CALCUTTA HIGH COURT

Emperor

Vs

Muktar Ali

(Blank ,J.)

09.06.1943

JUDGMENT

Blank, J.

1. The facts from which the present reference and appeal arise are stated conveniently in the following extract from the letter of reference: The prosecution case is that on the afternoon of Thursday, the 30th April last, four persons, viz., Hatem, Arshed, Abdul Aziz and Safiladdi were coming to Jaliaghata from Mithapur. When they came to the south-west of the house of one Kashem, in Jaliaghata, a party of armed men headed by one Seru attacked them. Arshed and Abdul Aziz fled into the house of Kasem unscathed. Hatem, Safiladdi and his brother Paban who came to their rescue, were injured with lejas. The injured men ran inside Kasem's house and took shelter in his hut. Hatem fell down on the door leading to the hatina of the hut. They were chased by the assailants. Hatem's mother came there running from her house which is close by and lamented over her son. Seru hurled a leja which struck Hatem's mother JarinaBibi. She at once fell dead there. The accused pleaded not guilty. They suggested a different version of the occurrence at a different place. They further suggested that Paban killed Jarina Bibi with leja.

2. Fourteen accused were convicted under Section 148, Penal Code, on an 8 to 1 verdict. With regard to the charge under Section 149 and 302, Penal Code, the jury returned a unanimous verdict of not guilty in favour of 5 accused and a verdict of guilty, by 5 to 4, in respect of the remaining accused whose cases have been referred by the learned Additional Sessions Judge. The learned Additional Sessions Judge agreed with the whole of the verdict of the jury except the majority verdict of guilty under Section 149 and 302. His reasons for reference were that this part of the verdict was based on misappreciation of evidence, there being no grounds for discrimination as between the five accused unanimously found not guilty and the nine accused found guilty by a majority verdict of 5 to 4; further that certain witnesses for the prosecution had been withheld whose evidence was so material that the jury ought to have presumed against the prosecution. The appeal is on behalf of the fourteen accused who were convicted under Section 148, Penal Code, and sentenced to rigorous imprisonment for one year each except in the case of 3 persons who were given the benefit of Section 562, Criminal P.C. When the hearing opened a preliminary objection was taken on behalf of the Crown. Section 307(2), Criminal P.C,.runs: "Whenever the Judge submits a ease under this section he shall not record judgment of acquittal or of conviction on any of the charges on which such accused has been tried. . ."

The words "such accused" refer to the words "any accused person" in Sub-section (1); these words in both Sub-sections were inserted by the amending Act of 1923 to remove doubts, which had arisen from certain decisions, whether it was competent to a Sessions judge to refer the case of one or some only of a number of accused persons. On the statute as it now stands, the present reference evidently cannot be attacked on the ground that the reference ought to have been made in respect of all the accused persons and of all the charges. We make these observations as the Crown first submitted that the reference was bad for the reason just stated. This submission was sought to be supported by the observations of Lort-Williams J. in Emperor v. Bishnu Charan . Apart, however, from the consideration that the observations of the learned Judge are not part of the findings of the Court it is clear from the text of those observations that the headnote does not represent them with complete accuracy; in particular para. 3 of the decision appearing at page 1184, may be referred to.

3. An objection of some substance is however that the reference in its present form is incompetent. It will be observed that the 9 persons whose cases are now referred were among the 14 convicted Under Section 148. For the Crown the case in *Emperor v. Taribulla*[1] was referred to. This decision was before the 1923 amendments but its authority is not affected thereby as the defects in the Order of reference were different from those in the present Order and the case remains an authority for the proposition that "only where the Sessions Court has made a proper reference will the High Court deal with the matter." In that case, however, the defects were remediable and this Court sent the reference back for the defects to be remedied and afterwards dealt with the reference in due course. The difficulty arising from the terms of the statute as it now stands was not in issue in that case and we are unable to treat it as an authority governing the present reference. The learned advocate for the Crown referred to the judgment of the Court in Emperor v. Bishnu Charan . In that case the Court rejected the reference firstly on the ground that the learned Sessions Judge had acted illegally in making a reference after recording an Order in respect of other charges against the accused person. We observe, however, that two of the learned Judges explicitly considered the evidence and rejected the reference also on the merits. The remarks of the third Judge at p. 1185 of the Report are consistent equally with the view that he did the same as with the view that he considered the legal objection fatal. We hesitate to hold that two at least of the three learned Judges who decided that case considered the legal objection taken by itself was necessarily fatal to the reference. We have also had our attention directed to an unreported decision, Ref. No. 24 of 1933, Emperor v. Pocha Mondal, in which Mukherji and Bartley JJ., observed:

