CRIMINAL REFERENCE.

Before Mr. Justice Caspersz and Mr. Justice Ryves.

EMPEROR

v.

ANNADA CHARAN THAKUR.*

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May 5.

Reference to High Court—Acquittal by Jury—Powers of the High Court—"Opinion" of Jury in cases of divided verdict—Consideration of entire evidence—Verdict not unreasonable on the face of the charge—Pardon—Omission to state reasons when facts leading to grant of pardon appear on the record—Criminal Procedure Code (Act V of 1898), ss. 307, 337(4).

Where the facts which led up to the tender of pardon appear on the record, the omission by the Magistrate granting it to state his reasons for so doing is not an illegality nor even an irregularity which vitiates the subsequent proceedings.

Deputy Legal Remembrancer v. *Banu Singh* (1) followed.

The High Court cannot throw out a reference under s. 307 of the Criminal Procedure Code merely because it might be argued, upon the face of the charge to the Jury, that the verdict was not altogether an unreasonable one, but it must consider the entire evidence and arrive at its own judgment after giving due weight to the opinions of the Judge and Jury.

Emperor v. *Lyall* (2) and *Emperor* v. *Abdul Rahaman* (3) followed.

King-Emperor v. *Chidghan Gossain* (4), *Emperor* v. *Anaruddin Biswas* (5), *King-Emperor* v. *Anes* (6) and *King-Emperor* v. *Prasanna Kumar Ganguli* (7) referred to.

Emperor v. *Chirkua* (8) dissented from.

The opinion of the Jury is their conclusion and not the reasons therefor, and in the case of divided verdicts the opinion of the minority must also be considered by the Court. The Legislature in directing the High Court to duly weigh the opinion of the Jury gives an implied authority for the taking of their reasons for the verdict, and the Judge will do well before making the reference to invite such reasons, not for the purpose of deciding whether it should be made, but for consideration by the High Court, after having made up his mind to refer the case and after telling the Jury of his intention to do

* Criminal Reference No. 2 of 1909, by A. Majid, Sessions Judge of Rajshaye, dated Jan. 22, 1909.

(1) (1906) 5 C. L. J. 224.
(2) (1901) I. L. R. 29 Calc. 128.
(3) (1908) 9 C. L. J. 432.
(4) (1902) 7 C. W. N. 135.
(5) (1908) Unreported.
(6) (1908) Unreported.
(7) (1907) Unreported.
(8) (1905) 2 All. L. J. 475.

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so. But the omission to take or record the reasons does not warrant the High Court in declining to go into the evidence.

Emperor v. *Chellan* (1) referred to.

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The accused, Annada Charan Thakur and Pratap Shaha, were tried with another, who died during the trial, before Abdul Majid, Sessions Judge of Rajshaye, and a Jury, charged, the first, under sections $\frac{302}{114}$ and 392 of the Penal Code, with robbery of the mail from Rampur Boalia to Natore and abetment of murder by Pratap of the mail-cart driver, Halalkhuri, and the second, under sections 302 and 392 of the Penal Code, with having committed the same robbery and the murder of the driver. The Jury acquitted Annada by a majority of 4 to 1, and Pratap in the proportion of 3 to 2. The Sessions Judge referred the case under section 307 of the Criminal Procedure Code differing "completely from the verdict of the majority, and being clearly of opinion that it was necessary for the ends of justice to do so."

On the evening of the 3rd August 1908, Halalkhuri, who was a driver of the pony mail-cart in the service of the Rajshaye Carrying Company, took delivery of the mail at the Rampur Boalia head Post Office and then proceeded to the branch Post Office at Ghoramara, whence, after receiving the postal bag, he started with a passenger on the cart, alleged to be the accused Annada, at 7-30 or 7-45 p.m., for Natore, 28 miles distant from Rampur Boalia. On the way he picked up two other passengers, supposed to be one Durlabh and the appellant Pratap, at the Panchani cutcherry. They then went on to Samsadipur where Durlabh alighted, leaving the others to continue the journey. In the early morning of the 4th August the dead body of the driver was found on the roadside, a few yards away from the 24th mile-post, covered with incised wounds. The cart was discovered in a paddy field about 90 cubits from the road. The mail bags were cut open and the contents taken out and arranged, but the only articles

(1) (1905) I. L. R. 29 Mad. 91.

abstracted turned out to be some copies of the P. W. D. Code and a few money-order application forms. The case for the prosecution was that it was the object of Annada to secure possession of the certified copy of a will and the records of a suit in the District Judge's Court which he believed were in the bags in the course of transmission to the High Court.

