APPELLATE CRIMINAL.

Before Sir Owen Beasley, Kt., Chief Justice, and Mr. Justice Cornish.

1930, November 20.

IN RE RAMAN KORAVAN AND TWO OTHERS (ACCUSED), APPELLANTS.*

Indian Penal Code (XLV of 1860), sec. 395—Robbery—Trial by jury—Proper direction—Violence used in course of committing theft or for the purpose of committing theft—Omission of—Whether would make charge bad and amount to misdirection—Charge of dacoity—Jury return verdict of "guilty" against less than five—Duty of Court.

In explaining to a jury the constituent elements of the offence of robbery, it is essential that the jury should be directed that theft only becomes robbery, when it is shown that, in the course of committing theft and for the purpose of committing theft, violence is used ; and the omission to point out that very important essential would make the charge bad on that point and would amount to a misdirection.

Where, at a Sessions trial, the jury have before them a charge of dacoity against named persons, and they return a verdict of "guilty" against some of them and a verdict of "not guilty" against the others, and the number of those found "guilty" falls below five, the jury should be told that they must have due regard to the fact that they have acquitted a certain number of persons reducing the number to below five and that before convicting any number short of five they must be satisfied that the accused found "guilty" were acting conjointly with persons not charged in the case and in number sufficient to make at least five including the accused found "guilty."

APPEAL against the order of the Court of the Additional Sessions Judge of Coimbatore in Case No. 79 of the Calendar for 1930 and Reference under section 307 of the Code of Criminal Procedure, 1898, by the Additional Sessions Judge of Coimbatore in the same case.

* Criminal Appeal No. 470 of 1930 and Reference No. 6 of 1930.

No one appeared for the appellants.

K. N. Ganpati for *Public Prosecutor* (*L. H. Bewes*) for the Crown.

The JUDGMENT of the Court was delivered by

BEASLEY C.J.—In the Court below, seven accused were charged with the offence of dacoity, and another, the sixth accused, was charged with dishonestly receiving stolen property under section 412, Indian Penal Code. The jury convicted the first, second, sixth and seventh accused; the first, second and seventh accused of dacoity and the sixth of receiving stolen property. The third, fourth, fifth and eighth accused were found "not guilty". The learned Sessions Judge accepted the verdict of the jury in regard to the eighth accused and acquitted him. In respect of the conviction of the first, second and seventh accused of dacoity, he sentenced the first and second accused to five years' rigorous imprisonment each and the seventh accused to four years' rigorous imprisonment. The jury having acquitted the third, fourth and fifth accused of the offence of dacoity, the learned Sessions Judge was dissatisfied with that acquittal and has referred the case to the High Court on the ground that the verdict of acquittal of those accused is perverse and that they should have convicted them of the offence of dacoity with which they were charged.

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The occurrence took place on the 27th March last. On that day, P.Ws. 1 to 6 were returning from a shandy at Erode in the cart of P.W. 7. There were four carts going along the road and the last cart of the four was the object of attack by some persons after the carts had reached a place about twelve miles away from Erode. According to the prosecution case, about ten persons attacked the carts, threw stones, beat the bandy-man, P.W. 7, and some of the prosecution witnesses. They

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then took some purses containing money, some cloth bundles, and a bag of paddy from the cart. They then made off because the occupants of the other three carts came to the spot. The case against the accused in the Court below rested on the evidence of identification of the accused as being the persons who were present, on that of the approver, P.W. 12, who gave evidence with regard to the offence and his association with some of the accused, and on the evidence that the first, the second and the seventh accused were shown to have been in possession of property proved to have been stolen under the following circumstances. The houses of the first and the second accused were searched, and in their houses were found articles of stolen property, and with regard to the seventh accused he gave information about where some of the stolen property lay hidden, and, as a result of the information given, articles identified as the articles which had been stolen were there found. There was plenty of evidence to connect the other accused in the case with the offence of dacoity, but, as before-mentioned, the jury acquitted them and the learned Sessions Judge is of the opinion that they did so, because the evidence against them was mainly that of an approver, and they had not been shown to have been in possession of recently stolen property as the first, the second and the seventh accused had, and that the jury were prepared to convict of the offence only those persons who were actually found to be in possession of stolen property or who were able to show the police the place where the stolen property lay hidden. He is of the opinion that there is plenty of evidence in the case which clearly connects the other accused with the offence of dacoity and that is how the case comes before us. One difficulty of course in the way of the learned Sessions Judge was that the jury only found

three of the accused guilty of dacoity—and this was not a case where the charge against the accused was of having committed dacoity with named persons and other unknown persons—and the effect of the jury's verdict without any explanation was that only three persons had been present and had taken part in a theft during the course of which violence was used, and therefore there was this difficulty that if the acquittal of the other four was correct, then clearly these three convicted persons could not be convicted of dacoity, because there is no proof that they had committed the offence of theft with violence with two or more persons, which would bring up the number to five required by the section. However, we are not here at present concerned with that point but with the charge to the jury of the learned Sessions Judge and it has been very fairly pointed out to us by the learned Public Prosecutor that there is a defect in his charge to the jury where he sets out the law on dacoity, namely, its definition. He says as follows:—"Dacoity is robbery conjointly committed by five or more persons; robbery is an aggravated form of theft; theft becomes robbery if force is used in committing the theft or in carrying away the property obtained by theft". Then he goes on to define what theft is. The learned Sessions Judge does not point out to the jury that it is necessary not only that force should be used during the commission of the theft but that it must be used for the purpose of committing the theft. As has been pointed out by this Court and by the Calcutta High Court, it is essential that the jury should be directed that theft only becomes robbery when it is shown that in the course of committing theft and for the purpose of committing theft, violence is used, and, in my opinion, the omission of the learned Sessions Judge to point out that very important essential makes his charge

