PRIVY COUNCIL.

Present: Viscount Sumner, Lord Thankerton and Sir Binod Mitter.

1929

Dec. 6.

ATTA MOHAMMAD

versus

THE KING-EMPEROR.

Privy Council Appeal No. 114 of 1929.
(Lahore High Court No. 235 of 1929.)

Criminal Case—Appeal to Privy Council—Alleged irregularity in Procedure—Absence of substantial injustice—Function of Judicial Committee in Criminal Cases.

Seven persons including the appellant, were charged that they were members of an unlawful assembly armed with deadly weapons, and that, in furtherance of a common intention, one of them, the appellant, caused the death of a named person, and that all were thereby guilty under sections 149 and 34 of the Indian Penal Code of causing the death, and thereby committed an offence punishable under sections 302, 149, 148 and 34 of that Code. At the trial the appellant, who pleaded an *alibi*, was alone found guilty ; he was found guilty of being the intentional cause of the death of the person killed, and he was sentenced to death under section 302. An appeal to the High Court on the evidence was dismissed. On an appeal to the Privy Council he complained for the first time (1) that, as he was not charged under section 300 of the Code, and the other accused were acquitted, he should not have been convicted ; (2) that it was not explained to him that he might be convicted under section 300, and that he was thus deprived of the opportunity of putting forward what might have been a successful defence under that section.

Held that, as there was a complete absence of substantial injustice, or of anything which outraged what is due to natural justice in criminal cases, the appeal should be dismissed.

Their Lordships do not act as a Court of criminal appeal, and are not concerned to regulate procedure of Courts in India, or to criticize what is mere matter of procedure ; the

questions raised, whether of any substance or not, were questions for the Indian Courts.

Appeal (No. 9 of 1928) by special leave from a judgment of the High Court (April 29, 1929) which confirmed a judgment of the Sessions Judge at Mianwali (February 1, 1929) convicting the appellant of murder and sentencing him to death.

The material facts appear from the judgment of the Judicial Committee.

Special leave to appeal was granted on July 29, 1929, by the Lord Chancellor, Lord Darling and Lord Tomlin (1).

MOREY, for the Appellant: Under section 221, sub-sections (1) and (4) of the Code of Criminal Procedure, the appellant was entitled to have all the sections under which he was charged clearly stated. He was charged only under sections 149 and 34 of the Penal Code, which relate respectively to unlawful assembly and the acts done by several persons in furtherance of a common intention. All the other accused being acquitted, the appellant could not be convicted under the charge as framed. There was no reference to section 300 (murder), and, though section 302 was referred to, that was only as to the punishment to which he would be liable upon a conviction under either section 149 or section 34. Further, it was not explained to the appellant under either section 149 or section 34. The circumstances stated above constitute so serious an

(1) The terms of the charge and other material particulars of the case were not fully before the Board. It appears that owing to the intervention of the long vacation, an adjournment of the hearing of the petition might result in delay which would be avoided by granting special leave. A. M. T.

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error in procedure that this appeal should be allowed; that course would be in accordance with the practice of the Board:—*Dal Singh* v. *The King Emperor* (1). Further, it was not explained to the appellant that under the charge framed he could be convicted as though he had been charged under section 300. If he had understood that, he might have put forward the defence that he personally acted in self-defence, but that would have been no answer to the actual charge framed. Thereby he suffered injustice.

Reference was made also to *King-Emperor* v. *Mathura Thakur* (2), and *Aiyavu* v. *Queen-Empress* (3).

DUNNE K. C. and WALLACH for the Respondent: A charge of murder against the appellant was clearly involved in the charge framed, as it stated that he had committed an offence punishable under section 302 of the Penal Code, which in terms provides the punishment for murder. The form of the charge was in accordance with that provided by the Code of Criminal Procedure, schedule V, form 28. There was no error in stating the charge; if there was, the accused was not misled, and the error was immaterial under section 225 of the Code of Criminal Procedure. Though the accused was represented by a pleader, he did not raise the present objection upon appeal to the High Court. Even if there was an irregularity, which is not admitted, it was merely one of procedure, which resulted in no injustice whatever.

MOREY replied.

(1) (1917) I. L. R. 44 Cal. 876, 889: L.-R. 44 I. A. 137, 146.
(2) (1901) 6 Cal. W. N. 72, 76. (3) (1885) I. L. R. 9 Mad. 61.

The judgment of their Lordships was delivered by—

VISCOUNT SUMNER—As this is a capital case, and as the conviction took place so long ago as February last, their Lordships think it best to give their reasons for the conclusion at which they have arrived, without taking further time to put them into writing.

The appellant's conviction and sentence having been confirmed on appeal, he applied to their Lordships last July for special leave to appeal. His petition was allowed, his point being in substance that he had been convicted without having had a fair opportunity of knowing what the charge was that he had to meet, and particularly of raising defences other than the one raised, or of relying on any circumstances which would have reduced the offence to a minor one. Under those circumstances their Lordships did what they rarely have occasion to do, and advised His Majesty in Council to grant special leave *ex abundanti cautela*, so that it might be discussed at length whether he had in truth been deprived of so important an opportunity.

