Before Mr. Justice Kemp, and Mr. Justice Phear.

1873
April. 29 & 30

THE QUEEN *v.* RAJCOOMAR BOSE.*

Charge of a Judge to a Jury—How to sum up the Evidence—Verdict of Jury—Criminal Procedure Code (Act X of 1872), *ss.* 255 & 256.

See also 12 B L R 254

Mr. *Ghose* (Baboo *Biprodass Mookerjee* with him) for the prisoner.

THE facts of this case and the arguments appear from the judgments of the Court :—

KEMP, J.—The prisoner, the Deputy Postmaster of Buggolah, in Zillah Nuddea, was suspended on the 2nd of May 1872. It appears that the reason of his suspension was that he had reason to find fault with a subordinate of the name of Jullodhur, and recommended his removal. His immediate superior wished to reinstate Jullodhur, but Rajcoomar Bose, the prisoner, objected to this, and this conduct on his part was considered to amount to insubordination and led to his suspension. Subsequently to his suspension, his successor, on taking charge of the Post Office of Buggolah, found that the cash balance in his hands amounted to Rs, 57. Of this sum the prisoner accounted for Rs. 2, and said with reference to the balance of Rs. 55 that it had been expended by him partly in keeping up a boat during the inundation of 1871, and partly in paying the wages of a railway peon of the name of Sreesh Chunder Pal. An explanation was called for from the prisoner Rajcoomar Bose, which he submitted in great detail to the Post Office authorities. In this explanation he makes the same statement with reference to the Rs. 55 cash balance that he now makes before the Sessions Judge. The Post Office authorities, not deeming that explanation altogether satisfactory, directed the Inspecting Postmaster, who has been examined in this case, to prosecute Rajcoomar Bose. The charges against Rajcoomar Bose are under s. 409 of the Penal Code of criminal misappropription of moneys which were in his charge in his capacity as a public servant. The Deputy Magistrate framed the charge under one head, but the Sessions Judge, for some reason which we do not quite understand, thought proper to split it up into three separate and distinct charges. The case was tried with the aid of a jury, and they convicted the prisoner under s. 409. The Sessions Judge has sentenced him to five years' rigorous imprisonment. The main grounds of the appeal are that the Judge has misdirected the jury, and that his summing-up is one-sided; that he has omitted to point out to the jury the evidence and points in favor of the prisoner, that he has omitted to point out to them the enmity which admittedly existed between the principal witness Jollodhur and the prisoner, that with reference to the alleged alteration of the date in the letter, which is marked J in the book, he

* Criminal Appeal, No. 296 of 1873, from an order of the District Judge of Nuddeah, dated the 17th February 1873.

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ought to have pointed out to the jury that the prisoner's case was that the letter in question was despatched in September; that there was no reason why the prisoner should alter the date from September to October, while the body of the letter remained unaltered, which conclusively shows that the letter was despatched in September, and not in October; and further, that the prisoner could have had no control whatever over that letter-book, inasmuch as from the date of his suspension in May 1872, to the date of his trial, many months after, it was never in his custody. Then it is urged that the Judge entirely omitted to draw the attention of the jury to the fact that the prisoner's case was not that he contracted with the boatmen directly with reference to the hire of the boat during the inundation, but that the contract was made with Jullodhur, and therefore the Judge was wrong in prominently calling the attention of the jury to the fact that the prisoner, instead of paying the boatmen, had paid Jullodhur, and directing them to take that circumstance into consideration as evidence against the prisoner. Then, and this is the most important error in the summing up, and by which undoubtedly the Judge has misdirected the jury in a most important part of the case, inasmuch as the Judge has directed the jury to hold as conclusive evidence againt the prisoner, the fact that the books which are admitted by him show that in January there was no such sum amounting to Rs. 40 as cash balance from which the prisoner could have paid the witness Jullodhur, as stated by him; whereas, on referring to these books, it appears that up to January there was a balance of Rs. 43. There are other minor omissions pointed out by the prisoner in the petition of appeal, but we think it sufficient for the purposes of this judgment to notice the principal ones which have been stated above. The petition winds up with a statement that the sentence of five years' rigorous imprisonment is too severe with reference to the prisoner's youth, and on turning to the answer of the prisoner, we find that he is a young man of the age of 21.

