APPELLATE CRIMINAL.

Before Mr. Justice Baguley.

NGA MYO *v.* THE KING.*

1938

Feb. 14.

The answer of the Full Bench having been received the following order in the appeal was passed by

BAGULEY, J.—This case has now got to be considered by me finally, the Full Bench having made its pronouncement on the reference which I made to it. In view of the terms of the answer and of what I said in my order of reference there is very little which I need say, but before finally disposing of the appeal I would like to make a few remarks with regard to the Full Bench answer because the gist of this answer does, undoubtedly, run counter to the general trend of the decisions on this point made by the High Courts in India.

The underlying fallacy which, with respect, seems to me to vitiate the decisions of the Indian High Courts lies in that they have failed to keep in view the fact that the leading case of *Baskerville* (1) deals with the way in which a Judge has got to charge his jury, whereas practically all the cases which come before this Court in appeal like the present case are decisions of a Judge who is trying a case without a jury. In dealing with *Baskerville*'s case the Indian High Courts seemed to have regarded what was said in *Baskerville*'s case as being directions to a jury as to what they are to believe and what they are not to believe. This is entirely wrong. If *Baskerville's* case is read carefully it will be seen that

* Criminal Appeal No. 1228 of 1937 from the order of the Addl. Sessions Judge of Myaungmya in Sessions Trial No. 19 of 1937.

(1) (1916) 2 K.B. 658.

1938

NGA MYO v. THE KING.

BAGULEY, J.

the Court there definitely directs a Judge that he has got to charge his jury on certain lines : he has got to warn the jury that an approver is to be regarded with suspicion and his evidence has got to be scrutinized very closely : indeed he has got to warn his jury that it is as a rule unsafe to convict on the uncorroborated evidence of an accomplice : that he has got to warn the jury that corroboration of the accomplice's evidence must be sought in evidence which does not carry the same taint as the evidence which requires corroboration and that, therefore, the evidence of one accomplice should not be regarded as corroborating the evidence of another accomplice in the sense in which the word is used in English Law. This warning the Judge has got to give to the jury and the Court of Appeal said that when a jury has not been charged on these lines and given the proper warning, the Court of Appeal would upset the conviction.

It is not, however, laid down that the jury has in every case got to accept the warning of the Judge. No Court in England has ever attempted to dictate to a jury what they are, or are not, to believe. If the Judge is of opinion that there is no legally admissible evidence for the jury to consider, it is his duty to withdraw the case from the jury or to direct them to give a formal verdict of " not guilty "; but if there is a case in which there is evidence which can be left to the jury then once the jury has taken the case into consideration, the jury has a free hand as to what it will, or will not, believe.

Baskerville's case goes on further, however, to say that if a jury has been given a proper warning and has given a verdict of " guilty " then in cases in which the conviction depends solely on the uncorroborated evidence of an approver or approvers unsupported by external corroboration from an untainted source then

when the case comes up in appeal the Court of Appeal will consider the evidence itself and will only interfere when it is of opinion that no reasonable jury properly directed could have come to the conclusion that the accused was guilty : so, it is manifest that even in England when a jury has been properly charged on the lines laid down in *Baskerville*'s case it is quite possible that after an examination of the evidence the Court of Criminal Appeal may confirm the conviction, even when there is no external support for the evidence of the approver or approvers.

If *Baskerville*'s case has the meaning given to it by many of the Courts in India a large part of the judgment in *Baskerville*'s case would have been completely unnecessary, for many Courts in India have held that a conviction based entirely on what they call tainted evidence is illegal and must be upset in appeal, as though the Judges in *Baskerville*'s case, after laying down the lines upon which a Judge ought to charge the jury had gone on to say something like the following :

" If, however, a conviction is based entirely on the uncorrobrated evidence of an accomplice or accomplices, no matter what the charge to the jury may have contained, this Court will upset the conviction."

That is what Beaumont C.J. says in *Shankarshet Ramshet* v. *King-Emperor* (1), and that is what the majority of the Bench said, before the decision of *Baskerville*'s case, in *Queen-Empress* v. *Maganlal* (2).

It will be seen, therefore, that most of the High Courts in India have gone a good deal further than *Baskerville*'s case goes, despite the fact that they appeared to think that they were applying *Baskerville*'s case, and it

(1) (1933) I.L.R. 58 Bom. 40, 43. (2) (1889) I.L.R. 14 Bom. 115.

1938

NGA MYO v. THE KING.

BAGULEY, J.

must, of course, be remembered that these decisions completely rule out the discretion which is given by section 133 of the Evidence Act which says that a conviction is not illegal because it depends solely on the uncorroborated evidence of an approver.

With regard to the present appeal I am satisfied that the evidence of the approver Nga Sint coupled with the two confessions made by the co-accused are sufficient to justify the finding that the appellant Maung Myo did take part in this dacoity. He was armed at the time and the sentence is the minimum allowed by Law.

I therefore dismiss this appeal.

APPELLATE CIVIL.

Before Mr. Justice Mya Bu, and Mr. Justice Mackney.

1937

Feb. 12.

KO PO MO AND ANOTHER

v.

MAUNG LU KHIN.*

Transfer of Property Act, s. 53A—Contract executed and possession given prior to amending Act coming into force—Suit filed after the amending Act in force—Applicability of section—Retrospective effect.

The provisions of s. 53A of the Transfer of Property Act have effect in a case where the contract was executed and the transferee had taken possession before the date the section came into operation (1st April 1930) provided the suit in which the section is set up as a defence was filed after it came into force. It is not the making of the contract that brings this provision of the Act into operation, but the filing of the suit by the transferor. The new enactment enables the defendant to set up a defence in certain circumstances, and in considering such circumstances it is the date of the suit that is relevant, and not the date of the agreement.

Durgapada v. *N. N. Chaudhuri*, I.L.R. 62, Cal. 492 ; *Pir Baksh* v. *Mahomed Tahar*, I.L.R. 58 Bom. 650 (P.C.); *Ramakrishna Jha* v. *Jainandan Jha*, I.L.R. 14 Pat. 672 ; *Suleman* v. *Patell*, 35 Bom. L.R. 722, referred to.

---

* Civil Second Appeal No. 196 of 1936 from the judgment of the District Court of Myaungmya in Civil Appeal No. 6 of 1936.