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granted. I am unable to read the sentence quoted above as meaning anything beyond what I have just summarised. In my opinion that observation in the judgment does not affect the considerations which made me hold that the Court is not concerned with the question whether the execution of the decree in Junagadh is time barred.

Issue No. 1 will be found in the negative, and issue No. 2 in the affirmative. There will, ther. fore, be a decree for the plaintiff against defendant No. 1 as prayed.

Attorneys for plaintiff : Messrs. *Bhatt & Co.*

Attorneys for defendant No. 1 : Messrs. *Gulamali, Noorani & Co.*

Attorneys for defendant No. 2 : Messrs. *Choksey & Co.*

Suit decreed.

N. K. A.

APPELLATE CRIMINAL.

Before Mr. Justice B. J. Wadia and Mr. Justice Kania.

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May 9

EMPEROR *v.* JHINA SOMA AND OTHERS (ORIGINAL ACCUSED NOS. 1 TO 3).*

Criminal Procedure Code (Act V of 1898), ss. 297, 537—Judge to explain law to jury—Provision imperative—Omission to explain—Effect—Verdict of jury—No reason to interfere unless perverse—Indian Penal Code (Act XLV of 1860), ss. 299, 300, 302.

The provision contained in s. 297 of the Criminal Procedure Code, 1898, is imperative and in cases tried with the help of a jury it is the clear duty of the judge to explain what in law are the essential requisites of an offence and what must be proved to constitute that offence. The explanation is necessary in all cases and it is certainly very important in a case where the charge is one of murder.

At a jury trial of three persons accused of an offence of murder the Sessions Judge omitted to explain the law to the jury. The trial ended in the acquittal of the accused. The Government having appealed :—

Held, that although it was the bounden duty of the judge to explain the law to the jury before dealing with the evidence, the omission to explain the provisions contained in ss. 299 and 300 of the Indian Penal Code had not been such as could be said to have occasioned a failure of justice.

* Criminal Appeal No. 493 of 1938.

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Emperor v. *Pultan Hussan*,[1] referred to.

Where, apart from the omission to explain the law, the Sessions Judge summed up the evidence very clearly and fairly on both sides, and left the matters which were within the province of the jury for their consideration:—

Held, that there was no reason to interfere with the verdict.

Emperor v. *Bai Lali*,[2] referred to.

CRIMINAL APPEAL against an order of acquittal passed by D. V. Vyas, Sessions Judge, Surat.

Murder.

Soma (accused No. 3) was the father of Jhina and Dayla (accused Nos. 1 and 2).

On May 5, 1938, a marriage procession was proceeding at lamplight towards Malvan, the occasion being the marriage of one Jogi.

Ranchhod Bhula (deceased) who had gone to Billimora to get a wedding present for the bridegroom joined the procession along with his wife, her parents, aunt and a little child. The child wanting to ease herself, the deceased stayed behind with his family.

It was alleged that the three accused along with a person called Chankka came up shouting when the first accused gave the deceased blows with a pen-knife, while the second and third accused held him.

The accused were put up for trial; accused No. 1 under s. 302 of the Indian Penal Code and accused Nos. 2 and 3 under s. 302 read with s. 114 of the Code.

The defence was that the deceased and Chankka were the aggressors and that the former was accidentally hit by the thrust of a penknife in the hands of the latter. In the alternative, the accused pleaded right of private defence.

The learned Sessions Judge, agreeing with the unanimous verdict of the jury, acquitted the accused.

The Government of Bombay appealed.

[1] (1935) 60 Bom. 599, F. B.

[2] (1932) 34 Bom. L. R. 896.

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B. G. Rao, Assistant Government Pleader, for the Crown.

