

Emperor Vs. Puttan Hassan

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Court : Mumbai

Decided On : Nov-19-1935

Reported in : (1936)38BOMLR19; 160Ind.Cas.1060

Judge : John Beaumont, Kt., C.J.,; Broomfield and ;N.J. Wadia, JJ.

Appeal No. : Case No. 17 and Fourth Criminal Sessions of 1935

Appellant : Emperor

Respondent : Puttan Hassan

Disposition : Application dismissed

Judgement :

John Beaumont, Kt., C.J.

1. This is a petition to the Court to review the conviction of the accused of the offence of murder by the Bombay Sessions Court and the sentence of death passed upon him, the petition being based on a certificate of the Advocate General given under Clause 26 of the Letters Patent. The certificate granted by the Advocate General is that in his judgment the question whether the direction to the jury by the learned Judge in this case and the omission to direct the jury do not amount in law to a misdirection should be further considered by the Court. The basis of the petition for review is, therefore, that there were misdirections and omissions in the summing up of the learned Judge which amount to error in a point

of law.

2. Section 297 of the Criminal Procedure Code provides that in cases tried by jury, when the case for the defence and the prosecutor's reply (if any) are concluded, the Court shall proceed to charge the jury, summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided. It is, therefore, mandatory upon the Judge to charge the jury, and in so doing, to sum up the evidence for the prosecution and the defence and to lay down the law. The object of requiring the Judge to sum up the evidence is that he may render such assistance as he can to the jury by pointing out to them the salient evidence for both the prosecution and for the defence. It is not necessary for him to read his notes of the evidence to the jury, though it may often be desirable to read his notes of important parts of the evidence; nor is it necessary for him to go through the whole of the evidence. But he ought to refer to the salient parts of the evidence. Now what the learned Judge did in this case was that he first laid down certain general rules for the guidance of the jury in appreciating the evidence, and no exception is taken to that part of the charge. He also dealt with the law relating to murder, and it is not suggested that he gave any misdirection :in his statement of the law, although it is suggested that his direction did not go far enough, in that he omitted reference to the exceptions to Section 300 of the Indian Penal Code. He then asked the jury whether they desired him to read out his notes of any part of the evidence, and on the jury saying that they did .not so desire, the learned Judge really did not deal at all with the evidence. It is no doubt legitimate for a Judge to ask the jury whether they have a particular piece of evidence in mind, or whether it would help them for him to read his notes on the subject; but the Judge is bound to sum up the evidence, whether or not the jury desire him to do so. The learned Judge made some general observations about the nature of the prosecution case, he referred to the fact that there were discrepancies in the evidence, though he did not allude to any particular discrepancy, and he referred generally to the defence suggested in the cross-examination of the prosecution witnesses. But it is impossible to say, in my opinion, that he summed up the evidence -to the jury, and as the learned Judge omitted to sum up the evidence to the jury and failed to comply with Section 297, it is, in my opinion, established that there is an error of law which brings the case within Clause 26 of the Letters

Patent.

3. The next point to consider is what our powers are in dealing with a case under Clause 26 of the Letters Patent. That clause provides that on its being certified by the Advocate General that in his judgment there is an error in the decision of a point or points of law decided by the Court of original criminal jurisdiction, or that a point or points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right. It was admitted by Mr. Poonawalla on behalf of the accused, and I think quite rightly admitted, that the clause does not entail that whenever any misdirection is found to exist, the Court has no option but to set aside the verdict. To hold that we are bound to set aside the verdict whenever any misdirection is proved would be to disregard the direction in the section that we are to review the case. It is clear, I think, from the wording of Section 537 of the Criminal Procedure Code that it does not apply to a case dealt with under Clause 26 of the Letters Patent. But, in my opinion, we ought to apply to such a case the principle which underlies that section, that is, that where there has been no illegality in the mode of trial, but some irregularity in the process of trial, we are not entitled to set aside the verdict or judgment unless we are satisfied that that irregularity has led to a miscarriage of justice, or has prejudiced the accused. Mr. Velinker for the Crown has relied on the decision of a full bench of this Court, which is not reported: *Emperor v. Leherchand Dayachand* see p. 23, *supra*, where the judgment is in these terms:-

Though our decision on some of the points raised by the Advocate General must be in the Accused's favour that does not entitle us to dispose of the case by simply quashing the conviction. For this Court to deal with the case now *be novo* no doubt transfers from the jury to this Court the determination of the question whether the legal evidence in the case is sufficient to support a conviction against each of the accused but the authorities are conclusive that section 26 of the Letters Patent casts upon us that duty.