One Abdus Sobhan, who was for some time a *lathial* in the service of Annada and his father, was arrested by the police on the 23rd September, and made a full confession of his guilt before Wajiuddin Ahmed, Deputy Magistrate of Natore, on the 24th and 25th September, shortly to the effect that by arrangement with Annada he met the postal cart at a certain spot on the road and aided in the robbery and murder. The confession was recorded under section 164 of the Criminal Procedure Code. On the 14th October the Sub-Inspector of Police, Pyari Kumar Burdhan, sent up Annada, Pratap, Kali Charan and Abdus Sobhan to the Magistrate with the following remarks in the charge-sheet: "There is no eye-witness in this case, except all circumstantial evidence. I, therefore, suggest that if the confessing accused, Abdus Sobhan, discloses the true facts without concealing anything, then he may be taken as King's evidence, otherwise not." The committing Magistrate thereupon, on the next day, tendered a pardon to Abdus Sobhan on the ground, as stated in the order of commitment, that there were no eye-witnesses of the occurrence, and then examined him as a witness in the case.

The evidence against the accused consisted of the testimony of the approver and of circumstantial evidence.

Mr. Donogh, for the Crown, after reading the letter of Reference, dealt with the evidence and then commented on the charge to the Jury.

Mr. K. N. Chaudhuri (*Babu Hemendra Nath Sen* and *Babu Krishna Kamal Mitter* with him), for the accused. The committing Magistrate did not record the reasons for tendering a pardon to the approver. The wording of section 337 (*4*) of the Code

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renders this essential. The Magistrate must show proper grounds for granting the pardon, and there should have been corroborative evidence before him: Russell on Crimes, 3rd edition, Vol. III, page 644; *Reg.* v. *Sparks* (1). Further, there is no evidence on the record that the approver accepted the pardon. The case of *Deputy Legal Remembrancer* v. *Banu Singh* (2) is distinguishable, as the circumstances under which pardon was there granted disclosed the reasons for it. In a reference under section 307, the Crown must substantiate the reasons given by the Judge for his view. It is not sufficient that he has disagreed or that the Jury were divided. There is no reason for referring the present case, as it does not appear on the face of the charge to the Jury that the verdict is unreasonable. If the charge does not disclose substantial reasons, the point of view from which the evidence should be considered is whether the Jury has taken an unreasonable and obtuse view, and not whether the High Court would convict upon it: *King-Emperor* v. *Chidghan Gossain* (3), *Emperor* v. *Chirkua* (4), *Emperor* v. *Anaruddin Biswas* (5), *King-Emperor* v. *Anes* (6), *King-Emperor* v. *Prasanna Kumar Ganguli* (7). No cases are cited in *Emperor* v. *Lyall* (8) in support of the view there taken. [He then went on to discuss the details of the evidence.]

Cur. adv. vult.

CASPERSZ, J. This is a Reference under section 307 of the Code of Criminal Procedure by the Sessions Judge of Rajshaye who disagreed with the verdict of the Jury acquitting the accused persons, Annada Charan and Pratap Shaha. The charges against the accused Annada were in respect of offences punishable under sections $\frac{3\,0\,2}{1\,7\,4}$ and 392 of the Indian Penal Code, and against the accused Pratap under sections 302 and 392 of the Code. The Jury, by a majority of four to one, acquitted the first accused, and by a majority of three to two

(1) (1858) 1 F. & F. 388.
(2) (1906) 5 C. L. J. 224.
(3) (1902) 7 C. W. N. 135.
(4) (1905) 2 All. L. J. 475
(5) (1908) Unreported.
(6) (1908) Unreported.
(7) (1907) Unreported.
(8) (1901) I. L. R. 29 Calc. 128.

acquitted the second accused on all the charges. One Kali Charan Thakur, the father of the accused Annada, died during the trial, and another accused, named Abdus Sobhan, was made an approver in the Court of the committing Magistrate, and he was examined as such in the Court of Session.