G. C. O'Gorman, with *V. N. Chhatrapati*, for the accused.

B. J. WADIA, J. This is an appeal by the Government of Bombay against the acquittal of the accused on the charge of murder and abetment of the commission of the offence of murder. The third accused is the father of the first and second accused who are brothers. The charge against them was that the first accused on or about May 5, 1938 at about 9-30 p.m. at Malvan did commit murder by intentionally causing the death of Ranchhod Bhula of Vasan, and that the second and third accused abetted the commission of the said offence of murder by the first accused, and thereby committed an offence under s. 302 of the Indian Penal Code so far as the first accused was concerned, and under ss. 302 and 114 of the Indian Penal Code so far as the second and third accused were concerned. The accused were tried by the learned Sessions Judge at Surat with the help of a jury. The jury unanimously came to the conclusion that the accused were not guilty of the offences with which they were charged, and the learned Judge agreeing with the verdict of the jury acquitted and discharged the accused on August 5, 1938.

The facts leading up to the alleged offence are that on the day in question (May 5, 1938) there was a marriage procession proceeding from the village of Vasan towards Malvan at about lamplight. Vasan is in the Chikhli taluka, while Malvan is in the taluka of Bulsar. The occasion of the procession was the marriage of one Jogi, son of Bhangia Lala. Several persons from Vasan joined the procession including the wife of the deceased, her parents and her aunt. The deceased who had gone to Billimora to get a wedding present for the bridegroom joined the procession later. The procession was on the move after lamplight, but as the little child of the deceased wanted to ease herself, the deceased, his wife, her parents and her

aunt stayed behind. Thereupon the three accused came up along with one Chankka, followed by another person, Ukadia Lala. It is alleged that the first accused shouted, "Where is the Khandhad?" The deceased Ranchhod said that he was there. It is further alleged that, thereupon, the third accused caught the deceased by the neck, and the second accused held his hands, and the first accused started giving him blows with a penknife; the deceased fell down and died almost instantaneously. The defence of the accused was that they were not the aggressors; the aggressors were the deceased and Chankka; that there was a scuffle, and that the deceased was hit accidentally by a thrust of the penknife in the hand of Chankka who really intended the blow for the first accused. In the alternative, the accused alleged that they killed the deceased in exercise of their right of private defence, viz., defending their person against the attacks of the deceased and Chankka. The first accused in the afternoon of the next day made a complaint in which he charged Chankka and the deceased, not knowing that he was dead, with having attacked his brother (second accused) and also himself when he went to help his brother. There was a long trial, several witnesses were examined on behalf of the prosecution, but no evidence was led on behalf of the accused, and the learned Sessions Judge summed up the case at great length to the jury. As I have stated before, the jury came to the unanimous conclusion that the accused were not guilty, and the learned Judge agreeing with the verdict of the jury ordered their acquittal and discharge.

The main grounds of appeal are: (*a*) that the direction given by the Judge to the jury as to the consideration of the alternative defences was not proper and should have been placed more clearly; (*b*) That the point whether there was occasion for reasonable apprehension in the mind of the opponents (accused) justifying the killing of the deceased was not explained to the jury in a proper way; (*c*) that

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having regard to the medical evidence and to the conduct of the first and second opponents after the commission of the murder, and to the facts stated in the counter-complaint of the first opponent, the verdict of the jury was unreasonable and unjust; and, lastly, (*d*) that the point as to why the opponents happened to be on the spot was not put to the jury in respect of its bearing on the possible guilt of the opponents. The Government, therefore, pray that the order of acquittal be set aside and the accused dealt with according to the law, and, if necessary, process be ordered to issue against the accused under s. 427 of the Criminal Procedure Code.

The Government have lodged this appeal under s. 417 of the Criminal Procedure Code which lays down that the local Government may direct the public prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court. It is provided by s. 418 (*1*) that an appeal may lie on a matter of fact as well as a matter of law, except where the trial was by a jury in which case the appeal shall lie on a matter of law only. Under s. 423 (*2*) it is provided that nothing contained in the section shall authorise the Court to alter or reverse the verdict of the jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to misunderstanding on the part of the jury of the law as laid down by him. An appeal, therefore, lies in cases tried by the jury on questions of law only, and under the criminal procedure the verdict of the jury is to be considered final where there is no error of law or misunderstanding on the part of the jury of the law as laid down by the Judge, or any misdirection by the Judge, and the Judge has agreed with the verdict of the jury.