It is, in my opinion, not necessary for us in this case to go as far as the Court went in that case, or to consider how far that ruling is in accordance with certain views of the Privy Council expressed in the well-known case of *Subrahmania Ayyar v. King-Emperor* I.L.R. (1901) Mad. 61 : 3 Bom. L.R. 540 It is, in my judgment, clearly open to the Court to consider, not: so much, what effect: the misdirection has upon the minds of this Court sitting in place of a jury, but what the effect of the misdirection was or may have been upon the minds of the jury which tried the case; and in so doing we must, I think, assume that the jury was a reasonably competent jury, though we must remember that a jury consists of laymen, and that a misdirection may have more effect upon the minds of laymen than upon the mind of a trained Judge.

4. In order to determine that question it is, of course, necessary to consider the evidence on the record, and we have been through the whole of the evidence. [After discussing the evidence in the case his Lordship proceeded:]

5. The broad points, on which Mr. Poonawalla relies to establish that there was a misdirection which prejudiced the accused, are first of all, that the Judge should have referred to the evidence in the case. I agree that he should have done so, but having regard to the nature of the evidence, I think that the Judge's omission to refer to it was really favourable to the accused. In my view the more the Judge had referred to the evidence, the worse it would have been for the accused. Then it is said that the Judge should have pointed out the discrepancies between the stories of the different eye-witnesses and the discrepancies between the stories which the several witnesses told in the Sessions Court and the stories the same witnesses had told in the Committing Magistrate's Court. Counsel had of course referred to those discrepancies. The Judge's duty would be to refer to any material discrepancy, but in my opinion there were here no such serious discrepancies as made it necessary for the Judge specifically to deal with them. The learned Judge did refer to the fact of there being discrepancies in the evidence, and he pointed out quite truly that minor discrepancies rather tend to strengthen, than to weaken, the evidence, because they suggest that the witnesses have not learnt the same story off by heart. In my opinion there was no failure of justice in the omission of the Judge to deal with the particular minor discrepancies which were shown to

exist in the evidence. Then it is said that the Judge did not refer to the fact that there were matter favourable to the accused, for instance that there were no blood-stains found on their clothes, no blood-stained knife found with the accused, and no injury on the person of the present petitioner. Well, all those are negative matters which, in my opinion, it was not essential: for the Judge to refer to. The points were again all before the jury, and they may well have thought that inasmuch as the present petitioner was not arrested until three days after the assault, the fact that no blood-stains were found on his clothes and no incriminating weapon found with him was very easily explained. Then a great point is made of the fact that the learned Judge did not refer to any of the Exceptions to Section 300 of the Indian Penal Code, and it is suggested that the defence might have brought the case within the 1st or 4th Exception. Admittedly, counsel for the petitioner did not himself read those exceptions to the jury, and if the learned Judge had read the exceptions, it would have been necessary for him, in my opinion, to tell the jury as matter of law that there was no evidence on which they could bring the case within either of those exceptions. If that is so, there was clearly no miscarriage of justice in the Judge not reading exceptions which did not apply. The exception principally relied on in; this Court is the 4th exception, which provides that culpable homicide is net murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner. The defence case as suggested in cross-examination was that the deceased Ramzanbux had told the accused that they were not to come to Pannabai's room. They had, on Pannabai's own admission, been harassing her, and she was frightened of them and wanted them not to come to her room, and as Ramzanbux was a rent-collector and was responsible for letting Pannabai's room to her, it no doubt is quite a possible theory that he told the petitioner that he was not to come to her room and frighten her. Then the defence theory is that Ramzanbux, when the accused came in, told them to go away and started to fight with a stick. Admittedly, he was not armed with .any knife. There is absolutely no evidence whatever in support of that story. The learned Judge did refer to it as a possible theory, and counsel quite rightly put that theory in cross-examination of the prosecution witnesses, but no witness accepted that theory as correct. They all

said that was not what ^happened, and merely to put a theory to witnesses, who reject it, does not provide any evidence of the truth of the theory. That being so, in my opinion, in law there was no evidence on which the jury could have held that the case fell within either exception, and the Judge would of course have had to warn the jury that the burden of bringing himself within one of the exceptions rested on the accused.

