APPELLATE CRIMINAL.

1908
March 17.

Before Mr. Justice Geidt and Mr. Justice Woodroffe.

NATABAR GHOSE
v.
EMPEROR.*

Jury, trial by—Misdirection—Culpable homicide—Proper charge in case of culpable homicide—Direction as to truth of plea of accused—Misrepresentation as to the effect of medical evidence—Expression of opinion by Judge.

The omission by the Judge to lay specifically before the Jury, in a case of culpable homicide, the question whether in causing death the accused had the intention to cause death or such injury as was likely to cause death, or the knowledge that he was likely to do so, though in the earlier part of the charge he had explained generally the terms "murder" and "culpable homicide" and had pointed out the distinction, is a material misdirection.

The omission to direct the Jury to consider the truth of the plea of some of the accused that they were not present at the occurrence, before convicting them, is a misdirection.

Misrepresentation of the effect of the medical evidence is a misdirection.

It is a misdirection for the Judge to express his opinion on various questions of fact without telling the Jury that his opinion is not binding on them and that they are the sole judges of fact.

THE appellants were tried before the Assistant Sessions Judge of Hooghly, sitting with a Jury, and unanimously convicted Natabar under ss. 148 and 304 of the Penal Code, Toosto under ss. 147 and $\frac{304}{149}$ and the others under ss. 148 and $\frac{304}{148}$.

The Judge accepting the verdict of the Jury sentenced the first appellant to six years', and the rest to four years' imprisonment each.

The accused appealed to the High Court.

Mr. Mahmoodul Huq and *Babu Nogendra Nath Bhattacharjee* for the appellants.

* Criminal Appeal No. 75 of 1908 against the Order of S. B. Bhuttacharjee, Additional Sessions Judge of Hooghly, dated Nov. 22, 1907.

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The Deputy Legal Remembrancer (*Mr. Orr*) for the Crown.

GEIDT J. The appellants have been convicted by the Additional Sessions Judge of Hooghly sitting at Howrah with a Jury, Natabar of the offence of culpable homicide not amounting to murder, and the other three appellants of that offence read with section 149 of the Indian Penal Code. Three of the appellants have also been convicted of rioting armed with a deadly weapon, and the fourth simply of rioting, and they have been sentenced to various terms of imprisonment.

It is urged on their behalf that there has been material misdirection of the Jury. The Sessions Judge, when dealing with the questions which the Jury had to consider, after stating the case for the prosecution, went on to observe as follows: "In dealing with a charge of culpable homicide you have first of all to see whether a man is dead, and whether he met with a violent end," and then the Sessions Judge referred to the medical evidence showing that the man had met with a violent death. The Sessions Judge goes on to say: "The question now is, had the accused any hand in causing this man's death, also whether they formed members of an unlawful assembly in furtherance of the common object, for which this act was committed."

It appears to me that these were not the only questions, which the Jury had to consider. There was one very important further question, to which the Sessions Judge has omitted reference altogether, namely, the question whether, in causing the death of the deceased, the accused had the intention to cause death, or such injury as was likely to cause death, or the knowledge that he was likely to cause death. This was a question on which the Jury were bound to come to a finding before they could convict the appellant of culpable homicide. It is true that in the first part of his charge the Sessions Judge explained the sections of the Penal Code defining "murder" and "culpable homicide," and he pointed out to them the distinction between the two. But in my opinion that was not sufficient. When laying before the Jury the questions, which they had to consider, it was his duty to lay specifically before them the question I have

indicated, and to tell them that, before they could find the accused guilty of culpable homicide, they must find that the accused had either the intention or knowledge which I have mentioned above. It appears to me that in this matter there has been a very material misdirection of the Jury.

In some other respects also the charge is not satisfactory. The accused Nos. 2 and 4 pleaded that they had not been present at the occurrence. The Sessions Judge does refer in the beginning of his charge to the plea, but omits all reference to it in the subsequent part of his charge, and he does not tell the Jury, as he ought to have told them, that, with reference to the accused Nos. 2 and 4, they must, before they convict them, find that they were present at the occurrence.

Then again the Sessions Judge has, in my opinion, somewhat misrepresented the effect of the medical evidence. The Assistant Surgeon, who examined the two accused persons, Natabar and Toosto, deposed that the wounds on them might have been self-inflicted. The Sessions Judge has represented this evidence as showing that the opinion of the Assistant Surgeon was that they were self-inflicted, and though he afterwards used the expression that in the Civil Surgeon's opinion the wounds could be self-inflicted, he said that this was an opinion which militated against the evidence for the defence.

Then again the charge is unsatisfactory in that the Sessions Judge has expressed his opinion on various questions of fact arising in this case without telling the Jury that his opinion was not binding on them, and that they were the sole judges of fact. He has made no reference to the separate function of the Jury as the sole judges of fact.

There is one other point to which I may refer, namely, the matter of the First Information. The First Information seems to have been proved by the Sub-Inspector, but it was apparently not read out to the Jury. The learned Sessions Judge in his charge has commented on that First Information, but counsel for the appellants contends that the contents of that First Information have been misrepresented by the Sessions Judge. Whether that was so or not, it was clearly the duty of the Sessions Judge, if that First Information was properly evidence, to have placed it

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as a whole before the Jury; if it was not evidence, it was equally his duty to have abstained from any reference to it altogether.

In my opinion there has been material misdirection of the Jury. The convictions and sentences must, therefore, be set aside and a new trial ordered.

WOODROFFE J. I agree.

Re-trial ordered.

E. H. M.