PATNA HIGH COURT

Emperor

Vs

Haria Dhobi

(M Noor, C.J. Dhavle , J.)

31.08.1937

ORDER

M Noor, C.J.

1. Haria Dhobi was committed to the Sessions on a charge "under Sections 392, 397" Penal Code, for robbing Baijnath Chokra of his silver mathias and gold lavangs and at the time of committing the robbery, causing grievous hurt to him in order to take away those trinkets. At the commencement of the proceedings in the Court of Session, the Assistant Sessions Judge who tried the case, added a charge under Section 325, Indian Penal Code. The charge of robbery was triable by jury, and that of grievous hurt triable with the aid of assessors. The jury returned a unanimous verdict of not guilty, and the same gentlemen functioning as assessors were unanimously of opinion that Bajinath was assaulted neither by Haria Dhobi, nor by Gajkishore. P. W. No. 4 (as suggested by the defence), but by some third person. The learned Judge took it that the prosecution case was that the accused had caused grievous hurt to Bajinath, not at the time of committing the robbery, but subsequent to its commission. He, therefore, directed the jury that Section 397, Indian Penal Code, was not applicable to the case and that the accused should be acquitted of that charge. He, however, considered the verdict of not guilty on the charge under Section 392 to be "perverse and against the weight of evidence" and has accordingly made this reference.

2. The prosecution story was that Baijnath, a boy of six, was taken from his house by Haria Dhobi after dusk, on a promise that sweets would be given to him, ostensibly to see a Kali Puja in Mauza Belhar about four miles away. Near a bundh, called the Jamua Bundh, 11 rassis away, Haria asked the boy for his mathais and lavangs, saying that thieves might (otherwise) snatch them away in the crowd, and on Baijnath's refusal, made him lie down on the bundh and took the trinkets by force. Baijnath grabbed at Haria's dhoti and was hit by him with the butt of an iron-bound stick on the right eye. Haria then fled with the trinkets, and Baijnath lay on the bundh crying in the dark until his cries brought on the scene Gajkishore Mahto, Baijal Pasban and Muhammad Rashid. These men took him to a mandap adjoining the house of Baijal; and

Baijnath's father Sital Bhagat and the chowkidar of his village, Basu Prasad, soon came there. Questioned about the bleeding injury on his eye, Baijnath said that it had been caused by Haria; about his trinkets he said that Haria had taken them. Sital and Basu thereupon took the boy to the dispensary at Sangrampur and afterwards went and lodged an information at the thana of Belhar. There was no witness to the occurrence except Baijnath himself, the scene being a solitary bundh away from the busti, and the time after dark. There was also the evidence of the men who came to the mandap that Baijnath had named Haria as his assailant. The learned Judge below says that the boy gave "a clear and consistent narration of the occurrence" and "impressed me in the witness-box"

3. On behalf of the defence, it was suggested that Gajkishore (P. W. No. 4), was the culprit and that Haria was away at the time in his father-in law's village of Gonra, ten or twelve miles away, and had been falsely implicated on account of enmity. The learned Judge found that this defence was not made out, and considered that the jury had totally failed to appreciate and weigh the evidence, having regard to the fact that it was not suggested by the defence that some third person had committed the offence (the view expressed by them as assessors).

4. We have before us only the written record of the evidence of Baijnath and the two opposed estimates of that evidence formed by the learned Judge and the jury. That record, as it stands is far froth con-vincing; the evidence does not read like the evidence of a boy of six and the cross-examination suggests that he merely went on saying "yes" to the questions that were put to him in examination in-chief. In a case of this kind where the guilt or inno-cenca of the accused depended almost wholly upon the evidence of one small boy the lower Court would, in our opinion, have done well to take that evidence down in the form of question and answer. On the record as it stands, it is difficult to see any reason to prefer the opinion of the learned Judge below to that of the jury on a simple question of fact

5. We must also observe that several points arose in the case which do not appear to have received sufficient consideration below. Take, for instance, the injuries that the. doctor found on Baijnath. The upper lid of the right eye was "detached for about a distance of half an inch" on account of a lacerated wound "beginning from the inner canthus" and the lower lid "split up into three pieces and all disorganised" it is not very easy on the face of it to reconcile this with the absence of any injury to the eye-ball in view of Baijnath's allegation that these injuries were caused with the buttend of an iron bound lathi. There were injuries on the upper and lower lids of the left eye and also on the lips and the right and left cheek, which cannot be explained by the other blows mentioned by Baijnath. Nor does the learned Judge appear to have adverted to such facts as that the accused belongs to the same village as Baijnath and is a young man aged about eighteen, and that the trinkets that Baijnath was wearing had been on his person for about two years, as Sital Bhagat tells us. The company that came to the mandap included Baijal, the chowkidar of Dumarai, besides Basu, the chowkidar of Baijnath's village Jamua; and it is not easy to believe that they all resisted what would appear to be the natural impulse in those

