Abdul Rahim Vs. Emperor

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Court : Privy Council

Decided On : Feb-26-1946

Judge : Viscount Simon, Lord Macmillan, Lord Wright, Lord Simonds &Amp;amp; Sir John Beaumont

Appeal No. : Privy Council Appeal No. 61 of 1945 (From Lahore)

Appellant : Abdul Rahim

Respondent : Emperor

Advocate for Pet/Ap. : Phineas Quass and M.P. Solomon, for Appellant ; B.J. MacKenna, for the Crown. Solicitors for Appellant, Douglas Grant and Dold ; Solicitors for the Crown, Solicitor, India Office.

Judgement :

Lord Macmillan:

The appellant on 12th May 1944 was convicted on a charge of murder and sentenced to death after a trial before the Sessions Judge of Ambala sitting with a jury of seven. The jury returned a verdict of guilty by a majority of four to three. There were other minor charges against the appellant on which he was also convicted, but it is unnecessary to refer to these. Sentence of death having been passed on the appellant the "proceedings," as required by, S. 374, Criminal PC, were submitted for confirmation to the High Court of Judicature at Lahore. The appellant also appealed to the High Court against his conviction.

The case came before a Divisional Bench of the High Court consisting of the Chief Justice Sir Arthur Trevor Harries and Teja Singh J. After reviewing the evidence and the summing up of the Sessions Judge to the jury they came to the conclusion that certain material evidence had been improperly admitted at the trial and that the Judge had seriously misdirected the jury. The Court had then to consider what were its powers in this situation and what course it should adopt. Counsel for the appellant maintained that on both grounds the verdict of the jury should be set aside and a new trial ordered. Counsel for the Crown maintained that notwithstanding the defects in the proceedings the Court was entitled to examine for itself the whole proceedings including the evidence and should not set aside the verdict of the jury and order a new trial unless it was satisfied on a consideration of the whole case that the verdict was wrong and that there had been a failure of justice.

In view of the importance of the questions raised as to the powers of the High Court in such circumstances and as to the proper course to be pursued by it, and also in view of the divergent opinions expressed on this topic in a number of previous reported cases, the learned Judges of the Divisional Bench decided to refer to a Full Bench the two following questions:

"(i) When in a murder reference and appeal it is found that inadmissible evidence has been admitted in a jury trial, can this Court in view of S. 167, Evidence Act, and/or S. 537, Criminal PC, exclude such evidence and maintain a conviction if the evidence remaining is sufficient to warrant it or must a re-trial be ordered ?

(ii) When in a murder reference and appeal it is found that there have been serious instances of misdirection and non-direction of a jury, should this Court in view of S. 537, Criminal P. C., proceed itself to consider the evidence and maintain a conviction if the evidence is sufficient or must a re-trial be ordered ?"

Those questions were considered by a Full Bench of five Judges presided over by the Chief Justice which on 11th December 1944 delivered judgment, answering the questions as follows:

(i) "Where inadmissible evidence has been admitted in a murder reference and appeal under S. 449, Criminal PC, the High Court may, after excluding such evidence, maintain a conviction, provided the admissible evidence remaining clearly establishes the guilt of the accused."

(ii) "The Court in an appeal by an accused person under S. 449, Criminal PC, can, where there has been a serious misdirection or non-direction, consider the evidence and maintain the conviction if the evidence clearly establishes the guilt of the accused."

The case was remitted with these answers to the Divisional Bench which on 8th January 1945 dismissed the appellant's appeal and confirmed the sentence of death passed upon him.

By order dated 3rd August 1945 special leave to appeal in forma pauperis to His Majesty in Council was granted to the appellant on the advice of the Board, but "restricted to the two questions referred to the Pull Bench by the Divisional Bench."

It will be observed that the answers returned by the Full Bench are narrower in scope than the questions referred to it, and are limited to cases under S. 449, Criminal P. C. This is explained by the circumstance that the case was one in which European and Indian British subjects were concerned and therefore came within the special provisions relating to such cases contained in chap. XXXIII of the Code, and particularly the special provisions relating to appeal in S. 449, which inter alia authorise an appeal on a matter of fact as well as on a matter of law in jury cases.

The judgment of the Full Bench discusses with much learning and a full citation of authorities the whole ground covered by the questions referred to it but thought it right to limit its answers to the specific case, as to which, being a case under S. 449, which allowed an appeal on fact as well as on law, it was in any event clear what the answers should be, whatever view might be taken with regard to appeals under other sections of the Code.

