APPELLATE CRIMINAL

Before Mr. Justice E. M. Nanavutty and Mr. Justice Rachhpal Singh

LAL BEHARI SINGH AND OTHERS, APPELLANTS *v.* KING-EMPEROR COMPLAINANT-RESPONDENT

1934 *May*, 10

Criminal Procedure Code (Act V of 1898), sections 268, 309 and 537—Indian Penal Code (Act XLV of 1860), sections 147, 333 and 396—Dacoity with murder—Trial with the aid of assessors—Sessions Judge's failure to record opinion of each assessor in respect of all the charges—Non-compliance with the imperative provisions of section 309 effect of—Trial, whether void in toto*—Jury trial—Misdirection to jury—High Court's power to order re-trial—Sentence of 14 years' transportation on a charge under section 396, I. P. C., whether illegal.*

In a trial with the aid of assessors the Sessions Judge is bound to record the opinion of each assessors in respect of all the charges on which the accused are being tried and his failure to do so merely means that he has virtually tried the case without the aid of assessors and such a trial before a Court of Session is void *in toto* because under section 268 of the Code of Criminal Procedure all trials before a Court of Session have to be either by jury or with the aid of assessors. The failure of the Judge to comply with the imperative provisions of section 309 of the Code of Criminal Procedure prejudices the accused in their defence and the disregard of an express provision of law as to the mode of trial is not a mere irregularity such as can be remedied by section 537 of the Code of Criminal Procedure. *Subramania Ayyar* v. *King-Emperor* (1); *Ram Krishna Reddi* v. *Emperor*, (2); *Shevanti* v. *Emperor* (3), and *Emperor* v. *Appaya Bastingappa Nonnapur* (4), referred to and relied on. *Abdul Rahman* v. *King-Emperor* (5), distinguished.

Where in a case under section 333, I. P. C., a trial by jury is held and the evidence shows that only one or two of the accused caused grievous hurt to a constable it is the duty of the Sessions Judge to explain it to the jury men that unless the accused are charged under section 333, I. P. C., read with

*Criminal Appeal No. 80 of 1934, against the order of H. J. Collister, I.C.S., Sessions Judge of Lucknow, dated the 20th of March, 1934.

(1) (1901) I.L.R., 25 Mad., 67. (2) (1903) I.L.R., 26 Mad., 598.
(3) (1928) 109 I.C., 497. (4) (1923) 25 Bom., L.R., 1318
(5) (1926) L.R., 54 I.A., 96.

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section 149, I. P. C., the conviction of those accused who are not proved to have caused any grievous hurt to the constable cannot be legally sustained and that only those persons who actually caused grievous hurt to the constable can be legally convicted of that offence but if the Judge does not explain it the High Court is justified in view of this misdirection to the jury to set aside the unanimous verdict of the jury in respect of the charge under section 333, I. P. C., and to order a fresh trial in respect of that charge.

A sentence of 14 years' transportation passed upon an accused in respect of a charge under section 396, I. P. C., is an illegal sentence and ought not to be imposed.

Messrs. *R. F. Bahadurji, Mustafa Raza* and *T. N. Srivastava,* for the appellants.

The Assistant Government Advocate (Mr. *H. K. Ghosh*), for the Crown.

NANAVUTTY and RACHHPAL SINGH, JJ.:—This is an appeal against a judgment of the learned Sessions Judge of Lucknow convicting the appellants Lal Behari Singh and Bishunath under section 396 of the Indian Penal Code and sentencing them to death and convicting Sahdeo Singh, Shambhu Singh, Ram Autar Pasi, Jian Pasi, Nanhu Pasi and Daljit Singh to undergo fourteen years' transportation for an offence under section 396 of the Indian Penal Code. All the appellants have also been sentenced for an offence under section 147 of the Indian Penal Code to undergo two years' rigorous imprisonment, the sentences to run concurrently. The appellants have also been convicted of an offence under section 333 of the Indian Penal Code and sentenced to five years' rigorous imprisonment; and this sentence was made to run concurrently with the sentences which were passed in respect to the offences under sections 147 and 396 of the Indian Penal Code. The reference in confirmation of the sentence of death passed upon Lal Behari Singh and Bishunath is also before us.