Now in this case, undoubtedly, the summing-up of the Judge is very defective, and he has in one or two instances, and notably in the instance of the cash balance book, altogether misdirected the jury. The jury in this case have not been intelligently guided by the Judge, evidence has been placed before them, which ought not to have been placed before them, and deductions have been drawn from facts which do not exist. The style of the charge also appears to us to be very objectionable. The jury are repeatedly called upon in the following terms:—"Do you believe this"? "Can you believe that?", instead of leaving them to judge of the evidence and to decide what weight is to be attached to it.

Now it is not in every case in which there has been a misdirection to the jury that this Court will set aside a verdict of guilty, but only in such cases in which the accused has been materially prejudiced, or where there has been a failure of justice. In other words, if this case had been tried with the aid of assessors, and this Court on appeal, after reading the whole of the evidence,

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should come to the opinion that the verdict was not warranted by the evidence, this Court would be justified, under the ruling to be found in the case of *Queen* v. *Elahi Bax* (1), to set said the verdict, to direct the discharge of the prisoner, and not to direct any fresh trial. In this case I have very carefully gone through the evidence, and I think that the prisoner is on that evidence entitled to an acquittal. (The learned Judge proceeded to examine the evidence and continued :—) on the whole case, therefore, if this had been a trial with the aid of the assessors instead of a trial by jury, we should not think it right to convict the prisoner upon this evidence. We, therefore, do not direct a fresh trial, but direct that the prisoner be discharged.

PHEAR, J.—I entirely concur in all that has fallen from my learned collegue, Kemp, J., but I think that, under the circumstances of the case, it may be as well if I add a few words, inasmuch as it very constantly devolves upon me to conduct trials by jury, and it seems to me, judging by the aid of my own experience, that in one particular at any rate the trial of this case in the Sessions Court has not been exactly what the law contemplates. It seems to me that the Judge's charge to the jury was not a summing-up of the evidence for the prosecution and defence such as is prescribed by the words of s. 255 of the Criminal Procedure Code; it was rather as I read it a sustained effort at persuasion, and there was no real endeavor made by the Sessions Judge to present the evidence on the one side and the other, both impartially before the jury. If I may be allowed to say so I think that this error probably proceeded from the adoption of the narrative form of charge. It is impossible, I imagine, to put a case to a jury in the narrative form from beginning to end with complete fairness to both sides without giving the narrative a double shape, *i.e.*, stating it, so to speak, in the alternative, and I apprehend that very few persons indeed are able to do this with any great degree of success. It is no doubt most useful, because it saves time, that the Judge should state to the jury in the narrative form so much of the facts as are admitted on both sides. But when he has reached this point, it is best I think that he explain distinctly the issues of fact which it remains for the jury to determine having regard to that part of the case which is admitted and to the charges upon which the prisoners are tried; and, having made the jury understand these issues, the more convenient mode of summing up for him to adopt is, in my judgment, to present to the jury as clearly and impartially as he can a summary of the evidence and the considerations and inferences to be drawn from the evidence, as they bear both on the negative and affirmative sides of each of these issues. It is impossible of course for any Judge to state every item of evidence, or to draw the attention of the jury to every fact which has been deposed to, but he can, without difficulty, give them a summary of the leading points of the evidence and the considerations and inferences to be drawn from it on the one side and on the

(1) B. L. R., Sup. Vol., 459.

other. He may if he thinks fit, under the last clause of s, 256, at the same time express to the jury his own opinion as to the facts: but that is a very different thing indeed from that which the Sessions Judge has done in this case. The Judge has not, as I read his charge, simply expressed his opinion, and then left all the evidence fairly before the jury on the one side, and on the other, for them to Judge of it by the aid of his opinion if they chose to avail themselves of it. But he has endeavoured, I think—that at any rate is the impresson which his charge is given me—from first to last, to persuade the jury to take the particular view of the facts and of the inferences from the evidence which he himself has taken and drawn, and indeed he has left them no loop-hole for taking any other view. This is not only not in accordance with the enactment of the code of criminal Procedure as I understand it, but I think it is a course calculated in the mofussil to withdraw altogether from the jury the actual decision of the case. Probably, in other tribunals than a mofussil Sessions Court, it might lead to exactly the opposite result to that which I suppose was desired by the Sessions Judge, that is, it would, in such a case as the present, lead to the opposite view being adopted by the jury, and so would cause an acquittal to become to instead of a conviction. I concur with the decision pronounced by Kemp, J.