As the Order in Council grants leave to appeal on the two questions referred to the Full Bench and as it is desirable that the whole matters raised in these questions should be considered and decided their Lordships do not propose to confine themselves to the special case of appeals under S. 449.

In India the verdict of a jury in a criminal case may come before the High Court for consideration in a variety of ways.

I. Under Chap. XXIII, S. 307, Criminal PC, if the trial Judge disagrees with the verdict and is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court "he shall submit the case accordingly recording the grounds of his opinion" and "shall not record judgment of acquittal or of conviction." The powers of the High Court in such a case are thus defined in sub-s. (3) of the section:

"In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal and subject thereto it shall after considering the entire evidence and after giving due weight to the opinion of the Sessions Judge and the jury acquit or convict such accused of any offence of which the jury could have convicted him upon the charge framed and placed before it; and if it convicts him may pass such sentence as might have been passed by the Court of Session.

" II. Under Chap. XXVII, S. 874, of the Code

"When the Court of Session passes sentence of death the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court."

In such a case the High Court, under S. 376

"(a) may confirm the sentence or pass any other sentence warranted by law; or

(b) may annul the conviction and convict the accused of any offence of which the Sessions Court might have convicted him or order a new trial on the same or an amended charge; or

(c) may acquit the accused person."

III. Chapter XXXI of the Code deals with appeals generally, whether by the public prosecutor from an acquittal or by the accused from conviction and sentence. Section 418 (1) provides that

"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 shall lie on a matter of law only."

Section 423 defines the powers of the appellate Court disposing of the appeal. The Court under sub-s. (1) is to send for the record of the case, if not already before it, and "after perusing such record" and hearing parties

"the Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may

(a) in an appeal from an order of acquittal reverse such order and direct that further inquiry be made or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law ;

(b) in an appeal from a conviction

(1) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial; or

(2) alter the finding, maintaining the sentence or with or without altering the finding reduce the sentence; or

(3) with or without such reduction and with or without altering the finding alter the nature of the sentence but subject to the provisions of S. 106, sub-s. (3), not so as to enhance the same."

Sub-section (2) of S. 423 is of special importance for the present purpose and is as follows:

"Nothing herein contained shall authorise the Court to alter or reverse the verdict of a jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by him."

IV. Chapter XXXIII of the Code, which applies to the case in hand, contains special provisions relating to cases in which European and Indian British subjects are concerned and in relation to jury trials provides in S. 449 (1) that

"notwithstanding anything contained in S. 418 or S. 423, sub-s. (2), or in the Letters Patent of any High Court an appeal may lie to the High Court on a matter of fact as well as on a matter of law."

Chapter XLV, which is entitled "Of Irregular Proceedings," provides in S. 537 as follows:

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chap. XXVII or on appeal or revision on account

(a) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code ;

* * * * *

(d) of any misdirection in any charge to a jury ; unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice."

To complete this citation of the statute law affecting revision and appeals in jury trials it is necessary to add the provision contained in S. 167, Evidence Act, 1872, which applies to all judicial proceedings in or before any Court, including jury trials. The section reads as follows:

"The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it shall appear to the Court before which such objection is raised that, independently of the evidence objected

to and admitted, there was sufficient evidence to justify the decision or that if the rejected evidence had been received it ought not to have varied the decision."

No one can read these statutory enactments without realising the wide disparity between the law of India and the law of England in their respective attitudes to the verdict of a jury in criminal cases. In India the law is purely the creation of statute, and the introduction of the system of jury trial among a people who had no previous experience of its working was not unnaturally accompanied with safeguards and modifications appropriate to such circumstances. In England on the other hand trial by jury, the palladium of British justice as Blackstone terms it, is an institution deeply rooted in the minds and habits of the people with which they have been familiar from time immemorial. It is therefore not surprising to find the verdict of a jury treated differently in Indian criminal legislation. To emphasise the difference it is enough to point out that the statute law in India in certain circumstances permits an appeal against a jury's verdict of acquittal and authorises the appellate Court to substitute a conviction on its own consideration of the evidence. Time and again eminent Judges in India have drawn attention to the importance of bearing these circumstances in mind and the danger of allowing preconceptions derived from English practice to influence the decision of Indian cases, (see, for example, the observations of Jackson J. in 5 W R Cr 80 ('66) Beng LR Sup Vol 459 : 5 WR Cr 80 (FB), In re Elahee Buksh.at p. 94.) This is not to say that the verdict of a jury is to be lightly regarded in India. Far from it. The Legislature has enjoined appellate Courts expressly to pay regard to it. But at the same time it has thought it right and necessary in the circumstances of India to confer upon appellate Courts extensive powers of overruling or modifying a verdict in the interests of the due administration of justice, confident that the appellate Judges, who have not themselves seen and heard the witnesses, will not exercise lightly the responsible power entrusted to them.