The case for the prosecution is briefly as follows: In village Karaura in the district of Lucknow there are two factions, one headed by Ram Narain Brahman and

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the other headed by Lal Behari Singh accused who has been sentenced to death. Towards the end of 1931 proceedings under section 107 of the Code of Criminal Procedure were taken against the men of both factions, and some men of both parties were bound over to keep the peace. In 1932 further proceedings under section 107 of the Code of Criminal Procedure were taken against the men of both parties and security demanded from Lal Behari Singh and Nanhu on one side and Ram Narain, Bishunath and others on the other. At that time Bishunath belonged to the party of Ram Narain but it is now said that he has joined the party of Lal Behari Singh. In July, 1933 action under section 107 of the Code of Criminal Procedure was taken against Ram Narain and Lal Behari Singh. On the 28th of July, 1933 Misri chaukidar reported at police station Mohanlalganj that Lal Behari Singh was collecting men to have a fight (see exhibit 4). In August, 1933 an armed guard was posted at Karora for about a fortnight upon the report of the police. On the 18th of September, 1933, Misri chaukidar again made a report (exhibit 5) at police station Mohanlalganj that Lal Behari Singh and Ram Narain were collecting men of their parties for a fight and there had been an exchange of abuse and throwing of brickbats. On the 20th of September, 1933, Misri chaukidar again made a further report (exhibit 3) that Ram Narain and Lal Behari Singh were collecting men and that there was likelihood of a breach of the peace, and he named Nanhu, Jian and Bishunath as the men who had collected on the side of Lal Behari Singh. This report (exhibit 3) was made at 5.10 p.m. in the evening of the 20th September, 1933. The second officer of police station Mohanlalganj, Pandit Sheo Prakash, at once proceeded to Karora with Misri chaukidar and two constables named Sheo Narain and Kalbe Husain and they reached village Karora at 1 a.m. on the 21st of September, 1933, and they passed the night at the rent-collecting house or "thana" of the

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Rani of Sissendi. On the 21st of September, 1933, at about 8 a.m. Sub-Inspector Pandit Sheo Prakash sent constable Sheo Narain to fetch Lal Behari Singh and Ram Narain, the leaders of the two factions. Constable Sheo Narain was unable to find Ram Narain, but he met Lal Behari Singh and told him that the Sub-Inspector wanted to see him and Lal Behari replied that he would go and see the thanadar shortly afterwards. Misri chaukidar had also been sent by Sub-Inspector Pandit Sheo Prakash to see if any *lathi* fight or other damage had been done the previous day. Chaukidar Misri Kori in the course of his enquiry met Bal Krishna, the brother of Bishunath accused, and he brought him before Sub-Inspector Sheo Prakash. Bal Krishna informed the Sub-Inspector that on the previous day his house had been looted by Ram Narain and his men. The Sub-Inspector told Bal Krishna to go and fetch his brother Bishunath and also to produce witnesses in support of his story. Bal Krishna left the presence of the thanadar but never returned again to him. Lal Behari Singh though he had promised to see the Sub-Inspector also failed to turn up. Sub-Inspector Sheo Prakash waited for these men for two hours and then sent constable Sheo Narain to find out why Lal Behari had not come. On the way constable Sheo Narain learnt that Bishunath, the brother of Bal Krishna, had gone away to fetch men from the neighbouring villages and so constable Sheo Narain hurried back to inform Sub-Inspector Sheo Prakash of this development. On getting this information Sub-Inspector Sheo Prakash sent a note (exhibit 9) to police station Mohanlalganj at about 10 a.m. on the 21st of September, 1933, asking for an armed guard to be sent immediately. Village Karora is about seven miles from police station Mohanlalganj and the Sub-Inspector's note (exhibit 9) reached thana Mohanlalganj in the afternoon of the 21st of September, 1933. Before the armed guard arrived the men of Lal Behari Singh's party quietly gathered

