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seems inconsistent with the view that any such confession had been made to her. When she was first questioned by the police she did not even mention her belief that her husband had been murdered much less did she name any persons as suspected of the murder.

I agree therefore that Babu Singh and Saktu should be given the benefit of doubt.

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November, 25

BY THE COURT:—We allow the appeals of Babu Singh and Saktu, set aide their convictions and sentences, acquit them of the offence charged and direct that they be immediately released.

We dismiss the appeal of Kallan, confirm his conviction and sentence and direct that the sentence of death be carried out in accordance with law.

APPELLATE CRIMINAL

Before Mr. Justice Bisheshwar Nath Srivastava

SATDEO (APPELLANT) *v.* KING-EMPEROR (COMPLAINANT-RESPONDENT)*

1935

November, 27

Criminal Procedure Code (Act V of 1898), sections 298, 303 and 307—Charge to jury—Judge expressing his opinion on evidence, effect of—Charge not vitiated—Indian Penal Code (Act XLV of 1860), section 489-B—Trial of offence of uttering forged notes—Mere verdict of jury that accused uttered the notes in dispute incomplete—Duty of Judge to ask jury further question—Omission, whether can be supplied by conjectures and surmises—Section 269(3), Cr. P. C.—Joint trial for offences some triable by jury and some with aid of assessors—Setting aside verdict of jury, effect of—Conviction for offences triable with aid of assessors, if can be set aside—Evidence Act (I of 1872), sections 10, 30 and 32—Conspiracy—Confession of co-conspirator not admissible under section 30 or 32, whether admissible under section 10.

It is the duty of the Judge to help the jury to come to a right conclusion and for this purpose he is entitled to express his opinion on the evidence. Such an expression of opinion

*Criminal Appeal No. 499 of 1935, against the order of Babu Bhagwat Prasad, Additional Sessions Judge of Lucknow, dated the 31st of July, 1935.

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by the Judge does not vitiate the charge if the members of the jury are told that they are the sole judges of the facts and are not bound by any opinion on the facts expressed by him.

In a trial for an offence of uttering forged notes under section 489B, I. P. C., a mere verdict of the jury that the accused uttered the notes in dispute is inconclusive and incomplete. In such a case it is the duty of the Judge to ask the jury such questions under section 303, Cr. P. C., as are necessary to ascertain their opinion as to whether the notes had been uttered with the knowledge of their being forged. If he omits to do so, the omission cannot be supplied by surmises and conjectures.

Where the accused are charged at the same trial with several offences some triable by jury and others triable with the aid of assessors and convicted of all, if the conviction for the offences triable by jury is set aside because of certain defects in the verdict of the jury, it does not follow that the conviction for the offences for which the accused has been tried with the aid of assessors must also be set aside, even though the evidence recorded was common to all the offences. *King-Emperor* v. *Chidghan Gossain* (1), *Ram Das* v. *Emperor* (2), *Kunjalal Ghose* v. *Emperor* (3), and *Ram Prasad Bismil* v. *King-Emperor* (4), relied on.

In a case of cirminal conspiracy, the confession of a co-conspirator may be admissible under section 10, Evidence Act, even if it is not admissible under section 30 or 32 of the Act.

None for the appellant.

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

SRIVASTAVA, J.:—These appeals have been preferred by Sat Deo and Babu Lal against the order of the learned Additional Sessions Judge of Lucknow convicting them under section 489B of the Indian Penal Code for uttering forged notes and sentencing Sat Deo to four years' rigorous imprisonment and Babu Lal to eight years' rigorous imprisonment. They have also been convicted under section 120B read with section 489B of the Indian Penal Code and sentenced to nine years' rigorous imprisonment each under this section, both the sentences being ordered to run concurrently. The

(1) (1902) 7 C.W.N., 135.
(2) (1934) A.I.J.R., 852.
(3) (1934) 155 I.C., 261.
(4) (1927) 1 Luck., Cas., 339.

appeals are directed against these convictions and sentences also.

It may be mentioned that the trial in respect of the offence under section 489B, I. P. C., was held with the aid of a jury and the conviction under that section is based on the verdict of the majority of the jury.

The case for the prosecution is that the two appellants together with one Harish Chandra and one Shankar Lal and a few others formed a conspiracy to forge notes by altering genuine Rs.10 currency notes into notes of the denomination of Rs.50 and uttering them as such. Harish Chandra was also prosecuted along with the two appellants but he died during the trial in the Sessions Court.

