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Court : Allahabad

Decided On : Jul-19-1932

Reported in : AIR1933All128

Appellant : Dakhani and ors.

Respondent : Emperor

Judgement :

Pullan, J.

1. The seven appellants have been tried in circumstances which give rise to certain questions of law. The charge framed against them was drawn up in the following terms:

That you on, or about 18th June 1981, were members of an unlawful assembly, and in prosecution of the common object of beating Bahadur and his son Mahabir some of the members voluntarily caused grievous hurt to Bahadur and you are thereby under Section 149, I.P.C., guilty of causing the said grievous hurt and simple hurt to Bahadur and Mahabir and thereby committed an offence punishable under Sections 325/149 and 148, I.P.C.

2. Certain offences are in the Allahabad Judgeship triable by a jury. The Sessions Judge believing that this was a case which under Section 269, Criminal P.C., should be tried by a jury for one of the offences committed, and with the aid of the

jurors as assessors for another, impanelled a jury and instructed the jury to give an opinion on the evidence as to the charge under Sections 325/149, I.P.C., and took their opinion as assessors on the charge under Section 148, I.P.C. This procedure is rendered necessary by the terms of the Criminal Procedure Code where persons are charged with several offences, some of which are triable by a jury and others not. In the present case there is only one offence charged against these persons. It is an offence of rioting in the course of which they caused certain injuries. The Judge had to consider whether the offence was one which could or could not be tried by a jury. In this province all offences of rioting, which are contained in Ch. 8, I.P.C., are excluded from jury trial. The Judge appears to have thought that by adding Section 325 which is triable by a jury, he brought this case within their jurisdiction. The Judge was mistaken. The charge was not under Section 325 but Sections 325/149, and the wording of the charge shows that the essential part of the offence was rioting. This is indeed inevitable in any case where Section 149 is employed for the basis of that section is that the persons who are held to be jointly responsible for an offence were committing that offence as members of an unlawful assembly, and were therefore where the offence was one involving the use of violence, as in the present case, rioting, within the definition of 'rioting' given in the Penal Code. This case therefore was not triable by a jury. It was triable by a Judge with the aid of assessors. Section 536, Criminal P.C., enacts that if an offence triable with the aid of assessors is tried by a jury the trial shall not 'on that ground only be invalid.' Opinions have been expressed in various High Courts that these words mean that a verdict given by a jury in a case which should have been tried with the aid of assessors can be regarded as the opinion of assessors, and the trial may stand not as a trial by jury but as a trial with the aid of assessors. This view was held by one of two Judges in the case of *Pattikadan Umbaru v. Emperor* (1903) 26 Mad 243 and a similar view seems to have been taken by the Calcutta High Court in the case of *Empress v. Mohim Chunder Rai* (1877) 3 Cal 765. The difficulty in accepting this view is that a jury gives a single opinion. Assessors must give their opinions separately. Consequently the verdict of a jury given as such is not and cannot be the same as the separate opinions of the members of the jury. I have no doubt that on this point I should follow the decision of a Full Bench of five Judges in the Bombay High

Court in the case of King-Emperor v. Parbhu Shankar (1901) 25 Bom 680. I cannot do better than quote the observations of Jenkins, C.J., at p. 688 of the Report:

I propose to confine myself to the words of the Code, though in doing so I will bear in mind what has been held in the several cases mentioned and discussed in the referring judgment. Section 404, Criminal P.C., provides that 'no appeal shall lie from any judgment or order of a criminal Court except as provided for by this Code or by any other law for the time being in force,' and under Section 418 'an appeal may lie on a matter of fact as well as a matter of law except where the trial was by jury, in which case the appeal will lie on a matter of law only.' At the same time it is provided by Section 536 that 'if an offence triable with the aid of accessors is tried by a jury, the trial shall not on that ground only be invalid.' These sections are clear and need no paraphrase. The first question they suggest is whether in this particular case the trial was by jury. The record leaves no doubt in my mind on this point; for the events of the trial absolutely negative the view that the accused was tried by the Court of Session with the aid of the jurors as assessors. The offence therefore though triable with the aid of assessors was in fact tried by a jury. This irregularity did not invalidate the trial; but did it attract the consequences of Section 418? This turns on the precise force in that section of the words 'where the trial was by jury.' Do they mean 'where the trial should have been by jury' or 'where the trial in fact was by jury. In my opinion the words are themselves the clearest answer to this question: they relate to what actually occurred, not to what should have occurred. An adoption of the rival view would lead to the result that a reversal of the conditions would leave an accused who was wrongly tried with the aid of assessors, without any right of appeal, though the scheme of the Code, shows that in the view of the legislature it is less advantageous to an accused to be tried with the aid of assessors than by a jury. I would under the circumstances answer the reference by saying that in the present case no appeal lies on a matter of fact.

3. Thus the opinion given by the jury in this case is a verdict which can only be challenged on questions of law. I have been referred to no case where a trial has been from beginning to end conducted as a jury trial where there was no offence charged which could in law have been tried by a jury. This is however the case

here, and one of the grounds of appeal is that there has been a misdirection of the jury. In my opinion this objection must prevail. From beginning to end the charge is a misdirection as it required the jury to give an opinion on a riot which a jury cannot be required to give under the law as enacted in this province. It is not the case that the Judge made any attempt to confine the attention of the jury to the causing of grievous hurt. He states in his summing up that the law applicable as laid down in Sections 141, 142, 146 and 147, 148, 149, 323, 325 and 320, I.P.C., and he read and explained all those sections to the jurors. The jury therefore were bound to consider this case as a case of rioting, and not as a case of individual assaults; and this is further emphasized by another error made by the Judge in the summing up when he failed entirely to point out to the jury that they were required to give an opinion as to the guilt of each of the persons charged. He has throughout regarded the accused as a body of men and not as individuals. And there is still a third error in his charge when he states that if the jury found the accused not guilty of the graver offence of 325 and 148 it will be open to them to find them guilty of the minor offences under Sections 323 and 147. But this Section 147 is absolutely excluded from trial by a jury. The jury then returned a verdict of guilty in the majority of 3 to 2, and this would normally mean that three of the jurors had found all the accused guilty and two of them found them as innocent. It was however explained by one of the jurors that this was not their verdict. Consequently the verdict contains a rider to the effect that one of the two dissenting gentlemen held that three of the accused were not guilty, and the others were guilty. In my opinion therefore the trial by a jury is vitiated by misdirection. In the circumstances of this case there can be no question of a retrial as the case was not triable by a jury at all, and the jury gave their opinion as assessors on the charge under Section 148 which, in my opinion, was the same charge as that which they had tried as a jury under another name. An appeal against this trial with the aid of assessors can be heard on questions of fact, and I have accordingly heard the arguments on behalf of all the seven appellants. (His Lordship then discussed case on merits and proceeded.) I accordingly allow the appeals of Baiju and Gharib, set aside their convictions and sentences and declare them to be acquitted. In the case of Dakhani, Bhopua, Chunni, Parshadi and Anandi I set aside their conviction and sentence under Sections 323/149, but uphold their

conviction and sentence under Section 147, I.P.C. These five men will accordingly surrender to their bail and serve out the remainder of their sentence.

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