CALCUTTA HIGH COURT

Panchu Das

Vs

Emperor

(Rampini and Gupta , JJ.)

01.03.1907

JUDGMENT

Rampini and Gupta, JJ.

1. The two appellants, Panchu Das, and Jatindra Nath Chatterjee, together with two women, Durga Peshakar and Hazari Peshakar, prostitutes, were tried before the Sessions Judge of Nuddia with the assistance of a Jury on charges under Sections 147, 149/304, 149/325, and 149/323 of the Indian Penal Code; The two women, Durga and Hazari, were found not guilty and have been acquitted. The Jury, by a majority of three to two, found the two appellants guilty of causing grievous hurt under Section 325 of the Indian Penal Code; and the Judge accepting that verdict has sentenced Panchu Das to rigorous imprisonment for seven years, and Jatindra Nath Chatterjee to like imprisonment for three years.

2. The appeal has been argued before us at considerable length by the learned Counsel for the appellants, and we have also heard the learned Assistant Government Pleader, in reply. As this Court cannot interfere with the verdict of a Jury except on grounds of misdirection by the Judge or of misunderstanding of the law by the Jury, it is unnecessary for us to consider the evidence or discuss the facts in detail. The case for the prosecution may briefly be stated as follows. The deceased, Guru Prasanna Dutt, a resident of Santipur, came to Krishnagar in company with his employer, Sarat Chandra Roy, and was staying at a place described as Mohini's Hotel. On Tuesday the 7th of August 1906 at about midnight Guru Prasanna, accompanied by witness Jogendra Paramanik, went to a brothel, and there he met the accused Durga Peshakar who lived in that house and with whom, it is suggested, he wanted to stay. The other accused persons are also said to have come or been present there. It is said that a quarrel ensued between the deceased and some of the others in regard to Durga in consequence of which the deceased was severely beaten by the four accused persons named above and one or two others. The deceased went to his lodgings at Mohini's Hotel in the morning and lay down never to rise again. He suffered from the effects of the injuries received, and also from diarrhoea, and died on the 11th of August, that is four days after the occurrence. The deceased did not at first tell anybody of the assault, and being questioned by Mohini, the hotel-keeper, and others denied that anything was the matter with him except illness. Eventually, on Friday the 10th of August, he told some of the witnesses that the four accused persons and one Upendra had severely beaten him. The statement of Guru Prasanna was recorded by the Police Sub-Inspector on the 11th of August, and was treated as the first

information in the case. On the same day his dying declaration was recorded by a Deputy Magistrate, Babu S.K. Mookerjee. A post mortem examination was held by the Civil Medical Officer, and as a result of the police investigation the four accused persons named above were sent up for trial.

3. The legality of the conviction of the two appellants has been impugned before us on various grounds. These may be summarised as follows:

(i) The improper rejection of material evidence, namely, the first information being the statement, of Guru Prasanna recorded by the Sub-Inspector on the 11th of August. This, as stated by the Sub-Inspector himself, was treated by him as the first information, and it was in our opinion also admissible in evidence as a dying declaration of the deceased. It was proved and marked as an exhibit before the committing Magistrate, and although there is nothing on the reeord show that it was tendered and rejected at the trial, we think it is an important piece of evidence which should been placed before the Jury.
(ii) Improper admission of evidence, namely, of he dying declaration recorded by Deputy Magistrate S.K. Mookerjee. He was not the inquiring Magistrate, and the statement was not recorded in the presence of the two appellants. This document was, therefore, clearly inadmissible unless and until it was proved by the Deputy Magistrate who recorded it. The note on the order sheet that the document was admitted without any objection on he art of the accused dose not make any difference. The Deputy Magistrate should have been examined as witness.
(iii) Omission to place evidence in favour of the accused before the Jury, namely the surathal report made by the police. It is contended that this report shows that there were no fractures of the leg or the wrist. We think it would have been better if the Judge had drawn the attention of the Jury to this document, though we do not think the omission to he very material.
(iv) The Judge expressed certain opinions as regards the facts without telling the Jury that they were at liberty to form their own opinion in regard to such facts, and also without anywhere telling them that if they had a reasonable doubt on any point the accused were entitled to the benefit of that doubts The learned Judge said in his charge-"It is established that the deceased on Tuesday night, 7th August 1906, shortly before midnight, went to a brothel with the witness, Jogendra." It is pointed out to us that the accused never admitted that Jogendra accompanied the deceased to the house of Durga, and that the Judge should have left to the Jury the question of the actual presence of witness Jogendra at the scene of occurrence. It is also urged that there was a dispute or doubt as regards the date of occurrence.
(v) Improper advice to the Jury in reference to the medical evidence. We think it unnecessary to discuss the observations made by the learned Sessions Judge on the evidence of the Civil Medical Officer, Khirode Chandra Chowdhury, or the criticisms which have been addressed to us upon those observations. One point in connection with that evidence strikes us, however, as very important, and as bearing directly on the charge of causing grievous hurt of which the appellants have been convicted. The post mortem examination, which is said to have been conducted by the Civil Medical Officer in the presence of the District Superintendent of Police and of more than one medical practitioner, showed that there was no fracture or dislocation of any bone or any other injury falling within any of the first seven classes described in the definition of grievous hurt in Section 320 of the Indian Penal Code. The hurt from which the deceased suffered would, therefore, be grievous only if it fell under the eighth head, namely, if it endangered life. On this point the medical witness deposed, "My idea is that had there been no wounds inflicted on the deceased there would not have been septic infections, noticed by me, All these injuries, if

