

APPELLATE CRIMINAL.

Before Mr. Justice A. G. P. Pullan.

NEHRU MAL v. KING-EMPEROR.*

1927
June, 29.

Criminal Procedure Code (Act V of 1898), sections 297 and 298—Jury trial—Summing up a case to the jury—Judge's duty in summing up a case to the jury—Misstatement of facts prejudicial to accused and omission to obtain decision of jury on a material point, effect of—Re-trial, when an accused is entitled to.

The duties of a Judge in summing up a case to the jury are given in sections 297 and 298 of the Code of Criminal Procedure, but they are not exhaustive.

A Judge must observe that whatever he says to the jury in summing up must be true and it is also necessary that he should obtain from the jury a decision on all the material points which go towards establishing a particular offence.

If the direction of the Judge is not only adverse to the accused but contains a misstatement of fact which is prejudicial to the accused and he omits to obtain the decision of the jury on a material point then the accused cannot be said to have had a fair trial and is entitled to a re-trial. [*Emperor v. Malgowda Basgowda* (1), referred to.]

Mr. St. G. Jackson, for the appellant.

The Government Pleader (Mr. H. K. Ghosh), for the Crown.

PULLAN, J. :—This an appeal from an order of the Sessions Judge of Lucknow who accepted the finding of the jury that Musammatt Rania is guilty of an offence under section 366A and Nehru Mal is guilty of an offence under section 368 of the Indian Penal Code. Both these persons have appealed on the ground principally that the Judge misdirected the jury.

* Criminal Appeals Nos. 313 and 347 of 1927, against the order of Mahmud Hasan, Sessions Judge of Lucknow, dated the 23rd of May, 1927.

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Now in summing up a case to the jury a Judge is allowed a certain amount of latitude. It is not necessary for him to repeat all the evidence and to give a précis of the arguments of Counsel. His actual duties are laid down in sections 297 and 298 of the Code of Criminal Procedure, but those sections are not exhaustive. They must be read together with the numerous judicial decisions which have found defects in the summing up of Judges. The first point which a Judge must observe in making his summing up is that whatever he says to the jury must be true. If he states that such and such fact is contained in the evidence the jury are bound to believe him, and the mere fact that he includes in his summing up a statement which he has culled from the evidence indicates to the jury that that piece of the evidence is important, and should be considered by them when giving their decision. It is also necessary that the Judge should obtain from the jury a decision on all the material points which go towards establishing a particular offence under the Penal Code. This was a case committed by a Magistrate under section 366A and as stated by him the case was that Musammat Rania induced this girl Gulaba to go with her to the Zoo but on the way she took her to a house occupied by two men Nehru Mal and Tara Chand where she was detained for a night and a day in order that she might be taken to the Punjab and sold in marriage. The girl was medically examined on the 14th of February, and the doctor gave his opinion that she had been subjected to carnal intercourse about five days previously. But at the time of the commitment there was no evidence that either of the accused Nehru Mal or Tara Chand had cohabited with her. There is no question that the Sessions Judge summed up strongly in favour of Tara Chand and strongly against Nehru Mal. If this was his

opinion he was perfectly right to make it clear to the jury. But he was not justified in stating in his summing up that there was definite evidence against Nehru Mal which, as a matter of fact, is not on the record.

The first general defect in this summing up is that although the offence charged was one under section 366A he did not put the question of the girl's age to the jury. A question of age is a question of fact, and although the doctor who examined the girl stated before the committing Magistrate that she was under 18 years of age, that statement of the doctor is not conclusive and the jury were bound to record a finding as to whether she was or was not a minor under 18 years of age when the offence is alleged to have been committed. This, therefore, is an omission from the summing up which, in my opinion, is of great importance. But the Judge made several sins of commission which are even more important. He apparently discarded the theory that the intention of the accused was to take the girl to the Punjab, and the case which he put to the jury was that the girl was kidnapped in order that she might have sexual intercourse with Nehru Mal. Up till the close of the girl's evidence in chief she had never stated as far as can be known that she had sexual intercourse with anybody, but in answer to a question by the judge at the close of her examination in chief she made this statement for the first time; and yet the Judge puts this forward before the jury as being the essence of the whole case and never brings it to their notice that this had not been the original case and was, as a matter of fact, a case started for the first time during the trial before the jury. Secondly the Judge stated in his summing up as against Musammat Rania and Nehru Mal that the statements of Gulaba were corroborated by several witnesses. Yet there is no witness who corroborates her statement as

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against Nehru Mal who does not also corroborate it as against Tara Chand who was acquitted on the Judge's direction. As a matter of fact the only witness who corroborates Gulaba as against either of these persons in a material point is a boy named Hari Shankar and he only says that he saw Gulaba and the first accused Musammat Rania in the house where she is said to have been concealed.

This leads to the most important error committed by the learned Judge.

Towards the close of his summing up he says the evidence of Ganga Prasad shows that the accused Nehru Mal and Tara Chand were living in one and the same house situate in Mohalla Narhi, but it was rented to Nehru Mal only. I have read the statement of Ganga Prasad and it does not appear that he ever said that the house was rented to Nehru Mal only, and there appears to be no evidence on the record that Nehru Mal should be considered to be the occupier of the house any more than Tara Chand. The jury was bound not only to accept what the Judge said about the evidence but to consider that it was a point of importance and one which told against Nehru Mal and told in favour of Tara Chand. It was, therefore, a misdirection which was likely to result in the jury taking a prejudiced view of the case as against Nehru Mal and consequently in influencing them to give an adverse verdict.

My attention has also been drawn to the manner in which the Judge passed over the alleged discrepancies in the evidence and the arguments of Counsel. I have been referred to a ruling of the Bombay High Court reported in *Emperor v. Malgowda Basgowda* (1), and especially the passage on page 651, where it is laid down that a Judge should not omit to call the attention

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of the jury to matters of prime importance, especially if they favour the accused, merely because they have been discussed by the Advocate. I have no doubt that the defects in the evidence and especially the point that Gulaba mentions her illicit intercourse withh Nehru Mal at a very late stage were dealt with by Counsel, but it is clearly the duty of the Judge in his summing up to repeat in some form the gist of these arguments and not to deal with the case as though the discrepancies in the evidence were of no value and the arguments of Counsel might safely be ignored. I do not consider that the accused Nehru Mal has had a fair trial because the direction of the Judge was not only adverse to him but also omitted to obtain the decision of the jury on a material point, and contained a misstatement of facts which was prejudicial to the accused.

I do not propose to say anything as to the case of Musammat Rania because in my opinion there should be a re-trial and if Nehru Mal is to be tried again Musammat Rania must also be tried again.

I would only remark in this connection that the statement of the Judge "that the circumstances show that there existed collusion between Musammat Rania and Nehru Mal" is objectionable in a summing up unless the Judge was prepared to go on to say what the circumstances were. I order, therefore, a re-trial of this case before a new jury and as I understand that the Judge who tried this case is only officiating in his post at present and that the permanent Sessions Judge will shortly be returning to his duties, I direct that the case shall be tried by the permanent Sessions Judge when he returns.

Nothing in this order will affect the case of Tara Chand who has already been acquitted.

Case remanded.

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