APPELLATE CRIMINAL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

H. W. SCOTT *v.* KING-EMPEROR.*

1935

Jan. 8.

Appeal to His Majesty in Council—Trial by jury by the High Court—Conviction, leave to appeal against—Letters Patent, cl. 39 Grounds for leave—Misdirection, Irregularity—Fair trial—Due administration of law—Grounds for leave to appeal and grounds of the appeal—Judicial Committee not a Court of criminal appeal or review—Charge to the jury—Judge's opinion of evidence—Criminal Procedure Code (Act V of 1898), s. 298 (2)—Improper admission of evidence.

Where a person has been convicted and sentenced by the High Court at a sessions trial an application for a declaration that the case is a fit one for appeal to His Majesty in Council lies under cl. 39 of the Letters Patent.

B. K. Ghosh v. *Emperor*, I.L.R. 52 Cal. 197—*referred to.*

Leave to appeal is not granted except where some clear departure from the requirements of justice exists. Misdirection as such, even irregularity as such, will not suffice. There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future. No leave to appeal can be granted where the grounds suggested cannot sustain the appeal itself, and the Privy Council will not allow an appeal on grounds that would not have sufficed for the grant of permission to bring it.

In re Dillet, 1887, 12 A.C. 459; *Ibrahim* v. *The King*, 1914 A.C. 599—*followed.*

The Judicial Committee is not a Court of criminal appeal or of criminal review. It will not interfere with the course of criminal law unless there has been such an interference with the elementary rights of an accused as has placed him outside the pale of regular law, or within that pale there has been a manifest violation of the natural principles of justice.

Arnold v. *King-Emperor*, 41 I.A. 149; *Mohindar Singh* v. *King-Emperor*, I.L.R. 13 Lah. 479—*followed.*

A Judge in charging a jury does not fulfil his duty if he merely reiterates the evidence given by the witnesses, and then leaves the jury to decide the case one way or another. He should direct the jury as to the weight which, in his opinion, ought to be attached to the evidence called at the trial; but he must at the same time let the jury consider the facts for themselves, and form their own opinion as to the value to be attached to the evidence of the several witnesses and the proper inference that ought to be drawn from the evidence as a whole.

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* Criminal Misc. Application No. 1 of 1935 arising out of Criminal Sessions Trial No. 42 of 1934 of this Court.

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Improper admission of evidence which has in no way deflected the course of the trial is not a ground upon which leave to appeal can be given.

Dal Singh v. *King-Emperor*, I.L.R. 44 Cal. 876—*referred to.*

McDonnell (with him *Williams*) for the applicant. This is a fit case for leave to appeal to His Majesty in Council under cl. 39 of the Letters Patent. There has been a grave miscarriage of justice in the Sessions Court for the following reasons; (*a*) the trial Judge refused to allow an important piece of evidence, namely, the "medical history sheet" of the brother of the deceased to be put in, when the defence was that the brother of the deceased was the real culprit; *b*) the trial Judge said that most of the prosecution witnesses were unreliable, yet he summed up very strongly in favour of the prosecution; (*c*) the trial Judge took the issues of fact out of the hands of the jury, and gave them the impression that they must accept the Judge's view of the facts; *Ofel Mollah* v. *King-Emperor* (1); (*d*) the examination of the accused, both in the committing Court and in the Sessions Court, was more in the nature of an attempt to extract a confession than an examination under s. 342 of the Criminal Procedure Code; *U Ba Thein* v. *King-Emperor* (2); (*e*) contrary to the provisions of s. 162 of the Code the police papers were put in as evidence in the case without any request in that behalf by the defence; and (*f*) two of the prosecution witnesses were arrested by the police before the rising of the Court on the private direction of the Judge. This was bound to influence a member of the jury or a witness who saw them to the prejudice of the accused.

(1) 18 C.W.N. 180. (2) I.L.R. 8 Ran. 372.

A. Eggar (Government Advocate) for the Crown. The leading case on the subject of appeals to His Majesty in Council in criminal matters is *In re Dillet* (1). This case was followed in *Arnold* v. *King-Emperor* (2) and *Clifford* v. *King-Emperor* (3). For the Privy Council to interfere with a criminal sentence there must be something so irregular or so outrageous as to shock the very basis of justice. *Mohindar Singh* v. *King-Emperor* (4). Mere admission of improper evidence is not a sufficient ground for interference unless injustice of a grave character has been done. *Dal Singh* v. *King-Emperor* (5).

