addressed to us on behalf of the Crown and while the case on behalf of two of the accused persons was being argued before us by Mr. Biswas, who was appearing on their behalf, it became apparent to us that, upon the present state of the record, it would not be possible for us to deal with the case on its merits with any degree of confidence. The difficulty that we felt arose out of certain defects which were noticed in the manner in which the evidence was recorded by the learned judge and also in consequence of the mode that was adopted on behalf of the prosecution in the matter of leading the evidence that was being adduced in support of the charges.

As regards the manner in which the evidence has been recorded I propose to say a few words in order to explain the nature of the difficulty that we have experienced. The prosecution case is that the four accused persons—on one occasion two of them jointly and on other occasions some one of them severally—took the police to certain places and produced some of the articles which, according to the prosecution, were in the possession of the deceased Gobindaram Marwari. The searches, in the course of which these articles were produced, are evidenced by a number of search lists, out of which it will be sufficient to refer here to four, namely, exhibits 10, 11, 12 and 13. Exhibit 10 is a search-list relating to the production by Jatin and Jyotish of certain articles on the 17th of May, 1934, at 8 p.m. I may state here that the occurrence, which forms the subject matter of this case, is alleged to have taken place at about 11 p.m. on

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the night of the 16th of May, 1934. Exhibit 11 refers to the production of articles by Bhangra on the 17th of May, 1934, at 9-30 p.m. Exhibit 13 describes the production of articles by Rafique-ud-din on the same night at 10 or 10-30 p.m. and Exhibit 12 relates to the production by Jatin of certain articles on the morning of the 18th of May, 1934, between 7 and 8 a.m. Evidence relating to these productions was given by the Sub-Inspector of Police who conducted the searches and was examined as witness No. 22 on behalf of the prosecution. The search-witnesses examined in connection with these searches are witness No. 5, Mahatabuddin Chaudhuri, witness No. 6, Fazal Karim Chaudhuri and witness No. 7, Maulvi Basirulla Ahmad. The Sub-Inspector, who had conducted the searches, gave an account of the different searches that he had held and of the different articles that were produced by the accused persons in the course of those searches. I propose to quote here a portion of his deposition as recorded. I quote from page 28 of the paper book. He said this:—

> At 4-30 p.m. I arrested Jatin and Jyotish, who were in the cycle-shop of Jyotish. I took them to the *thânâ*. I arrested Rafique and Bhangra about 7-30 p.m. Jyotish and Jatin led us to a spot under the mango tree, Jyotish pointed out a spot. Some articles were dug up in the presence of witnesses. I made a list of them attested by witnesses. Proves exhibit 10. Then Bhangra took us to a dried pond, from inside the cavity he produced some ornaments and cash. I made out a search list which the witnesses attested. Proves exhibit 11. Then Rafique took us to a garden near his house and produced one *kherua* bag. I prepared a search list which was attested by witnesses. Proves exhibit 13.
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> 18th morning, Jatin took us to a dried tank, he produced some purses and an empty tin. Proves exhibit. (The number of the exhibits is left blank, but there is little doubt upon the other evidence that we have. It is exhibit 12). Jatin took us to the house of Debi Barman, where he lived. From inside a suit-case he produced notes value Rs. 175. He made over a *lungi* to me. Proves exhibits VI to XXVIII.

It will be seen that, from this evidence, it is not possible to ascertain which of the aforesaid exhibits were recovered, in the course of which of the searches. The articles, which correspond to these exhibits, will be found described in a list that was prepared in the Court of Sessions and is printed at page 46 of the paper-book. Of the three search-witnesses, to whom

reference has been made above, witness No. 7, Mr. Basirullah Ahmad, has given very general evidence relating to all the searches; he has not referred to the articles that were produced in the course of the searches, at least he has not tried to identify them; but the other two witnesses, namely, No. 5, Mahatabuddin Chaudhuri and No. 6, Fazal Karim Chaudhuri, are very important. When one proceeds to examine the evidence of Mahatabuddin Chaudhuri, as recorded, one finds that, after speaking about the preparation of the lists—exhibits 10, 11 and 12—and also speaking about the production of articles by Rafique-ud-din, the witness does not refer to exhibit 13, although he purports to have been a witness to the search that was held in connection with the production of articles by Rafique-ud-din, and proves only exhibits VI to XXIV. It is very difficult for one to understand why, if he was speaking about the production of the articles in the course of the searches that he was speaking to, he would not refer either to exhibit 13 or to any of the other articles produced in the searches excepting articles, Exhibits VI to XXIV. An examination of the evidence of prosecution witness No. 6, Fazlal Karim Chaudhuri, discloses a still greater confusion. At page 16 of the paper book he says :—

> The *dárogá* made a list of the articles found, proves exhibit 10, and took the articles into custody. Identifies exhibits VI to XIV.

