# APPELLATE CRIMINAL.

*Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Carnduff.*

## FANINDRA NATH BANERJEE

*v.*

## EMPEROR.*

1908
*November 23*

*Charge—Jury—Heads of charge—Contents of, and time of recording heads of charge—Misdirection of Jury—Omission to read whole of the depositions of witnesses—Omission to direct Jury to draw a "presumption" against the prosecution, when certain witnesses were not called—Direction in rioting cases—Oral proof of statements by witnesses to the police—Criminal Procedure Code (Act V of 1898), ss. 162, 297, and 367—Circular Orders of the High Court, Chap. I, Order 59—Evidence Act (I of 1872) ss. 114, Ill. (g) and 157—Indian Penal Code (Act XLV of 1860) ss. 141, and $\frac{302}{149}$.*

It is not necessary that the heads of charge to the Jury should be reduced to writing before delivery of the charge, but they ought to be written as soon as possible thereafter and when the facts are fresh in the Judge's mind.

The heads of charge should represent with absolute accuracy the substance of the charge, and be such as to enable the High Court on appeal to see distinctly, whether the case was fairly and properly placed before the Jury. *Circular Orders of the High Court, Chap. I, Order 59*, referred to.

It is not incumbent on the Judge to read the whole of the depositions of the witnesses to the Jury. It is enough that references have been made to them so as to sufficiently attract their attention to them.

It is not necessary that the Judge should direct the Jury, in so many words, that the omission of the prosecution to call certain witnesses raised a "presumption," under the Evidence Act (I of 1872), s. 114, *Ill.* (*g*), that their evidence would be unfavourable to the Crown, if he has pointed out that the Jury might properly draw any inference they pleased from such omission

Section 141 of the Penal Code is sufficiently explained to the Jury, if the Judge has told them that, if five persons go in a body with the common object of murdering a man, and if he is killed in the prosecution of the common object, then, no matter who struck the fatal blow, all are equally guilty of murder under ss. $\frac{302}{114}$ of the Penal Code.

Section 162 of the present Criminal Procedure Code prohibits the use of the record of the statement of a witness taken under section 161 as evidence, but does not over-ride the general provisions of the Evidence Act as to proof of such statement by oral evidence, and such statement is admissible

* Criminal Appeals Nos. 693—695 of 1908, against the order of L. Palit, Sessions Judge of Jessore, dated the 5th of June 1908.

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under s. 157 of the Act in corroboration of the evidence of the witness given at the trial.

The proviso to section 162 of the present Code is confined to, and is for the benefit of, the accused.

*Queen-Empress* v. *Bhairab Chunder Chuckerbutty* (1) distinguished. *Emperor* v. *Narayan Raghunath Patki* (2), *per* Beaman J., dissented from. *Reg.* v. *Uttamchand Kapurchand* (3), and *Empress* v. *Kali Churn Chunari* (4) referred to.

CRIMINAL APPEALS.

THE appellants were tried before the Sessions Judge of Jessore with a Jury who, by a majority of four to one, convicted them under sections $\frac{302}{110}$ of the Penal Code. The Judge, accepting the verdict of the majority, sentenced the accused to transportation for life on the 5th June 1908, and they now appealed to the High Court.

*Mr. K. N. Chowdhry* (*Babu Narendra Kumar Bose* with him in No. 693, and *Babu Monmotho Nath Mukerjee* in Nos. 694 and 695) for the appellants. The heads of charge were not written out till a month after. This is not contemplated by the law. Refers to s. 367 of the Code. The Judge has misdirected the Jury on several points. He has not read out the medical evidence to them, nor has he told them that the omission of the prosecution to call important witnesses raised a presumption that their evidence would have been unfavourable to the Crown: *See* the Evidence Act s. 114, *Ill.* (*g*). His direction to the Jury on s. 141 of the Penal Code is not explicit. He has further wrongly admitted oral evidence of the statement of a witness made to the police during the police investigation. Such statement cannot be used under s. 162 of the Code to corroborate the witness giving evidence in Court: See *Queen-Empress* v. *Bhairab Chunder Chuckerbutty* (1) and *Emperor v. Narayan Raghunath Patki* (2).

*Babu Atulya Churn Bose* and *Babu Bunkim Chunder Sen* for the Crown. S. 367 does not require a written judgment

(1) (1898) 2 C. W. N. 702.
(2) (1907) I. L. R. 32 Bom. 111.
(3) (1874) 11 Bom. H. C. 120.
(4) (1881) I. L. R. 8 Calc. 154.

in such cases. The medical evidence was substantially dealt with in the Judge's charge. S. 162 of the Code does not over-ride the general rule in s. 157 of the Evidence Act. See *Reg.* v *Uttamchand Kapurchand* (1) and *Empress v. Kali Churn Chunari* (2).