The first question submitted relates to the effect of the misreception of evidence. It has been found by the High Court that in the present case material evidence was improperly admitted. What are the powers and what is the duty of the High Court in such circumstances? It was contended for the appellant that the evidence improperly admitted might have so seriously prejudiced the minds of the jury as to

have brought about a failure of justice and that he was entitled on a new trial to have the verdict of a jury on proper evidence. To this submission S.167, Evidence Act, in their Lordships' opinion affords a complete and conclusive answer. The improper admission of evidence is thereby expressly declared not to be a ground of itself for a new trial. The appellate Court must apply its own mind to the evidence and after discarding what has been improperly admitted decide whether what is left is sufficient to justify the verdict. If the appellate Court does not think that the admissible evidence in the case is sufficient to justify the verdict then it will not affirm the verdict and may adopt the course of ordering a new trial or take whatever other course is open to it. But the appellate Court if satisfied that there is sufficient admissible evidence to justify the verdict is plainly entitled to uphold it. If the misreception of evidence is an irregularity within the meaning of S.537, Criminal P. C., on which their Lordships find it unnecessary to pronounce an opinion, it plainly has not occasioned a failure of justice where, as here, the appellate Court, obeying the injunction contained in S. 167, Evidence Act, has found that there is sufficient admissible evidence to justify the verdict. Their Lordships find themselves accordingly in agreement with the answer returned by the Pull Bench to the first question addressed to it by the Divisional Bench subject to an amendment of the concluding words of the answer so as to read "provided the admissible evidence remaining is in the opinion of the Court sufficient clearly to establish the guilt of the accused." They see no need, however, to limit the answer to a murder reference and appeal under S. 449 of the Code.

The second question requires more detailed consideration. The High Court has found that in his charge to the jury the learned Sessions Judge seriously misdirected them. Does this entitle the accused as of right to an order for a re-trial It will be observed that in the sections of the Criminal Procedure Code above quoted there is express reference to a misdirection to a jury in two places, once in S. 423 (2) and again in S. 537. The guidance thereby given to the appellate Court is in each case negative not positive. Under the earlier section, the Court is enjoined not to reverse the jury's verdict unless it is of opinion that the verdict is "erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by him."

Under the later section the Court is enjoined not to reverse or alter the jury's verdict on account of any misdirection in the Judge's charge unless such misdirection has in fact occasioned a failure of justice. While these injunctions are expressed negatively they may be said to be pregnant negatives implying that there is a case for reversing or altering the verdict of the jury when the Court is of opinion either that the verdict is erroneous owing to the Judge's misdirection or the jury's misunderstanding of the law laid down by him or that the misdirection has in fact occasioned a failure of justice. The primary duty of the Court on an appeal is indicated in S. 423 (1). It is to consider with the record before it whether there is "sufficient ground for interfering." That there has been a misdirection is not of itself a sufficient ground to justify interference with the verdict. The Court must proceed to consider whether the verdict is erroneous owing to the misdirection or whether the misdirection has in fact occasioned a failure of justice. If the Court so finds then it has a plain justification for interfering and indeed a duty to do so.

The controversy which, as the reported cases show, has long existed in the High Courts of India has centred round the question whether the appellate Court, in deciding whether there is sufficient ground for interfering with the verdict of a jury, particularly where there has been a misdirection by the Judge, has the right and duty to go into the merits of the case for itself and on its own consideration of the evidence to make up its mind whether the verdict was justified or not. On the one hand, it has been said that the accused is entitled to have his guilt or innocence decided by the verdict of a jury and that the appellate Court has no right to substitute its own judgment in place of a verdict by a jury. The powerful observations on this subject by Lord Chancellor Herschell in 1894 AC 57 (1894) 1894 AC 57 : 63 LJ PC 41 : 69 LT 778, Makin v. Attorney-General for New South Wales are invoked in support of this view. On the other hand it is argued that it is impossible for the Court to perform the duty laid upon it by the Code without applying its own mind to the soundness of the verdict.

The argument that no man shall be convicted save by the verdict of a jury returned on competent evidence and under proper judicial direction loses much of its force so far as India is concerned when it is realised that in an appeal from an acquittal the appellate Court under S. 428 (1) (a) if it considers that there is sufficient

ground for interfering may find the accused guilty and pass sentence upon him according to law. How it can do so without itself going into the whole merits of the case it is impossible to conceive.

