APPELLATE CRIMINAL.

Before Cunliffe and Henderson JJ.

EKABBAR MANDAL

v.

EMPEROR.*

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Feb. 12.

Appeal—Case triable by assessors but tried by jury, if appeal lies on facts in—Code of Criminal Procedure (Act V of 1898), ss. 418, 536.

Per HENDERSON J. When an offence tried with the aid of assessors is tried with the aid of a jury and no objection is taken during the trial the appellant does not get a right of appeal on facts.

Empress v. *Mohim Chunder Rai* (1) discussed.

Per Curiam. Evidence of motive is not evidence of conspiracy. In a case where there is really no evidence of conspiracy but merely that of motive and evidence of ordinary association, it is the duty of the Judge to direct the jury to return a verdict of not guilty.

CRIMINAL APPEAL.

The material facts of the case and the argument in the appeal appear sufficiently from the judgment.

Anil Chandra Ray Chaudhuri and *Ajit Kumar Datta* for the appellant Jelaluddin.

Debendra Narayan Bhattacharjya and *Ajit Kumar Datta* for the appellant Ekabbar Mandal.

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

CUNLIFFE J. These two appeals arise out of a poisoning case which was tried before a Judge and a jury at Bogra. There were six persons on their trial before the Court: one of them by name Ekabbar Mandal was on his trial for murder and conspiracy to murder; the remainder were merely put on their trial for conspiracy to murder. And it may be noted that one of those who were charged with conspiracy alone was a woman. The result of the trial was that

*Criminal Appeal, No. 923 of 1936 and Criminal Revision, No. 1209 of 1936, against the order of S. N. Modak, Sessions Judge of Pabna and Bogra at Bogra, dated Oct. 2, 1936.

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the accused No. 3, who is appellant No. 1 here, was convicted both of murder and conspiracy to murder, and accused No. 1, who is appellant No. 2 here, was convicted of conspiracy to murder. The remainder were acquitted. Both the appellants Nos. 1 and 2 were sentenced to transportation for life.

It may be observed that the procedure adopted by the learned Judge in handling the case, quite apart from the materials contained in his summing up, was a faulty one. The verdicts which were given in the individual cases were all the verdicts of the jury. It was in accordance with law that he should take the verdict of the jury in the case of murder. But, under the puzzling and, to my mind, the artificial application of s. 269 of the Code of Criminal Procedure, faced with the position that he was trying a combined case of murder and conspiracy to murder, he ought to have treated the jury on all charges, apart from the actual murder, as assessors. He ought to have taken their opinions as assessors individually with regard to the conspiracy charges but he did not do so. This combined procedure has been deprecated on more than one occasion in this Court, and, as my learned brother points out, it is not at all necessary. By a stroke, to use my learned brother's expression, of the Government pen, it is possible under the Criminal Procedure Code to alter the trial of conspiracy in a mixed murder and conspiracy case to one in which the jury functions as jury in both aspects of the case.

Another awkward position which has been created in this particular case is that if the learned Judge had taken the opinions of the persons sitting with him as assessors, and not their verdict as jurymen, there would have been, as far as the accused in the conspiracy part of the case was concerned, an appeal on facts, but as he did not do so, although there are rulings to the effect that such a procedure ought not to penalise the accused, no doubt, on an equitable basis, it is not quite certain whether they are

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permitted to have an appeal on the facts and law. So far as the particular appellants are concerned, we are satisfied for reasons that I shall proceed to give that it would not be safe to uphold either of these convictions owing to the manner in which the learned Judge handled his jury.

It will perhaps be convenient if I deal firstly with the conviction on the conspiracy charges in the case of both appellants. It is of course true that there is nothing more difficult to prove than actual criminal conspiracy. The proof of conspiracy in law is very largely inferential but the inferences which are to be drawn by the jury and which the jury should be directed to consider with regard to their conspiracy verdict must be, even if they are mere inferences, supported by solid evidence.