The learned counsel for Babu Lal attacked the charge made by the learned Additional Sessions Judge to the jury on the ground that the learned Judge had expressed his own opinion about the evidence in very pronounced terms and that generally the summing up by him of the case against the accused was not fair. He has also contended that the verdict given by the jury was quite incomplete and in fact no verdict on which the conviction could be based. It is the duty of the Judge to help the jury to come to a right conclusion and for this purpose he is entitled to express his opinion on the evidence. I note that he qualified his observations with the remark that they, the members of the jury, were the sole judge of the facts and were not bound by any opinion on the facts expressed by him. He emphasised this by adding that they were not only at liberty to differ from any opinion expressed by him but that it was their duty as jurymen to give their independent findings. In the circumstances I am not satisfied that there was any misdirection or that the summing up was not fair.

As regards the verdict the questions which arose for determination in the case under section 489B were (1) whether the accused had uttered the notes in question as

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alleged, and (2) whether the accused when they uttered the said notes knew or had reason to believe that they were forged. The learned Judge in his charge to the jury had pointedly drawn their attention to these two essential elements of an offence under section 489B. After the charge had been delivered the jury retired and on their return gave their verdict which was recorded by the learned Additional Sessions Judge in the following words:

"*About exhibit* 25—4 are of opinion that it is proved that Satdeo uttered this note at Allahabad. One Lala Murli Manohar says that it is not proved."

"*About exhibit* 97—3 are of opinion that it is proved that Babu Lal uttered this note at Nasirabad. 2 Lala Murli Manohar and Babu Ram Lal say that it is not proved."

"*About exhibit* 102—The same as about exhibit 97."

It will be seen from the record of the verdict as quoted above that the jury only expressed their opinion about the fact of three of the notes having been uttered by the accused being proved. They did not express any opinion as to whether the accused knew or had reason to believe that the notes were forged. Nor did they give any verdict to the effect that the accused were guilty of the offence under section 489B, I. P. C. No doubt the learned Additional Sessions Judge seems to have treated this verdict as one of guilty. It is possible that if the jury had been questioned they might have returned a verdict against the accused on the question of guilty knowledge also. But I am clearly of opinion that in the case of a verdict of the jury it is not open to the Court to make surmises or conjectures. Section 303 of the Code of Criminal Procedure provides for the Judge asking the jury necessary questions in order to ascertain what their verdict is. The learned Judge ought not to have stopped merely at recording the verdict about the accused having uttered particular notes at particular places but should have ascertained from them their opinion as to whether the said notes had been uttered

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with the knowledge of their being forged. I have therefore no doubt that the verdict recorded by the learned Additional Sessions Judge is inconclusive and incomplete. It is by no means impossible that the jury if questioned might have expressed the opinion that they were not satisfied about the guilty knowledge of the accused when they uttered the notes. In *King-Emperor* v. *Chidghan Gossain* (1) their Lordships of the Calcutta High Court remarked that the Court cannot supply by conjecture or inference the omission on the part of the Sessions Judge to ascertain from the jurors themselves what they meant by their verdict. So in the present case also I find myself unable to treat the verdict which I have reproduced verbatim above as one of guilty under section 489B, I. P. C. The conviction based n the above verdict must therefore be set aside. In view of the opinion which I have formed about the appeal against the conviction under section 120B, I. P. C., I do not think it worthwhile to order a retrial.

Turning now to the conviction for the offence of criminal conspiracy under section 120B, I. P. C., as already stated, the appellants Sat Deo and Babu Lal and Harish Chandra were being tried together for this offence when Harish Chandra died. He had made a long confession, exhibit 16, before a Magistrate of the first class. Sat Deo also made confessions which are exhibits 289 and 19.

The first contention urged on behalf of Babu Lal appellant is that if the conviction under section 489B is set aside the conviction under section 120B read with section 489B, I. P. C. must also be set aside because the two offences were closely linked together. It has been argued that if the specific charge of the uttering of particular forged notes fails the charge of conspiracy for the passing of forged notes as genuine must also fail. I regret I cannot accede to the contention. Section 269(3) of the Code of Criminal Procedure provides that when the

(1) (1902) 7 C.W.N., 135.