Before dealing with the merits of this Reference, it will be convenient to dispose of two matters of law upon which the learned counsel for the accused has made his submissions to this Court. Mr. Chaudhuri's first contention is that the committing Magistrate, in tendering a pardon to the approver, Abdus Sobhan, illegally omitted to record his reasons for so doing. I do not think that there is any force in this contention, or that the omission was an illegality by reason of which the evidence of Abdus Sobhan is inadmissible for the purpose of considering the merits of this case.

The facts, so far as it is necessary to mention them in this part of the judgment, are these. Halalkhuri, a driver of the postal mail-cart plying between Rampur Boalia and Natore in the district of Rajshaye, was murdered on the night of the 3rd August 1908 at a place on the road to Natore and situated about four miles distant from Natore. The mail bags were opened and examined, and a certain parcel was abstracted. The case has been called the Natore Mail robbery case; and a large force of police conducted the necessary investigation with the result that, on the 23rd September 1908, the four accused persons, whose names have already been mentioned, were arrested. Against all the accused a charge-sheet was submitted by the Sub-Inspector, Pyari Kumar Burdhan, on the 14th October 1908. In that charge-sheet the Sub-Inspector suggested that a pardon might be tendered to the accused Abdus Sobhan on the usual terms and conditions. The Deputy Magistrate took up the case, and, after the examination of two witnesses, he drew up a proceeding under section 337 of the Code of Criminal Procedure to the following effect:—

"Pardon is hereby tendered to the accused Abdus Sobhan in the marginally noted case (Emperor *v.* Kali Charan Thakur,

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Annada Charan Thakur, Abdus Sobhan and Partap Shaha, under sections 302, 395 and 109 of the Indian Penal Code) on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the murder of Halalkhuri, and of every other person concerned whether as principal or abbettor. Abdus Sobhan accepts the pardon and is examined as a witness. (Signed) Girish Chandra Dutt, Deputy Magistrate, Rajshaye, 15-10-08."

It is quite evident, therefore, that the pardon was tendered to Abdus Sobhan in the course of the enquiry before the committing Magistrate. The facts which led up to the tender of pardon appear on the record, and that being so, on the authority of the case of *Deputy Legal Remembrancer* v. *Banu Singh* (1), there is no doubt that the omission to state the reasons was not only not an illegality but not even an irregularity which vitiates the proceedings held subsequent to such tender and acceptance of pardon. The procedure adopted by the Deputy Magistrate was perfectly justified by the facts and circumstances of the case as known to him and appearing from the papers.

The second contention of the learned counsel for the accused relates to the procedure adopted in this Court on the hearing of this Reference, and we have been invited by Mr. Chaudhuri to make a reference on the subject to a Full Bench in the event of it appearing that there is any conflict of decision upon the point. The contention amounts to this, that there was really no reason for the Sessions Judge to make a reference to this Court under section 307 of the Criminal Procedure Code, because, on the face of the Sessions Judge's charge to the Jury, it does not appear that the verdict was an unreasonable one. The contention arose during the protracted hearing of the arguments in this Court because Mr. Donogh, for the Crown, did not read the Sessions Judge's charge to the Jury until after he had placed the letter of Reference and all the evidence before this Bench. If the

(1) (1906) 5 C. L. J. 224.

contention be right, and if, on the face of the charge to the Jury, the verdict cannot be called perverse or unreasonable, it was clearly superfluous to enter into the merits of the case and the voluminous evidence on the record.

In my opinion the procedure adopted at the hearing was neither unusual nor inconvenient. In the first place, the verdict of the Jury was inconsistent. Four Jurors acquitted Annada against whom the evidence, if believed, was certainly stronger than the evidence against the accused Pratap who was acquitted by a smaller majority of three to two. Secondly, in dealing with a Reference under section 307 of the Code, the High Court must consider the entire evidence and give due weight to the opinions of the Sessions Judge and the Jury.