The police papers were in fact used by the defence for the purpose of cross-examination. The defence was not prejudiced by the Court's refusal to call for the medical history sheet of the deceased's brother. The brother himself gave evidence, as did also the parents and two medical men. They all testified to the sanity of the brother. The trial Judge repeatedly pointed out to the jury that they were free to form their own opinion upon the evidence, and only gave them the benefit of his own judicial experience which it was quite legitimate and proper for him to do.

PAGE, C.J.—This application fails.

At the November Sessions of the High Court Henry Wall Scott by an unanimous verdict of the jury was convicted of murder, and sentenced to death.

The present application is presented under clause 39 of the Letters Patent of the High Court for a

(1) (1887) 12 A.C. 459.
(2) I.L.R. 41 Cal. 1023.
(3) I.L.R. 41 Cal. 568.
(4) I.L.R. 13 Lah. 479.
(5) I.L.R. 44 Cal. 876.

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declaration "that the case is a fit one" for appeal to His Majesty in Council.

In my opinion the application lies under clause 39 [*Barendra Kumar Ghosh* v. *Emperor* (1)]. Now, the test which the Court applies in order to determine whether a case falls within clause 39 of the Letters Patent is well settled. In *Ibrahim* and *The King* (2) Lord Sumner, delivering the judgment of the Judicial Committee, observed :

"Their Lordships' practice has been repeatedly defined. Leave to appeal is not granted 'except where some clear departure from the requirements of justice' exists : *Riel* v. *Reg.* (3); nor unless 'by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done' : *Dillet*'s case (4). It is true that these are cases of applications for special leave to appeal, but the Board has repeatedly treated applications for leave to appeal and the hearing of criminal appeals as being upon the same footing : *Riel*'s case (3) ; *Ex parte Deeming* (5). The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself ; and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. Misdirection, as such, even irregularity as such, will not suffice : *Ex parte Macrea* (6). There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future : *Reg.* v. *Bertrand* (7)."

In *Barendra Kumar Ghose* v. *King-Emperor* (8) Mookerjee J. observed that

"whether leave is granted by the Court appealed from or by the Judicial Committee, it is plain that the answer to the

(1) (1924) I L.R. 52 Cal. 197 at p. 218.
(2) (1914) A.C. 599 at p. 614.
(3) (1885) 10 A.C. 675.
(4) (1887) 12 A.C. 459.
(5) (1892) A.C. 422.
(6) (1893) A.C. 346.
(7) (1867) L.R.P.C. 520.
(8) 39 C.L.J. 1 at p. 3.

question, whether the case is a fit one for appeal, must depend on the same considerations; the grant of the leave to appeal is a step ancillary to the determination of the appeal, and the principles which regulate the ultimate decision of the appeal cannot obviously be ignored when an application for leave is examined: *Ebrahim* v. *R.* (1)."

The *locus classicus* upon the subject is *In re Dillet* (2); and the practice of the Privy Council pursuant to *In re Dillet* (2) was clearly explained by Lord Shaw in *Arnold* v. *The King-Emperor* (3) as follows:

"The power of His Majesty under his Royal authority to review proceedings of a criminal nature, unless where such power and authority have been parted with by statute, is undoubted. Upon the other hand, there are reasons both constitutional and administrative, which make it manifest that this power should not be lightly exercised. The over-ruling consideration upon the topic has reference to justice itself. If throughout the Empire it were supposed that the course and execution of justice could suffer serious impediment, which in many cases might amount to practical obstruction, by an appeal to the Royal Prerogative of review on judicial grounds, then it becomes plain that a severe blow would have been dealt to the ordered administration of law within the King's dominions."

His Lordship, after citing the passage from *Dillet*'s case (2) to which reference has already been made, proceeded:

"The present case brings prominently before the Board the question of what is the sense in which those words are to be interpreted. If they are to be interpreted in the sense that wherever there has been a misdirection in any criminal case, leaving it uncertain whether that misdirection did or did not affect the jury's mind, then in such cases a miscarriage of justice could be affirmed or assumed, then the result would be to convert the Judicial Committee into a Court of Criminal Review for the Indian and Colonial Empire. Their Lordships

(1) (1914) A.C. 599 at p. 614. (2) (1887) 12 A.C. 459.
(3) (1914) 41 I.A. 149.

