CALCUTTA HIGH COURT

Emperor

Vs

Nirmal Kanta Roy

(Stephen ,J.)

01.04.1914

JUDGMENT

Stephen, J.

1. The accused in this case has been indicted under five counts. These are, first, the murder of Nripendra Nath Ghose under Sections 302 and 34 of the Penal Code; secondly, murder of the same man under Sections 114 and 302 of the Code; thirdly, abetting the murder of the same man under Sections 109 and 302 of the Code; fourthly, the murder of Ananta Teli; fifthly, culpable homicide of Ananta Teli. To these charges he pleaded "not guilty." I told the jury that there was no evidence of an offence under the first count, and they acquitted him accordingly. The jury differed as to his guilt under the second and third charges and there were not as many as six who agreed in opinion. The jury unanimously acquitted him of murder under the fourth charge, and differed as to the fifth charge, without six agreeing in opinion, I accordingly discharged the Jury under Section 305 of the Criminal Procedure Code.

2. The accused was then tried again in accordance with Section 308 of the Code; and as he wished to raise a defence under Section 403, I allowed him to be charged and to plead again, though I doubted if this were necessary or had any legal effect.

3. To every remaining charge of the indictment, that is, to the second, third and fifth he pleaded "not guilty", and that he had been previously acquitted, care being taken that he should make the two pleas at the same time.

4. The points that have been argued on his behalf are that, as he was acquitted of the charge of murder of Ananta, he cannot be tried again for committing culpable homicide on him; that, as he has been acquitted of an offence under Section 302 read with s.34 in relation to the murder of Nripendra, he cannot be convicted of an offence in relation to the same man under Section 302 read with s.109 or s.114; that, as I told the jury that if they believed the facts related as to the killing of Ananta, 1 did not see how they could convict the accused of any offence less than

murder, the jurors had no right to convict him of any less offence and consequently those of the jurors who considered him guilty of culpable homicide ought to have found him "not guilty", in which case there would have been a unanimous verdict of "not guilty."

5. For reasons I shall state in a moment, I do not consider that it is necessary to refer this matter in any way to the jury: but in case my opinion as to this should be dissented from hereafter, I propose to take a verdict on the plea relating to a previous acquittal though, as there are no facts for them to decide I shall tell them that, as a matter of law, they are bound to return a verdict that the plea is not made out.

6. The first point depends, and in my opinion depends solely, on the construction to be put on Section 403 of the Criminal Procedure Code. This provides that a person who has once been tried for an offence and acquitted, 'shall not be liable to be tried again for the same offence, nor, on the same facts, for any other offence for which a different charge from the one made against him might have been made under Section 236, or for which he might have been convicted under Section 237". By Section 236 "if a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences." By Section 237" if in the case mentioned in Section 236, the accused is charged with one offence and it appears in evidence that he committed a different offence, for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it." I am of opinion that Section 235, dealing with acts in a series so connected together as to form one transaction, has no application to the present case; consequently neither Sub-section (2) nor any of the other sub-sections need be immediately considered. In this case the evidence discloses only one illegal act, as far as Ananta is concerned, and the accused has been charged in the alternative with having committed murder or culpable homicide of Ananta, a procedure the correctness of which has not been disputed. Section 403, however, protects him only against a trial for murder and "and any other offence for which a different charge from the one made against him might have been made." But the offence of culpable homicide, for which it is now proposed to try him, is the same charge that was made against him, and on the terms of the section therefore this defence must fail. If he had been charged with murder alone, no doubt a verdict of "not guilty" would protect him from another trial for culpable homicide; and should he be acquitted of culpable homicide he will be protected from a trial for any offence involving hurt: but where a charge was made, the case falls outside the provisions of the law dealing with cases where it might have been made. Then the procedure relating to the discharge of the jury seems to me to be wholly inconsistent with the possibility of a verdict on one charge acting as a decision of another. By Section 303(1) of the Code the jury are to return a verdict on all the charges on which the accused is tried. They have returned a verdict on two: there remain three that have to be dealt with by another jury under Section 308. This procedure seems to me as obvious as it is reasonable.

7. Also, for the purposes of Section 403, I do not consider that the accused is being "tried again." He is being tried on the original indictment, and I consider that he is being tried on his first plea of "not guilty." The duty of the Court is to continue the trial of the accused before another jury; and the process may continue till a verdict is passed on all the counts without the accused being" tried again "under Section 403. I am aware that Section 308 refers to the accused being "retried" but this does not affect the construction of Section 403.

8. It is, however, if I have rightly understood the argument for the accused, contended that Section 403 must be construed with reference to the English Law relating to criminal pleading. I think this is an erroneous view, and that for the following reasons.

9. Sections 271 and 272 of the Criminal Procedure Code contain all that is necessary as to pleading, and there is no need to supplement their contents by a reference to any other system of judicature. The accused can plead "guilty" under Section 271, he can claim to be tried, or he can refuse to plead, which is taken to be the same as claiming to be tried. The plea of "not guilty" is thus one not recognized by the Code, and this has been the law since 1872 at least: and I suppose that this is intentional, and is designed to get rid of a great mass of English law relating to criminal pleading which for more than half a century has been discredited, and is in fact falling into an oblivion, which for practical purposes it well deserves.