Now it seems to me that, as far as the conspiracy charge here is concerned, there is practically no evidence worth the name at all. The prosecution case was that the deceased who was a Mahomedan school master had married a young child who, after the marriage ceremony had taken place, was retained in her father's house. And for some reason or another, as the years went on, and she approached the actual age when she would normally have been allowed to go to her husband on attaining puberty, the family began to become hostile to him. One of the accused here is this girl-wife's father. It is said in the evidence that he is a man of poor circumstances in life. He had two grown-up sons and there is a history of a law case between the husband and his relatives in law and there is certain vague evidence about an earlier admitted assault. But the main figure in the quarrel, between the deceased school-master, the man who is said to have been poisoned, and the family was the first accused before the Court whose name is Jalaluddin. Jalaluddin, it seems, was a neighbour of the wife's family and it is asserted in the evidence that he objected to the girl-wife being handed over to the

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husband to live in her husband's house, because although he himself had a wife and two children and appears to have been a man of middle age, he had become attached to this girl, and as evidence shows, during her childhood and as she was growing up, he was in the habit of making her presents of dress cloths, sweets and so on, and he used to visit her parent's house and the evidence also seems to show, they preferred Jalaluddin to the deceased because they backed up the child's objection to go in to live with the husband.

The story of the Crown shortly is that the third accused Ekabbar and another accused, Azimuddin, asked the deceased, probably a more educated man than any of them, to come over to Ekabbar's house and take part in a religious reading at which a number of people in the village were meeting, and after the religious reading had taken place, somewhere about midnight the deceased together with certain of the congregation including all the accused before the Court sat down to a meal at Ekabbar's invitation. It was a simple meal of rice and duck curry. The way it was served was not described quite uniformly in the evidence, but it appears each guest was supplied with a glass of water and a plate for rice and subsequently a cup for the curried duck. Evidence shows that the rice was distributed on to these plates from the common bowl, but it seems that the curried duck was brought in, each guest's portion being already placed in the cup. The last accused, the woman I have mentioned, is said to have been engaged in the cooking of this meal and it is possible that she or anybody in the kitchen put the curry into the individual cups. It was Ekabbar, the man who was convicted of murder, who distributed the cups and it was the prosecution case before the Sessions Court that the cup that was placed before the deceased was made of porcelain, whereas the others were made of brass. It was not quite certain how the cups were distributed, whether they were taken into the dining

room all at once on a tray or whether Ekabbar brought them in two by two. Everybody, according to the evidence, commenced eating and towards the finish of the meal the deceased got up saying that he was feeling unwell. Subsequently, he was sick in the house and asked to be taken to another house nearby where a man whom he designated as his disciple lived. There he became sick again. He was attended by a doctor, a local unqualified man, who tried to administer some vomiting medicine consisting of Ipecac mixed with water, and he is also said to have given him some form of injection. He subsequently died. When he called the attention of the company in the dining room that he was unwell, he addressed Ekabbar by name. Ekabbar afterwards absconded and there is evidence to show that the portion of the vomit which was the result of the deceased being sick in the house where he died was taken away and therefore could not be examined. The vomit, however, which was found on a mat in the disciple's house was examined. It contained traces, so the examiner says, of aconite and when the body of the deceased was dissected at the *post-mortem* examination, there were found traces of aconite in the liver. That is more or less broadly the evidence of the prosecution given as to the actual crime in the Sessions Court and it might at once be said that there does not seem to be any implication in that story of the second appellant Jalaluddin. But there is certain evidence against Jalaluddin although it has no actual connection with the day of the deceased's death.

The first is that a witness of the prosecution who was a shop-keeper said that Jalaluddin and another man had gone into his shop and the other man had bought some potatoes for him and that it was Jalaluddin who produced the money to pay for the potatoes. If the evidence is to be construed in the ordinary manner the shopkeeper saw Jalaluddin taking 2 pice out of his pocket and making the actual payment.

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There was another evidence which was not commented upon in the arguing of the appeal that another witness saw Jalaluddin and Ekabbar talking together the evening before or an evening very close to the time the crime was committed.

That is the whole evidence of conspiracy against Jalaluddin and in my opinion the learned Judge ought to have told the jury at once when the prosecution case was over that such evidence was not sufficient to convict him of criminal conspiracy to murder the deceased. I have no doubt in my mind that the jury were largely influenced in Jalaluddin's case by the story of the quarrel between the husband and the wife's family but such evidence is merely evidence of motive and is not direct or indirect evidence to show that Jalaluddin was actually in the conspiracy. The potato-buying incident is common place and nothing possibly can be concluded in my opinion from the two accused being seen talking together in the garden of Ekabbar's house shortly before the day of the crime.

Now as to the conspiracy charge against Ekabbar, I am not satisfied either that Ekabbar was guilty of conspiracy on the evidence of what he did during the dinner. It seems to me that the conspiracy evidence, such as it is, in Ekabbar's case, is bound up with the conspiracy evidence against Jalaluddin. There is also a history of motive in Ekabbar's case. He seems to have taken certain part in the expression of enmity and so on against the deceased but that this evidence should amount to a testimony producing a plot to take the deceased's life I do not accept.

