APPELLATE CRIMINAL.

Before Mr. Justice H. G. Smith.

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SITA RAM AND OTHERS (APPELLANTS) *v.* KING-EMPEROR (COMPLAINANT-RESPONDENT).*

September, 28.

Criminal Procedure Code (Act V of 1898), section 423(2)—Jury trial—Summing up—Misdirection—Judge omitting to call attention of jury to the fact that the evidence against the accused was not corroborated—Possibility of jury returning a different verdict if attention had been so called—Failure, if amounts to misdirection—Evidence against accused not sufficient to support conviction—Retrial, if to be ordered.

Held, that where it is possible that if the Assistant Sessions Judge had clearly called the attention of the jury to the fact that there was no corroboration of the prosecution evidence as against the accused, they might have returned a different verdict as regards him, the failure by the Judge to do that in his summing up amounts to misdirection within the meaning of section 423(2) of the Code of Criminal Procedure.

Imperator v. Minhwasayo and others (1), relied on.

In a case where the appellate court finds that the evidence against the accused was not such as was sufficient to support a conviction a retrial ought not to be ordered. *Jamiruddin Masadli* v. *Emperor* (2), relied on.

Mr. *Naimullah*, for the appellants.

The Assistant Government Advocate (Mr. *Ali Mohammad*), for the Crown.

SMITH, J. :—This is an appeal by five men who have been convicted by the learned Assistant Sessions Judge of Fyzabad. Two of them, Nohar, Ahir and Panchu Ahir, were convicted under section 397 of the Indian Penal Code and sentenced to seven years' rigorous imprisonment each. The other three Sita Ram, Brahman, Ram Deo Singh, Thakur, and Mangal, Sonar were convicted under section 395 of

*Criminal Appeal No. 251 of 1931, against the order of Pandit Kishan Lal Kaul, Assistant Sessions Judge of Fyzabad, dated the 25th of July, 1931.

(1) (1909) 11 Cr., L.J., 13. (2) (1902) I.L.R. 29 Calc., 782.

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the Indian Penal Code and sentenced to five years' rigorous imprisonment each. The trial was held with a jury.

There is said to have been a dacoity at the house of one Sidhari, Chamar at a village called Khatmipur on the night of the 24-25th of July, 1930. The police did not at first send any body up for trial, and the complainant was obliged to make a complaint about the dacoity in court on the 9th of September, 1930. Even so, there was considerable delay, but in the end, in April last the five appellants were sent up for trial, and were convicted and sentenced as aforesaid.

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Of the inmates of the house, Sidhari and his wife Musammat Gauri gave evidence, and two villagers named Ram Daur and Ram Autar said that when the alarm was raised they went towards Sidhari's house and saw a number of men running away. Each of them claimed to have recognised amongst those men Mangal, Sita Ram and Ram Deo of the appellants. Ram Daur said he also recognised one Sukhari, Chamar, and Ram Autar said he also recognised four men, named Tirath, Jeo Dhan, Sukhari, Chamar, and Rameshar, Kori. With these additional men, however, we are not concerned. The evidence of Ram Daur and Ram Autar was the only evidence materially to corroborate the evidence of Sidhari as regards the identity of the accused. The investigating officer, somewhat curiously, did not at first issue warrant for the arrest of any of the persons mentioned in the first report, nor did he search the house of any of them, so there was no property recovered. There can be no doubt that some men, at any rate, entered the house of Sidhari that night and stole some of his property. Sidhari was badly knocked about. He sustained several incised wounds, one of which, a triangular wound on the left side of the chest, was described as grievous. Sidhari claimed in his evidence

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to have recognised all the five appellants and a sixth man in the person of Tirath. He said that Nohar and Panchu attacked him with spears. His wife, Musammat Gauri, did not profess to have recognised any of the men who entered the house, and substantially the only evidence in support of Sidhari's was that of Ram Daur and Ram Autar, the nature of which has already been mentioned.

It was urged before me in the first place that the law relating to dacoity was not fully explained to the jury by the learned Assistant Sessions Judge, but I think there is no force in that suggestion. The Assistant Sessions Judge appears to have put the law before the jury in full detail, and if they failed properly to understand it, as appears from the fact that at first they found the appellants guilty of robbery only, although they found all five of them guilty of participation, that was not due to any fault of the Assistant Sessions Judge in explaining to them the law on the subject.

It was contended in the second place that the Assistant Sessions Judge did not lay before the jury sufficiently exhaustively the discrepancies which are to be found in the statements made by Sidhari at different times. His first report (exhibit 1) was made on the 25th of July, 1930, and he made a statement (exhibit C) to the Sub-Inspector of Police that same night; on the next day he made another statement (exhibit B) to the Tahsildar, and on the 9th of September, 1930, he made the complaint in court which has already been referred to. That is exhibit 2 in the case. His statement before the Committing Magistrate was taken on the 22nd of April, it is exhibit A in the case, and lastly his statement was recorded in the Sessions Court on the 22nd of July, last.

