

The State Vs. Durgeswar Datta and ors.

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SooperKanoon Citation : sooperkanoon.com/123363

Court : Guwahati

Decided On : Mar-23-1956

Judge : Sarjoo Prosad, C.J. and Ram Labhaya, J.

Appellant : The State

Respondent : Durgeswar Datta and ors.

Prior history : Ram Labhaya, J. 1. This is a reference under Section 307, Criminal Procedure Code from the court of the Assistant Sessions Judge, Upper Assam Districts. The case has been referred to this Court under the following circumstances.:- 2. Seven persons namely Dharmeswar Dutta, Durgeswar Dutta, Baneswar Dutta, Hen-dul alias Santaram Saikia, Banshidhar Dutta, Dimbeswar Saikia and Lambadhar Saikia were committed to the Court of Session for being tried under Sections 304/149, Indian Penal Code. They we

Judgement :

Ram Labhaya, J.

1. This is a reference under Section 307, Criminal Procedure Code from the court of the Assistant Sessions Judge, Upper Assam Districts. The case has been referred to this Court under the following circumstances.:-

2. Seven persons namely Dharmeswar Dutta, Durgeswar Dutta, Baneswar Dutta, Hen-dul alias Santaram Saikia, Banshidhar Dutta, Dimbeswar Saikia and

Lambadhar Saikia were committed to the Court of Session for being tried under Sections 304/149, Indian Penal Code. They were tried with the aid of a jury. The jury found all not guilty under Section 304 read with Section 149 and the learned Judge agreeing with this verdict has acquitted all the accused of this charge. The jury further returned a unanimous verdict of guilty under Section 304, Part II, Indian Penal Code against Durgeswar, Baneswar and Lambadhar. No charges were framed against these accused under this section. The learned Judge has not been able to agree with this part of the jury's verdict. He thinks that conviction of these accused in the circumstances of this case is possible only under Section 326, Indian Penal Code. In view of this difference of opinion he has referred the case of the three accused to this Court for disposal under Section 307, Criminal Procedure Code.

3. Mr. Khaund, the learned Counsel for the accused has questioned the legality of the reference. He has pointed out that a partial or a piecemeal reference of the case of the three accused was not possible in law. It is invalid. His second contention is that in the absence of a separate charge under Section 304, Part II or Section 326, Indian Penal Code, the accused cannot be convicted under either of these sections. He has urged that the absence of a specific charge is an illegality which would vitiate the conviction and in support of this contention he has relied on *Nanak Chand v. State of Punjab*, (S) A.I.R. 1955 SC 274 (A). He has also argued that a conviction under Section 304, Part II or Section 326 would necessarily cause prejudice to the accused in the absence of these charges. He has pressed for their acquittal on the grounds above stated.

4. The learned Government Advocate has supported the view which has found favour with the learned Assistant Sessions Judge, He has urged for conviction of the accused under Section 326 as such a course would not be illegal; nor would it occasion any prejudice to the accused. On the other hand he thinks that the conviction under Section 326 would be most appropriate.

5. Section 307, Criminal Procedure Code prescribes the procedure in cases where the Sessions Judge disagrees with the verdict of the jury. This section provides that if the

Judge disagrees with the verdict of the jurors, or of a majority of the jurors, on all or any of the charges on which any accused person has been tried, and is clearly of opinion that it is necessary for the ends of justice to submit the case in respect of such accused person to the High Court, he shall submit the case accordingly

Clause (2) of Section 307 provides that where the Judge submits a case under this section, he shall not record judgment of acquittal or conviction on any of the charges on which such accused has been tried, but he may either remand such accused to custody or admit him to bail.

6. The provisions contained in Section 307 do not make it obligatory on the Court to refer the case of all the accused to the High Court where the Judge differs from the jury only in regard to the verdict against some. It does contemplate and authorise a reference of the case of such persons in respect of whom the Judge declines to accept the verdict. In regard to others against whom the verdict of the jury is acceptable the Judge may convict and sentence or acquit as the case may be. The section however is enabling. The Judge is not bound to refer the whole case. But there may be cases in which it may be desirable or convenient to refer the whole case. There is no prohibition against such a course.

7. In regard to the accused whose case is sought to be referred it is clear from the language of Clause 2 of Section 307 that the submission must be of the whole case against the particular accused and not merely about such charges or which the Judge disagrees with the jury. If the reference is limited to such charges only, the Hon'ble Court may be precluded from considering the entire evidence on the record against the accused. The Judge therefore has not been permitted to divide the verdict of the jury against a particular accused and to accept a part of it and reject the other. The entire case must be referred to the High Court even though the Judge cannot agree with the verdict of the jury in respect of one or some only of the charges. This is the undoubted requirement of Clause 2 of Section 307.