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are clearly of opinion that no such proposition is sound. This Committee is not a Court of Criminal Appeal. It may in general be stated that its practice is to the following effect; It is not guided by its own doubts of the appellant's innocence or suspicion of his guilt. It will not interfere with the course of criminal law unless there has been such an interference with the elementary rights of an accused as has placed him outside the pale of regular law, or, within that pale, there has been a violation of the natural principles of justice so demonstratively manifest as to convince their Lordships, first, that the result arrived at was opposite to the result which their Lordships would themselves have reached, and, secondly, that the same opposite result would have been reached by the local tribunal also if the alleged defect or misdirection had been avoided. The limited nature of the appeal in *Dillet*'s case (1) has been referred to, and their Lordships do not think that its authority goes beyond those propositions which have now been enunciated."

In *Mohindar Singh and another* v. *The King-Emperor* (2) Lord Dunedin, delivering the judgment of the Board, tersely observed :

"Their Lordships have frequently stated that they do not sit as a Court of Criminal Appeal. For them to interfere with a criminal sentence there must be something so irregular or so outrageous as to shock the very basis of justice."

Now, I have perused the record in this case. I have read the evidence of the witnesses, and we have had the advantage of a careful argument by Mr. McDonnell on the case presented on behalf of the applicant. It is unnecessary for the purposes of disposing of this application to enter upon a discussion in detail of the facts disclosed by the evidence. It is sufficient, in my opinion, that we should hold, as we do, that there was ample evidence adduced at the trial to justify the finding of the jury that the applicant was guilty of the murder of Locksley

(1) (1887) 12 A.C. 459. (2) (1932) I.L.R. 13 Lah. 479 at p. 482.

Telfer. In order to understand the nature of the case in which the present application is made, however, it is as well to point out that it is not in dispute that the applicant, Scott, was filled with a consuming passion for Locksley Telfer's wife, and that he thought, if she was divorced from the deceased, that she might be induced to throw in her lot with him. Further, it is common ground that the applicant, Scott, drank three double measures of whisky about 8 o'clock on the night of the 23rd of June, and that he then hired a taxi cab, and with a loaded pistol on him proceeded to the house where Locksley Telfer lived. It is also not disputed that on arrival at the house a message was sent by the applicant to Locksley Telfer asking him to come out, that Locksley Telfer came out of the house and stood on the right hand side of the car, that an altercation took place between the applicant, Scott, who was seated on the back seat of the car and Locksley Telfer who was standing outside the car, that after a time Locksley Telfer was shot dead by some one within the car, that subsequently while Locksley Telfer's brother Douglas Telfer and Scott were struggling together a stranger named Clayton appeared on the scene, and that Clayton took hold of the applicant, struck him on the back of the head, and when the applicant fell to the ground pinned him to the ground until the police arrived.

Upon the evidence adduced at the trial the jury, if they elected to accept it, in my opinion, were amply justified in finding the applicant, Scott, guilty of the murder of Locksley Telfer.

What was the defence set up at the trial? It was twofold. On the one hand the applicant himself in his examination under section 342 stated that he was engaged in a struggle with Locksley Telfer and

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with Douglas Telfer who had climbed into the car from the left side, that in the course of the struggle he lost possession of the loaded automatic pistol which "got into young Telfer's hand", and that somehow or other Locksley Telfer was shot, not by him but it would seem by his brother Douglas Telfer. On the other hand his learned counsel adopted a different line of defence, namely, that the applicant, Scott, was acting as he did act in self-defence. Such a defence, of course, involves the assumption that it was the applicant, Scott, who fired the shot that killed Locksley Telfer, and that defence was wholly inconsistent with the defence put forward by the applicant himself, namely, that he had never fired the pistol that night at all. These two inconsistent theories which formed the basis of the defence were fully and clearly put before the jury. I propose to say no more about them except that each of them was rejected by the jury.

Now, the learned advocate for the applicant has based his argument in support of the present application upon more than one contention. He rightly and properly stated, however, that he mainly relied upon the contention that in his charge to the jury the learned trial Judge took the issue of fact out of the hands of the jury, and directed the jury in such a way that they must have been under the impression that they were precluded from exercising their own judgment as to the conclusion at which they would arrive on the issues of fact, and that they must accept the view of the facts which found favour with the learned trial Judge. In my opinion if the charge had been one of that description undoubtedly there would have been a violation of the natural principles of justice; for the effect would have been that the accused would not have been tried by a jury, as

prescribed by law. I am of opinion, however, that the applicant wholly failed to substantiate this contention.

In my opinion a Judge in charging a jury does not fulfil his duty if he merely reiterates the evidence given by the witnesses for the prosecution and the defence, and then leaves the jury to decide the case one way or another.