4. At the outset it may be pointed out that a reference of this description is not quite in order. It has been pointed out by this Court that when a learned Sessions Judge makes a reference Under Section 307, Criminal P.C. in respect of an accused person the whole case, in so far as that particular accused is concerned, must be left open for the consideration of this Court on such reference. Piecemeal references of this description have been always condemned by this Court inasmuch as they place this Court in a very embarrassing position. We have however gone through the letter of referenoe of the learned Judge and his charge to the jury and have also heard the learned Deputy Legal Remembrancer who has placed the facts and circumstances of the case. Having done so we have come to the conclusion that so far as this particular case is concerned the defect in the reference need not deter us from dealing with the matter which has been sent up to us for our consideration." In this instance the reference was accepted. We also note that in *Emperor v. Nawal Behari*[2] a Division Bench of the Allahabad High Court dealt with a case in

which the error now under consideration had been made by setting aside the conviction and sentences passed by the Sessions Judge and substituting a conviction and sentence by the High Court. On the foregoing considerations we proceed to deal with the present reference. We are to consider the entire evidence and to give due weight to the opinions of the Sessions Judge and the jury. The learned advocate appearing in support of the reference has taken us through the evidence of P. Ws. 2 to 8, the eye witnesses, and submits that with reference to the charge Under Section 302 and 149, Penal Code, the evidence against all the accused persons is generally to the same effect. The learned advocate for the Crown conceded that it was difficult to discriminate between the cases of the 9 now referred and the remaining 5. He referred to the abstract of the evidence as against individuals appearing at p. 43 of the Paper Book and suggested that the jury might have discriminated on the basis that the accused whom the witnesses spoke of as carrying weapons were guilty Under Section 302 and 149, Penal Code whereas the others were not guilty. The suggested explanation however fails to account for the instances of accused Akkel Ali and Tazem alias Kottia, who were found not guilty by the jury although the evidence is that 4 witnesses in the former case and 5 in the latter say that the accused had, a leja in hand. In our view the first reason for the reference propounded by the learned Judge is sound and must prevail.

5. The remaining reason is based on the fact that two witnesses one Saburjan, wife of Kasem, and the other Golbaru, the daughter of the deceased woman and the wife of Safiladdi, P. W. 6, were withheld by the prosecution. The evidence shows that they were in Kasem's house at the time of the occurrence and that their statements to the police were recorded under Section 161, Criminal P.C. The learned Judge states in the letter of reference that the jury should have drawn a presumption under Section 114, Illus. (g), Evidence Act, in respect of the occurrence inside Kasem's house when these two material witnesses were not examined. This topic was dealt with by the learned Judge towards the close of his charge at p. 46, lines 5 to 25 of the Paper Book. The learned Judge has perhaps rather under-emphasised, the importance, on the facts of the present case, of the omission to examine these two women. We do not think he would have been exceeding his duty had he put it pointedly to the jury that the omission to examine them, in the particular circumstances, raised serious doubts of the good faith of the prosecution evidence relating to the occurrence inside Kasem's house. Be that as it may, the jury could, and in our opinion should, have noted that potential witnesses of comparable authority to those examined were not examined and could and should have inferred thence in the circumstances of the case that if they had been witnesses they would not have supported the prosecution case. In our opinion, therefore, this ground is also a good ground for supporting the reference.

6. It remains to consider the appeal. Here we have only to see that the jury were properly charged with this part of the case and that their verdict is not perverse. The learned advocate for the appellants has taken us through the evidence separately so far as it relates to this part of the case. He submits that the defence case was not put before the jury. That is to be found at the end of the cross-examination of P. W. 1. Cross-examination on the point is found, for example, at p. 9, lines 58 to 62 of the same and our attention has also been drawn to the passages at p. 11, lines 45 to 53, p. 12 lines 48 to 51 and similar passages at pages 14 and 15 of the Paper Book. The defence case, as it appears on the evidence, is that the occurrence took place on Adam All's plot (p. 8 of the Paper Book) and that the prosecution shifted the place of occurrence to suit their case. We find however that the matter was put before the jury clearly and in sufficient detail at p. 44, lines 51 to 57 of the Paper Book and we concur generally in the submission of the learned advocate

for the Crown that the offence under Section 148, Penal Code, has been abundafntly proved unless all the prosecution witnesses are lying. In this view we hold that the appeal is without merits and should be dismissed. We, therefore, accept the reference and acquit the 9 persons whose cases have been referred of the charges Under Section 149 and 302, Penal Code. We dismiss the appeal and maintain the conviction and sentences Under Section 148, Penal Code passed on the appellants, other than those who had been given the benefit of Section 562, Criminal P.C. who will now surrender to their bail, if on bail, and serve the remainder of their sentences.

Edgley, J.

7. I agree.

Cases Referred.

1('21) 8 A.I.R. 1921 Cal. 252
2('30) 17 A.l.R. 1930 All, 489