10. I consider, therefore, that it is not open to the accused to make any answer to an indictment except "guilty" or a claim to be tried. If an accused claims to be tried, I am of opinion that, subject to special provisions, he can take any objection to his trial or conviction at any time, before verdict at any rate, and in any form, that the Court sees fit to allow. In particular I conceive that Section 403 has nothing to do with pleading; but is in terms a limitation on the jurisdiction of the Court; for if a man is not liable to be tried, the Court has no jurisdiction to try him. I consequently think that a defence under that section may be get up at any time before verdict in any form; and that it is to be decided on the terms of Section 403 which seem to me to decide clearly and reasonably all the questions that have, as far as I know, arisen in England as to the effect of the pleas of autrefois acquit or autrefois convict, several of which still remain undecided for practical purposes.

11. Under these circumstances, I hold that the question whether the accused can now be tried for culpable homicide is a question of law to be decided by me without reference to the jury: and I decide accordingly that he can, and indeed must, be so tried.

12. With a view, however, to what may happen hereafter I propose to put the matter to the jury in the way I have mentioned.

13. Although I have thus decided this matter without reference to English law, I have been

referred to a considerable number of English authorities on various points.

14. But in the first place, supposing the acquittal of the accused to have been properly made the subject of a plea, and suppose, the case to be governed by English law, the accused is met by difficulty as to the form in which he has pleaded which seems to me fatal to his contention. For though he pleaded "not guilty" at the time that he pleaded autrefois acquit, and thus brought himself within the rule laid down in Archbold's Criminal Pleading, page 181, which is an authority in such matters, he had already pleaded "not guilty" in the previous trial, or rather at the commencement of this trial, and that plea is still awaiting adjudication. The second plea was, therefore, unnecessary and of no effect. The case falls, therefore, within the decision of Alverstone L.C.J. in *Rex v. Banks*[1] where, after saying that the point before him is an extremely technical one, (though not more technical than the present one) and may therefore be met with a technical answer, he lays down that "a defendant having pleaded "not guilty" to an indictment is not entitled, while that plea is standing, to have a plea of autrefois acquit put on the record. The accused in fact seems to have pleaded double in circumstances in which that course is not allowed by law. Assuming this case, therefore, to be governed by the English law of pleading, I hold that autrefois acquit has not been properly pleaded.

15. It would seem from the same authority and the cases there quoted that the proper course to have followed, according to English law, would have been to take a verdict from the jury at once, if indeed one is needed when all the facts to be ascertained are on the record. It is said, however, that a jury that is already empanelled may decide the issue: Russell on Crimes (7th Ed.) p. 1996, and *Rex v. Parry*[2]

16. The English law applicable to an indictment for manslaughter after an acquittal for murder on the same facts is beyond doubt, as an indictment for the major puts the accused in jeopardy of a conviction for the minor offence: Russell p. 1963; but I have searched the modern leading authorities in vain for any decision or any rule as to the effect of a verdict on one count on the decision on another. All the numerous cases that I have been able to verify refer to indictments following acquittals or convictions on previous indictments or informations, and in most of the cases it is decided in terms that the indictment is good or bad as the case may be. This follows from the fact that in England an indictment is a highly formal document, and the finding of a fresh indictment is the criterion of the institution of a new trial. But in this case there is no question of the indictment being in any way defective. Each count in an indictment is, for the purposes of evidence and judgment, a separate indictment: *Latham v. Queen*[3] and also Stephen's Digest of Criminal Procedure, Article 236; and would seem to stand or fall independently of one another. The one reported case where a conviction on one count was held to support a plea of autrefois convict on a subsequent trial on another count is *Reg. v. Grimwood* [4]Here on an indictment for causing grievous bodily harm and other offences involving assault and for common assault, the Jury disagreed as to the major charges and convicted of assault. The Recorder sent the indictment to the Assizes for the retrial on the major counts, and POLLOCK

B. held that the prisoner was autrefois convict, and could not be tried again. The same result would, one may assume, have followed, had the first verdict been one of acquittal, though in that case the basis for the major charges would have been negatived. But I cannot regard this case as of any high authority. It was decided on circuit without further consideration. It is, as far as I am a ware, only reported in the Justice of the Peace. It is referred to in Archbold (24th edition), at p, 235, but is not, referred to in the far. more authoritative Russell, though the 7th edition of that work is edited by Mr. Craies, the very learned editor of the 24th edition of Archbold. The silence of other works of authority on the matter is significant, and I cannot regard the report in the Justice of the Peace as showing more than that the very experienced Judge who tried the case considered it inexpedient that the case, should proceed further. I consider, therefore, that there is no English authority for the contention that a verdict on one count can, in the case of a re-trial after disagreement of the jury, affect the trial of another count. And on principle I can see no reason why a verdict on one count should have an effect in a re-trial on the same indictment that it would not have at the original trial. I, therefore, hold that, even if the principles of English law are to be applied to the present case, the acquittal for murder is no bar to the re-trial for culpable homicide. But in finding that the acquittal for murder is no such bar I rely on my finding that the case is to be decided solely on the effect of Section 403 of the Criminal Procedure Code.

