JURY REFERENCE.

Before Ross and Wort, JJ.

RAMJAG AHIR

v.

KING-EMPEROR.*

1927.

July, 28.

Evidence Act, 1872 (*Act I of* 1872), *section* 154—*witness tendered by prosecution but not examined—cross-examination by prosecution not permissible—Trial by Jury—reason for verdict not to be ascertained—Code of Criminal Procedure*, 1898 (*Act V of* 1898), *sections* 303 *and* 307(3).

Where the prosecution tenders a witness but does not examine him, cross-examination of the witness by the prosecution cannot be allowed under section 154 of the Evidence Act, 1872, which provides:

"The court may, in its discretion, permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party".

It is illegal for the judge to question the jury as to the reasons for their verdict.

King-Emperor v. *Punit Chain* (1), dissented from.

King-Emperor v. *Ali Hyder* (2), followed.

The facts of the case material to this report are stated in the judgment of Ross, J.

C. M. Agarwala, Assistant Government Advocate, in support of the reference.

H. L. Nandkeolyar (with him *Gopal Prasad* and *P. P. Varma*), against the reference.

Ross, J.—Six persons Ramjag Ahir, Subhag Ahir and Nathuni Ahir of Gobindih, Dasrath Ahir and Sukhram Ahir of Chilbilia and Rambarat Ahir of Nonar, were charged with dacoity and were tried by jury before the Assistant Sessions Judge of Shahabad. The jury were unanimously of the opinion that

* Jury Reference no. 9 of 1927. Reference made by T. D. Mukharji, Esq., Assistant Sessions Judge of Shahabad in his letter no. 920, dated the 14th June, 1927.

(1) (1922) 3 Pat. L. T. 413. (2) (1925) 4 Pat. L. T. 425.

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the accused were not guilty. The learned Assistant Sessions Judge disagreed with the verdict and has referred the case to this Court under section 307 of the Code of Criminal Procedure.

The occurrence took place on the evening of the 1st of February, 1927. Mahadeo Prasad the junior Sub-Inspector of Piro and Qamruzzaman Khan, the Sub-Inspector of Sahar, were travelling on an ekka driven by one Ayub along a katcha road towards Piro. They had reached a point between Bachri and Chilbilia when they met eleven or twelve men with lathis coming from the opposite direction. Mahadeo challenged them, whereupon they fell upon the ekka and its occupants and assaulted them and took away some property of inconsiderable value.

The evidence for the prosecution was the statements of the two Sub-Inspectors and Ayub; and of certain persons who had seen one or other of the accused at Piro bazar on the evening of the 1st of February or returning to their villages the following morning. This latter evidence would afford some corroboration of the evidence of the three principal witnesses if the identity of the assailants was reasonably well-established; but in itself it is of slight value. The question for decision in the case is the sufficiency or otherwise of the identification. On the 15th of February a test identification was held at Arrah. On that occasion Qamruzzaman identified Ramjag, Dasrath, Sukhram and Rambarat; Mahadeo Prasad identified Ramjag and Subhag; and Ayub identified Ramjag and Nathuni. It thus appears that Ramjag was identified by all three, whereas of the other accused there was identification by one witness only.

The defence was that the witnesses had had opportunities of seeing the accused on two occasions—first on the 4th of February when the Inspector Lataf Ali Khan visited the place of occurrence and the villages Chilbilia and Gobindih where he examined the accused persons of these villages and Bachri where

he examined the suspects of Nonar; and, secondly, on the 7th of February when the Superintendent of Police went to the spot. Of the present accused the Inspector examined Sukhram and Dasrath of Chilbilia, and Subhag and Nathuni of Gobindih, and he also examined Makhan Ahir, the father of the accused Rambarat, of Nonar. It is admitted by the prosecution that Qamruzzaman and Mahadeo Prasad were present at the place of occurrence when the Inspector went there; but the Inspector says in his evidence that Qamruzzaman simply showed him the place of occurrence and left immediately and he swears that none of the accused persons was present at the place of occurrence when he was there. Qamruzzaman also says that he went to the place of occurrence to meet the Inspector; and Mahadeo Prasad was at the place of occurrence on both occasions and saw Achhay Lal Dusadh, the chaukidar of Chilbilia, there. As to the second occasion, the Superintendent of Police was not examined; and it is contended on behalf of the accused that an adverse inference should be drawn against the prosecution from his absence. The witness on this second visit is Ziarur Rahman, the investigating Sub-Inspector. He consulted the Superintendent of Police about the case and postponed arrest until after the consultation. Then he made the arrest and took the suspects straight to Piro. He denies that ever before the evening of the 7th had he caused any suspects to be brought up to the thanah or to any place and says that neither Qamruzzaman nor Mahadeo was present when he examined the accused persons and suspects at Chilbilia and Gobindih and that the witnesses all left the place as soon as the Superintendent left and before the Sub-Inspector passed orders to bring up the suspects. Against this evidence there are the statements of two witnesses, Muhammad Hussain, dafadar, and Achhay Lal Dusadh, chaukidar of Chilbilia, Muhammad Hussain spoke of six persons including Subhag, Nathuni, Ramjag and Dasrath as having been brought to the place of occurrence when the