Under section 298 (2) of the Criminal Procedure Code it is laid down that "the Judge may, if he thinks proper, in the course of his summing up, express to the jury his opinion upon any question of fact, or upon any question of mixed law and fact, relevant to the proceeding". In my opinion it is proper and reasonable that a Judge, when charging a jury at the end of a criminal trial, should direct the jury as to the weight which, in his opinion, ought to be attached to the evidence called at the trial. But, of course, in charging the jury in connection with the facts of the case the Judge must leave the jury under no misapprehension as to their duty in the matter, namely, that the jury must consider the facts for themselves, and form their own opinion as to the value to be attached to the evidence of the several witnesses, and the proper inference that ought to be drawn from the evidence as a whole.

Now, in the present case there is no doubt that the learned trial Judge did express, sometimes in strong terms, the view which he took as to the evidence of certain witnesses who were called at the trial. He was entitled to do so, and, in my opinion, while he expressed his view in strong terms he carefully set before the jury the substance of the evidence that had been adduced at the trial; and so far from seeking to withdraw the decision as to the facts from the domain of the jury he took meticulous care over and over again to warn the jury that they were not

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bound to accept any view which he might express as to the value or merits of the evidence, but that it was their duty and their responsibility to consider the evidence for themselves, and to form their own conclusion as to whether the accused was guilty or not of the offence with which he was charged. At the outset of his charge the learned Judge observed :

"It is your duty to decide the facts. Both of us have our respective responsibilities, and I feel sure you are prepared to shoulder your responsibility just as much as I am prepared to shoulder mine . . .

As you have been told, you are to judge, under my direction, what are the true facts of this case. You have to find the facts in accordance with the law as I shall now try and lay it down to you. It is my business to tell you what is the law by which you are to be guided. So far as the law is concerned, in this tribunal I am the last word, and whatever I say you must take to be correct. A further duty is laid upon me by law to sum up the evidence to you, to show you how the law is applicable to the evidence which we have heard, and how the evidence as we have heard it will fit in with the law as I shall explain it to you. More than that, it is my duty to guide you, as far as I can, in coming to your decisions on the facts. I have been trying criminal cases in this country now for the past more than 24 years first as a Magistrate and subsequently as a Judge, and you, as a jury, are entitled, so far as I can give it to you, to the benefit of such experience as I have gained during the course of this time. So, when I come to sum up the evidence to you, I must necessarily, and I shall, express opinions on the evidence, and I shall tell you what evidence I think to be credible evidence on which you may rely, and I shall tell you what part of the evidence I think to be incredible. I shall express opinions as to what facts I think have been proved and what facts, in my opinion, have not been proved. When I am addressing a jury, as I hope in most other things of my life, I do not believe in half-measures, and I shall probably express strong opinions, but bear in mind, Gentlemen, that you are not bound by any opinion which I may express in regard to the facts. No doubt you will listen to what I have to say—as you

have listened to what learned counsel have said—and give due consideration to my address and to the opinions I express, but so far as the facts are concerned, if you think that I am wrong, then it is open to you to say that I am wrong. So far as the law is concerned, you must take what I say. So far as the evidence and the facts are concerned, it is for you to come to the final decision. If you do not agree with anything I say on that subject, then you can differ from me."

The learned advocate for the applicant conceded that not only in this passage did the learned trial Judge point out specifically that it was the duty of the jury to form their own opinion upon the facts of the case but that in 21 instances in the course of the summing up he repeated in substance the same warning to the jury. How it can reasonably be contended in such circumstances that in the present case the learned trial Judge withdrew from the domain of the jury the right to determine the facts after forming their own opinion upon the evidence I am bound to say passes my comprehension. I go further. In my opinion, although the learned trial Judge did pass severe strictures upon the credibility of certain of the witnesses whose evidence was adduced at the trial, the summing up taken as a whole was an exhaustive, critical and accurate statement of the evidence at the trial, in which after duly charging the jury he left the final decision expressly in their hands. There were certain other minor incidents in the course of the trial upon which the learned advocate for the applicant further based the present application, but, in my opinion, there is no substance in any of them.

Mr. McDonnell, who was not present at the trial, relied upon the fact that Mr. Williams who was then counsel for the accused had applied that the medical history sheet, which I take it was a document prepared by the police upon information received from

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the relatives of Douglas Telfer who was for a short time under observation in a mental hospital, should be produced by a police officer under subpoena, and that the application had been disallowed by the learned trial Judge. I am not prepared to discuss whether or to what extent that document was or could be made evidence at the trial, because in the circumstances, in my opinion, it cannot reasonably be contended that it would have had any material effect upon the course of the proceedings whether this document had or had not been in evidence at the trial. In any event it could only have been used for the purpose of testing the credibility of those persons upon whose information the history sheet had been compiled, and to my mind it is quite clear that Mr. and Mrs. Telfer, the father and mother of Douglas Telfer when in the witness box were prepared to answer fairly any question that was duly put to them.

