APPELLATE CRIMINAL.

Before S. K. Ghose and Khundkar JJ.

ENAYET KARIM

v.

EMPEROR.*

1934.
Aug. 28.

Misdirection—Summing up, what it should be—Reference—Code of Criminal Procedure (Act V of 1898), ss. 297, 307.

The expression "summing up the evidence of the prosecution and defence" under section 297 of the Code of Criminal Procedure does not mean that a judge should give merely a summary of the evidence. He must marshall the evidence so as to bring out the lights and the shades and the probabilities and the improbabilities, in order to give proper assistance to the jury, who are required to decide which view of the facts is true. Where, in a summing up, the jury, who were to decide which view of the facts were true, got no assistance from the judge as to how to come to such decision, the trial was liable to be set aside.

On appeal from a trial by jury, the High Court has to consider whether, on proper directions, not only as to the principles of law but as to the evidence, the jury, as reasonable men, would have found that the charge was proved.

Lawrence v. *The King* (1) referred to.

Both for the purpose of a reference under section 307 of the Code of Criminal Procedure as well as for the purpose of a proper and intelligent summing up, it is necessary that the trial judge should himself appreciate the evidence and form his own opinion on the case.

CRIMINAL APPEAL.

The material facts and arguments appear sufficiently from the judgment.

Pugh, *Suhrawardy* and *A. S. M. Akram* for the appellants.

Basu, *Government Counsel*, and *Nirmalchandra Chakrabarti* for the Crown.

*Criminal Appeal No. 464 of 1934 against the order of D. K. Mukherji, Assistant Sessions Judge of Hooghly, dated May 30, 1934.

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The judgment of the Court was as follows :—

The above-named four appellants were tried by the learned Assistant Sessions Judge of Hooghly, sitting with a jury, on charges under sections 344 and 366 of the Indian Penal Code. The jury returned a unanimous verdict of guilty and the learned judge agreeing has convicted them as above and sentenced the appellant, Abdul Latif, to undergo rigorous imprisonment for five years, and each of the other appellants to undergo rigorous imprisonment for four years and six months.

The case for the prosecution, shortly stated, is as follows: The appellants are residents of Bagnan, police-station Polba, in the district of Hooghly. One Kusumbala Dasee, a woman aged 16 or 17 years, who is P. W. 2 in the case, was living at the time of the occurrence, in the house of her brother, Gokul, P. W. 10. Her husband Keshab, P. W. 8, was also living with her in the same house, but, at the time of the occurrence, he was away. One day in *Agrahâyan*, 1339 B.S., at about 10 a.m., Kusum carried some food to the field, where Gokul was working. While returning, the woman was waylaid by these four appellants, who gagged her and carried her off by force to the house of the appellant, Abdul Latif. There, it was alleged, she was kept wrongfully confined for about 8 months and, during this time, Abdul Latif had sexual intercourse with her. In *Srâban*, 1340 B.S., she was taken by these appellants to Syeduddin Ahmad, sub-inspector, Jogachia, in the district of Howrah, and, in the *thânâ*, she was wrongfully confined for about 10 days. The Secretary of the *Arjya Samâj*, Calcutta, got information about the matter and deputed his *durwân*, Jaynarayan Singh, P. W. 1, to make enquiries. He went to Jogachia dressed as a hawker and had an interview with the woman in the *thânâ* house of the sub-inspector of Jogachia. Then he made more enquiries and ultimately filed a petition of complaint on the 9th August, 1933. The husband Keshab also filed a

petition of complaint on 31st August. Meanwhile, it appears, in April, 1933, that is to say, during the period of the alleged confinement in Abdul Latif's house, the woman's brother Gokul was arrested on a charge of dacoity and subsequently he was tried and convicted in a proceeding under section 110 of the Code of Criminal Procedure, in consequence of which he was sent to jail. On the 27th April, Suresh Ray, sub-inspector of Polba police-station, who is court witness No. 2, held an investigation in connection with the dacoity case and examined the girl, whom he found living in a *châlâghar* in the *Mussalmân* quarter. It appears that later there was an information brought to the police that the girl had attempted to commit suicide and also that she had been abducted. It may be that Gokul said this to a police officer while in jail. At any rate, there is no doubt that Bhababhim Singh, assistant sub-inspector, Dadpur outpost, under Polba police-station, came to the village and recorded the statement of the girl on the 17th June, which is Exhibit 4, and he submitted a report on the 18th June following, which is Exhibit 3. In that statement, the girl is reported to have said that she had separated from her husband and brother and was living in her own hut on the bank of Bhairabipârhâ tank and, according to the assistant sub-inspector, she was there living as a prostitute. On the complaint filed by Jaynarayan, P. W. 1, a warrant for the production of the girl was issued and she was brought from Jogachia *thânâ*. It was reported by the Circle Inspector, court witness, that the girl told him that she had come to Jogachia *thânâ* to work as a maid servant. The defence is that there is a *dalâdali* in the village and that the case is the outcome of enmity, the men of the party of Mir Alani having instituted the case through the agency of Jaynarayan Singh.