circumstances, the impulse of going and getting hold of the accused in Jamua, even though it is true that Sital and Basu went to the dispensary and (as the learned Judge points out) had no authority to arrest the offender. The alibi set up by the accused was also by no means a last moment defence. It was mentioned at once during the Police investigation and was enquired into by the Police of the neighbouring thana concerned, apparently in the absence of the accused, and found to be true. The learned Assistant Sessions Judge has criticised the evidence of the defence witnesse38 on lines which cannot fairly be applied to witnesses of their standing--Panchu chowkidar, a Dome, and Phulo Raut, a simple villager, The jury may well have asked themselves the question whether there was any reason made out why these witnesses should tell lies on behalf of a person of the standing of Haria Dhobi or his father-in-law. As for the prosecution witnesses, there was apparently not much scope for cross-examination in the circumstances of this case, though we cannot help observing that the Committing Magistrate speaks of a witness (who was not examined in the Court of Session) stating:that some mantras were whispered into the ears of the boy Baijnath to shake off the evil spirit, after which his father had noticed the ornaments missing and made enquiries from him, and that before the boy Baijnath gave out the name of accused Haria, he had spoken out something which he could not hear.

6. This apparently explains some of the meagre cross-examination in the case and it is curious that the point was not further investigated below. On a consideration of the entire record, we are unable to accept the view of the learned Judge that the evidence of Baijnath ought to be acted upon. It seems to us on the contrary that the evidence of Haria's alibi is entitled to much more weight than the learned Judge gave to it. We are not prepared to hold that the jury took an unreasonable view of the evidence. The reference made by the learned Assistant Sessions Judge must, therefore, be discharged and the accused acquitted in accordance with the verdict of the jury in respect of the charge of robbery.

7. The result of the trial with the aid of assessors on the charge under Section 325, Indian Penal Code, was that differing from all the assessors the Assistant Sessions Judge found Haria Dhobi guilty, and on the ground that the doctor was not asked whether the disfigurement of the right eye of the boy would be permanent, recorded a conviction under Section 323 with a sentence of one year's rigorous imprisonment. It may be observed in passing that if the Public Prosecutor failed to put to the doctor a question which the lower Court considered necessary, the Court should itself have put it.

8. Having ascertained from the Sessions Judge of Bhagalpur that no appeal bad been preferred to him by Haria against this conviction, and after coming to the conclusion that the alibi set up by Haria was at least as likely to be true as Baij-nalh's allegation that Haria was his assailant--an allegation which may even have been a pure mistake on account of the time and place of the offence--we issued a rule calling upon the District Magistrate to show cause why the conviction under Section 323 should not be reversed and Haria acquitted. The learned Assistant Sessions Judge found authority for the trial of Haria on the charge under Section 325, Indian Penal Code,

in Illus. (m) tos. 235, Criminal Procedure Code but his view that the hurt to the boy was caused not at the time of committing the robbery but subsequent to its commission, overlooks the facts that robbery by its definition includes hurt caused not only in order to the committing of the theft or in committing the theft, but also in carrying away the property obtained by the theft, and that the hurt was caused to Baijnath during the effort of the offender to get away with the trinkets. The entire offence allegeed against Haria--robbery attended with, grievous hurt--was essentially triable by jury, and the view of the jury that the accused was away in his father-in-law's village and was not the offender ought really to dispose not only of the charge;, under Section 392, but also of that under Section 325, including the minor offence under Section 323, If the entire offence had (as it should have been placed before the jury, it would have been open to the jury to find the accused guilty under Section 323 only, even though no charge had been framed under this section or under Section 325 : see In Re: A. Muthiyalu 37 M 236 : 17 Ind. Cas. 51 : AIR 1914 Mad. 425 : 13 Cr.LJ 730 and Emperor v. Changouda Pirgouda 45 B 619 : 59 Ind. Cas. 195 : AIR 1921 Bom 59 : 22 Cr LJ 51 : 22 Bom LR 1241. In the erroneous view that the learned Judge took of the relation of the hurt to the robbery, it was doubtless open to the learned Judge to try Haria under Section 325 with the aid of the jurors a9 assessors and to take his own view of the evidence. We have already said enough to show that the view of the learned Judge on the evidence cannot be upheld in the circumstances of this case. The rule against which no cause has been shown musts therefore, be made absolute, and the conviction of Haria under Section 323, together with the sentence of one year's rigorous imprisonment must be set aside.