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accused is charged at the same trial with several offences of which some are and some are not triable by jury, he shall be tried by jury for such of those offences as are triable by jury, and by the Court of Session, with the aid of the jurors as assessors, for such of them as are not triable by jury. The trial in the present case was strictly in accordance with this provision of the Code of Criminal Procedure. If the conviction for the offences triable by jury is set aside because of certain defect in the verdict it does not follow as a necessary consequence of it that the conviction for the other offences for which the accused has been tried with the aid of assessors must also be set aside. No doubt the evidence recorded in the case was common to both the offences but in one case the evidence had to be considered by the jury which had to form its opinion about it and in the other case it had to be considered by the Sessions Judge with reference to the offences which were not triable by jury. In *Ram Das* v. *Emperor* (1) which is a case very similar to the present one in which the accused were tried with the aid of the jury for an offence under section 489A and 489B, I. P. C., and on a charge of conspiracy under section 120B read with section 489A and 489B, I. P. C., with the aid of the same jurors acting as assessors it was held by a learned Judge of the Allahabad High Court that where the accused are charged at the same trial with conspiracy, which is triable with the aid of assessors, and some other offences committed in pursuance of the conspiracy, which are triable with the aid of the jury, and the verdict of the jury being in favour of the accused the Judge acquits them in respect of those charges, it is still open to the Judge, so far as the charge of conspiracy is concerned, to take into consideration the evidence disbelieved by the jury who were dealing with the other charges. The circumstances of the present case are even more favourable to the prosecution than the circumstances of the case just referred

(1) (1934) A.I.J.R., 852.

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to inasmuch as, although I have found it necessary to set aside the conviction under section 489B because of the defect in the verdict, yet the evidence for the prosecution about the uttering of the notes appears to have been believed by the majority of the jury who were distinctly of opinion that the notes in question had been uttered by the accused. I am therefore of opinion that in spite of the appeals having been successful in so far as they are directed against the convictions under section 489B, I. P. C., it does not follow from it that the convictions relating to the offence of conspiracy must also be set aside.

Next on the merits of the case it has been argued that the confession of Harish Chandra, exhibit 16, is inadmissible against the appellants and that the evidence is quite insufficient to justify the conviction.

As regards the admissibility of the confession of Harish Chandra against the appellants, it is conceded by the learned Assistant Government Advocate that it is inadmissible under section 30 of the Indian Evidence Act as Harish Chandra died before the completion of the trial. He has, however, maintained that the statement exhibit 16 is admissible against the appellants under section 10 of the Indian Evidence Act. He has in support of his arguments relied on a decision of the Calcutta High Court in *Kunjalal Ghose* v. *Emperor* (1) and of a Bench of this Court in *Ram Prasad Bismil* v. *King-Emperor* (2). In the first of these cases a Bench of the Calcutta High Court remarked as follows:

"'Conceding in favour of the petitioner that the confession of the doctor who died very soon after the statement was made by him is not admissible in evidence under section 32(3), Evidence Act, there can be no doubt that the statement was admissible under section 10 of the Act seeing that other evidence in the case disclosed reasonable grounds for believing that there was a conspiracy, and that the doctor was a conspirator."

(1) (1934) 155 I.C., 261.

(2) (1927) 1 Luck. Cas. 339: I.L.R., 2 Luck., 63.

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In the second case a Bench of this Court observed as follows:

"The first point that we have to note is the construction to be placed upon the provisions of section 10 of the Indian Evidence Act. This section renders admissible in cases of conspiracy much evidence which is not ordinarily admissible under the Indian law. The provisions of the section are wider than those of the English law. Under it anything said, done or written by any conspirator in reference to the common intention of the conspiracy after the time when such intention was first entertained by any conspirator is a relevant fact as against each of the persons believed to be so conspiring as well for the purposes of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it."

As a result of this opinion they held at page 370 a confession made by one of the accused to be admissible in evidence against all the appellants under the provisions of section 10 of the Indian Evidence Act. Both these cases fully support the contention of the learned Assistant Government Advocate. The learned counsel for Babu Lal has sought to distinguish the last mentioned case on the ground that the accused who had made the confession was alive. In my opinion the question whether the person who made the statement is dead or alive does not affect the application of section 10. The decision of the Bench of this Court is binding upon me sitting as a single Judge. I must therefore hold that the confession of Harish Chandra, exhibit 16, is admissible against the appellants.

Next as regards the merits of conviction, having heard the counsel at some length I am not satisfied that the conviction is incorrect. Harish Chandra in his confessions, exhibit 16, deposed directly about the agreement made amongst the appellants, Harish Chandra and several others that currency notes of Rs.10 should be forged and converted into notes of Rs.50 and passed as