8. The learned Judge has contravened the provisions of Section 307, Clause (2), by referring the case of the accused only in regard to the offence for which the jury have returned a verdict of guilty. He has acquitted them of the charge under Sections 304/149, Indian Penal Code. The reference involves non-compliance with

the provisions of Clause (2) of Section 307. But the reference is not necessarily vitiated for that reason. If no prejudice is caused to the accused, the case may still be disposed of on the reference. Clause (1) of Section 537, Criminal Procedure Code cures errors, omissions and irregularities in orders, judgments or other proceedings unless failure of justice is in fact occasioned thereby. The submission of the case to the High Court has not by itself resulted in any failure of justice.

The order of reference therefore need not be quashed on that ground. The learned Counsel for the accused argues that the reference is vitiated by an apparent illegality and therefore it should not be entertained. In his view, on this illegal reference the Court could not consider whether the accused could be found guilty for any offence with which they were not charged, on the basis of available material. We think this contention, cannot prevail in view of the provisions contained in Section 537, Criminal Procedure Code. If the error, omission or irregularity complained of has in fact caused no failure of justice, it is curable. The error is not fatal to the act of submission. It is open therefore to this Court to entertain the reference and dispose of the case on its merits.

9. The next question is whether it is possible in law to convict the accused either under Section 304, Part II or under Section 326 as the case may be in the absence of charges for these offences. Mr. Khaund has relied on (S) : 1955 CriLJ721 and some observations of Imam J. in *Willie (William) Slaney v. State of Madhya Pradesh*, (S) : 1956 CriLJ291, in support of his contention. The learned Government Advocate has also relied on (S) : 1956 CriLJ291. The question before us has been considered and discussed threadbare in this case by the learned Judges of the Supreme Court and the judgment embodies an authoritative answer to the question. The learned Judges did not all agree on certain aspects of the problem, though the agreement covers large ground. In this case the two accused were charged under Section 302 read with Section 34, Indian Penal Code, Separate charges were framed against each.

The charge against William was that he went with his brother to the house of Mrs. Waters and in furtherance of the common intention did commit murder by intentionally or knowingly causing the death of her brother Smythe. A charge in the

same terms was framed against the co-accused. But there was no alternative charge under Section 302 against any of the accused. It was found by the Courts below that William inflicted the fatal blow. He was found guilty under Section 302, The other accused was acquitted. It was held that having regard to the nature of the charge framed, the omission to frame a separate charge under Section 302, Indian Penal Code against William was a curable irregularity which in the absence of prejudice could not affect the legality of his conviction. On facts he was found guilty under Section 304 Part n and sentenced to rigorous imprisonment for five years.

10. All the learned Judges were agreed that the accused could have been convicted for the offence for which he was personally responsible even in the absence of a charge as the charge under Section 302 read with Section 34 indicated very Clearly that he was charged with having committed murder by intentionally or knowingly causing the death of Smythe, deceased.

11. The learned Judges also were agreed that there was no conflict of views between the two decisions of the Supreme Court in (S) : 1955 CriLJ721 (A) and Suraj Pal v. State of Uttar Pradesh, (S) : 1955 CriLJ1004 . In fact the case was referred to a Bench of five Judges in order to determine whether there was any conflict of views expressed in the two cases. These cases were referred to in the course of the argument in the case, though these cases were under Section 302 read with Section 149 and not under Section 302 read with Section 34, Indian Penal Code as in (S) : 1956 CriLJ291 .

12. It was further held unanimously that where a charge has been framed against the accused as in this case (under Section 304 read with Section 149) a conviction for a substantive offence under Section 304 or Section 326 would be a curable irregularity if failure of justice has not been occasioned in fact. Such a case is not a case of a total absence of a charge. The broad proposition that where there is no charge the conviction would be illegal, prejudice or ' no prejudice, did not prevail with any of the learned Judges. The majority of the Judges declined to accept as sound the broad proposition advanced that where there is no charge, the conviction would be illegal, prejudice or no prejudice. Dealing particularly with

cases to which Sections 34, 114 and 149 of the Indian Penal Code may apply they observed as follows:

Sections 34, 114 and 149 of the Indian Penal Code provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention; 'and the charge is a rolled-up one involving the direct liability and the constructive liability' without specifying who-are directly liable and who are sought to be made constructively liable.

In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to-be fatal by itself, and before a conviction for the substantive offence, without a charge, can be set aside, prejudice will have to be made out.