together in the house of Musammat Mehnda (P. W. 28) and from the house of Mehnda there is easy access to the roof of the house of Jagannath (P. W. 3). Jagannath (P. W. 3) professes not to belong to the party of Ram Narain but one Bhondu Singh is said to belong to Ram Narain's party. Now Bhondu Singh's mother Musammat Mantora (P. W. 5) was living in the house of Jagannath. Jagannath became aware of the presence of men on the roof of his house. This was at about mid-day on the 21st of September, 1933. Jagannath's wife Musammat Mangala and Musammat Mantora (P. W. 5) were at the time in the house of Jagannath. It is alleged that Bishunath called out from the roof of Jagannath's house that Jagannath should turn out Bhondu Singh from his house, as he belonged to the party of Ram Narain. Jagannath informed Bishunath that Bhondu Singh was not in his (Jagannath's) house. After that the men of Bishunath's party came down from the roof into the courtyard of Jagannath's house. When they came down they began to loot the house of Jagannath, and they robbed Musammat Mangala, the wife of Jagannath, of the ornaments that she was wearing. Musammat Mantora was also deprived of the ornaments that she was wearing. It is alleged that Sub-Inspector Sheo Prakash, who was about a furlong away from Jagannath's house and was sitting in the rent-collecting house or thana of the Rani of Sissendi, heard the noise made at Jagannath's house and he came with the two constables, Sheo Narain and Kalbe Husain and Misri chaukidar as well as two other men Tulai (P. W. 13) and Wajid, to the house of Jagannath to find out what the row was about. When Sub-Inspector Sheo Prakash arrived at the house of Jagannath he found about a hundred men assembled outside the house. Seeing Sub-Inspector Sheo Prakash coming, the crowed fell back. The Sub-Inspector found the door of Jagannath's house open and he and the two constables Sheo Narain and Kalbe Husain and Misri chaukidar and Wajid and Tulai (and

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two others namely Gur Prasad and Sheo Din according to the first information report) entered the house of Jagannath. Sub-Inspector Sheo Prasad found that confusion reigned inside the house and he saw men inside the courtyard as also on the roof of the house. The Sub-Inspector found the men in the courtyard looting the women and the women were screaming. Sub-Inspector Sheo Prakash seized Bishunath, who happened to be near him, and constable Kalbe Husain caught hold of Daljit Singh while constable Sheo Narain seized two men, whom he could not afterwards identify. Lal Behari Singh seeing that the thanadar had seized Bishunath inside the house went to the roof of the house from the courtyard and thereupon Bishunath called out to Lal Behari: "Are you going to let the police kill me?" Thereupon Lal Behari Singh replied: "Kill the *'salas'*, do not let them escape." After this brickbats and stones were thrown down from the roof and then Sub-Inspector Sheo Prakash and the two constables Sheo Narain and Kalbe Husain let go the men whom they had arrested, and Sub-Inspector Sheo Prakash fired four or five revolver shots in the air. Then one of the men on the roof cut away a portion of the parapet and hurled it at the head of the thanadar down below. Sub-Inspector Sheo Prakash fell down with his face downwards. Seeing this the men on the roof jumped down and began to belabour the unfortunate Sub-Inspector and his two constables with *lathis* and spears. Sub-Inspector Sheo Prakash was severely beaten and constable Kalbe Husain also received grievous hurt but constable Sheo Narain escaped with slight injuries. Then half an hour later all the men ran away. Constable Sheo Narain after he recovered his senses carried the wounded Sub-Inspector and constable Kalbe Husain to the "thana" or rent-collecting house of the Rani of Sissendi and he sent Mendai Gorait to make a report at thana Mohanlalganj. This report was made at thana Mohanlalganj at about 4.45 p.m. on the