It was held in *Emperor* v. *Chellan* (1) that the "opinion" of the Jury, in section 307 of the Code of Criminal Procedure, is the conclusion of the Jury, and not the reasons on which that conclusion is based. I think that if the verdict of the Jury is unanimous, it coincides with their opinion. If it is a divided verdict, the opinion of the minority, no less than that of the majority, must be considered by the Court dealing with the Reference. In the present case, the opinions to which due weight must be given are the opinions of three Jurors against the opinions of two Jurors and the Sessions Judge. The verdict here is a bare verdict. But, supposing the Sessions Judge, after recording the verdict, had recorded (after inviting) the reasons given by the Jury for their verdict, we should have been entitled to consider those reasons whether expressed by the majority or the minority of the Jurors empanelled. I am disposed to agree with the observations of Mr. Justice Davies, at page 95 of the report of *Emperor* v. *Chellan* (1) that "the Legislature in directing that this Court should duly weigh the opinions of the Jury gives an implied authority for the taking of such opinions," and the Sessions Judge would have done well, before referring this case to this Court, to have invited the opinions of the Jury and to have

(1) (1905) I. L. R. 29 Mad. 91.

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given them an opportunity of reconciling the inconsistent verdict in respect of the two accused persons. I am careful to add that the Sessions Judge might have done so, not for the purpose of deciding whether a reference should be made, but after arriving at his conclusion to refer the case to the High Court and after telling the Jury that such was his intention. I also agree with the judgment of Sir S. Subrahmania Ayyar, officiating Chief Justice, and Mr. Justice Boddam, that "the circumstance that no such reasons have been recorded by the Sessions Judge does not warrant the High Court to decline to go into the evidence and to arrive at its own judgment after giving due weight to the views taken by the Judge and the Jury as to the guilt or innocence of the accused."

It follows that we have to form our own opinion on the evidence, and this brings me to the third consideration involved in this question of law, namely, whether the procedure which has been followed is in accordance with the authorities, reported and unreported, to which our attention has been called by the learned counsel for the accused.

The circumstances of the case are altogether special. I have already mentioned the inconsistency involved in the verdict of the Jury. It may be added that the trial in the Court of Session occupied more than six weeks of the time of the Sessions Judge and the Jury. It would have been an obvious disregard of our duty to have thrown out this Reference, merely because it might be argued upon the face of the charge to the Jury that the verdict was not altogether an unreasonable one.

The first case to which I may refer is that of *Emperor* v. *Chirkua* (1). That, no doubt, is in favour of Mr. Chaudhuri's contention. But it was a decision of Mr. Justice Richards sitting with Banerjee, J. in a reference where neither party was represented and where no authorities were considered. With the greatest respect for the learned Judge, I think that his judgment is in direct conflict with the plain wording of

(1) (1905) 2 All. L. J. 475.

section 307 of the Code of Criminal Procedure. In his commentary on the Code, Sir Henry Prinsep observes :—"The result of legislation seems to be that, unless the Sessions Judge accepts it, the verdict of a Jury in a Sessions Court, outside a Presidency town, has no longer the ordinary force of a verdict of a Jury, and that, if the Sessions Judge disagrees with a verdict and submits the case to the High Court, the determination of the case lies with the High Court after full consideration of the evidence and after giving due weight to the opinions of the Sessions Judge and of the Jury."

In the case of *Emperor* v. *Anaruddin Biswas* (1) (Criminal Reference No. 33 of 1908, decided on the 11th November 1908, the learned Judges (Holmwood and Ryves, JJ.) observe "We cannot hold that the Jury were not justified in taking the view that they did, or at least that it was not open to the Jury to take the view that they did. That in a Reference under section 307 is quite sufficient." But they go on to consider whether there had been a miscarriage of justice, and it is evident that they considered the case on its merits. In this connection I shall presently notice another and a matured decision of the same learned Judges in which they have more clearly expounded the law.