Mr. Pugh, for the appellant, has contended that the learned judge's charge to the jury is open to serious objection, because it is meagre and inadequate, there being no proper sifting of the evidence, which

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again is inherently improbable and full of material inconsistencies. Mr. Basu, appearing for the Crown, has contended that the jury, having believed the evidence, the matter is concluded and it is not open to this Court to interfere in appeal. Mr. Pugh has further drawn attention to a passage in the order of the learned judge, by which he sentenced the accused and it is as follows:—

> The accused after the delivery of the verdict asks me to refer the case to the Hon'ble High Court under section 307 of the Code of Criminal Procedure. But in the view of the petition filed to-day by the Public Prosecutor regarding the charge and the unanimous verdict of the jury, I do not think that it is necessary for the ends of justice to submit the case to the Hon'ble High Court.

Mr. Pugh has contended that the learned judge apparently realised the weakness of the prosecution evidence and thought that the jury would acquit, and that he would have referred the case to this Court under section 307 of the Code of Criminal Procedure had he not been influenced by the attitude of the Public Prosecutor. This action, on the part of the Public Prosecutor, in filing a petition has been repudiated by Mr. Basu, in this Court and it is not clear what reason there was for the filing of such a petition, when the jury had returned a unanimous verdict of guilty. But it lends colour to Mr. Pugh's argument that the judge was at first in favour of making a reference, against the verdict of guilty. With regard to that, it must be said that it was the duty of the judge to make up his own mind about the case. It must be remembered that section 307 of the Code of Criminal Procedure places a powerful weapon in the hands of the judge in the moffussil, and it is not available to a judge of this Court, sitting in session, to prevent miscarriage of justice on account of a wrong verdict on the part of the jury, and in view of its provision it is necessary that the trial judge should for himself appreciate the evidence and form his own opinion on the case, so as to see whether it is necessary, for the ends of justice, to make a reference against the verdict. Not only for the purposes of this section, but likewise for the purposes of proper and

intelligent summing up, it is necessary that the judge should appreciate the evidence properly. This Court has pointed out more than once that the expression "summing up the evidence of the prosecution and defence" under section 297 of the Criminal Procedure Code does not mean that a judge should give merely a summary of the evidence. He must marshall the evidence so as to bring out the lights and the shades, the probabilities and the improbabilities, in order to give proper assistance to the jury, who are required to decide which view of the facts is true. On a question of misdirection as to evidence, this Court has to see whether it is reasonably probable that the jury would not have returned the verdict but for the misdirection complained of. In the case of *Lawrence* v. *The King* (1) Lord Atkin said as follows :—

> Nor are their Lordships satisfied that in any case the jury must have returned a verdict of guilty. It is true that there was evidence against the accused, but a close scrutiny of the evidence fails to satisfy them that upon a proper direction the jury might not reasonably have come to the conclusion that the guilt of the accused was not established beyond a reasonable doubt.

In that case, the trial court had omitted to give a direction on certain elementary principles of law, but where the misdirection has been as to evidence the argument applies with equal force, and it is for consideration whether, on a proper direction and having all the circumstances before them, the jury, as reasonable men, would have found that the charge was proved.

Now, in the present case, there are certain features, which are probably beyond controversy and which may, at first sight, favour the prosecution. It is pointed out by Mr. Basu, for the Crown, that it is noteworthy that the complaint was instituted at the instance of a third party, the *Arjya Samâj*. Next, there is no doubt that the girl was actually found in

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the *thânâ*. Further, there is no doubt that, sometime before, that the girl was found living at her village, but away from her own people and the house of her brother. On the other hand, these features, apparently favourable to the prosecution, are counterbalanced by others, which the learned judge failed to point out. The circumstances indicate that the Secretary of the *Arjya Samâj* might have been misled, because the prosecution was really the work of the *durwân*, P. W. 1, who was seen associating with some Mahomedans, specially Nasirul Huq, at the latter's house. The jury might have felt some sympathy for the *Arjya Samâj*, but the learned judge omitted to warn the jury that they must not be actuated by any sentimental consideration. It appears that news was brought to the Secretary of the *Arjya Samâj* by two upcountry men, but these have not been produced. Then, as regards the finding of the girl in the *thânâ*, the question is whether the circumstances connected therewith are inconsistent with the defence case, namely, that the girl was living there voluntarily. There is no discussion of this in the charge. According to the prosecution case, she had been questioned by two police officers while she was living in the village. To them she did not divulge the truth. But, nearly 9 months after the occurrence, while she was still in the hands of the sub-inspector, who was in the *thânâ* at the time, she chose to divulge the story to a passing hawker. The learned judge does not discuss the evidence at all from the point of view of probability. If it is true that for 8 or 9 months the girl was living in the house of Latif, the question for the jury was whether that would be consistent with her story of abduction and wrongful confinement, but this is not brought out by the learned judge in his charge. Then, as mentioned already, there is the evidence of three police officers, all Hindus, who took part in the investigation, while the girl was alleged to have been kept under wrongful confinement. The girl admits the interviews with the two police officers. The learned judge ought to have