evening of the 21st of September, 1933 and head constable Abu Zafar (P. W. 23) recorded the report. Sub-Inspector Shafiulla, officer-in-charge of police station Mohanlalganj, was absent from his thana and had gone to Lucknow that day but he reached Mohanlalganj at 5 p.m. in the evening of the same day, i.e. the 21st of September, and he met there Mendai Gorait and he at once hurried back to Lucknow to inform the Superintendent of Police of what had occurred and then he went in a motor lorry with an armed guard accompanied by the Deputy Superintendent of Police to the scene of the occurence. The motor lorry reached Karora at 9 p.m. on the 21st of September, 1933. Sub-Inspector Sheo Prakash was found lying still unconscious and constable Kalbe Husain was in great pain. The officer-in-charge of police station Mohanlalganj recorded the statement of constable Sheo Narain and a very brief statement of constable Kalbe Husain and he directed constable Sheo Narain to go to police station Mohanlalganj and make a full and detailed report of the occurrence. Constable Sheo Narain reached thana Mohanlalganj at 11 p.m. on the night of the 21st of September, 1933, and made his report (exhibit 1). A police investigation followed. Sub-Inspector Sheo Prakash died as a result of the injuries inflicted upon him and ultimately Sub-Inspector Shafiulla arrested thirty-one persons, but subsequently sixteen were released under section 169 of the Code of Criminal Procedure. Lal Behari Singh, Sahdeo Singh, Shambhu Singh, Ram Autar Brahman, Ram Autar Pasi, Bal Krishna, Bishunath, Maiku, Darshan, Ram Asrey, Jian, Paridin, Nanhu, Daljit Singh and Kharga were prosecuted in the Court of Mr. Chimman Lal, Magistrate of the first class, for offences under sections 147, 333 and 396 of the Indian Penal Code, and the Magistrate committed all these accused to stand their trial in the Court of Session on the charges framed against them. The learned Sessions Judge acquitted

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six of the accused and convicted the remaining accused for offences under sections 396, 333 and 147 of the Indian Penal Code and sentenced them as stated above.

The learned Counsel for the appellants, Mr. R. F. Bahadurji, at the commencement of his able arguments on behalf of the accused contended that the trial in the Court of Session was illegal inasmuch as the learned trial Judge had not complied with the imperative provisions of clause 1 of section 309 of the Code of Criminal Procedure which lay down that "the Court *shall* require *each of the assessors* to state his opinion orally *on all the charges* on which the accused has been tried, and shall record such opinion, and for that purpose may ask the assessors such questions as are necessary to ascertain what their opinions are. All such questions and answers to them shall be recorded." He contended that under section 268 of the Code of Criminal Procedure all trials before a Court of Session have to be either by jury or with the aid of assessors, and if the Sessions Judge does not require each of the assessors to state his opinion orally on all the charges framed against the accused, then there has been no trial in accordance with law and the trial must be deemed to be void *in toto*.

In the present case the leaned trial Judge has not apparently recorded the opinion of the assessors as regards the charge under section 396 of the Indian Penal Code framed against the accused. Assessor no. 1, Babu Parshotam Das states as his opinion that prisoners Lal Behari Singh, Sahdeo Singh, Bal Krishna, Bishunath, Jian Pasi, Nanhu and Daljit Singh are guilty of offences under sections 302/149 and 147 of the Indian Penal Code. Now there was no charge framed against the accused in respect of an offence under section 302 of the Indian Penal Code read with section 149 of the Indian Penal Code and no opinion of this assessor in respect of the charge under section 396 of the Indian

Penal Code which was actually framed against the accused has been recorded.

Assessor no. 2, Saiyid Bahadur Ali Khan, gave as his opinion that prisoners, Lal Behari, Sahdeo Singh, Shambhu Singh, Bal Krishna, Bishunath, Jian Pasi, Nanhu and Daljit Singh were guilty of an offence under section 147 of the Indian Penal Code. No opinion of this assessor in respect of the charge under section 396 of the Indian Penal Code has been recorded as to whether he considered the prisoners guilty or not guilty in respect of that charge.