We next come to the question as to whether, quite apart from the conspiracy, Ekabbar was guilty of the murder of the deceased Munshi. The first thing that occurs I think to an ordinary person reading the story of what occurred on that night must be this that although the action of Ekabbar may have been that of a guilty man, it might actually have been that of an innocent man, and I do not find that the learned Judge pointed out this specifically to the jury or with

enough force. It is true that he did mention the possibility of his innocence to the jury in general terms but it seems to me that it was his duty to analyse all the movements which took place which could possibly be called guilty and subject them to a test one way or the other. Then the jury would have been in a much better position to make up their minds on this important question. I was careful to say that the story of the distribution of the plates and cups was not quite uniform in the prosecution evidence in the Sessions Court but our attention was called by the learned advocate for the first appellant to another very important point. It was this, that in the evidence before the committing Magistrate there was a witness who said that there was not only one porcelain cup which was on the dinner table but in fact there were several. If this description was true, it deals a very severe blow to the pivot of the prosecution case because, as I understand it, it was somehow suggested that the fact that the deceased alone had a porcelain cup placed before him was because whoever placed the poison in that cup was unable to do so without running the risk of poisoning anybody else. That I suppose was the way it was put; but the theory seems to me to fall to the ground if in fact there were several cups made of china on the dinner table and not one of the specially selected type. Nowhere, however, in the learned Judge's summing up has this remarkable piece of evidence been commented upon at all. There is no doubt that in all cases of murder by poisoning, the only way in which the case of an accused can be successfully placed before the jury so that they are in an unassailable position to give their opinion one way or the other is by the most minute analysis of the whole of the evidence in the case.

Our attention was also called to a very considerable discrepancy which exists between the description of the symptoms displayed by the deceased man after he felt himself to be undergoing the effects of the

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poisoning in the evidence given by the witnesses in the Court of the committing Magistrate and in the Court of Sessions. It is quite obvious by a scheduled comparison of these different versions of what occurred that the evidence before the Sessions Court has been perfected in favour of the prosecution, and with the fairness that always characterises the Crown in these cases, the learned Deputy Legal Remembrancer admitted that this evidence bore traces of improvement all along the line. It is a piece of evidence that ought to have been specifically placed before the jury but this was never done. The learned Judge went very thoroughly into the evidence but in these cases it must be remembered that throughout the time the jury sat in Court, they heard the evidence brought to their notice in resume by the defence and they heard the evidence recapitulated by the prosecution: and what we want to see in this province is an attempt on the part of the learned Judges to throw, if possible, a new angle on the whole case, if that can be done, so that the jury, discriminating between the enthusiasm of the defence on the one hand and, what is usually known, the cold presentation of the evidence for the prosecution on the other, can be in a position to look on the evidence before the Court as a whole.

I do not think that that was done in this case. I am very disappointed in the manner in which the learned Judge handled it. It would not be safe in my view at all to hold Ekabbar guilty of murder on such evidence nor would it be at all safe to say that he and Jalaluddin were guilty of conspiracy to murder.

The consequence is that these appeals will be allowed and the convictions and sentences of these two men will be set aside.

There is also a Rule directed towards a possible enhancement of sentence. That Rule will be discharged.

HENDERSON J. I am surprised that the learned Judge did not pass a sentence of death in this case.

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Murder by poisoning is always cruel and deliberate. There is nothing in the evidence to suggest that there was any extenuating circumstance and the learned Judge does not give any reason for his action except a question-begging statement to the effect that the circumstances do not call for the extreme penalty. I should not be at all surprised if the reason is that the learned Judge was reluctant to sentence anybody to death on such flimsy evidence. The result of this is that the unfortunate appellants have been deprived of the advantage of a reference which would have entitled them to show that they ought to be acquitted on the facts.

It was, however, contended that, in view of the error made by the learned Judge in trying the conspiracy charge with a jury, the appellants have a right of appeal on facts. There are authorities both ways. I myself have no hesitation whatever in rejecting this contention. One of the old cases of this Court is that of *Empress* v. *Mohim Chunder Rai* (1). Now, the learned Judge Mr. Justice Maclean, who expressed the opinion, himself said that it was unnecessary to do so because that particular appeal as an appeal on facts failed. He gives no reason for his opinion. The other learned Judge Mr. Justice Mitter expressly declines to subscribe to it. It seems to me that that opinion stultifies the provisions of s. 536 of the present Code and entirely ignores s. 418. If we read s. 536, it becomes apparent that the appellants have no real grievance in this matter at all. As soon as the learned Judge started to take the verdict on this charge, they should have protested and asked that the individual opinions of the jurors should be taken as assessors. Had the learned Judge refused to do that, they would have immediately brought themselves outside s. 536 and would have been able to show prejudice. The wording of s. 418 is perfectly plain. It does not say that an appeal is limited to a question

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of law in a case triable by jury. The words used are "except where the trial was by jury". That to my mind is perfectly conclusive. I therefore hold that there is no appeal on facts on the conspiracy charge. Had I held otherwise, Mr. Bhattacharjya's client would have been in a ridiculous position. He would have had an appeal on the facts on the conspiracy charge but not on the murder charge.