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Divisional Inspector went there. He also says that Mahadeo Prasad was there and Ayub, but he does not remember if Qamruzzaman was there or not. He remembered that out of the accused persons he had seen Ramjag, Subhag and Nathuni present at the place of occurrence during the Divisional Inspector's visit. It is said on behalf of the prosecution that this witness has made a mistake. It is not suggested that he is hostile to the prosecution; on the contrary the defence of the accused was that he was at the bottom of the whole case against them, because his house was looted by the Ahirs during the Bakrid riot the previous year. Achhay Lal Dusadh also spoke of certain accused persons including Dasrath and Sukhram being made to sit in the bathan of his village Chilbilia about 50 bighas from the place of occurrence in expectation of the Inspector's visit. This witness was attacked by the prosecution as hostile. He was not called by the prosecution, but the learned Assistant Sessions Judge noted on his deposition that he was " tendered as gained over ". He was cross-examined by the defence and also by the prosecution. This procedure was altogether wrong. Under section 154 of the Evidence Act

> " The Court may in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party."

But the witness must be called. Here the witness was not called by the prosecution. There was nothing to show that his evidence would have differed from his proof and there was no ground upon which he could be treated as an adverse witness or cross-examined by the prosecution.

Now in this state of the evidence it is difficult to see that the verdict of the jury is one with which this Court can interfere. The evidence of identification was slender in amount in the case of all the accused except Ramjag, and there was evidence which threw doubt upon the genuineness of the test identification. The night was admittedly dark; and the question

whether the accused were sufficiently identified is a queston of fact depending on oral evidence, upon which two opinions might well be held. Whatever view be taken of the powers of the High Court on a reference under section 307, I think it may be safely said that this case is not sufficiently clear for the interference of this Court with the verdict of the jury. I should add that the procedure adopted by the learned Sessions Judge in questioning the jury on the reasons for their verdict was illegal. The only power that the Judge has to question the jury is that conferred by section 303 of the Code and it is limited to putting such questions as are necessary to ascertain what their verdict is.

I would discharge this reference and direct that the accused be acquitted and released from bail.

WORT, J.—I agree that this reference should be discharged. In this case there is one point of which mention should be made.

It would appear that the jury returned a unanimous verdict, whereupon the learned Sessions Judge asked that they should give the reasons upon which their verdict was based. Now it may very well be that the learned Sessions Judge was under a misapprehension as to the proper construction to be placed on section 307, and it may have been in his mind that in order to assist this Court to which reference was being made, he should obtain the opinion or rather the reasons for the verdict of the jury. It may be, as I have said, that in construeing sub-section (*3*) of section 307 of the Code of Criminal Procedure (which reads—" after giving due weight to the opinions of the Sessions Judge and the jury ") he thought it necessary to obtain their reasons. But as was pointed out by a learned Judge of this Court in a case to which I shall presently refer, " the opinion of the jury is its verdict and not the reasons upon which that verdict is based ". Now I do not wish to express myself in too strong language, but all that I have to say in

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regard to this matter is that this practice which seems to be very much in vogue is not only inexpedient, but has no warrant in law. The rule in regard to this matter in England can be expressed in these terms—"A Judge would decline to hear reasons upon which the jury has based their verdict and they must not be asked to give them". Now I do not say that the English cases in regard to either substantive or adjective law relating to crime are binding on the Courts in India; but I should be surprised to hear that the law in India differs in this respect from that of England. But I need not leave it there. There is not only authority but authority of this Court to show that the practice to which I have referred is erroneous. The learned Assistant Government Advocate in arguing this point referred to a case the case of *Punit Chain* (1), in which one of the learned Judges of this Court expressed his view that it was the duty of the trial Judge to obtain from the jury their reasons so that the High Court, when reference is made, should be in the position to better understand the verdict given them. But this was dissented from by the learned Judge sitting with him in the Divisional Bench and it was that Judge who gave voice to the proposition to which I have given reference in the first part of this judgment, to the effect that the opinion of the jury is its verdict and not the reasons upon which it is based. But there is clear authority to show that this procedure is illegal [*King-Emperor* v. *Ali Hyder* (2)] where a Division Bench of this Court decided that "it is not competent to the Sessions Judge to ask the jury for their reasons after a clear verdict had been returned by them". In this case the jury were not only unanimous in the verdict but clear. The practice which the learned Sessions Judge adopted in this case was illegal and, in my view should cease.

I agree that the reference should be discharged.

(1) (1922) 3 Pat. L. T. 413. (2) (1923) 4 Pat. L. T. 425.