genuine. He further stated that on one occasion Babu Lal himself made one such note. He has also given a long history of the movements of the various members of the gang including the appellants and how they passed the forged notes as genuine at various places. The learned Additional Sessions Judge has given good reasons for holding that the confession was voluntary. It was made when Harish Chandra was in jail and was recorded by the Magistrate with due precautions and after giving him necessary warnings. It appears that Harish Chandra was suffering from phthisis and he made the confession when he felt that he could not live long. His statement is also corroborated in several material particulars by the statement of P. W. 55 Gabru who was in the service of Harish Chandra for a short time. Though it is the statement of an accomplice and as such has to be accepted with caution yet in view of the very detailed nature of the statement and the circumstantial details given by him it is difficult to believe it as a tutored statement. I am therefore inclined to agree with the lower Court that in the main the statement made by Harish Chandra is true. There is no reason to think that the confessions made by Sat Deo also are anything but voluntary. Even though they have subsequently been retracted they can be used in evidence against Sat Deo. They are also admissible against Babu Lal who was jointly tried with Sat Deo. As the other evidence in the case sufficiently corroborates his statement about Babu Lal being one of the conspirators and having passed some of the forged notes as genuine they have rightly been used by the lower Court as evidence against Babu Lal also.

Next we have 127 notes exhibited in this case which were passed as genuine at various places in Northern India. It is obvious and is not denied by the counsel for Babu Lal that all these notes are genuine notes of Rs.10 each which have been converted into notes of Rs.50 each. The statement of Mr. Surendra Lal Ghosh

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a retired Honorary D. S. P. of the C. I. D. who was examined as an expert, shows clearly that all these notes are the handiwork of forgers of the same school. One remarkable fact which has been verified by me personally is that in most of them there is a letter shaped like X to be found in the line where the value of the note is stated in Madrasee characters. The learned Additional Sessions Judge made an analysis of the evidence and as a result of it noted the movements of Harish Chandra, Babu Lal and Sat Deo. It is striking that the visits of the members of the conspiracy to different places more or less synchronised with the uttering of forged notes in those localities. It is also in evidence that on occasions Babu Lal and Harish Chandra and Harish Chandra and Sat Deo were staying at the same time in the same hotel or *dharamshala*. This evidence of close association amongst the members of the conspiracy also affords important evidence against the appellants.

It has in my opinion been satisfactorily proved that on the 10th of August, 1933, Ram Lal P. W. 27, a general merchant of Nasirabad, sold an electric torch for Rs.4-4. He was paid the note exhibit 97 and returned the balance of Rs.45-12 to the customer. Ram Lal has identified Babu Lal as the customer who had given him the note exhibit 97 when he bought the electric torch. It is also significant that a torch which has been identified by Ram Lal as similar to the torch which had been sold by him was recovered from the possession of Harish Chandra when he was arrested. Similarly Babu Lal has also been identified by P. W. 37 Tikam Chand as the customer who purchased silk from his shop in Ajmer and gave him the currency note exhibit 102 and obtained the balance of Rs.47-4. As I have stated the majority of the jury were of opinion that the uttering of these notes by Babu Lal was satisfactorily proved. The learned Additional Sessions Judge also has believed the evidence of these witnesses which is fully supported by the probabilities and circumstances of the case. No

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sufficient grounds have been made out for me to arrive at a different conclusion. Having given my careful consideration to the entire evidence I am satisfied that the charge of conspiracy under section 120B read with section 489B, I. P. C., has been satisfactorily brought home to both the appellants Sat Deo and Babu Lal. Their convictions for this offence must therefore be upheld. I am also not prepared to say that considering the nature of the conspiracy which called for a deterrent sentence, the sentence is excessive.

Srivastava, J.

I accordingly set aside the convictions and sentences passed on the appellants under section 489B, I. P. C., but uphold their convictions under section 120B read with section 489B, I. P. C. and maintain the sentences passed on them for this offence.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice G. H. Thomas

PURBI DIN (PLAINTIFF-APPELLANT) *v.* HARDEO BAKHSH SINGH, DEFENDANT AND 8 OTHERS, PLAINTIFFS (RESPONDENTS)*

1935 *December,* 3

Transfer of Property Act (IV of 1882), section 82—Plaintiff owning portion of property mortgaged—Defendants owners of other portions of mortgaged property—Plaintiff paying entire mortgage-debt—Section 82, Transfer of Property Act, whether applies.

If the plaintiff owns a portion of the property covered by the mortgage and the defendants are owners of other portions of the mortgaged property and the plaintiff pays the whole of the mortgage debt for which the entire mortgaged property was liable, the case clearly falls within the terms of section 82, Transfer of Property Act and must be governed by the provisions of that section and the plaintiff is entitled to claim

*Second Civil Appeal No. 91 of 1934, against the decree of Pandit Krishna Nand Pande, Additional Subordinate Judge of Unao, dated the 24th of November, 1933, reversing the decree of Babu Gopal Chandra Sinha, Munsif (North), Unao, dated the 14th of December, 1932.