In the case of *King-Emperor* v. *Anes* (2) (Criminal Reference No. 6 of 1908, decided on the 10th March 1908), Mr. Justice Geidt sitting with Mr. Justice Woodroffe heard the evidence and, on a consideration of that evidence, they expressed themselves as not prepared to say that the majority of the Jury were wrong in refusing to act on it. The learned Judges added that "there is nothing to show that the verdict of the Jury was perverse or that they refused to convict the accused on any other ground than the *bonâ fide* belief that it would not be safe to convict them on the evidence which was placed before the Court." In my opinion the learned Judges did no more than give due weight to the verdict of the Jury in that reference.

(1) (1908) Unreported. (2) (1908) Unreported.

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The last unreported case is that of *King-Emperor* v. *Prasanna Kumar Ganguli* (1) (Criminal Reference No. 14 of 1907, decided on the 27th May 1907) which was decided by Mr. Justice Mitra and myself. There, also, the merits were entered into, and the opinion of the Sessions Judge was considered, and it was pointed out that the element of doubt in the case which, in the opinion of the Sessions Judge, was 1 in 177,000, was in reality much greater, and the judgment concluded with the observation that "the circumstances were very suspicious, and it might be that the accused was guilty. But it cannot be said that the guilt of the accused is morally certain."

If any of the unreported cases had been clear authority for the extreme contention which has been submitted to us, they would have found a place in the Law Reports.

There are reported cases on the subject and I proceed to consider these. In the case of *Emperor* v. *Lyall* (2) the reference was against an unanimous verdict of the Jury acquitting the accused. Mr. Pugh, counsel for Lyall, the principal accused in the case, cited authorities to the effect that the High Court must act in accordance with the unanimous verdict of the Jury, unless it was shown to be perverse or clearly and manifestly wrong. The learned Judges (Prinsep and Stephen, JJ.) overruled his contention, and pointed out that the terms of section 307 of the Code of 1882 had been altered by subsequent legislation, and they observed :—"It is not necessary for the prosecution to show that the opinions of the Jury are perverse or clearly and manifestly wrong, as was held in the cases cited to us which were decided before the law was amended in 1896 and expressed as it now stands."

In a somewhat later case, *King-Emperor* v. *Chidghan Gossain* (3), Mr. Justice Stevens sitting with Mr. Justice Harington pointed out "that the Sessions Judge was not justified in taking up the time of this Court by making a refer-

(1) (1907) Unreported. (2) (1901) I. L. R. 29 Calc. 128.
(3) (1902) 7 C. W. N. 135.

ence in a case in which the evidence for the prosecution was, on his own showing in his charge to the Jury, so open to hostile criticism as to justify the Jury in regarding it with suspicion." (page 140). Nevertheless, the learned Judges went very fully into the merits of the case, and they certainly did not reject the Reference merely because the Sessions Judge ought not to have made it.

The last case to which our attention has been called is a decision of Mr. Justice Holmwood and my learned brother, Mr. Justice Ryves, in *Emperor* v. *Abdul Rahaman* (1), where the two cases which have just been cited were considered. It admits of no doubt that this case is a fuller exposition of the law than that enunciated in the unreported case of *King-Emperor* v. *Anaruddin Biswas* (2) (Criminal Reference No. 33 of 1908, decided on the 11th November 1908 by Holmwood and Ryves, JJ.), to which reference has been made.

The contention of the learned counsel that the case of *Emperor* v. *Abdul Rahaman* (1) should not have been referred under section 307 of the Criminal Procedure Code, because the Sessions Judge himself in his charge to the Jury warned them that they should certainly pause and consider a particular circumstance in the evidence of the prosecution, and that it was, therefore, fairly open to the Jury to acquit the accused, was not accepted, and the learned Judges proceeded to consider the evidence in the case which appeared to be clear and convincing, and the result of the reference was that the accused was convicted.

I have now dealt with all the cases cited, and in my opinion there is no real conflict of decision or want of uniformity in the procedure adopted by this Court on the hearing of this Reference under section 307 of the Code. It is obvious that in every case, even where the verdict was unanimous, the Court proceeded to consider the merits and to hear the evidence. I have indicated how the opinions of both the Sessions Judge and of the Jury, including a

(1) (1908) 9 C. L. J. 432. (2) (1908) Unreported.