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Similarly Assessor no. 3, Babu Khushal Chand, gave as his opinion that Lal Behari Singh, Sahdeo Singh, Shambhu Singh, Bal Krishna, Bishunath, Jian Pasi, Nanhu and Daljit Singh were guilty of an offence under section 147 of the Indian Penal Code. No opinion of this assessor in respect of the charge under section 396 of the Indian Penal Code is recorded.

Assessor no. 4, Lala Benarsi Das, gave as his opinion that Lal Behari Singh is not guilty of an offence under section 147 of the Indian Penal Code, but he held prisoners Sahdeo Singh, Shambhu Singh, Bal Krishna, Bishunath, Jian Pasi, Nanhu and Daljit Singh guilty of an offence under section 147 of the Indian Penal Code. This assessor was not called upon to express any opinion in respect of the charge under section 396 of the Indian Penal Code.

Assessor no. 5, Mr. Mohammad Raza, gave as his opinion that prisoners Lal Behari Singh, Sahdeo Singh, Shambhu Singh, Bal Krishna, Bishunah, Jian Pasi, Nanhu and Daljit Singh were guilty of an offence under section 147 of the Indian Penal Code and that the remaining accused were not guilty. This assessor has also given no opinion in respect of the charge under section 396 of the Indian Penal Code.

In *Subrahmania Ayyar* v. *King-Emperor* (1) their Lordships of the Privy Council held that the disregard

(1) (1901) I.L.R., 25 Mad., 61.

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of an express provision of law as to the mode of trial was not a mere irregularity such as could be remedied by section 537 of the Code of Criminal Procedure. The learned Sessions Judge was bound to record the opinion of each assessor in respect of all the charges on which the accused were being tried, and his failure to do so merely means that he has virtually tried the case without the aid of assessors, and such a trial before a Court of Session is void *in toto* because under section 268 of the Code of Criminal Procedure all trials before a Court of Session have to be either by jury or with the aid of assessors.

In *Ramakrishna Reddi* v. *Emperor* (1), it was held by the learned Judges of the Madras High Court that under sections 269(3) and 309 of the Code of Criminal Procedure the Sessions Judge should have taken the opinion of all the jury as assessor on the latter charge, and that his failure to do so was not an "omission" or "irregularity" to which section 537 of the Code of Criminal Procedure applied.

Again in *Shevanti* v. *Emperor* (2), it was held by a learned Judge of the Nagpur Judicial Commissioner's Court that the words "on all charges" in section 309 of the Code of Criminal Procedure meant that distinct opinion of each assessor on each charge must be taken and recorded and that omission to do so was fatal to the conviction of the accused on a charge on which the opinion of the assessors was not taken and recorded.

Again in *Emperor* v. *Appaya Baslingappa Nonnapur* (3), it was held by the Bombay High Court that it was imperative for the trial Judge to take the opinion of the assessors on the charge in respect of which it was going to convict the accused and that the failure to do so rendered the conviction of the accused illegal and unsustainable.

(1) (1903) I.L.R., 26 Mad., 398. (2) (1928) 109 I.C., 497.
(3) (1923) 25 Bom., L.R., 1518.

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The learned Assistant Government Advocate relied upon a ruling of their Lordships of the Privy Council reported in *Abdul Rahman* v. *King-Emperor* (1), in which it was held by their Lordships of the Privy Council that as there had been no actual or possible failure of justice the appeal failed whether the sections of the Code of Criminal Procedure had or had not been properly applied. In our opinion this ruling has no applicability to the facts of the present case. The appellants before us were entitled to have the opinion of the assessors recorded on all the charges framed against them, and the failure of the learned Judge to comply with the imperative provisions of section 309 of the Code of Criminal Procedure has in our opinion, in the circumstances of this case, prejudiced the accused in their defence on the merits.

We are, therefore, reluctantly compelled to set aside the convictions and sentences passed upon the accused in this case and to order a fresh trial.