13. The difference between the two views; expressed in this judgment, it appears, was limited to the interpretation of Section 535. The majority view was that notwithstanding the very wide sweep of Section 535 there may be cases in which the trial would be illegal without the necessity of a positive finding of prejudice. The view was illustrated by instances which appear on page 137 of the judgment and which need not be reproduced. Their Lordships did not agree to the suggestion that the wording of Section 535, Criminal Procedure Code was sufficiently wide to cover every case of no charge. Expressing their disagreement with the suggestion they observed as follows:

We are unable to agree that Section 535 of the Code of Criminal Procedure is to be construed in such an unlimited sense. It may be noticed that this group of sections relating to absence of a charge, namely Sections 225, 226 and 232 and the powers exercisable thereunder, are with reference to a trial which has already commenced or taken place. They would, therefore, normally relate to errors of omissions which occur in a trial that has validly commenced.

There is no reason to think that Section 535 of the Code of Criminal Procedure is not also to be understood with reference to the same context. There may be cases where a trial which proceeds without any kind of charge at the outset can be said to be a trial wholly contrary to what is prescribed by the Code- In such cases the

trial would be illegal without the necessity of a positive finding of prejudice.

Bose J. gave emphatic expression to the minority view. In his view

they between them (including Sections 535 and 537) cover every possible case that relates to the charge and they place all failures to observe the rules about the charge in the category of curable irregularities. Chapter XIX deals comprehensively with charges and Sections 535 and 537 cover every case in which there is a departure from the rules set out in that chapter. Such departures range from errors, omissions and irregularities in charges that are framed, down to charges that might have been framed and were not and include a total omission to frame a charge at all at any stage of the trial. In all these' cases the only question is about prejudice.

14. The line of demarcation between the two views is really very thin and in practice may not cause any difficulty. Section 233 of the Criminal Procedure Code requires that for every distinct Offence of which any person is accused there shall be a separate charge, and every such; charge shall be tried separately, except in the cases mentioned in Sections 234, 235 and 236. We are here not concerned with the provisions of the Code relating to joinder of charges. The requirement of Section 233 of the Code undoubtedly is that for every distinct offence there should be a separate charge. Sections 234,, 235 and 236 specify cases in which charges may be jointly tried. Exceptions to the rule enunciated in Section 233 are contained in Sections 237 and 238. In cases falling under these sections an accused may be convicted of the offence for which he has not been charged. These provisions exhaust cases where it would be legal to convict a person without a charge.

15. A charge is an important step in a criminal proceeding. It separates the inquiry stage from the trial. The prosecution produces all evidence in its possession in the course of the inquiry. This evidence may point to or disclose commission of several offences. It is for the Magistrate to decide after the prosecution case is closed if a prima facie case has been made out against the accused in regard to any offence. If the evidence does not make out a prima facie case, the accused is discharged. It is only when a prima facie case is disclosed about a certain offence

or offences that a charge is framed. When the Magistrate frames a charge for a Specified offence, the implication is that in his view a prima facie case has been made out with respect to that charge.

If prosecution evidence indicates or discloses other offences, the implication also would be that in his opinion evidence does not make out a prima facie case. The implication would be there, whether it is a trial of warrant case or of a case which is committed to the Sessions. Where a charge is not framed for which there is evidence, the accused is entitled to assume that he is called Upon to defend himself only with regard to the offence for which he has been charged. It is not necessary then for him to meet evidence relating to offences with which he has not been charged. He is merely to answer the charge. The Code does not require him to meet all evidence led by prosecution.

He has only to rebut evidence bearing on the charge. The prosecution case is necessarily limited by the charge. It forms the foundation of the trial which starts with it and the accused can justifiably concentrate on meeting the subject-matter of the charge against him. He need not cross-examine witnesses with regard to offences he is not charged with nor need he give any evidence in defence in respect of such charges.

16. The requirement of the Code for the charge except in cases covered by Sections 237 and 238 can be complied with before judgment is pronounced and in cases of trial with the aid of a jury before the verdict is given. If it is found before judgment or the verdict of the jury that there is justification for putting the accused on trial for an offence for which he has not been charged, a charge should always be framed. A trial Court should not hasten to convict the accused for offences for which he is not charged under' the influence of the idea that the irregularity is not fatal to the trial or is curable. There is no justification for deliberate or conscious non-compliance with the imperative provisions of the Code. It is not possible to give any exaggerated importance to the requirement of the Code that there should be a distinct charge in writing for every offence.