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minority of the Jury, are entitled to due weight in accordance with the express language of section 307 of the Code. The procedure adopted by Mr. Donogh in the present case was perhaps unusual, but, regard being had to the length of the Sessions Judge's charge to the Jury and to the evident want of arrangement and method in marshalling the materials presented to the Jury, we thought that the learned counsel for the Crown should not be pressed to place the charge before us at an early stage of the hearing. It was subsequently placed before us, and the contention of Mr. Donogh was that the Sessions Judge did not put the evidence against the accused sufficiently strongly before the gentlemen of the Jury. We have carefully read and considered the charge for ourselves, and, even if it had been read to us at the very commencement of the hearing, we should not have been in a position to say that the Jury were justified in acquitting the accused. In the circumstances of this case it was impossible to limit the hearing or to confine it to a consideration of the charge to the Jury and the points made therein for or against the case for the prosecution.

There may be cases in which a Sessions Judge unnecessarily makes a Reference under section 307, but, in such cases, the Crown would certainly not press the Reference, and so it might be disposed of on a bare consideration of the charge to the Jury and of the material passages in the evidence. But this is not one of those cases.

I would accordingly overrule the second contention advanced by the learned counsel for the accused, and proceed to deal with the evidence.

I have read the judgment about to be delivered by my learned brother, and, without repeating his observations, I content myself with saying that I entirely agree with that judgment.

RYVES, J. I agree generally in the conclusions of law arrived at by my learned brother.

On the second point I wish to add only a few words.

Mr. Chaudhuri's contention is that if it can be shown to this Court, on behalf of the accused, that a perusal of the letter of Reference of the Sessions Judge, under section 307 of the Criminal Procedure Code, and of his charge to the Jury, shows that the verdict of acquittal (whether unanimous or divided) was not unreasonable, this Court could not, or at any rate should not, go into the evidence and examine the case on its merits, but must, having due regard to the opinion of the Jury, reject the Reference.

It seems to me this contention goes much too far, and is not supported by any one of the cases, reported or unreported, to which he has referred. Among other cases, which have been duly considered by my learned brother, he relies on the unreported case of *Emperor* v. *Anaruddin Biswas* (1) (Criminal Reference No. 33 of 1908, decided on the 11th November 1908), to which I was a party. That case is no authority for this proposition, for there we did examine the whole record, and, in the result, arrived at the conclusion that we should not disturb the unanimous finding of the Jury. In that case the Judge considered that the statements made by the accused were "confessions" of their guilt. We pointed out that they were not, but on the contrary were "pleas in avoidance." In that case the scope of section 307 was not, so far as I recollect, commented on in argument nor was it in issue. It was a peculiar case on its facts and the Judge had misinterpreted the statements of the accused. No authorities were cited and considered, and it was not a considered judgment. In however general terms the judgment may have been couched, it is no authority for the proposition now contended for. Personally I now think the latter part of the judgment has been expressed too widely. I adhere to the opinion expressed in the considered judgment which I delivered in the case of *Emperor* v. *Abdul Rahaman* (2) (in which Holmwood, J. concurred) in which the scope of the section was in issue, and in which authorities were cited and considered.

(1) (1908) Unreported.

(2) (1908) 9 C. L. J. 432.

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[His Lordship then dealt with the facts of the case, and acquitted both the accused.]

PER CURIAM: We do not think it necessary to comment on all the evidence placed before us in detail. A brutal murder and robbery remains undetected and unpunished, principally, as it seems to us, because the salient features in the case were overlooked, namely, the clue furnished by the evidence of Bangshi on the 4th August, and the significant fact that the only postal packet abstracted was the one containing Codes of the Public Works Department. The learned Sessions Judge, however, bestowed great pains on the trial of the case, and, though his charge to the Jury lacks arrangement and method, we recognise the care and the ability displayed.

The result is, in our opinion, that the prosecution have failed conclusively to prove their case. We, therefore, under section 307, clause (3) of the Criminal Procedure Code, acquit the accused, Annada Charan Thakur and Pratap Shaha, and we direct that they be immediately released.

Accused acquitted

F. H. M.