Now, the conspiracy charge is, in my opinion, based on no evidence whatever. The only thing relied upon by the prosecution is the incident with regard to the potatoes. The prosecutions were not able to show that aconite was administered in certain potatoes nor were they able to suggest that such potatoes were the potatoes purchased in the shop in question. Had they been able to go as far as that, they could have made out a case of abetment against the appellant Jalaluddin. It surpasses my comprehension how anybody could on this evidence alone support a charge of conspiracy even in the popular sense of the term. Certainly it would be impossible to infer from this and this alone that these two appellants agreed together to murder the deceased. The learned Judge in my opinion should have directed the jury to acquit the two appellants on this charge.

I entirely agree with my learned brother that the murder charge has not been dealt with in a proper way. The explanation seems to be, if I understand the charge to the jury correctly, that the learned Judge was so busy and worried over the conspiracy that he really forgot about the murder altogether. At any rate he nowhere places this charge specifically and clearly before the jury. The case is so weak that the learned Judge ought really to have considered very seriously whether he should have allowed it to go to the jury at all. What is transparent is that, apart from the evidence with regard to the china cup, there was absolutely nothing at all to justify the conviction. The learned Judge ought therefore to have put it in the forefront of the charge that the jury should

not convict unless they accepted the evidence with regard to the china cup, and then and there, he should have referred to the discrepancy with regard to it.

He should then have proceeded to put clearly the circumstances which have some important bearing on this question, the case depending as it does upon circumstantial evidence alone. It is quite obvious that very important circumstances are those which tend to throw light on the question whether aconite was administered in the house of the feast or not. It should have been made clear to the jury that unless they were satisfied that the poison was administered in that house, this appellant could not be convicted.

Now, one of the most important circumstances in this aspect of the case is the evidence with regard to the symptoms which were displayed by the deceased when he first complained of feeling ill. The most remarkable point of this evidence is, as my learned brother has pointed out, the case as made in the committing Magistrate's Court. I shall first deal with the evidence in the committing Magistrate's Court. The only symptom suggesting aconite poisoning in these depositions is vomiting. Vomiting of course may be accounted for in countless ways. The other symptoms did not suggest aconite poisoning at all.

Then when the case comes into the Court of Sessions we find the characteristic symptoms of aconite poisoning introduced for the first time and jumbled up with the other symptoms that were given out in the early stage of the case. The result is that not only ought the learned Judge to have pointed out to the jury the very grave doubt whether the deceased had taken aconite when his illness first developed; but he should also have drawn their attention to the very suspicious nature of the evidence. No reasonable man could doubt that these symptoms were introduced into these depositions as a result of the chemical

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examiner's report. There is therefore the further point that the learned Judge should have asked the jury to hesitate before they accepted the evidence of witnesses, guilty of such unblushing concoction, with regard to any of the incidents that took place at the feast.

Then the other important question on this point is what transpired in the second house where P.W. 14 was called in to treat the deceased. The suggestion of the defence is that aconite may have been administered by this man either through mistake or incompetence. At any rate, they point out the various unsatisfactory features in his evidence. This witness appears to have been mishandled by the learned Judge altogether. He told the jury that the fact that aconite was found in the vomiting matter picked up in the second house completely disposes of the defence theory. That is not so at all. It entirely depends upon whether the doctor was telling the truth or not. The finding of the aconite therefore is consistent with either case. The learned Judge should have directed the jury accordingly and then proceeded to point out the invidious position in which this doctor was placed and the unsatisfactory features of his deposition. When I read it, it certainly appears to me that it is more the story of a man trying to defend himself than of a man who is telling all that he really knew about the case.

I am not inclined to say any more. I entirely agree with my learned brother that this case was not properly put before the jury at all. I have no doubt that if they had been properly charged, they would have brought in a verdict of not guilty unless they were entirely unreasonable men.

Appeal allowed. Accused acquitted.

A.C.R.C.