Where through oversight or inadvertence no charge has been framed or some omission, error or irregularity has crept into a charge which has been framed, the

conviction shall not be set aside on appeal or revision if the omission and the irregularity have caused no injustice. Cases however are easily conceivable in which the total absence of a charge may not result in any injustice. On the other hand absence of a charge in a particular case may by itself provide sufficient evidence of prejudice and need for a positive finding of prejudice may be obviated. No hard and fast rule can be laid on this point and the decision in each case must rest on its own facts and circumstances.

17. Section 232 brings into clear relief the importance that the legislature has given to the framing of a charge. The appellate Court and also the High Court in the exercise of its powers of revision and its powers under Chapter 27 are under an obligation to direct a new trial if they come to the conclusion that the absence of a charge or any error in the charge had the result of misleading the accused in his defence. Where a charge is framed under Section 304/149, Indian Penal Code, notwithstanding the fact that there is evidence before the Court on which individual responsibility may be fastened on someone of the accused for certain offences, the accused may conceivably be misled by the charge. He may confine his attention to answering the charge of constructive responsibility. He is under no obligation to meet the charge of any substantive offence that evidence may disclose when the trial Magistrate or Judge declines to put him on trial for that offence.

In fact an argument that he has been so misled may be difficult to resist in quite a number of cases. Cross-examination of witnesses may not have been directed to showing that the charge for substantive offence is groundless. Available defence evidence may not have been given. A retrial may be the only way out of the difficulty in a number of cases. It is therefore imperative for the trial Court to frame a charge if it finds that there is material for convicting an accused for a substantive offence before judgment is given or before the verdict of the jury is obtained. The appellate and the revisional Courts also may not readily condone omissions or irregularity covered by Sections 535 and 537, where there are reasonable grounds for the contention that prejudice has occurred or must necessarily have occurred.

The omission to frame a charge is in effect very similar to a refusal to give the accused a hearing or a refusal to allow him to defend himself or a refusal to explain the nature of the charge to him. The accused is not asked to defend himself in regard to an offence he is not charged with. The omission should attract similar consequences. It is not per se fatal. But it would be sometimes a glaring circumstance pointing to prejudice. There may however be cases where it is possible to come to the conclusion without any hesitation that the omission has not caused any injustice. Cases can be conceived in which the plea of prejudice may not be open to an accused even though there was a total omission to frame the charge.

18. The contention of Mr. Khaund that the failure to frame a charge under Section 304, Part II or Section 326 would make the conviction illegal without reference to prejudice receives no support from the language of Section 535, Criminal Procedure Code or from the judgments of the learned Judges of the Supreme Court in : 1956 CriLJ291 . All the learned Judges were agreed that the conviction for an offence different from the one the accused is charged with, is not per se fatal even if the case does not fall under the provisions of Section 237, Criminal Procedure Code. This is also the conclusion which the explicit language of Section 535 leads to almost inexorably. The Jury has given its verdict. It is not now possible to alter the charge; vide Section 227, Criminal Procedure Code.

If conviction according to the verdict of the jury or the opinion of the Judge involves prejudice a retrial would be the proper course. This would involve reversal of the verdict of the jury. But in the absence of prejudice the accused may appropriately be convicted either under Section 304, Part II or under Section 326, whichever offence is made out by evidence on the record. We have been taken through the evidence. On this evidence, the view of the learned Judge expressed in the order of reference is that each of the three accused could be convicted under Section 326 but not under Section 304, Part II as found by the jury.

19. The prosecution case was that deceased Haridas had paddy lands about ten miles off from his bari. He had been in possession for about four or five years after purchasing the lands from Kana. The accused who lived at Barbilgaon a village

close to where the land is situate, had lands in the neighbourhood. Haridas had litigation with the accused and sometime before the occurrence the accused were convicted and fined on the complaint of the deceased. On 14th June, he went in the morning with about twelve ploughmen. The accused then came out in a body armed with dangerous weapons from a contiguous bari, rushed at Haridas and attacked him. Durgeswar was said to have given the first blow with a jatha on the eye. Baneswar struck him with a Dao on the head several times.

Lambodhar gave the deceased a Dao blow On the ear when he fell down and then all the accused except Debeswar are said to have given the deceased indiscriminate beating. The charge against the appellants and the co-accused was under Section 304 read with Section 149, Indian Penal Code only. The common object of the unlawful assembly according to the charge was to take forcible possession of the land from the deceased. It is not necessary to reproduce evidence bearing on the question of possession. The charge under Section 304 read with S 149 has failed. All the accused liave been acquitted of the charge. There is no appeal from the acquittal. But it is difficult to any what consideration weighed with the jury in returning a verdict of not guilty so far as 'this charge was concerned. They have not given their reasons.