placed before the jury the statement made by the girl on the 27th April, 17th June and 9th August, respectively, before the sub-inspector of Polba, the assistant sub-inspector of Dadpur and the Circle Inspector. These are quite inconsistent with the prosecution case. Mr. Basu, for the Crown, has contended that very likely these police officers had been gained over by the accused party and they were carrying on a sort of bogus investigation in order to meet the defence case. This is far-fetched, but it was no doubt for the jury to decide and the learned judge never put it to them. The three Hindu police officers were examined as court witnesses because the prosecution were under the impression that it was their duty to examine only those witnesses who would support the prosecution case and not necessarily those who would tell the truth. However, they were examined, and the girl's sister-in-law, Nisada, was also examined as a court witness. The learned judge told the jury that if they believed these witnesses, the prosecution would fall to the ground and he left it at that. He did not discuss what reasons there were for believing or for disbelieving, having regard to the probabilities or otherwise and the inconsistencies in the evidence. The girl's sister-in-law, Nisada, is entirely hostile to the prosecution case. She supports the defence and, in fact, she brought a criminal charge of rape against the complainant Jaynarayan. The husband, who subsequently filed a petition of complaint, tells a story, which also is not consistent with probability. He says that he was sent by the accused, Poorna, to his native village, where he lived for 8 months, a most docile act on his part. The question is whether he had abandoned the girl for the time, but the learned judge did not invite the jury to consider the probabilities on this point. Then, as regards the girl herself, leaving aside the question as to whether the so-called court witnesses should be believed or not, the learned judge did not examine her evidence in detail to show how far the evidence was probable or consistent. To us it seems that her

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evidence bristles with improbabilities and inconsistencies. It is noteworthy that, in the petition of complaint filed by Jaynarayan and also in the petition filed by the husband, no case of abduction by force or wrongful confinement in the house of Abdul Latif was alleged. No doubt, P. W. 1 was not an eye-witness, but his evidence is that he had ascertained the facts from the girl herself and from her brother Jugal. The latter is alleged to be an eye-witness to the occurrence and so is a Mahomedan, P. W. 3, who, however, admits that he did not tell any one of the occurrence, but the learned judge did not point this out to the jury. Then again the brother of P. W. 10 says that he laid an information of the occurrence at Polba *thânâ*, but the *dâroga* refused to record it, as if he had already been gained over to the side of the accused. He further says that he complained to the magistrate about the abduction of his wife, and this complaint was also ignored. This was never pointed out to the jury. Thus, with regard to the summing up of the evidence, the charge of the learned judge is quite colourless and he gives no advice as to credibility. On the contrary, the record discloses that some inadmissible evidence had been introduced. For instance, one witness deposes to other incidents of alleged abduction on the part of the accused, but the learned judge never took care to warn the jury that this evidence, as to the bad character of the accused, which might have been let in through the ineptitude of the defence, must be left out of consideration. Again P. W. 4 speaks of the beating of Gokul, which is heresay, but it was let in and the learned judge did not warn the jury on this point. The husband in his complaint mentioned section 498 of the Indian Penal Code as one of the offences complained of. But this charge apparently was not persisted in and although, as mentioned already, the prosecution started out with a case of enticement, in the evidence a case of abduction and forcible confinement was sought to be made out. In his summing up what the learned judge did was to give to the jury a

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string of points, but he did not express any opinion either way nor did he discuss the evidence in detail. The result is that the jury got no assistance. Furthermore the learned judge did not take care to discuss the evidence as against each accused separately, although no case has been made out even on this evidence under section 344 of the Indian Penal Code against all the accused. Our conclusion is that the learned judge did not place the evidence properly before the jury and that his charge was vitiated by serious misdirection. Having regard to the state of the evidence, we do not think that there should be a retrial of the case.

The result is that we allow the appeal, set aside the conviction of and the sentence passed on the appellants, acquit them of the offences under sections 344 and 366 of the Indian Penal Code, and direct that they be forthwith set at liberty.

The appellants will be discharged from their bail bonds.

Appeal allowed.

A.C.R.C.