1884

BASARUDDIN BHUIAH v. BAHAR ALI.

thoroughfare, and that, therefore, the Deputy Magistrate had no jurisdiction. He further was of opinion that the limit of time specified in s. 147 should have been applied; and that the Deputy Magistrate should have referred the parties to the Civil Court. He, therefore, referred the case to the High Court.

No one appeared on the reference.

The order of the Court was delivered by

WILSON, J.—We think the order of the Deputy Magistrate cannot be supported. It has been more than once held by this Court that the powers now embodied in ss. 133 to 137, with regard to the obstruction of public ways, are not to be exercised where there is a *bonâ fide* dispute as to the existence of the public right. In the present case it is plain that the right of way is really in dispute, and that its existence is at least open to doubt. No order, therefore, can be made under the sections referred to, until the public right has been established by proper legal proceedings, civil or criminal.

Order reversed.

Before Mr. Justice Wilson and Mr. Justice Macpherson.

LEIU TU AND SIX OTHERS (PETITIONERS) *v.* QUEEN EMPRESS.*

1884 October 18.

Misdirection of Jury—Jury trial—Burmah Courts Act of 1875, *s.* 80—*Reference to High Court.*

Three persons, who were attacked and wounded in an affray, informed the police on the same day that the persons who had attacked them were A, B, and C. Eighteen days afterwards the same complainants gave to the Magistrate inquiring into the case the names of four other persons whom they said, with the three persons first accused, formed the attacking party. The seven accused were tried jointly for the offence before the additional Recorder of Rangoon and a jury. In his charge to the jury the Additional Recorder omitted to call their attention to the fact that four out of the seven accused had not been mentioned by the prosecutors until after eighteen days had passed over. The prisoners were convicted.

Held, that the Additional Recorder misdirected the jury; that under the circumstances the misdirection prejudiced the four persons last accused; and that the verdict must be set aside as far as they were concerned.

* Criminal Reference No. 2 of 1884, made under s. 80 of the Burmah Courts Act, by the Special Court of British Burmah, consisting of the Judges, W. E. Ward, Esq., and R. S. T. McEwen, Esq., dated September 15th, 1884, against the order of the Additional Recorder of Rangoon.

1884

LEIU TU v. QUEEN EMPRESS.

THIS was a reference to the High Court under s. 80 of the Burmah Courts Act of 1875. The facts of the case are stated in the judgment of the Court. The point referred was as follows:—

Whether or not, in this particular case, the learned Additional Recorder misdirected the jury, so far as appellants Nos. 4 to 7 inclusive are concerned, in that he did not point out to the jury the omission on the part of the complainants to charge the appellants with having assaulted them until 18 days after the assault took place; and if there has been a misdirection, whether or not such misdirection should be held to have so prejudiced these appellants as to justify this Court in setting aside the verdict of the jury so far as they are concerned.

Mr. *W. Jackson* for the appellants.

The judgment of the Court was delivered by

WILSON, J.—The case in which this reference has been made arose in this way: It appears that on the evening of the 6th of April, the three complainants went into a house in Rangoon occupied by certain actresses; that the persons said to be the seven accused came in afterwards; that a quarrel arose in which injuries were inflicted (it is alleged by the seven accused persons or some of them) upon the complainants; that on the evening of the occurrence, or immediately after it, the complainants who had gone to the *thannah*, pointed out two of the accused persons, who had also gone there, as amongst the persons who had assaulted them, and on the same evening, they mentioned the name of the third, but at that time they said nothing about the appellants whose case is now before us—the accused persons 4, 5, 6, and 7. The complainants were the same evening taken to the hospital, where the police officials followed them, and made endeavours to obtain from them the names or identification of any other persons amongst their assailants, in addition to the two who had been identified, and the one who had been named; but the police officials failed to obtain any further information then. Eighteen days after the occurrence, and about four days after some of the complainants had come from the hospital, a petition was presented, not through the police, but to the Magistrate who was then investigating the case in which the four appel-