Moreover in performing its duty under S. 374, when a sentence of death is submitted to it for confirmation, the High Court of necessity is entitled and bound to consider the whole merits of the case for itself. How else could it decide, as it may do, to acquit the accused notwithstanding the jury's verdict of guilty? Similarly, under S. 307 where the trial Judge who disagrees with the jury's verdict submits the case to the High Court it is plainly the duty of the High Court to go into the whole case for itself in order to enable it to decide whether the accused should be acquitted or convicted. There is therefore nothing shocking in the estimation of the Legislature of India in empowering an appellate Court, notwithstanding the verdict of a jury, to reconsider the evidence for itself and arrive at a contrary conclusion. Under such a system arguments derived from English practice or from the Australian case above-mentioned are seen to be inapplicable and indeed misleading.

But it is said that whatever may be permissible under other sections of the Code, it is not permissible for the appellate Court to go into the merits of the case in an appeal under Chap. XXXI for S. 418 enacts expressly that where there has been a trial by jury an appeal shall lie on a matter of law only. This, it is argued, precludes the appellate Court from entering upon the merits. It has already been pointed out that under S. 423 the appellate Court may on an appeal from an acquittal find the accused guilty. This power is not expressed to be inapplicable to cases where the acquittal has been by the verdict of a jury and if it is to be exercised would seem necessarily to involve the consideration of the whole case on the evidence. An appeal may be entertained only on a question of law, but once it has been held by the appellate Court that there has been an error in law it is open to it to "interfere" with the jury's verdict and if it thinks that the error in law affords sufficient ground for doing so it will then proceed to consider which of the various forms of "interference" it will adopt. Section 423 clearly indicates that within its meaning a misdirection by the Judge falls within the category of error in law, for it contemplates in sub-s. (2) that an appeal is competent on the ground of

misdirection. But a misdirection having been found to have occurred it is not necessarily a ground for interference. It may have been of a more or less trivial character. But if it has led to an erroneous verdict being returned or to a failure of justice the statute plainly indicates that a case for interference has arisen. What form the interference shall take is left to the Court which is given a wide discretion. It need not order a re-trial. It may for example acquit the accused. To order a re-trial might well operate injustice in readily conceivable circumstances.

The question of the precise meaning of the word "erroneous" occurring in S. 423 (2) has been much discussed. One view is that it means that the verdict is wrong on the merits. The other is that it means that the verdict has been vitiated by the misdirection irrespective of the merits, and that it is not for the Court to consider what judgment it would have given on the merits but what verdict a jury properly directed might have returned on the evidence. Their Lordships do not find it necessary to express an opinion upon this question of construction in view of the terms of S. 537 which peremptorily precludes the Court from interfering with a jury's verdict on the ground of misdirection unless the misdirection has "in fact occasioned a failure of justice." The words "in fact" were inserted by amendment to give emphasis to the injunction and it is noteworthy that the Legislature took this step after two decisions by the High Court in Calcutta by which it had been held that it was not entitled in deciding whether there had been a failure of justice to go into the evidence for itself: 21 Cal 955 ('94) 21 Cal 955, Wafadar Khan v. Queen-Empress. and 25 Cal 230.('97) 25 Cal 230, All Fakir v. Queen-Empress. In their Lordships' opinion the Court in deciding whether there has been in fact a failure of justice in consequence of a misdirection is entitled to take the whole case into consideration and determine for itself whether there has been a failure of justice in the sense that a guilty man has been acquitted or an innocent man has been convicted.

In the exhaustive judgment of the Full Bench the authorities on the subject are very fully discussed. Their Lordships do not propose to analyse them again in detail. But they desire to draw special attention to the case in 6 W R Cr 80 ('66) Beng LR Sup Vol 459 : 5 WR Cr 80 (FB), In re Elahee Buksh (cit. sup.) the importance of which seems to have been to some extent overlooked in certain

subsequent cases. The decision in 5 W R Cr 80 ('66) Beng LR Sup Vol 459 : 5 WR Cr 80 (FB), In re Elahee Bukshwas that of a Full Bench of five Judges of the High Court of Calcutta presided over by that learned and experienced Chief Justice, Sir Barnes Peacok. There the appellant was convicted and sentenced to transportation for the crime of dacoity. At the trial the Judge seriously misdirected the jury. The Divisional Bench sought guidance from the Full Bench. The provisions of the Criminal Code at that time were not identical with those now in force but were substantially the same. The learned Chief Justice in a careful judgment, concurred in by his colleagues, examined in all its bearings the question of the powers and duty of an appellate Court in dealing with an appeal where misdirection has occurred. He points out that the statute does not compel the Court to send the case back for a new trial. "In determining," he says at p. 90,

"whether the verdict ought to be set aside and a new trial granted for a defective summing-up of the evidence, it appears to me that the question to be considered is not whether upon a proper summing-up of the whole evidence a jury might possibly give a different verdict but whether the legitimate effect of the evidence would require a different verdict."