It is possible that the Assistant Sessions Judge may not have called the attention of the jury to every

possible discrepancy that may be said to exist in Sidhari's various statements, but it was not shown to me that any discrepancy was not put to them which was of importance, and which might possibly have led them to return a different verdict as regards all or any of the accused. The charge to the jury shows that the Assistant Sessions Judge was at considerable pains to lay before the jury a good many passages from the various statements made by Sidhari, and I do not think there is any reason to think that he omitted anything that was material. The most important point was that from certain portions of the statement made to the Sub-Inspector of Police on the 25th of July, 1930, and the statement made to the Tahsildar on the following day it appears that Sidhari said that only three men went into the house, and not six. That point was duly brought to the notice of the jury by the Assistant Sessions Judge, who had the relevant portions of these statements read to the jury.

The only point that can seriously be urged against the charge to the jury is this. The Assistant Sessions Judge, after setting forth the grounds on which Sidhari's evidence had been attacked for the defence, went on to say as follows :—

> "On behalf of the prosecution you have been told that you should not mind the discrepancies you may notice because Sidhari has deposed before you after the lapse of about a year from the date of the incident. It was also pointed out for the prosecution that as the names of the accused before you are all mentioned in the first information report (exhibit 1) you should hold that Sidhari's statement, that they entered his "*kothri*" on the night in question and injuries with spears were inflicted on his person by

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two of them, is substantially correct. It was further argued that as his statement was materially corroborated by other evidence you should believe it."

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The Assistant Sessions Judge should clearly, in my opinion, have pointed out to the jury at that point that as far as the cases against Panchu and Nohar were concerned, there was no corroboration, material or otherwise, of the evidence of Sidhari, and he should have asked the jury to consider whether, in those circumstances, and having particular regard to the fact that Sidhari seems at times to have said that only three men went into the house, his evidence could safely be accepted as against Nohar and Panchu without corroboration. His failure to do that seems to me to amount to misdirection. If any authority is needed on the point, I may refer to the following passage from a ruling *Imperator* v. *Minhwasayo* and *others* (1) :—

> "In India, where the Judge is bound by statute law to sum up the evidence for the prosecution and defence, any omission, however slight, is at least an irregularity, and may not unfairly be termed an error of law inasmuch as there has been a failure to conform with the law. Hence, in India, 'misdirection' is an appropriate term to apply to an omission in summing up. But it was realized very early that, to treat every failure to conform with the Procedure Codes as a matter of law which could be made the subject of appeal under section 418, Criminal Procedure Code, or of second appeal in the case of civil suits, would lead to absurdity. Thus, on the Civil

(1) (1909) 11 Cr. L.J., 13 (15).

Side, it was found necessary to refuse to treat any error of law or defect in the procedure as a matter of law unless it were substantial and might possibly have produced error or defect in the decision of the case on the merits (*see* section 100, Civil Procedure Code of 1908) and on the Criminal Side the test laid down was whether or not the omission was in the opinion of the Court of such importance as to have led to an erroneous verdict by the jury [section 423 (2), Criminal Procedure Code]. Thus, for practical purposes, an omission in a summing-up is not an error of law or a 'misdirection' unless it be on a point of substantial importance or, where the point has been fully dealt with by the defence counsel, of prime importance."

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I agree with the principles laid down in the passage of that ruling which I have quoted, and I think that it is more than possible that, if the Assistant Sessions Judge had clearly called the attention of the jury to the fact that there was no corroboration of Sidhari's evidence as against Nohar and Panchu, they might have returned a different verdict as regards those men. I do not think the convictions of those two men can be sustained, and I do not think it is a case in which a re-trial ought to be ordered. I have pointed out that the evidence of Sidhari taken by itself was not very reliable and, in view of the fact that it is not corroborated against these two men, I think the evidence against them was not such as was sufficient to support a conviction. For the principles which ought to be applied in deciding what course to adopt

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in a case of this nature, I may refer to what was said in a ruling *Jamiruddi Musalli* v. *Emperor* (1). I accordingly set aside the convictions and sentences of Nohar and Panchu, acquitting them, direct that they be released.

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As regards the other three appellants, there was evidence corroborative of Sidhari's evidence in the statements made by Ram Daur and Ram Autar. The Assistant Sessions Judge put the evidence of those two witnesses fully and fairly before the jury and it was quite competent for the jury to accept the evidence of those witnesses as sufficient corroboration of the evidence of Sidhari himself. I think there is no ground for interference in their cases, except in so far as it is rendered necessary by the fact that I have felt constrained to acquit Nohar and Panchu. The number of persons convicted of participation now stands at three only. In this connection, of course, I bear in mind the point that has been referred to more than once already, that Sidhari himself more than once suggested that only three men went inside the house. I accordingly alter the convictions of Sita Ram, Ram Deo Singh and Mangal to convictions under section 394, Indian Penal Code, but I maintain their sentences, their appeals with this slight modification being dismissed.

(1) (1902) I.L.R., 29 Calc., 782 (791).