In the list on page 46, exhibits VI to XIV are described in this way :—

> Nima (Khutis containing articles written in the search lists, exhibits 8 to 12 as in lower court's exhibits).

The record has been made with reference to exhibits, which, according to the said list, were articles found, not only in the course of the search evidenced by exhibit 10, but in the course of searches to which exhibits 8 to 12 of the lower court's exhibits correspond. This clearly is a confusion, which ought to have been cleared up in the course of the trial. Furthermore, I find that when the witness was

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speaking about exhibit 11 and exhibit 13, the record that has been made of his evidence in connection with exhibit 11 is "Proves exhibit 11 and identifies exhibits "XV to XVIII," and with regard to exhibit 13 it has been recorded,—"Proves exhibit 13 and exhibit XVIII "to XXIV." Exhibit XVIII, therefore, is an article which is found in the record of the evidence of this witness as referring to the search-list exhibit 11, as also to the search-list exhibit 13. This, again, is impossible.

Turning to the evidence of identification in respect of the articles, it may be observed that considerable difficulty has been felt because there is nothing to indicate which particular item of the exhibits, mentioned in the list at page 46, corresponds to which particular item in a search-list. To take one instance, if the evidence of Nella Mahmud (prosecution witness No. 8) is referred to it will be found on page 18 that he says that he kept two *khilâ bâlâs* or *paunchis* and two *murkunies* as security and the record states that these are exhibit VIII, exhibit XXIII, as well as exhibit XXII. Referring now to the list on page 46, one finds that exhibit VIII and exhibit XXIII are *khilâ bâlas* and exhibit XXII is a pair of gold *murkunies*. If one turns to the search-lists in connection with the searches, in the course of which these articles were recovered, one finds that in Exhibit 10 "a bangle" is mentioned and in Exhibit 13 "a silver bangle with a "clip" is mentioned. If the evidence, which this witness has given as regards identification of these *khilâ bâlas* has to be considered as satisfactory, then one will have to assume that, in respect of two items of articles, which form a pair one can properly be described as "a bangle" and the other as "a bangle with a clip". It is not for the court to be placed in such a situation that it will have to make such an assumption for the purpose of connecting the accused with the crime upon the evidence of identification which is given in this way. Four persons having stood their trial together, it is reasonable to expect that evidence should be given and recorded in such a

way that it would be possible for each one of them to know what the allegation of the prosecution is as regards the articles that each of them has produced and how the prosecution has sought to prove that those articles have been identified as being articles belonging to or in the possession of the deceased at the time the crime was committed. When, in a case of this nature, there are several search-lists, in each of which several items of property are mentioned, the prosecution ought to prove their case with regard to the different items severally and the different items of property or different groups thereof mentioned in a search-list ought to be separately and consecutively numbered either by letters or figures or by some other distinguishing marks, and the same numbering should be followed while recording the evidence of witnesses relating to the searches to which those search-lists refer. If that procedure is adopted, there will be no difficulty on the part of the court in appreciating the evidence that is adduced in respect of the searches.

As regards the mode of leading evidence that was adopted in this case, I shall now say a few words, because, in this respect also, some important defects have been noticed by us. In a capital case of this description it is important that the more important of the witnesses should be examined in such a way as would enable the court to properly appreciate their evidence. The evidence should be led in sufficient detail and with due regard to the sequence of events; the facts which the witnesses saw or the acts which they did and also the reasons which actuated them to do the acts being narrated in an intelligent fashion. And it is only by this means that a clear and consistent account of the whole thing may be presented before the judge and the jury. What I notice is that, with respect to some of the more important witnesses in this case, who should have been examined in much fuller detail, the minimum of evidence, that would, in law, be sufficient to establish the charges, was adduced on behalf of the prosecution, leaving it to the defence to find out by cross-examination other facts

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and circumstances which would either go to support or to destroy the evidence which the witnesses gave. I wish to refer here to one instance and one instance only; but, in doing so, I wish to guard myself against being understood as indicating either that I consider the point to be of no importance from the point of view of the defence or that it is a point which is fatal to the prosecution. Two of these witnesses, namely, witness No. 5, Mahatabuddin Chaudhuri, and witness No. 6, Fazal Karim Chaudhuri, were certainly important witnesses and their evidence is that although they were residents of places somewhat distant from the place where the *thânâ* was, they came to the *thânâ* in the early morning on the 17th of May, 1934 and remained with the Police-Inspector for a considerable time. The prosecution thought that it was sufficient for them to have from each of these witnesses a bare statement that he came to the *thânâ* early in the morning of that day and it was left to the defence to find out why or for what reason the said witnesses thought it necessary to come to the *thânâ* at all. Such statements, devoid of circumstantial details, if presented before the court, are of little avail, so far as the question of drawing any inference from them is concerned, and can afford but little help to the court in judging of their truth or otherwise. The witnesses, at least the more important witnesses in a case of this nature, should be examined in much greater detail.