17. The second point depends on the terms of Section 34. This provides that "when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone." In this case the killing of Nripendra was, according to the evidence, done by one person who was not the accused. It way, therefore, not done by several persons and I do not see how the section can apply. The only act he can be liable for under the section is one done by several persons of whom he was one, that is by the man who escaped and himself. They may have committed many criminal acts together: but they did not both kill Nripendra. The difference between the acts of the two men is that the one actually killed the Inspector, and the other accused merely attempted to kill him. In order to make the accused liable for murder, under Section 34, it would be necessary to say that an offence and an attempt to commit it are the same "act," which seems to me not to be the case. I am aware that a wider construction has been placed on the section in *Queen-Empress v. Mahibir Tiwari*[5] and see *Gouridas Namasudra v. Emperor*[6] which is, however, an essentially different case from the present. The view that is indicated in these cases is plainly stated in Mr. Mayne's comment on this section in paragraph 243 of his well-known work. He there paraphrases Section 34 thus--"When several persons unite with a common purpose to effect any criminal object, all who assist in the accomplishment of that object are equally guilty, though some may be at a distance from the spot where the crime is committed and ignorant of what is actually being done." This is not what the section says, as I read it, and I consider the paraphrase is incorrect. The fact is that the learned author has taken the section as embodying the distinction between the principals in the first and second decree recognized by the Common Law, and its practical abolition by the Consolidation Acts of 24 & 25 Vict. (1861) passed subsequently to the enactment of the Penal Code. The present state of the English law on the subject is

compendiously stated in Articles 36, 38, and 45 of Stephen's Digest, the two earlier articles setting out the Common Law rules, the last the means taken to nullify them: but I cannot suppose that it was intended to reproduce such a complicated system into India any more than that the words of Section 34 produce any such result. A justification of this opinion on historical grounds may be formed by reference to the Draft Penal Code of 1837 (Macaulay's Code) Section 3, and Chapter IV, "On Abetment," Sections 85-108, and Chapter IV of the Report thereon in 1846, especially paragraphs 179 to 182, 189, and paragraph 662 in the Postscript. Article 39 of Stephen's Digest is practically the same as Mr. Mayne's paraphrase; but no provision similar to the rule there stated is to be found in the Penal Code except in Section 149, where the rule omitting the distinction between principals in the first and second degree, is applied to unlawful assemblies.
18. Under these circumstances, I am of opinion that Section 34 is to be read according to the meaning of its terms without reference to any doctrines derived from the English Common Law. I hold, therefore, for the reasons I have given, that the section does not apply to the present case.

19. At the same time I have no doubt that on the case made by the prosecution, the accused is within the scope of Sections 109 and 114, under which read with Section 302, he is indicted.

20. Abetting is defined by Section 107, and the evidence to my mind if relied on shows that the accused instigated and aided whoever it was that committed the murder, and there is, therefore, a case made out under Section 109, for there is no reason for saying that a man must be absent in order to abet under that section. The instigating the unknown murderer by accompanying him to the place, and by aiding him in his flight afterwards, which the accused on the evidence did, might have taken place though the accused was not present at the murder. But on the evidence he was so present, and Section 114, therefore applies to the case. [See Section 93 of Code of 1837, and pages 201 and 202 of the Report of 1846.]

21. In reference to English law, it seems to me that the effect of Sections 109 and 114 is to supersede all the English law relating to principals of the first and second degree, and accessories before the fact. They are apt for this purpose, and again the provisions of the Code seem to me to cover all the cases provided for by English law, except the rule stated in Art.39 of Stephen's Digest, and to contain the whole law applicable to the subject in India.

22. It has been suggested that the acquittal under Section 34 negatived the existence of a common intention which is in fact essential to abetment: but as I directed an acquittal on legal grounds the finding of the jury has not determined any question of fact.

23. I hold, therefore, that the acquittal under Section 302 read with Section 34 has no effect on the charges relating to abetment.

24. I may have misapprehended the third point, at any rate I do not understand it. I expressed an

opinion that if the facts given in evidence were believed, the accused was guilty of murder; but the question was one of fact, and if the jury disagreed with me in point of fact they had a right to do so. 1 cannot understand their decision, but I had no power to overrule it.

25. [The Jury returned a verdict of "not guilty" by a majority of seven to two. The Judge disagreed with this verdict, the Advocate-General entered stay of proceedings under Section 333 of the Criminal Procedure Code, and the accused was discharged.]

Cases Referred.

1[1911] 2 K.B. 1095
2(1837) 7 C. & P. 836
3(1864) 5 B. & Section 635; see Archbold, p. 82
4(1896) 60 J.P. 809
5(1899) I.L.R. 21 All. 263
6(1908) I.L.R. 36.Calc.659