MACLEAN C. J. and CARNDUFF J. These cases were tried before a Judge and Jury. The Judge agreeing with a majority of the Jury, four to one, convicted the prisoners of an offence under section 302 read with section 149 of the Indian Penal Code, and sentenced them to transportation for life. The appeals, therefore, cannot succeed, unless the appellants can satisfy us that there was some misdirection by the learned Judge in his charge to the Jury. The first criticism upon the action of the Judge is that, whilst the verdict was delivered on the 29th May 1908, and the sentence was passed on the 5th June following, his charge to the Jury was not written out until the 29th June. Reference has been made to section 367 of the Code of Criminal Procedure. That section does not assist the appellants, for there is a proviso that "in trials by Jury, the Court need not write a judgment, but the Court of Session should record the heads of the charge to the Jury." There is nothing there as to when it must be written, as in the case of a judgment by the Court dealt with in a preceding part of the section. If we refer to the Circular Orders of this Court, Chapter I, Order 59, we find an express order to the effect that it is not necessary that the direction to the Jury should be reduced to writing before delivery, but it is essential that the "heads of charge" (section 367) placed upon the record should represent with absolute accuracy the substance of the charge, and be such as to enable the High Court, in the event of an appeal, to see distinctly, whether the case was fairly and properly placed before the Jury. Whilst, therefore, there is nothing in the point to assist the appellants, we think it is very unsatisfactory that the charge to the Jury was not, in the case before us, written out until

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the 29th June, nearly three weeks after the sentence. We are strongly of opinion that in these cases such charge ought to be written out as soon as possible after the charge to the Jury has been actually delivered, and when the facts of the case are fresh in the mind of the Judge.

The first point of misdirection is that the Judge did not read the medical evidence to the Jury, but one has only to look at the charge to see that there were frequent references to the medical evidence. There is nothing that makes it incumbent upon any Judge to read the whole of the depositions of the witnesses to the Jury, and, we think, in the present case the medical evidence was sufficiently attracted to their attention.

Then it is said that the Judge did not sufficiently warn the Jury that the omission of the prosecution to call certain witnesses, and particularly the palki-bearers, raised a presumption that their evidence would be unfavourable to the prosecution, and reference is made to section 114 *Ill.* (*g*) of the Evidence Act. It is perfectly true that in his charge we do not find the word "presumption," but again and again the Judge has pointed out to the Jury that they might properly draw any inferences they pleased from the fact that these witnesses were not called. There is no substance in this point.

Then it is suggested that the Judge did not sufficiently explain to the Jury the provisions of section 141 of the Indian Penal Code. But it appears from a note made by the Judge that in the charge to the Jury they were told that, if the five persons went in a body with the common object of murdering Banku Behari, and, if he was killed in the prosecution of that common object, then, no matter which of them struck the blow or blows, which caused death, all would be equally guilty of murder under section 302, read with section 149 of the Indian Penal Code. We scarcely think we should be justified in saying, if the Judge, as appears, so addressed the Jury, that there was any real misdirection on this point.

There only remains the question whether the Court below was wrong in admitting oral evidence of a statement made to

the police by a witness to corroborate that witness's deposition at the trial. The appellant relies upon two reported cases, namely, *Queen-Empress* v. *Bhairab Chunder Chuckerbutty*, (1) and the Full Bench case of *Emperor* v. *Narayan Raghunath Patki* (2).

In the former it was held that the general provisions of section 157 of the Indian Evidence Act of 1872 were overridden by the special provisions of section 162 of the Code of Criminal Procedure. But the Code then under consideration was the Code of 1882; the language of the corresponding section 162 of the present Code is materially different. That case is, consequently, distinguishable. In the other case the point now raised was not decided by the Full Bench in Bombay or before the Court, though there are some *obiter dicta* upon it by one of the learned Judges, Mr. Justice Beaman.

The language of the respective Codes of 1872, 1882 and 1898 are different. In that of 1872 section 119 enacted:—"No statement so reduced into writing shall be signed by the person making it, nor shall it be treated as part of the record or used as evidence." Section 162 of the Code of 1882, on the other hand, was thus expressed:—"No statement, other than a dying declaration, made by any person to a police officer in the course of an investigation under this Chapter shall, if reduced to writing, be signed by the person making it or be used as evidence against the accused." The present section 162 provides that:—"No statement made by any person to a police officer in the course of an investigation under this Chapter shall, if taken down in writing, be signed by the person making it, nor shall *such writing* be used as evidence."

In the case of *Reg.* v. *Uttamchand Kapurchand* (3) it was held that the provisions of section 155 of the Indian Evidence Act of 1872 were not controlled by section 119 of the Act of 1872, the Criminal Procedure Code then in force. This view was approved of by Wilson J. in *Empress* v. *Kali Churn Chunari* (4). The point may be shortly summed up thus. Sec-

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tion 157 of the Evidence Act allows the statement by way of corroboration to be proved. Section 162 of the Criminal Procedure Code, now in force, enacts that, if any such statement as is now under consideration is taken down in writing, the writing cannot be used as evidence. If it be said that it is a refinement to hold that the writing cannot be admitted, but that the statement, if not reduced to writing, can, the answer is that the Legislature has chosen to alter its language in section 162 of the present Criminal Procedure Code, drawing a distinction between the statement and the writing.

We may add that we have not overlooked the proviso to the present section, but that is confined to and for the benefit of the defence, as the prosecution have free access to all the police papers.

There is nothing, therefore, in the special provision of the existing Code to over-ride the general provisions of the Evidence Act as to the proof by oral evidence of former statements; consequently the oral evidence here objected to was rightly admitted by the lower Court. We may add that, apart from this, there is sufficient evidence on the record to sustain the conviction.

The result is that we affirm the conviction and sentences and dismiss these appeals.

*Appeals dismissed.*

E. H. M.