1884

LIEU TU v. QUEEN EMPRESS.

lants, accused Nos. 4, 5, 6, and 7 were said to have been amongst the assaillants. All the seven persons were accordingly committed for trial. The case came on for trial before the Additional Recorder of Rangoon and all the seven accused were convicted. On appeal to the special Court, objections were taken to the summing up of the Additional Recorder to the jury, and the two members of the special Court, *viz.*, the Judicial Commissioner and the Additional Recorder having differed in opinion, this reference has been made. The point referred is this: Whether or not in this special case the learned additional Recorder misdirected the jury in so far as the appellants Nos. 4 to 7 inclusive are concerned.

Now, in explaining his summing up and its bearing upon the case, the learned Additional Recorder says this: "The seven accused were identified by the various witnesses as well as by the complainants, and the share taken by each man was spoken to. So complete was the evidence of this identification, that the appellants' advocate made a strong point of it in their favor and pointed out to the jury that the witnesses should not be believed because of the very completeness of their evidence." It is thus clear that in the view of the learned Additional Recorder, the evidence of identification against the whole seven accused persons, including the appellants, was of an exceptionally clear, specific and strong kind. If that was so, it appears to us that it was of the very first importance to point out to the jury, that as to four of these people, the story originally told to the police did not touch them at all, but that all this exceptionally clear story was heard of, for the first time, eighteen days after the occurrence. That seems to us to be not a small circumstance which the Judge might fairly pass by, or assume that the jury would give full weight to. It was a matter of so much moment that in an ordinary appeal from a conviction by a Judge with assessors, it would probably be sufficient to upset the conviction. Then there is another aspect of the case, *viz.*, that the attention of the jury was not drawn to the material difference that existed in the evidence as against the two sets of accused persons. So far as we can see from the statement of the Additional Recorder, he left to the jury the case against all the seven accused men as if there was substantially the same case against them all. We think that

1884

LIBU TU v. QUEEN EMPRESS.

there was a very great difference between the two cases. The charge against the first three accused persons was made immediately after the occurrence. The charge against the other four was made for the first time eighteen days afterwards. We think that the omission to call the attention of the jury to this vital matter was a defect so serious as to amount to misdirection within the meaning of that word as construed in the cases cited by the Judicial Commissioner and the Additional Recorder. We further think that, under the circumstances of the case, these four persons were prejudiced by the mode in which the matter was left to the jury. Indeed it could not be otherwise. We are of opinion, therefore, that the point referred to this Court must be answered in this way: that the learned Additional Recorder did misdirect the jury in the manner indicated in the reference, and that this misdirection did so prejudice the appellants 4, 5, 6, and 7 as to justify the special Court in setting aside the verdict of the jury so far as regards these four prisoners.

Before Mr. Justice Wilson and Mr. Justice Macpherson.

QUEEN EMPRESS *v.* ISHWAR CHANDRA SUR (ACCUSED).*

1884 *October* 24.

Criminal Procedure Code—Act X of 1882, *s.* 109, 110, 112—*Security for good behaviour.*

Before a Magistrate can pass an order directing an accused to furnish bail and security for his good behaviour, it is necessary that the accused should be given an opportunity of entering into his defence; and that he should be clearly informed of the accusation which he has to meet.

ONE Ishwar Chandra Sur was reported to the Magistrate of Dacca as being "a notorious bad character"; the Magistrate ordered the arrest of Ishwar, and on his appearance took the evidence against him, informing the accused that the order would if passed, "be under s. 110 of the Code, for one year," and called upon him to show cause why he should not give security and bail for his good behaviour. After recording the answer of the accused the Magistrate passed the following order: "He will furnish Rs. 50

Criminal Reference No. 160 of 1884 made under s. 438, by W. H. Page, Esq., Offg. Sessions Judge of Dacca, dated 10th October 1884, against the order of F. Wyer, Esq., District Magistrate of Dacca, dated the 27th August 1884.