It has been contended on behalf of the Crown by the learned Assistant Government Advocate that so far as the charge under section 333 of the Indian Penal Code is concerned, this Court would not be justified in setting aside the unanimous verdict of the jury in respect of this charge. In our opinion the evidence on the record shows that only one or two of the appellants caused the grievous hurt to constable Kalbe Husain and unless the accused were charged under section 333 of the Indian Penal Code read with section 149 of the Indian Penal Code, the conviction of those accused, who are not proved to have caused any grievous hurt to constable Kalbe Husain, cannot be legally sustained. It was the duty of the learned trial Judge to have explained this point of law to the jurymen, but he apparently did not do so, nor was his attention also drawn to the fact that as the charge under section 333 of the Indian Penal Code stood, only those persons who actually caused grievous

(1) (1926) L.R., 54 I.A., 96.

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hurt to constable Kalbe Husain could be legally convicted of that offence. We, therefore, feel justified in view of this misdirection to the jury to set aside the unanimous verdict of the jury in respect of the charge under section 333 of the Indian Penal Code and to order a fresh trial in respect of that charge.

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Before we part with this case we would like to point out with a view to avoiding future difficulties that the charges framed by the learned Committing Magistrate are in our opinion very defective and need to be carefully scrutinized. It was the duty of the learned Government Pleader to have seen to this. The charge in respect of the offence of riot is made to fall under section 147 of the Indian Penal Code read with section 149 of the Indian Penal Code. The addition of section 149 of the Indian Penal Code is to our mind unintelligible and meaningless. The common object of the rioters set forth in the charge is the commission of dacoity and the obstruction of the police by criminal force in the lawful discharge of their duties. It does seem rather extraordinary that the rioters had the common object of committing dacoity in the presence of the police and obstructing the police by criminal force. So far as the record goes the common object of the rioters seems to have been the desire to wreck their vengeance on the party of Ram Narain by beating Bhondu inside the house of Jagannath.

In respect of the charge under section 396 of the Indian Penal Code we would like to point out that that charge also needs to be remodelled and made to read as follows:

"That so and so in the course of the riot committed dacoity with murder by robbing the inmates of the house of Jagannath and causing the death of Sub-Inspector Sheo Prakash and thereby committed an offence punishable under section 396 of the Indian Penal Code read with section 149 of the Indian Penal Code."

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In respect of this charge the prosecution would be well advised to have an alternative charge also framed against the accused in respect of an offence under section 302 of the Indian Penal Code read with section 149 of the Indian Penal Code.

As regards the third charge also it is essential for the prosecution that the charge should be framed to the effect that in the course of the riot the accused voluntarily caused grievous hurt to constable Kalbe Husain in his discharge of his duties as a public servant and thereby committed an offence punishable under section 333 of the Indian Penal Code read with section 149 of the Indian Penal Code.

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This case is a very simple one but owing to the haphazard manner in which it has been presented in the Court of Session it has created serious difficulties for us in appeal, and we trust that the fresh trial in the Court of Session will be free from all such difficulties.

Finally we may point out that the sentence of 14 years' transportation passed upon some of the accused in respect of a charge under section 396 of the Indian Penal Code is an illegal sentence and ought not to have been imposed. We note this fact for the guidance of the learned Sessions Judge, who will try this case afresh.

Case remanded.

APPELLATE CRIMINAL*

Before Mr. Justice E. M. Nanavutty and Mr. Justice Rachhpal Singh

IMAMUDDIN, APPELLANT *v.* KING-EMPEROR, COMPLAINANT-RESPONDENT

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Evidence Act (I of 1872), section 24—Confession—Retracted confession untrue and uncorroborated—Conviction whether can be based on such retracted confession—Blood stained article recovered from accused—Stains not proved to be of human blood—Inference whether deducible that stains were of human blood—Witness making recklessly false statement—Evidence whether to be relied on.

*Criminal Appeal No. 98 of 1934, against the order of Ch. Akbar Husain, I. C. S., Sessions Judge of Sitapur, dated the 4th of April, 1934.