He expressed his decision in formal propositions of which the second and third may be usefully quoted :

"2. That for the reasons above stated there was error in law in the summing up of the evidence which would warrant the Court in setting aside the verdict of guilty if the Court is satisfied that the prisoner was prejudiced by the error and that there has been a failure of justice.

3. That the verdict and conviction ought not to be set aside if the Court be of opinion that the verdict was warranted by the evidence and that upon that evidence they would have upheld the conviction on appeal if the trial had been by the Judge with the aid of assessors instead of by jury."

On the point having again arisen in 21 Cal 955 ('94) 21 Cal 955, Wafadar Khan v. Queen-Empress. (cit. sup.) in 1894 a Calcutta Divisional Bench, to which the case in 5 W R Cr 80 ('66) Beng LR Sup Vol 459 : 5 WR Cr 80 (FB), In re Elahee

Bukshwas surprisingly not cited, took the view that, there having been misdirection and the appeal being only on law, the Court had no right to go into the facts for itself. In reaching this decision the Court was largely influenced by the Australian case in 1894 AC 57 (1894) 1894 AC 57 : 63 LJ PC 41 : 69 LT 778, Makin v. Attorney-General for New South Wales (cit. sup.). In 1897 in 25 Cal 230 ('97) 25 Cal 230, All Fakir v. Queen-Empress. (Cit. sup.), a Divisional Bench in Calcutta, again without regard to the decision of the Full Bench in 5 W R Cr 80,1followed the decision in 21 Cal 955('94) 21 Cal 955, Wafadar Khan v. Queen-Empress.On the other hand there have been several cases in which the ruling in 5 W R Cr 80 ('66) Beng LR Sup Vol 459 : 5 WR Cr 80 (FB), In re Elahee Buksh.has been given effect. It is sufficient to refer to the cases in 26 Mad 1 ('03) 26 Mad 1, Emperor v. E. W. Smith.and AIR 1940 Lah 87('40) 27 AIR 1940 Lah 87 : 187 IC 458, A. M. Mathews v. Emperor. In the former the appeal was by the public prosecutor against an acquittal at a jury trial. There having been a misdirection by the Judge the Advocate-General contended that the Court was bound to order a re-trial. This contention was negatived. Benson J. at p. 15 used these words :

"We cannot say that there has in fact been a failure of justice without considering the credibility of the evidence and I think it would be unreasonable and contrary to the express direction of S.537 to hold that once misdirection, even though it be an important one, is established we are bound mechanically to order a re-trial even though in our judgment the evidence for the prosecution is untrustworthy."

In AIR 1940 Lah 87('40) 27 AIR 1940 Lah 87 : 187 IC 458, A. M. Mathews v. Emperor.

the appellant by the verdict of a jury had been found guilty on three charges of cheating and fraud, and the accused appealed from the convictions. Blacker J., after holding that there had been misdirection, reviewed a number of the conflicting authorities, though 3 WR Cr 801 was apparently not cited, and reached the conclusion that he was entitled himself "to examine the evidence to see whether the verdict was erroneous and has caused a failure of justice." Having done so he set aside the verdict and sentence and acquitted the appellant on one of the charges but affirmed the verdicts and sentences on the two other charges.

Without finding it necessary to express any opinion with regard to the learned Judge's interpretation of the word "erroneous" their Lordships find themselves in agreement with his decision that he was entitled to examine the evidence for himself in order to see whether it justified the verdicts pronounced, or whether there had in fact been a failure of justice.

Before parting with the case their Lordships would observe that the views of some of the Judges who have considered the matter in India have been much influenced by the circumstance that in some instances the appellant may appeal both on fact and on law while in others the appellant may appeal only on law. Their Lordships do not attach so much importance to this distinction nor do they find in it a determining feature. Consequently they do not think it necessary in agreeing with the answer of the Full Bench to the second question posed by the Divisional Bench in the present case to restrict the answer to appeals arising under S. 449 which provides for an appeal both on fact and on law.

In the result their Lordships will humbly advise His Majesty that the appeal be dismissed.

Appeal dismissed.