6. In my opinion, although there was a failure to comply with Section 297 of the Criminal Procedure Code, and that failure does amount to an error in law, that failure has not led to any miscarriage of justice, and has not in any way prejudiced the accused; and that being so, I am of opinion that we should dismiss the petition.

Broomfield, J.

7. I agree, and I shall state my reasons as briefly as possible. Section 297 of the Criminal Procedure Code requires the Judge to sum up the evidence for the prosecution and the defence and to lay down the law. A proper summing up by the Judge is an essential part of the system of trial by jury prescribed by the Code, and except where the facts are admitted, a proper summing up should include a summary of the case for the prosecution and the case for the defence, and some reference to the actual depositions of the witnesses with appropriate comment or criticism. Material discrepancies in the evidence should also be pointed out. The amount of detail necessary must obviously depend on the nature of the case. It has to be remembered that the jury, who are the judges of fact, have usually no record of the evidence on which they are to pronounce. The Judge has his notes and also the depositions taken before the Magistrate. The jury, as a rule, have nothing but their recollection of what the witnesses have stated. It is the Judge's duty, therefore, to make sure that the essential facts deposed to, facts in issue and relevant: facts, are fresh in the minds of the jury before they retire to consider the verdict. If there has been a very full discussion of the evidence at the Bar, the Judge's work is lightened, but he is not relieved of his duty, nor is he relieved of it by the opinion of the jury themselves, which may be unduly optimistic, that they are not in need of any reminder.

8. In the present case, as the learned Chief Justice says, there has not really been any summing up of the evidence. There are only two short passages in this very long charge in which there is any specific reference to the evidence at all, and though, if I may say so with respect, the learned Judge's charge is quite admirable as a guide to the appreciation of oral evidence in the abstract, it was not calculated to give the jury very much practical assistance in dealing with the particular case before them.

9. Then, as to laying down the law, the defence put forward on behalf of the accused apparently was that the injuries to Ramzanbux were caused in the course of a sudden quarrel in such circumstances that exception 4 to Section 300 of the Indian Penal Code might come into operation. That exception was not specifically referred to by the learned counsel for the accused, but nevertheless, as it was fairly obvious that reference was made to that exception, it should have been read out and explained by the Judge, although, as the learned Chief Justice has pointed out, if he had done so, it would also have been proper for him to explain that there was in fact no evidence to substantiate that defence. I think there has clearly been a non-direction by the learned trial Judge, which, in my opinion, amounts to misdirection within the meaning of Clause 26 of the Letters Patent. The learned counsel for the Crown admits that that view is in accordance with the authorities. In any case, if there was not a misdirection, there was an error on a point of law and that would, be sufficient to make Clause 26 apply.

10. The question then arises, what is the consequence of our finding that there was a misdirection or an error in law in the summing up. Clause 26 contemplates a final disposal of the case by this Court, and it has been held that there can be no new trial: *Emperor v. Panchu Das* I.L.R. (1920) Cal. 671. On the other hand, Section 537 of the Criminal Procedure Code does not apply, so that our power to interfere is not limited by statute to cases where there has been a failure of justice. But I agree with the learned Chief Justice that the principle of that section may be applied, and if it appears that there has been no failure of justice, it is difficult to see why we should interfere with the verdict, unless indeed we are bound to do so. In the course of the arguments we were referred to *Emperor v. Fateh Chand Agarwala* I.L.R. (1916) Cal. 477 Mr. Justice Mookerjee, who was one of the

Judges who decided that: case, considered it to be an open question whether, after finding that there has been a misdirection of the jury, there is any option left to the Court except to set aside the conviction and acquit the accused. The learned Judge referred to several authorities, some of the Calcutta High Court and some of this Court, to the effect that it is competent to the Court to consider the whole case on the evidence and to pass such sentence as shall seem right. But he considered it a moot point whether those decisions could stand in view of the decision of the Privy Council in *Subrahmania v. King-Emperor* (1901) L.R. 28 I. A. 287 : I.L.R. 25 Mad. 611 : 3 Bom. L.R. 540. It may be doubted whether the decision of the Privy Council in that case goes as far as has sometimes been assumed. The case has been taken as an authority for the proposition that if there has been disobedience of a mandatory provision of the Code, that vitiates the whole trial, irrespective of the question whether there has been prejudice to the accused. But there is nothing in the judgment which really goes as far as that, and the Privy Council themselves have referred to *Subrahmania Ayyar's* case in a later judgment, *Abdul Rahman v. King Emperor* (1926) L.R. 54 I. A. 96 : 29 Bom. L.R. 813, in such a way as to suggest that the question whether there has been a failure of justice is always a relevant consideration. I may refer in that connection to *Ramaraja Tevan, In re* I.L.R. (1930) Mad. 937.