It was contended on behalf of the Crown that there was a misdirection in so far as the learned Judge did not expound the law relating to the offences to the jury. It is true that

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in the heads of the charge to the jury there is no reference to the sections under which the accused are charged. Under s. 297 of the Criminal Procedure Code it is the duty of the Judge to explain to the jury all the essential elements of the offences charged against the accused and to give directions on the law so as to make the law clear in relation to the facts of the case and the evidence adduced. Even the mere reading of the sections to the jury does not amount to an explanation of the law. Nor can the Judge rely on the fact that advocates on both sides had explained the law to the jury. The Judge must lay down the law by which the jury is to be guided. This provision is imperative, and it cannot be too emphatically stated that in cases tried with the help of a jury it is the clear duty of the Judge to explain what in law are the essential requisites of an offence and what must be proved to constitute that offence. That the provision of the Code is mandatory was again laid down recently by the Full Bench in *Emperor* v. *Puttan Hassan*,[1] and it is indeed surprising how a Sessions Judge, who is usually a man of considerable experience, can proceed to charge the jury without in the first instance explaining the law on the subject. Such explanation is necessary in all cases, and is certainly very important in a case where the charge is one of murder. It is incumbent upon the Judge to explain what is culpable homicide under s. 299 of the Indian Penal Code, and under what circumstances culpable homicide amounts to murder, and under what circumstances it does not, under s. 300.

An important non-direction to the jury, or an omission to direct them on an important point, amounts to a misdirection; but we must read s. 297 along with the provisions of s. 537 of the Code. In that section it is laid down that "subject to the provisions hereinbefore contained no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on account of any

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error, omission or irregularity (as mentioned in sub-cl. (*a*) of that section) or of the omission to revise any list of jurors or assessors in accordance with s. 324 or of any misdirection in any charge to a jury unless such error, omission, irregularity, or misdirection, has in fact occasioned a failure of justice." There are, therefore, three categories coming under this section, first, where there is an error, omission, or irregularity, in any stage of a trial or enquiry or proceeding; secondly, where there is an omission in revising the list of jurors or assessors, and, thirdly, in the case of misdirection in the charge to the jury. It is necessary, however, that the misdirection should be such as to occasion failure of justice, such failure of justice as would vitiate the trial or proceedings. The misdirection causing failure of justice may at times arise in relation to the case for the prosecution; but in the majority of cases the effect of a misdirection to the jury comes up for consideration on the ground that it has prejudicially affected the accused. There is, however, no ground for broadly assuming that if even a mandatory provision of the Code is infringed, the result in all cases must be to vitiate the trial irrespective of whether it has or has not occasioned failure of justice. It was undoubtedly the bounden duty of the Sessions Judge to explain the law to the jury before dealing with the evidence, but I do not think that the omission to read and explain the relevant sections in this case has been such as can be said to have occasioned a failure of justice. It was pointed out to us by the learned counsel for the accused that this ground was not even taken by Government, but that would not debar the prosecution from urging it in the appeal.

The only other ground that was mentioned to us was that the alternative defence, viz., that the accused acted in self-defence or defence of their person, was not fully and properly explained to the jury. The learned Judge, however, clearly pointed out the alternative defence to the jury, and we find it stated by the Judge in