Nextly, as regards the production of articles, the evidence is relevant as evidence of conduct under section 8 of the Indian Evidence Act. Under that section, statements accompanying or explaining conduct are also relevant as part of the conduct itself. What we have on the record, so far as the prosecution witnesses examined on this point are concerned, is only the fact that the articles were pointed out by the accused persons. If there was any statement made by an accused person at the time of the production or just before the production of the articles then this statement may very well go in as part of the conduct

under the provisions of section 8 of the Evidence Act. So far as the evidence of conduct, as adduced in this case, is concerned, no attention seems to have been paid to this matter and the result is that the evidence is in one sense incomplete and imperfect.

Lastly, I should also refer to one other matter, and that is this. There is one instance in which two of the accused persons are said to have jointly produced some of the articles. In leading evidence with regard to this part of the case no attention seems to have been paid to the salutary principle laid down by Mr. Justice Straight of the Allahabad High Court in the case of *Queen-Empress* v. *Babu Lal* (1), a principle which has been reiterated by this Court so recently as in the case of *Durlav Namasudra* v. *Emperor* (2), namely that where joint acts of several persons are sought to be proved, in order to ask the court to draw an inference from such conduct, evidence should be led with some degree of particularity so that it may be possible for the court to draw the necessary inference from the conduct of each one of the persons concerned in the act. The principle applies not only to evidence relevant under section 27, but also to that under section 8 of the Evidence Act.

Upon this state of the record, we have seriously considered the course which ought to be adopted with regard to this case. We are aware that a retrial in a criminal case should not be ordered too lightly and should be avoided as much as possible. A retrial certainly should not be ordered, where it can be established that there is really no evidence to go before a jury, because, to order a retrial in such circumstances would be to put the accused to unnecessary harassment. That, however, cannot be said to be the position here. We are also aware that in a retrial there is always a danger of the prosecution trying to fill up the gaps in the evidence that has been adduced; but this difficulty may very well be overcome if the judge, who presides at the trial, is astute enough and

(1) (1884) I. L. R. 6 All. 509. (2) (1931) I. L. R. 59 Calc. 1040.

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if the jury are properly directed. Having regard to the importance of the case and the gravity of the crime, we think we ought to order a retrial in this case if we have got the power to make such order.

The question then arises as to whether, in a case under section 307 of the Code of Criminal Procedure, it is within the power of this Court to make an order for retrial. This question has been argued by Mr. Biswas, appearing on behalf of two of the accused persons, and it is necessary that we should express our view on it. The argument that has been addressed to us, as I understand it, is this that although the High Court, in a reference under section 307 of the Code of Criminal Procedure, can exercise the powers which are conferred upon a court of appeal and which may ordinarily be exercised by a court dealing with an appeal, the exercise of such powers is subject to the condition that it is the High Court which has got to pass the final order of acquittal or conviction; in other words, it is argued that, although this Court, sitting on a Reference under section 307 of the Code of Criminal Procedure, may make orders such as are contemplated by section 426 as regards the release of an accused person on bail or under section 428 as regards the calling for further evidence and so on, it is not competent to make any order which would be inconsistent with its function as a court of appeal, which has got the duty to discharge of either convicting or acquitting an accused person. This, as I understand it, is the argument that has been put forward by Mr. Biswas in this connection. Now, in support of this argument, a good deal of reliance has been placed upon the expression "and subject thereto" which appears in sub-section (*3*) of the section and special reliance has been placed upon two words appearing in it, namely, the word "and", also the word "shall." Some difficulty no doubt is felt by reason of the use of the words, to which Mr. Biswas has thus referred, because the use of the words may be taken as suggesting that the provision which follows them is a mandatory provision. But his