11. In any case the extreme view has not been pressed before us. The learned counsel for the accused, if I understand his argument correctly, does not dispute the power of this Court to pass such order as the justice of the case requires, though he argues that in the circumstances of this case the judgment should be either one of acquittal or of conviction of culpable homicide not amounting to murder. His argument seems to be really this: If there has been a misdirection, it may be assumed that the verdict has been affected: if the evidence has not been properly summed up, it is possible that if it had been properly summed up the jury would have been less influenced by points in favour of the prosecution and more influenced by points in favour of the defence. If the law bearing on the defence has not been explained, it is possible that if it had been explained the jury might have accepted the defence; and if there is any possibility that the jury might have decided other' wise than they did, whether reasonably or not, the accused should have the benefit of that chance. But I do not think there is any authority for this

proposition even in the cases on which Mr. Poonawalla has relied. It may be going too far to say that the whole case is open to us and that we are at liberty to substitute our own judgment for that of the jury, though there is respectable authority even for that view. But, in any case, I think that the criterion must be, not what the jury might conceivably have held, but what it might have reasonably held if properly charged by the Judge. There is nothing strange or illogical in such a view of our powers or duty. The High Court has constantly to place itself in the position of the jury in this sense in appeals from juries' verdicts and in references under Section 307, and I entirely agree with the learned Chief Justice that on the evidence in this case there is not the slightest reason to believe that there has been any failure of justice, and that the petition should be dismissed.

N.J. Wadia, J.

12. It has not been alleged that there has been any actual misdirection in this case, and no objection has been taken to the exposition of the law by the learned Judge. The case is one entirely of non-direction. It is alleged that the failure of the learned Judge to refer to the evidence of the more important witnesses in detail, to discuss it and to point out the discrepancies in it, his failure to explain what the defence of the accused was, and to point out that the accused relied on exceptions 1 and 4 to Section 300 of the Indian Penal Code and to read out and explain those exceptions to the jury was such serious non-direction, as would amount to misdirection. To amount to misdirection the non-direction must be such as must have misled the jury and seriously prejudiced the; accused and thus resulted in a failure of justice. Although it is true that as the case had been heard by the jury for five days their recollection of the evidence could not have been very fresh, the evidence had admittedly been put before the jury in detail by the learned Advocate General and by the two counsel who appeared for the two accused. This is a fact which must be borne; in mind when considering how far the jury could have been misled or prejudiced by the omission to put or discuss the evidence in detail in the charge. I think that: in the circumstances of the case the mere omission to go through or comment on the evidence did not mislead the jury. The learned Judge at two places in his charge pointedly asked the jury whether they desired him to read out the evidence in detail, and was told by them that they did

not. Even so, however, the omission to refer to certain discrepancies on material points, especially with regard to the number of persons concerned in the offence, was a serious omission, and would, I consider, amount to misdirection. It was contended that the accused had nowhere expressly pleaded that his case came within the purview of either exception 1 or exception 4 to Section 300 of the Indian Penal Code, and looking merely at the statement of the accused, that appears to be correct. But there was, in my opinion, sufficient indication in the cross-examination of the prosecution witnesses to suggest that it was the accused's case that there had been some provocation offered to accused No. 1 or to the members of his party by Ramzanbux, and also that the attack on Ramzanbux was not the act of the accused alone or of any one member of his party, but that there had been a general fight between the party of the accused and that of Ramzanbux. There was an indication, therefore, that reliance was being placed on exceptions 1 and 4 to Section 300, and in the arguments of the learned counsel for the first accused it had been contended that it was not a case of murder in cold blood, but of death resulting from a sudden quarrel, and that the offence, if any, would be one not of murder, but of culpable homicide not amounting to murder. In these circumstances it was, I think, clearly necessary for the learned Judge to refer in his charge to exceptions 1 and 4 to Section 300, and to explain them to the jury, and his failure to do so amounts to misdirection.