Mr. Morey has put the case before their Lordships, as he always does, with great clearness and fairness. He complains that the charge recorded was that Atta Mohammad and a number of others, seven in all, were members of an unlawful assembly armed with deadly weapons and that, in prosecution of a common object and in furtherance of a common intention, one of the members, Atta Mohammad, caused the death of Ghulam Muhammad, and all were thereby, under sections 149 and 34 of the Indian Penal Code, guilty of causing the death of Ghulam

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Muhammad, and thereby committed an offence punishable under sections 302, 149, 148 and 34 of the Indian Penal Code. Section 34 was introduced by way of amendment or addition afterwards. The phraseology of the charge is common, but it is true that, of these sections which are mentioned one after another, some refer to the substance of the offence, and others, or one, at any rate, of them, to the punishment of the offence.

As the result of the trial, the appellant alone was found guilty, but he was found guilty of being the intentional cause of the death of Ghulam Muhammad. He appealed, and admittedly his notice of appeal contained no suggestion whatever of the case that is now made on his behalf. He had pleaded an *alibi* at the trial, and in his grounds of appeal he embodied various criticisms upon the weight of the evidence, and then he added that an assault under these conditions would amount to private defence, and that the offence does not amount to murder, and that the sentence called for should have been much lighter.

He appeared by an advocate on the appeal and had been legally defended at the trial, and it is as clear as possible that, with full knowledge of the course which the trial had taken, neither the appellant himself nor those who represented him had any sense whatever of the injustice that is now urged or any idea of his having been deprived of the opportunity of knowing the charge on which he was tried or of raising defences appropriate to that charge. The argument is that, because there was no specific mention of section 200 of the Indian Penal Code as the section under which he was being proceeded

against, and because he was charged, as a member of an unlawful assembly, with acting with a common object and in furtherance of a common intention, he being the person who struck the blow, the acquittal of all the other persons put an end to that charge, and the possibility that he might be nevertheless convicted under section 300 was one that had never been explained to him properly or at all, and one which it must be taken did him the serious injustice of misleading him as to his true position and depriving him of what might have been a successful defence.

The proceedings on the appeal, however, make it quite clear that in fact he was deprived of no proper opportunity, that the nature of the charge was quite sufficiently known to him and to the advocate who appeared for him, and that he was unconscious of having suffered any wrong of that kind until the appeal fell into able hands in this country.

It is well to add that there has been no complaint that he was not separately indicted, and no reliance has been placed on section 233 of the Criminal Procedure Code; the case has been solely put upon departure from the statutory provisions as to stating and explaining the particular charge, which has been proceeded with.

Under these circumstances their Lordships think it quite plain that there has been no departure from the requirements of natural justice, and that there has been a trial which in all substance was fair and which has given the prisoner every real opportunity that he required to understand the charge and make his defence.

The practice of their Lordships' Board is so well settled with regard to such a case that it is unnecessary to cite authorities or to restate principles.

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The most that is said here is that certain statutory requirements of procedure were not satisfied, and as their Lordships have so often had occasion to say, India is provided by law with a complete and carefully devised Criminal Procedure Code applicable to the Courts of criminal review, which have considered this case and the functions of which have been discharged. Their Lordships, in advising His Majesty, do not act in criminal matters as a Court of Criminal Appeal, and are not concerned to regulate procedure of Courts in India or to criticize what is mere matter of procedure. Accordingly, their Lordships find it unnecessary to discuss the points which have been raised as to the propriety of such a form of indictment as this, as to the utility and extent of explanations such as the Code refers to, and as to the validity of such sections as section 225 as an answer to any irregularity that there may have been. They do not desire it to be understood that they think that the contentions raised on behalf of the appellant on those points could be sustained. No opinion was expressed in the Court below as regards that and the point was never considered there. Their Lordships have, therefore, nothing to say upon these questions except that they are questions for the Indian Courts in the exercise of their criminal jurisdiction.

In the complete absence of any substantial injustice, in the complete absence of anything that outrages what is due to natural justice in criminal cases, their Lordships find it impossible to advise His Majesty to interfere. Their Lordships, therefore, will humbly advise His Majesty that for these reasons this appeal must be dismissed.

A. M. T.

Solicitor for appellant: *T. L. Wilson & Co.*

Solicitor for respondent: *Solicitor, India Office.*

PRIVY COUNCIL.

Before Viscount Dunedin, Sir George Lowndes and Sir Binod Mitter.

1929

Dec. 16.

WALI MUHAMMAD AND OTHERS (DEFENDANTS) Appellants

versus

MUHAMMAD BAKHSH AND OTHERS (PLAINTIFFS), Respondents.

Privy Council Appeal No. 31 of 1929.
[Lahore High Court No. 814 of 1923 (1)

Civil Procedure Code, Act V of 1908, section 100—Second Appeal—Finding of Fact—Construction of Document—Whether question of Law involved.

A decision of fact by a first appellate Court does not involve a question of law so as to be open to reconsideration upon second appeal under section 100 of the Code of Civil Procedure, 1908, merely because documents, which were not instruments of title, or otherwise the direct foundations of rights, have to be construed for the purpose of deciding the question.

Mortgagees resisted a suit in 1921 to redeem, alleging that the mortgagors about 1892 had sold to them the equity of redemption. The land being in the Punjab, a sale and transfer could be effected orally. The defendants relied, *inter alia*, upon entries of their names as owners in a record-of-rights made in 1892 under the Punjab Land Revenue Act, 1887, section 31, which under section 44 were to be presumed to be correct. The District Judge found that the alleged sale was not proved.

Held, that the *onus* was upon the mortgagees to prove that the mortgage was no longer subsisting, and that the decision of the District Judge was one of fact, and therefore

(1) *See* (1924) I. L. R. 5 Lah. 84.