9. We desire to add a few words about a point that has occurred to us in this case. If Haria had appealed to the Court of Session against the conviction under Section 323, Indian Penal Code, and if the Sessions Judge had accepted the alibi and allowed the appeal before this reference under Section307, Criminal Procedure Code, came up for hearing, the High Court would have been placed in the impossible position of being compelled either to take the same view of the alibi as the Sessions Judge, or if it took a different view in the reference under Section 307, to leave the acquittal by the Sessions Judge alone since it could not be interfered with in revision. Other anomalies that arise on the view that in a Sessions case tried partly by jury and partly with the aid of assessors, the reference to the High Court under Section 307 must be confined to that part only which was tried by jury, have been noticed from time to time and recently in *Jogneswar Ghosh v. Emperor*[1] *and Cheru Sheikh v. Emperor*[2] *This view has been taken in this Court in Emperor v. Lachman Gangota* [3]*following Pachaimuthu v. Emperor*[4] in which it was held that an Assistant Sessions Judge should have disposed of certain charges which were triable with the aid of assessors instead of submitting the whole case (which included a charge triable by jury) under Section 307. The view that such a reference was incompetent was rested on *Emperor v. Kalidas*[5] and *Emperor v. Vyankatsingh*[6]*,* though they do not quite support the proposition that the High Court cannot entertain a reference under Section 307, until the Court of Session has disposed of the charges which were triable with the aid of assessors. Reasons for such a view were, however, given in *Emperor v. Chanbasappa Baslingappa* [7]where Barlee, J., pointed out, in a case which consisted of a charge under Section 307, Indian Penal Code triable with the aid of assessors and

another charge under Section 326, triable by jury, that if the Sessions Judge had not disposed of the charge under Section 307, Indian Penal Code, before making the reference and if on the reference the High Court were to find "that there had been no attempt of murder, that is, if we were to believe the accused's defence", the Sessions Judge "would have to give judgment in direct opposition to this view or adopted against his own judgment". The learned Judge pointed out that this difficulty could be avoided by taking the view that Sub-section (2) of Section 307, Criminal Procedure Code, refer only to offences triable by jury. It is obvious that such a solution would not have been possible if in the present case, there had been an appeal to the Sessions Judge from the conviction under Section 323 recorded by the Assistant Sessions Judge' and if in dealing with the appeal the Sessions Judge had accepted the alibi of the accused. The words of Sub-section (2) of Section 307, are fairly general:Whenever the Judge submits a case 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....

10. The sub-section does not speak of a part of a case tried by jury or of a trial by jury, though the section occurs in a part of the Chapter headed "Conclusion of Trial,, in Cases Tried by Jury", while Section 309 occurs in the Part "Conclusion of Trial in Cases Tried with Assessors". Section 269 (3) provides for the trial of a part of a case by jury and of another part by the Court with the aid of the jurors as assessors. But there is no special provision for the "conclusion of trial" in cases so tried. In Emperor *v. Lachman Gangota*[8]*, reference was made to the reason given in Emperor v. Hazari Lal*[9]*,* for requiring all, and not merely some of the charges tried by jury to be referred under Section 307:The High Court, if it is to exercise its functions properly in a reference, cannot approach the transaction as a whole with its hands tied as to one or more aspect,

11. It is clear that for the same reason cases tried by Assistant Sessions Judges in which the part tried with the aid of assessors is appealable to the Courts of Session should, if possible, be referred to the High Court in their entirety if an impossible position is to be avoided in dealing with references under Section 307. Whether headings F and H in Chap. XXIII of the Code regarding the "Conclusion of Trial" are altogether decisive in cases of this kind or whether the words of Sub-section 2 of Section 307 should have a wider construction placed on them than has so far been the case, may require consideration on an appropriate occasion. It may perhaps be usefully added that we have not been referred to any reported case in which the point was considered and that in *Pachai-muthu v. Emperor* [10] the possibility of the difficulty now pointed out was not averted to.

Cases Referred.

140 CWN 1186 : 166 Ind. Cas. 418 : AIR 1936 Cal 527 : (1936) Cr. Cas. 137 : 38 Cr.LJ 212 : ILR (1937) 1 Cal 306; 65 CLJ 351 : 9 RC 529
240 CWN 1374
315 PLT 367 : 154 Ind. Cas. 16 : AIR 1934 Pat. 424 : (1934) Cr. Cas. 928 : 36 Cr.LJ 469 : 7 RP 441

455 M 715 : 137 Ind. Cas. 810 : AIR 1932 Mad. 512 : (1932) Cr. Cas. 430 : 62 MLJ 571 : 35 LW 671 : Ind. Rul. (1932) Mad 466 : 33 Cr.LJ 533
58 Bom LR 599 : 4 Cr.LJ 192
69 Bom LR 1057 : 7 Cr.LJ 236
733 Bom LR 1571 : 135 Ind. Cas. 495 : AIR 1932 Bom 61 : (1932) Cr. Cas. 85 : 33 Cr.LJ 172 : Ind. Rul. (1932) Bom 111
815 PLT 367 : 154 Ind. Cas. 16 : AIR 1934 Pat. 424 : (1934) Cr. Cas. 928 : 36 Cr.LJ 469 : 7 RP 441
911 Pat 395 : 137 Ind. Cas. 190 : AIR 1932 Pat. 156 (1932) Cr. Cas. 273 : 33 Cr.LJ 505 : 13 PLT 93 : Ind. Rul. (1932) Pat. 148
1055 M 715 : 137 Ind. Cas. 810 : AIR 1932 Mad. 512 : (1932) Cr. Cas. 430 : 62 MLJ 571 : 35 LW 671 : Ind. Rul. (1932) Mad 466 : 33 Cr.LJ 533,