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to the jury bad on that point and that it amounts to a misdirection. This question was considered by a Bench of this Court of which I was a member in Criminal Appeals Nos. 169 and 183 of 1930. In that case, the Assistant Sessions Judge in his charge to the jury defined the offence of robbery as follows:—"When in committing the theft or in carrying away property, a person voluntarily causes hurt or wrongful restraint, the offence amounts to robbery"; and we held that that amounted to a misdirection, because on the authority of this High Court and the Calcutta High Court the omission to state that the violence must be used for the purpose of committing the theft was one which amounted to a misdirection. That is what the learned Sessions Judge has done in this case. The other cases upon the point are *Karuppa Gounden* v. *Emperor*(1), a decision of SPENCER and NAPIER JJ., and also *Otaruddi Manjhi* v. *Kafiluddi Manjhi*(2) and *King-Emperor* v. *Mathura Thakur*(3). As there is a misdirection in this case with regard to what constitutes the offence of dacoity, clearly the accused cannot be convicted of that offence. There is clear evidence that they were guilty however of the offence of theft. The offence of theft was quite correctly stated to the jury and there is ample evidence to show that the three convicted accused persons were guilty of that offence. They have filed jail appeals, and therefore it is necessary to say whether there was any misdirection by the learned Sessions Judge with regard to the facts of the case. There was not. There is clear evidence that the first accused's house on being searched contained a *saree* identified to be one of the stolen articles, that the second accused's house on being searched was found

(1) (1916) 38 I.C. 730. (2) (1900) 5 C.W.N. 372.
(3) (1901) 6 C.W.N. 72, 79.

to have in it M.O. 80, another article proved to have been stolen, and that the seventh accused pointed out a place where were discovered several articles identified as stolen property. Under these circumstances there was no misdirection by the learned Sessions Judge with regard to the evidence against those persons and there was ample evidence upon which they could be convicted of theft. As it was, they were on a misdirection convicted of dacoity. But it is open to us to convict them here of the offence of theft, and there being ample evidence with regard to the commission of that offence and no misdirection by the learned Sessions Judge upon the point, there must be substituted for the conviction of dacoity a conviction of the offence of simple theft. The theft was accompanied by some amount of violence and therefore we see no reason for treating this as anything but a serious offence, and under these circumstances they must be sentenced in respect of the offence of theft to three years' rigorous imprisonment. The disposal of the question of the misdirection as regards the law relating to the offence of dacoity makes it unnecessary for us to consider any further the reference to us by the learned Sessions Judge. If there had been a proper direction with regard to dacoity and we had been able to find that the verdict of the jury with regard to the other accused persons was perverse, the verdict of acquittal with regard to those persons would have to be set aside; but as the direction was wrong in law on the question of dacoity, we cannot go into the further question as to whether or not the acquittal of the three accused was or was not correct. I think I ought to mention one matter, because it is a matter which frequently arises when a jury have before them a charge of dacoity, viz., in cases where the charge is as against named persons, the jury often return a verdict acquitting some of them and convicting the

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others and the number of those convicted falls below five. In such cases, it should be pointed out to the jury what the effect of that verdict is. For instance, suppose nine persons are charged with the offence of dacoity and five of them are acquitted by the jury and four convicted. The number of those convicted being four and not five, it is essential that the attention of the jury should be directed to the effect of that verdict. As five persons have not been convicted of dacoity, unless the jury are of the opinion that in addition to the five acquitted there were other persons concerned not before the Court, clearly the verdict of conviction of the four persons of the offence cannot possibly stand. In this case, the accused were not charged with having committed dacoity together with unknown persons ; had they been so, the difficulty would not have arisen, because it was open to the jury to find that the three persons whom they did convict were acting conjointly with two or more persons other than the named persons. But that was not the charge here, and it is very important when such a situation as this arises that the jury should be told when they do return such a verdict that they must have due regard to the fact that they have acquitted a certain number of persons reducing the number to below five and that they must be satisfied before convicting any number short of five that they were acting conjointly with persons not charged in the case.

The result is that the conviction of the first, the second and the seventh accused of the offence of dacoity is altered to a conviction of theft and that the sentence passed upon them is reduced to one of three years' rigorous imprisonment each. The third, the fourth, and the fifth accused must be acquitted and are directed to be set at liberty.

B.C.S.