There is very little justification for the inference or the presumption that the jury thought that the accused were in possession of the land. The accused themselves did not claim it. They merely pleaded alibi. They denied the occurrence as also their presence in the scene. It is possible that the jurors thought that all those who have been sent up had not taken part in the assault or that there was no unlawful assembly at all and the assault on the deceased was sudden or the premeditated. If the jury had thought that others even without any common intention took part in the assault, they would not have returned a verdict of not guilty. Like the appellants they should have held them responsible for their own acts. The likelihood is that in their view the appellants alone participated in the assault.

20. Medical evidence reveals that the deceased had

1) One punctured wound 2 1/2' X 2" on the front aspect of the middle of the neck. The wound penetrated into the trachia.

2. One incised wound on the right ear- the pinna of the ear was separated into two pieces.
3. One incised wound 5'X1 1/2' bone cut on the right side of the frontal and parietal regions.
4. One incised wound 3' X 1' bone cut on, the posterior aspect of the right parietal region.

There were fractures of the right temporal, parietal and frontal bones. The entire right temporal bone and a portion of the parietal bone were smashed into pieces. The broken pieces of the bone entered into the brain substance. There was fracture of the sternum in its middle portion and fracture of the ribs from 1st to 10th on the right side. Death according to the medical testimony was due to all the injuries found on the person of the deceased.

21. The first four injuries are admittedly Injuries caused by sharp edged weapons. They are also grievous. Eye witnesses from the prosecution side were all agreed that Durgeswar gave the deceased a blow with a spear. Some say that it was on the eye and others have not given its location. In regard to the two accused Baneswar and Lambodhar, they have deposed that they gave dao blows and caused injuries to the deceased on the head. So far as these two accused are concerned evidently they were responsible for causing grievous hurts. In regard to Durgeswar it is said that the blow given by him was on the eye. But there is no injury there. The injury on the middle aspect of the neck could be by a spear. His having used the spear and caused an injury is a circumstance deposed to by all witnesses and it is probable that the injury on the neck was caused by him.

He too individually would be responsible for causing grievous hurt. Death obviously was the cumulative effect of injuries. But the learned Jugu points out and with considerable justification that it is not possible on the evidence to fix individual responsibility on anyone for causing culpable homicide not amounting to murder. If the accused could not be punished under Section 304 read with Section 149 or Section 34 and have to be held responsible only for their individual acts, the conviction could only be under Section 326, He therefore could not accept the

jury's verdict under Section 304, Part II against the accused. I agree that it would not be correct under the circumstances of the case to hold the accused responsible individually for committing culpable homicide.

In order to convict them under Section 304, Part II it is necessary to find that each one individually or separately was guilty of committing culpable homicide not amounting to murder and the culpable homicide was caused by an act which was done with the knowledge that it is likely to cause death. Now though death has been the result of the injuries caused to the accused, the evidence does not show that death was caused as a result of injuries caused by any one accused. Everyone being responsible for his own injuries the question is whether his own injuries have actually caused death, and when inflicting he had the knowledge that the injury was likely to cause death. Medical evidence in the case does not assist in fixing responsibility for culpable homicide on any of the accused.

The doctor has not stated that any particular injury or injuries caused death. The accused may have jointly caused death. They might have been found guilty under Section 302/34 or Section 304, Part I read with Section 34. They were not charged with these offences. The jury could not find them guilty even under Section 304/149 and did not return a verdict of guilty under Section 304, Part II read with Section 34. The evidence on the record was not enough to fix liability for culpable homicide on any or each as the result of his own acts. The difficulty that the learned Judge felt in agreeing with the verdict of the jury seems to me to be real, There is no such difficulty in finding them severally liable under Section 326, for, the injuries they have caused are grievous.

In fact even if each of the injuries were sufficient in the ordinary course of nature to cause death, all may still be not guilty of committing culpable homicide for the act the accused is sought to be convicted for under Section 304, Part II, the injury caused by him must result in death. I therefore find it difficult to convict the accused under Section 304, Part II. But each one has been shown to have caused grievous hurt voluntarily with sharp-edged weapons and has thus rendered himself liable to conviction under Section 326, Indian Penal Code. In this view the accused could not complain of any prejudice. The learned Counsel could not show how

even by a conviction under Section 326 any failure of justice would in fact be occasioned.