13. Assuming that there has been misdirection, the question is what the powers of this Court acting under Clause 26 of the Letters Patent are. We have clearly no power to order a retrial. The language of the clause requires that the case must be finally decided. It has been held by this Court and also by the Calcutta High Court that where the Court on review decides in favour of the accused on the point of law on which the certificate has been granted by the Advocate General, it is open to the Court to consider the whole case on the evidence and to pass such sentence as shall seem right. The question whether the view taken by this Court and the Calcutta High Court had been overruled by the decision of the Privy Council in *Subrahmania Ayyar v. King-Emperor* I.L.R. (1901) 25 Mad. 61 : 3 Bom. L.R. 540, was considered by the Calcutta High Court in *Emperor v. Fateh Chand Agarwala* I.L.R. (1916) Cal. 477 and again in *Emperor v. Panchu Das* I.L.R. (1920) Cal. 671, and although in the first case the question was left open, is the later case

it was decided by a full bench that the Court has power under Clause 26 of the Letters Patent to examine the evidence and to determine after the exclusion of the inadmissible evidence whether the residue is sufficient to justify a conviction, and two of the learned Judges were of opinion that the Privy Council ruling in Subrahmania Ayyar's case had not overruled the view which the Calcutta High Court and the Bombay High Court had previously taken. Mr. Poonawalla, who appears for the accused, has conceded that if this Court thinks that there was misdirection it would be the duty of the Court to place itself as far as possible in the position of the jury and decide what they would have done if properly directed. In my view we have the power to consider the evidence and to decide whether as a result of the misdirection there has been a failure of justice, and whether if there had been no misdirection, the jury could have come to a different verdict.

14. I have already expressed my view that the omission to refer to and to discuss the evidence in detail was not, in the circumstances of the case, a very serious omission, and could not have misled the jury. The relevant portions of the evidence had been already placed before the jury by the learned Advocate General and by the two counsel for the accused, and must have been fresh in their minds. There were undoubtedly certain discrepancies in the statements of some of the witnesses and especially in the statements made by the murdered man, Ramzanbux, and by his brother very soon after the offence. Although these were not specifically referred to, it cannot be said that they were not referred to at all, or that the jury's attention had not in any way been directed to them. The learned Judge expressly asked the jury to consider whether the fact that in each of the statements made by the different witnesses, from the very start the name of accused No. 1 was always mentioned first would weigh with them so as to outweigh the other fact that in some cases the names of other persons were added to those of accused Nos. 1 and 2. He also pointed out to them that in the first instance six persons were implicated, then four persons, and then in the Sessions Court, only two, and he asked them to weigh these discrepancies and to pronounce whether the addition of the names besides the two at various times could be explained in any way consistent with the truth of the prosecution case. At another place in the charge he again asked them to go into the details very carefully, and to consider whether they thought that that second fact, that others

were mentioned together with the accused, would make them discard those statements and pay no heed to the fact that from the very start these two persons, viz., the two accused, had been mentioned as responsible for the death of Ramzanbux. The existence of the discrepancies, therefore, was pointedly brought to the notice of the jury and sufficiently stressed. It would certainly have been better if the actual statements made by Ramzanbux at different times and by some of the prosecution witnesses with regard to the number of persons concerned in the offence had been read out. But the reference made to the discrepancies was, in my opinion, sufficient to direct the jury's attention to the existence and seriousness of the discrepancies, and it cannot, therefore, in my opinion, be said that the omission to refer specifically to the discrepancies had seriously misled the jury or had occasioned a failure of justice.

15. The defence put forward by the accused was also referred to. It was pointed out that the defence had argued that there must have been some kind of provocation, and that it was alleged, and questions were put to witnesses indicating that the deceased must have told the accused and their party to leave Pannabai's hall, that lie must have done so rudely, that angry words must have been exchanged, and a quarrel had arisen, and in the heat of that quarrel somebody struck, and that there was not sufficient evidence before the jury to find out who struck the blow, nor was the evidence sufficient to find that the person who struck the blow did it with the intention of killing. Here again, it was, in my opinion, incumbent on the Judge to point out to the jury that the accused relied on exceptions 1 and 4 to Section 300, and to read out and explain those (exceptions to them. But I agree that the omission to do so has not occasioned a failure of justice. There was clearly no evidence whatever which could have enabled the accused to prove that their case fell either under exception 1 or exception 4, and if the Judge had referred to these exceptions, it would also have been his duty to mention that the burden of proving that their case fell within the exceptions was upon the accused, and that they had failed completely to discharge that burden. It cannot, therefore, be said that the accused has been prejudiced by the omission of the learned Judge to refer specifically to exceptions 1 and 4 in his charge. I agree, therefore, that no failure of justice has occurred, and that the petition must be dismissed.

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