argument, if accepted, would amount to this that the words "subject thereto" should be read as being equivalent to the expression "subject nevertheless to "the provision that." The sub-section may be divided for the purposes of the present argument into two portions: the first portion saying "the High Court "may exercise any of the powers which it may exercise "on an appeal", and the second portion saying "it "shall, after considering the entire evidence and "'after giving due weight to the opinions of the "Sessions Judge and the jury, acquit or convict "such accused......"; and these two portions are joined together by the expression "and subject thereto." As I have said, to adopt this argument would be to regard the expression "and subject thereto" as being equivalent to the expression "and subject neverthe-"less to the provision that", in other words, the first portion of the sub-section, to which I have referred, would have to be treated as being subject to the second portion—the dominating portion which directs, according to the argument, that whatever powers a court of appeal may exercise in a matter under section 307 of the Code of Criminal Procedure it will eventually have to pass an order of conviction or acquittal. I do not think that this argument is well-founded. There is, I admit, a certain amount of difficulty in construing this sub-section, having regard to the words that have been used. This difficulty has been created by piecemeal amendments, which section 307 of the Code of Criminal Procedure has several times undergone, since its original enactment, to meet difficulties pointed out from time to time. There are certainly some difficulties; one of them, for instance, is that, although the word "any" is used, there are powers which a court of appeal possesses under section 423, but which cannot possibly be exercised by a court sitting on a reference under section 307, *e.g.*, the power to order a commitment; again clauses (*a*) and (*b*) of section 423 speaks of "conviction", "acquittal" and "finding" and "sentence" —expressions which are wholly inapposite to a case

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under section 307. But notwithstanding all these difficulties, to give effect to the sub-section, taken as a whole, one is forced to the conclusion that the second part of the sub-section is more or less redundant and that the first part of the sub-section contains the governing provision, under which the High Court is to act in a Reference under section 307.

It appears that section 307 first came into the statute book as section 263 of Act X of 1872. Under that section, there were cases, in which it was held that the High Court was not competent to make an order for retrial. Later on, the sub-section, in its present form or at least in its present form so far as this particular matter is concerned, came into being by the enactment of Act XIII of 1896. In 1899 Sir Arthur Collins C. J. and Benson J., in the case of *Queen-Empress* v. *Anga Valayan* (1), referring to the amendment made by Act XIII of 1896 observed thus:—

> We might, no doubt, order a new trial by the Sessions Judge for the offence under section 396, but that would be attended with obvious inconveniences.

So that, in the opinion of the learned Judges in that case, a retrial could be ordered under the provisions of sub-section (*3*) of section 307 of the Code of Criminal Procedure, as it then stood. Since then, there has been, as I understand, no case in which the power to retrial has been disputed and, on the other hand, orders of retrial have been freely and frequently made by this Court, while dealing with references under section 307 of the Code. Some of the instances in which such a retrial has been ordered will be found in the following cases:—

*King-Emperor* v. *Rajendra Roy* (2). This was a case in which there was a misjoinder of charges in the course of the trial that had been held.

*King-Emperor* v. *Nazar Ali Beg* (3). In this case the trial was vitiated by misconduct on the part of the jury.

(1) (1898) I. L. R. 22 Mad. 15, 18. (2) (1918) 22 C. W. N. 596.
(3) (1920) 25 C. W. N. 240.

*King-Emperor* v. *Profulla Kumar Mazumdar* (1). In this case a retrial was ordered upon a new charge, which the High Court thought should have been framed upon the evidence that had been adduced.

*Emperor* v. *Nani Mandal* (2). The trial in this case was held in contravention of the provision of sections 342 and 364 of the Code of Criminal Procedure.

Coming to more recent times, there have been quite a number of cases, not reported, in which orders for retrial have been passed from time to time by different Division Benches of this Court. I am not suggesting for a moment that because the point was not taken in any of the cases before now the point has not to be considered. But, on a question of construction of a statute, the fact that it has been interpreted by the Court in a particular way for a sufficient length of time is relevant. I am of opinion that, under sub-section (*3*) of section 307, the High Court has ample power, in a case, in which there has been no proper or adequate trial, to make an order that the accused persons should be retried.

On all these considerations, I hold that the Reference should be accepted in part, that the verdict of the jury in this case should be set aside and that the case should be sent back to be retried upon charges under sections 302 and 392 of the Indian Penal Code. Having regard to the circumstances of the case, such retrial should be held by some judge other than the Sessions Judge—preferably by an Additional Judge—to be deputed for the purpose. If the deputation of an Additional Judge for this purpose cannot be conveniently arranged for, the retrial should be held by the Sessions Judge of Dinajpur.

DERBYSHIRE C. J. I agree.

COSTELLO J. I agree.

*Retrial ordered.*

A.C.R.C.

(1) (1922) I. L. R. 50 Calc. 41. (2) (1924) I. L. R. 52 Calc. 403.