The witnesses for the prosecution were fully cross-examined. They have assigned definite parts to the appellants. The case of the accused was that there was no occurrence as alleged and they were not on the scene. The prosecution version assigning distinct parts to the accused was met by a common defence, But there is no evidence in support of the defence version. The learned Counsel made no attempt to show that there was any actual misleading or that it was possible for the accused to improve their case on a retrial. He was concentrating in view of the decision in Nanak Chand's case : 1955 CriLJ721 on the contention that a conviction for a substantive offence would be illegal

This contention has been disposed of above and as stated already the question whether prejudice would be caused or there would be actual failure of justice has to be decided on the facts and circumstances of each case, the mere omission to frame a charge not being per se fatal. In the circumstances of this case we do not think any prejudice would be caused if according to the opinion of the learned Assistant Sessions Judge the accused are held guilty under Section 326, Indian Penal Code. There is no compulsion in the facts of the case for ordering a retrial.

22. It has been argued however that the learned Assistant Sessions Judge did not address the jury on the possibility of the accused having acted in the exercise of their right of private defence. This contention again is based on the assumption that the jury found that the accused were in possession of the property I see no justification for this assumption and apart from this there is nothing in the prosecution evidence to suggest even remotely that the accused had the right of private defence either of the person or property. Even the learned Counsel could not refer us to any proved fact or circumstance which would indicate that the accused found themselves in a predicament in which they could cause grievous injuries to the deceased in the exercise of the right of self-defence. The accused themselves did not claim the right. The learned Assistant Sessions Judge had ample justification for not asking the jury to consider this aspect of the matter. There is nothing on the record to support this plea.

23. For reasons given above we agree with the learned Assistant Sessions Judge and find the appellants guilty under Section 326, Indian Penal Code. Each one of them shall undergo rigorous imprisonment for seven years.

Sarjoo Prosad, C.J.

24. I agree to the proposed order. As the points raised in this case are of some importance, I prefer to indicate my own views.

25. The learned Assistant Sessions Judge, Upper Assam Districts, Mr. K. M. Deb, in making the reference to this Court appears to have overlooked the mandatory provisions of Sub-Section 2 of Section 307 of the Criminal Procedure Code. The said Sub-section provides that whenever the Judge submits a case under Section 307 he should not record judgment of acquittal or conviction on any of the charges on which such accused has been tried. The provision is very essential because what the section requires is that the whole case in regard to the accused about whom there is a difference of opinion between the Judge and the jury, should be submitted to the High Court for its decision.

'The duty of this Court on submission of the case as provided by Sub-section (3) of Section 307, Cr. P. Code is that it has to consider the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict the accused of any offence of which the jury could have convicted him on the charge framed and placed before it. Therefore, if the Sessions Judge records a finding of acquittal or conviction on any particular charge and submits the case for the decision of the Court on some other charge against the accused, the obvious difficulty which arises is that this Court is prevented from examining the entire evidence for itself in order to arrive at its conclusions. It is for this reason that the practice of submitting a case piecemeal, as it were, has been strongly condemned, as it places the High Court in a very embarrassing situation. In this case all the accused were charged under Section 304/149 of the Indian Penal Code as being members of an unlawful assembly and in prosecution of the common object of that assembly to take forcible possession of a certain piece of land and commit culpable homicide not amounting to murder by causing the death of one Haridas Konwar.

The jury found that the charge under Section 304/ 149 of the Indian Penal Code had not been established against the accused; but it felt that accused Durgeswar Dutta, Baneswar Saikia and Lambodar Saikia were guilty under Section 304, Part II of the Indian Penal Code and returned a verdict of guilty accordingly. The learned Judge accepting the verdict of the jury acquitted all the accused including the three, whose case is now before us, under Section 304/149 of the Indian Penal Code. He, however, differed from the verdict returned by the jurors that these three accused were guilty under Section 304, Part II of the Indian Penal Code and has referred the case to us to that extent only recommending that the verdict was erroneous and the accused should be convicted under Section 326 of the Code. This is clearly an erroneous procedure which the learned Judge has adopted and I wish he had been conscious of the anomaly which he has thereby created.

The language of Section 307 of the Criminal Procedure Code is perfectly clear and unambiguous and reading the entire section as a whole there should have been no doubt in the mind of the learned Judge that the law never contemplated a reference of this kind wherein he proceeded to forestall the verdict of this Court in regard to a part of the case, and referred the other part if any for the decision of the High Court. There is also another important aspect of this case which escaped the notice of the learned Judge. It is true that under Section 307 of the Cr. P. Code, the Judge is not bound to refer the case of all the accused to this Court. If he is inclined to accept the verdict of the jury in regard to some of the accused but differs from the verdict in regard to others, he may in appropriate cases accept the verdict of the jury and acquit the accused on that verdict and submit the case of only those accused to the High Court about whom there is difference of opinion between him and the jury.