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para. 4 of his charge to the jury that it was suggested that it was the deceased who was the aggressor and caused serious injuries to the second accused, and that a reasonable apprehension arose in the mind of the accused about their own safety, and that on account of that apprehension they attacked the deceased in self-defence and killed him. At the end of his long summing-up the learned Judge also told the jury that, although the defence of self-defence was not raised by the accused and was not suggested in the cross-examination of the prosecution witnesses, and although it was inconsistent with the other defence put forward by the accused, it was still open to the jury to consider it and to see whether in the circumstances of the case it was made out or not. The learned Judge was right in putting this alternative defence to the jury for their consideration in the way he did. It was, however, open to the jury to come to the conclusion on the evidence of the witnesses, whom they had seen and whom they had heard, that the prosecution had failed to establish the case against the accused. In a criminal trial the presumption of innocence is always in favour of the accused till he is found guilty, and he is also entitled to the benefit of a reasonable doubt. Even if the defences taken up by the accused in the alternative were inconsistent, that would not necessarily prove that the evidence led on behalf of the prosecution, who must establish the guilt of the accused, should have been believed by the jury. It was for the jury to consider what weight they should attach to the evidence that was led before them. Apart from the omission to explain the law, the learned Judge summed up the evidence very clearly and fairly on both sides, and left the matters which were within the province of the jury entirely for their consideration. Under the circumstances, we see no reason to interfere with the verdict. No Court will interfere with the verdict of a jury, even if it may itself think differently of the evidence, or because it thinks that another jury may have come to

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a different conclusion. To lightly interfere with the verdict of a jury with which the Sessions Judge has agreed would be to reduce trial by jury in this country to a farce. There is a case reported in *Emperor* v. *Bai Lali*[1] where the Sessions Judge had disagreed with the verdict of the jury and submitted the case under s. 307 of the Criminal Procedure Code to the High Court, and yet the High Court held that, unless there was any perversity in the verdict or any misdirection, there was no reason why they should interfere with the verdict.

Taking all the facts of the case and the evidence into consideration, I am of opinion that the appeal fails and must be dismissed.

KANIA J. I agree. Section 297 of the Criminal Procedure Code in very clear terms enjoins the Sessions Judge to charge the jury by summing-up the evidence for the prosecution and defence and laying down the law by which the jury is bound. The omission to do this may or may not cause a miscarriage of justice. Section 537 of the Code provides that if a misdirection (and an omission to lay down the law would be a misdirection) causes a failure of justice it would vitiate the trial. Therefore, in the present case we have to find whether the Court failed to lay down the law as provided in s. 297, and if so, whether there was a miscarriage of justice. Unless both those questions were answered in the affirmative, the verdict should not be disturbed.

On going through the record it appears that the learned Sessions Judge has not recapitulated the relevant sections of the Indian Penal Code. To that extent it may be stated that there was omission to lay down the law. It appears very clearly, however, that in different portions of his summing-up he had stated to what extent and under what circumstances the right of private defence of person could be

[1] (1932) 34 Bom. L. R. 896.

exercised by the accused. He had also pointed out that this defence was not put forward in the cross-examination of the witnesses, but was seriously urged in the course of the argument of the advocate for the accused. He also properly pointed out at the close of the summing-up that, in spite of the failure of the advocate for the accused to set up this defence and to cross-examine the prosecution witnesses on that point, and although the defence was inconsistent with the other defence, if the jury on the materials before them thought that a case of self-defence of person was established, it would be their duty to consider it, and give effect to their conclusion. To that extent therefore the learned judge considered the evidence and gave directions on the point of private defence, and I do not think, therefore, that the charge suffers from any serious omission. On going through the whole record I do not think that there has been any failure of justice occasioned in this case, and therefore, I do not think this Court should interfere with the unanimous finding of the jury.

I cannot allow this case to pass without emphasising that the provisions of s. 297 of the Criminal Procedure Code are emphatic, and overlooking the same is likely to give rise to a miscarriage of justice and considerable waste of public time and money. It is necessary that the provisions of this section should be rigidly adhered to and not overlooked. Even at the cost of repetition, the law should clearly be expounded, especially when the charge is one of murder, otherwise serious consequences are likely to ensue which a high judicial officer could and should avoid.

Appeal dismissed.

Y. V. D.