The learned trial Judge pointed out in the course of his summing up that what was important for the jury to consider in connection with the mental condition of Douglas Telfer was his demeanour in the witness box. I respectfully agree with him. But when it is borne in mind that the jury had before them not only Douglas Telfer himself but his father and mother and the evidence of Major Fraser and Dr. Kundu, both of whom stated that Douglas Telfer while under observation did not disclose any sign of insanity, it is idle to contend that the non-production of the medical history sheet, even if it were admissible in evidence, could afford any ground upon which this Court would be justified in making the declaration which is sought.

The learned advocate for the applicant further stated that inasmuch as the learned Judge in his

charge to the jury expressed the opinion that certain of the witnesses for the prosecution were in his view not worthy of credence, he ought to have specifically directed the jury that they should critically scrutinize the evidence upon the ground that the main witnesses as to the *factum* of the murder were relatives of the deceased. Taking the charge as a whole, however, in my opinion, the jury were fully and sufficiently directed as to the evidence, and there was no ground for complaint as suggested on behalf of the applicant.

The only other matter to which reference need be made, was a contention by Mr. McDonnell that the trial became vitiated because, after two witnesses for the prosecution had given their evidence and the Court had risen for the day, the learned trial Judge had privately directed that these witnesses should be taken into custody. Although at first Mr. Williams, who appeared for the applicant at the trial, seemed loth to do more than instruct his leader Mr. McDonnell to make the suggestion, he has this morning sworn an affidavit *inter alia* to the following effect:

"That two witnesses for the prosecution Maung Than and Ba Tin after their evidence was concluded on the 26th November were arrested outside the Court when the Court rose for the day by the police, and when I went out of the Court between 4-30 and 5 p.m. on the 26th November before the case for the prosecution had concluded these two witnesses were seen by me arrested by the police outside the Court on the western corridor, and I have no doubt they could have been seen by the Jury as well."

The affidavit does not go very far. If the deponent left the Court at 5 o'clock after the Court had risen at 4-30, it is extremely unlikely that any person concerned in the case would still be in the western corridor, or that the jury or any of the

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witnesses would have seen these two witnesses under arrest. No affidavit is forthcoming, nor should I be disposed to attach much weight to it if it were, to the effect that any juror or witness either saw or was influenced by this incident. In my opinion there is no ground for suggesting or pretending that the course of the trial was influenced in the slightest degree by what the deponent of this affidavit stated that he saw.

One other matter was referred to by the learned advocate for the applicant in support of his argument. It was that in the course of the cross-examination of Douglas Telfer his statement to the police was put in evidence and marked Exhibit 3. It is clear that Exhibit 3 was called for by the defence, but whether the defence put in the whole statement or how otherwise it became an exhibit is not clear. It may well be, I do not pause to consider, that only such parts of that statement ought to have been admitted in evidence as had been made use of by the defence or in re-examination by the Crown; but, in my opinion, even if the whole statement ought not to have been admitted, the course of the trial was in no way thereby deflected, and it would form no ground upon which an application under clause 39 could be based [*Dal Singh* v. *King-Emperor* (1)]. That disposes of the contentions upon which the applicant seeks to support the present application, and in my opinion he has lamentably failed to bring the case within the rule of practice laid down in *Arnold* and *King-Emperor* (2). It was incumbent upon him, as therein stated, to make out at any rate a *primâ facie* case that

"there has been a violation of the natural principles of justice so demonstratively manifest as to convince their Lordships, first,

(1) (1917) I.L.R. 44 Cal. 876. (2) (1914) 41 I.A. 149.

that the result arrived at was opposite to the result which their Lordships would themselves have reached, and secondly, that the same opposite result would have been reached by the local tribunal also if the alleged defect or misdirection had been avoided."

So far from being satisfied that the applicant has brought the case within the ambit of *Arnold* v. *King-Emperor* (1), it appears to me, after considering the record of the case, that not only does the case not fall within clause 39 of the Letters Patent but that, as at present advised and without entering upon a detailed discussion of the facts, the present application is one of a series of attempts on the part of the applicant with the assistance of experienced and ingenious counsel to avoid the ineluctable consequences of a murder conceived and deliberately committed by reason of the uncontrolled desire of one man to possess the wife of another.

For these reasons, in my opinion, the declaration must be refused, and the application dismissed.

MYA BU, J.—I agree.

(1) (1914) 41 I.A. 149.