But even there the learned Judge has to remember that if the case of one set of the accused is inextricably bound up with the case of the other set, about whom he has a difference with the jury, then the appropriate course for the learned Judge to adopt is to refer the entire case to this Court including the case of even those persons in regard to whom there was no difference of opinion between the Judge and the jury. That procedure is advisable and inevitable with a view to avoid any conflict of decisions or to cause any embarrassment to this Court in freely

considering the entire evidence in the case. In the present instance the charge under Section 304/149 of the Indian Penal Code was against all the accused persons, the allegation being that they all shared in that common object of the unlawful assembly.

That being so, the Judge took a serious and perilous responsibility upon himself in proceeding to adopt the verdict of the jury for the acquittal of the accused under Section 304/149, IPC and then in proceeding to submit the case of only three of the accused to this Court, and that also to a very limited extent. The reference in my opinion is therefore illegal and I was inclined to reject the reference and to direct the learned Assistant Sessions Judge to proceed to decide the matter according to law. Indeed, after having had the advantage of examining the evidence, it appears to me that, even as it was, there was plenty of justification for the jury to have found the accused Durgeswar Banerwar and Lambodar guilty of the offence under Section 304 Part II of the Indian Penal Code.

26. Briefly the prosecution case is that on 14-6-53 when Haridas Konwar of Japaragaon went in the morning with his ploughmen to plough the disputed field, all the seven accused appeared on the scene variously armed in a body, from accused Dharmeswar's bari which was contiguous to the disputed land and rushed at Haridas and attacked him with dangerous weapons from all sides. The attack was witnessed by a number of persons who were ploughing the fields nearby and also by the ploughmen who protested and were in their turn threatened by the accused. Accused Durgeswar was stated to have inflicted the first blow with a jathi or spear nearabout the region of the eye. Banerwar struck him with a Dao on his head several times and accused Lamhodar gave the deceased a Dao blow on the ear when the injured man fell down.

Even then all the accused except Debeswar continued to beat the injured indiscriminately and when the accused left, the man was found dead on the spot. It is, somewhat difficult to understand the verdict of the jury on the charge under Section 304/149, I.P.C. when the evidence on the point that all the accused took part in the assault resulting in the death of the man was overwhelming. The deceased Haridas Konwar had as many as 9 injuries on his person. The entire

right temporal bone and a portion of the parietal bone were smashed into pieces and the broken pieces of the bones entered into the brain substance. There were extensive bruises all over the entire area of the right side of the chest, fracture of the sternum in its middle portion and fracture of the ribs from 1st to 10th on the right side.

The third rib entered into the right lung and caused its rupture. There was also a punctured wound on the front aspect of the middle of the neck and an incised wound on the right ear and another incised wound on the right side of the frontal and parietal regions. Death in the opinion of the doctor was due to the injuries described above. In view of the evidence it is somewhat, incomprehensible that the jury should have returned a verdict of not guilty under Section 304/149 of the Indian Penal Code; but the learned Judge chose to accept the verdict of the jury on that point and has acquitted all the accused under that charge. There is no appeal on behalf of Government against the order of acquittal and the verdict of the jury, therefore, under that charge cannot be challenged now.

The Judge, however thought that the verdict of the jury as against these accused persons under Part II of Section 304 could not be sustained. Even if we assume that the act of the accused was culpable homicide not amounting to murder and that they had no intention of causing death, it is quite apparent from the nature of the injuries inflicted by them individually as proved by the evidence and the medical report, that the injuries were inflicted with the knowledge that they were likely to cause death. The injuries caused by these accused were caused by dangerous and sharp cutting weapons and on vital parts of the body, accused Durgeswar having pierced with a. spear near the region of the right eye and the other two having struck the victim with dao out the head several times.

The evidence reveals that there were serious injuries on these parts of the body as alleged by the prosecution and anyone in his senses should have known that they were likely to cause death as indeed they did. In submitting the reference the learned Judge concedes that the witnesses do speak of the part which each accused had in the attack upon the deceased Haridas Konwar; but he says that all the accused took part and there was no specific mention of the part played by

each accused either before the police or in the ejahar. Therefore, in his Opinion it would not be right to convict them under Section 304, Part II of the Indian Penal Code as opined by the jury.

He further points out that the Doctor found one punctured wound on the frontal aspect of) the middle of the neck; the wound puncturing the trachea, and which injury in the opinion of the doctor was alone sufficient to cause the death of Haridas Konwar. But he says that the doctor did not find any injury on or near any of the eyes. The injury on the neck which was a punctured injury 2J'X2' was evidently caused by a spear and the learned Judge does appreciate that the spear blow aimed at the eye may have struck of neck and the jury may therefore have reasonably concluded that the accused Durgeswar struck the phala blow, while the other two accused struck him with dais on the head and ears.