received by any man in ordinary health, would in my opinion not be dangerous to his life." The learned Judge did not call the attention of the Jury to this important piece of evidence, and more especially to the effect which it has on the charge of grievous hurt. No doubt it was for the Jury, upon a consideration of the nature of the injuries taken as a whole and the entire medical evidence and the evidence of other witnesses who saw the injuries, to come to a conclusion as to whether the hurt was grievous or not. But we think that their attention should have been specially called to the medical opinion quoted above, and it should have been pointed out to them that in this case there was no evidence of grievous hurt under the first seven heads of Section 320 of the Indian Penal Cede, and that there could be no conviction under Section 325, unless the Jury believed that the injuries inflicted were, in spite of the medical opinion quoted above, dangerous to life.

(vi) Lastly, it has been argued before us that the conviction of the appellants under Section 325 of the Indian Penal Code is illegal on the ground that there was no such charge ever framed against them, and that they had never been called upon to meet such a charge. In support of this contention the judgment of this Court in *Ram Sarup Rai v. Emperor*[1] has been cited to us, which was a case somewhat similar to the present one, and the same question was raised and decided in it. We concur in the view of the law taken by the learned Judges who decided that case.

4. The offences with which the accused were charged were rioting and culpable homicide and causing grievous hurt not by themselves but through others by virtue of Section 149 of the Indian Penal Code. If the evidence recorded by the committing Magistrate showed that the accused or any of them inflicted hurt or grievous hurt with their own hands, or abetted by instigation or conspiracy the infliction of such hurt, additional counts of charge for those offences should have been added in the Sessions Court. But since the charge, which the Sessions Judge himself says was drawn up in a confused manner, was not amended before or during trial, the accused could be convicted only of the offences charged or of any other offences covered by the offences charged tinder the provisions of Sections 236, 237 and 238 of the Criminal Procedure Code. We do not think that under any reasonable construction of those Sections it can be said that the offences of causing grievous hurt is minor to, or included in, a charge under Section 325 read with Section 149 of the Indian Penal Code. On this ground, therefore, as well as on the other legal grounds noted above, we must hold that the conviction of the appellants cannot be sustained.

5. It is to be regretted that in a case of such importance and presenting many points of difficulty the learned Sessions Judge should not have delivered a charge more careful and lucid than what appears from the record to have been given by him. We are not unmindful of the fact that the law requires only the heads of charge to he recorded. At the same time, since the law allows an appeal on grounds of misdirection; it is not only desirable but necessary that the charge should be recorded in an intelligible form and with sufficient fulness to enable the Appellate Court to satisfy itself that all points of law were clearly and correctly explained to the Jury in reference to the facts and the evidence in the case. In the present case the charge, as reduced to writing, appears in the shape of disconnected sentences, and is deficient in such clear and precise directions as the Jury might well expect from the Judge. Some of these omissions have already been noted above, and we shall only draw attention to another important omission which, in our opinion, amounts in law to serious misdirection. The learned Judge said-"If, therefore, the Jury find that a riot took place they should, under Section 149, find every member of the unlawful assembly guilty of causing hurt or grievous hurt, etc." Then the Judge proceeded to explain the

definitions of hurt, grievous hurt and culpable homieicie. But he nowhere instructed the Jury what their verdict should be if they found that there was no unlawful assembly of five or more persons but that grievous hurt or hurt was caused by any one or more of the accused persons. He put before the Jury the questions "Was deceased beaten? If so, who beat him? Did he die from the beating? He has also told the Jury-"If they find that any fracture of any limb or a danger to life was caused by the accused or any one of them the conviction should be under Section 325." This was no doubt on the supposition of there being an unlawful assembly. The Jury, however, by their verdict acquitted the accused persons by implication of rioting, as, of five persons said to have been altogether implicated, two were found not guilty. Yet the Jury convicted both the appellants under Section 325 of the Indian Penal Code, and it is impossible for us to say that they were not misled by the advice of the Judge quoted above. Mr. Roy, for the. appellants, has urged that upon the evidence which has been adduced no re-trial of the appellants should be ordered. There can be no doubt, however, that the deceased was severely beaten, and there is no reason to think that the case is a false or concocted one. We should not, in these circumstances take upon ourselves the duty of judging of the credibility or the sufficiency of the evidence, including the dying declaration of the deceased.

6. In setting aside, therefore, the Conviction of the appellants and the sentences passed upon them, we direct that they be re-tried by the Sessions Court with the assistance of another Jury on the charges upon which they were committed or on any other amended charges which the Court may think fit to frame.

Cases Referred.

1(1901) 6 C.W.N. 98