If that is so, I am unable to find what difficulty there was in accepting this verdict of the jury. The very fact that all the witnesses did not say that Durgeswar struck on the eye shows that they were not sure as to where the 'spear blow actually fell. But the fact remains that accused Durgeswar attacked the deceased as deposed by the witnesses with a spear on the region of his eye or neck and a spear injury was found in the middle of his neck. It is wrong to import something in the verdict of the jury for which there was no justification, namely, that they acted on some supposed misconception of a common intention.

Whatever the effect of the other injuries may be and whosoever may have caused those injuries, the evidence in regard to the injuries caused by these accused individually appears to be almost consistent, and has been accepted by the jury who returned a verdict of guilty against them under Part II of Section 304, I.P.C. I should have, therefore, thought that there was ample justification for the verdict of the jury and that the learned Assistant Sessions Judge might have very well accepted that verdict. He has, however, recommended that the accused should be convicted under Section 326, I.P.C

It is quite obvious from his judgment also that he is not prepared to disbelieve the evidence of the prosecution witnesses against these accused which has been accepted by the jury. My learned brother thinks that it is not necessary to reject the

reference and that we should accept the recommendation of the Judge that the accused should be convicted for an offence under Section 326, I.P.C. only. In the circumstances although I was more inclined to accept the jury's verdict of guilty against them under Section 304, Part II of the Indian Penal Code, I yield to the recommendation of the learned Judge now accepted by my learned brother.

27. It has been however very strenuously urged on behalf of the accused that they having been acquitted of the charge under Section 304/149 of the Indian Penal Code, could not be convicted of any offence either under Section 304 or Section 326, I.P.C. in the absence of a specific charge for this purpose. My learned brother has very elaborately examined the argument on that point, but I would desist from entering into the sophistications of the argument because in my opinion the matter is now concluded almost beyond doubt by a very recent decision of the Supreme Court in (S) : 1956 CriLJ291 .

As has been rightly pointed out the Code is a Code of Procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that an accused person gets a full and fair trial along certain well-established and well-defined lines that accord with our notions of natural justice. If he is tried by a competent Court, and if he is told and clearly understands the nature of the offence for which he is being tried if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is substantial compliance with the outward forms of the law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial are regarded as venal by the Code and the trial is not vitiated unless the accused can show substantial prejudice.

The rules of procedure therefore cannot be utilised as a pretext to defeat justice. I should not be however taken to encourage any loose practice on the part of trying Magistrates and Judges in framing charges against the accused. Far from it, I think the rules relating to the framing of charges as embodied in the Code should be meticulously respected. In my opinion, it is the duty of officers trying cases to frame charges where so required by the law clearly and adequately to meet the

requirements of the case and to give clear notice to the accused of] the offence alleged against him so as not to prejudice his defence.

It is always better to err on the safe side and to frame an additional or alternative charge if the facts justify the same. I cannot help observing that of late I have noticed a tendency to ignore framing a charge under Section 302, I.P.C. even where such a charge is appropriately justified: on the facts and circumstances of a case, thereby causing a deliberate miscarriage of justice and a serious detriment to fair and impartial trial. Such an oversight is not permissible and must be unequivocally condemned.

I agree that it is the Court's duty to frame appropriate charges against the accused neither omitting nor conceding any charge that may be justified on the facts; but it is another thing to say whether the omission of a charge where it has happened would necessarily defeat the trial in every case. I have no desire to add my own gloss to the very emphatic observation of their Lordships of the Supreme Court in the decision in question. I would be content to conclude the judgment with the very significant remarks of Chandrasekhara Aiyar, J. in the case in question, wherein his Lordship said:

Sections 34, 114 and 149 of the Indian Penal Code provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention; 'and the charge is a rolled-up one involving the direct liability and the constructive liability' without specifying who are directly liable and who are sought to be made constructively liable.

In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge, can be set aside, prejudice will have to be made out. In most of the cases of this kind, evidence is normally given from the outset as to who was primarily responsible for the act which brought about the offence and such evidence is of course relevant.

Therefore, applying this test, in my opinion, there has been no prejudice to the accused caused by the mere omission of a substantive charge under Section 304,

Part II in the alternative; or under Section 326 of the Indian Penal Code. Section 326, I.P.C. is a minor offence and there was already a charge against the accused under Section 304/149, I. P. Code.

28. On the above grounds I agree that the reference should be accepted and the accused convicted and sentenced under Section 326 of the I. P. Code as already stated.

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