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1868. Sept. 2.

Trial by Jury—Summing up of Judge—Setting aside Verdict—Accomplice—Pardon—Complainant—Crim. Proc. Code, Sec. 360.

On a trial by jury the Session Judge in summing up should give a full and detailed statement of the evidence on both sides; he should point out the legal bearing of it, and what weight the jury ought to attach to its several parts. His omission to do so, *if the accused is thereby prejudiced*, amounts to such an error in law as would justify a court of appeal in setting aside the verdict.

No general rule can be laid down as to when a prisoner is prejudiced by a defective summing up, but in general if the finding of the jury in such a case is one that an appeal court would set aside, if the trial had taken place with the aid of assessors, the Court will interfere and set the verdict aside.

In capital cases, and all cases of a serious or complicated nature, the Judge ought to read over the evidence *in extenso* to the jury.

The Judge ought, if requested, to allow the accused an opportunity of cross-examining all witnesses whose depositions have been taken for the prosecution by the committing Magistrate but whose evidence is dispensed with by the prosecutor at the trial. His refusal to do so is, however, not an error in law.

Where the Magistrate erroneously treated a witness as an accomplice, and granted him a conditional pardon:

Held that his evidence did not require corroboration.

Where a person gave information to a Magistrate and the police of a murder having been committed, and subsequently, on the charge having been dismissed, petitioned the Session Judge to have the matter re-investigated:—

Held that he was not a complainant within the meaning of Sec. 360 of the Crim. Proc. Code.

THE accused were tried by jury on a charge of murder before F. Lloyd, Session Judge at Puṇá, and, having been convicted, were each sentenced to transportation for life.

From the above conviction the prisoners preferred an appeal to the High Court.

The Appeal was heard before WARDEN and SARGENT, JJ.

White and *Macpherson* for the prisoners.

Dhirajlál Mathurádas (Government Pleader) for the prosecution.

The facts of the case appear from the following judgments:—

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WARDEN, J.:—The four accused have been tried by a jury for the murder of one Bábyá, and, having been convicted, have been sentenced to transportation for life by the Session Judge of Puṇá; consequently, under Sec. 408 of the Code of Criminal Procedure, there can only be an appeal to this court on a matter of law.

The accused Nos. 3 and 4 are the sons of Báláchand, the owner of the house in which Bábyá was found with his throat cut. The accused No. 2 is the daughter of Báláchand, and the wife of the accused No. 1.

Messrs. White and Macpherson have raised several objections to the summing up of the Session Judge, and urge that there was a misdirection to the jury; that the Session Judge did not, in the exercise of a sound discretion, give proper advice to the jury, and summed up in a very imperfect manner.

As this court, when entertaining an appeal in a case tried by a jury, can only go into matters of law, it is needless for me to dwell in detail on all the evidence recorded in the case. I will, therefore, only allude to such facts as require to be considered in order to arrive at a proper decision as to whether there has been a misdirection to the jury, or such a defective summing up by the Session Judge as to have led to a failure of justice.

The first objection raised by the learned counsel is with regard to the evidence of the witness No. 11 (Náráyaṇ), that, although consistent with the defence, it was not brought to the notice of the jury as worthy of their consideration; I consider that the story of the deceased, Bábyá, having entered the house for the purpose of committing a theft, and, on detection, committing suicide with a razor which he had in his possession at the time, is too absurd to be believed. I have never before, in the whole course of my experience, heard of a thief, no matter what his caste, committing or attempting to commit suicide when he found himself detected in the commission of a burglary; and it is even still more absurd to suppose that the accused, and one

of them a female of high caste, would have laid hold of a thief and struggled with him to prevent his cutting his own throat if he felt so disposed. I, therefore, think that the Session Judge very properly refrained from requiring the jury to take this story into their consideration. I am of opinion, with regard to the next objection of counsel, that the Session Judge was quite right in holding that the witness Nárâyaṇ was not an acccomplice, and that his evidence did not require corroboration. If, however, corroboration had been needed, there was ample in this case: the four accused were bespattered with blood on their persons and clothes, and the accused female had a fresh cut on her finger, and, what is more, this cut was so slight that the quantity of blood on her *sáḍi* could not have issued from the cut alone. When the police got admission into the house (which, however, was not without a little delay), they found the deceased, Bábyá, lying dead with his throat cut, and they very properly took into custody every one whom they found in the house —amongst them was the witness Nárâyaṇ; there being no proof of his having had anything to do with the murder, he was released, and he then disclosed what he had seen: his reticence in the first instance, when he found himself taken into custody on suspicion of having been concerned in a murder, was very natural, and nothing more than what any other native in his place would have done. Mr. Jervoise, Magistrate F. P., in granting a pardon to this witness, committed a grave error, for the man was not in any way an accomplice; the Session Judge also erred in not having intimated to this witness, before proceeding to take his evidence, that he was not to consider himself a pardoned accomplice, and that the Magistrate F. P. had gone out of his way to grant him a pardon, for he had committed no offence.

The Session Judge's remark that the evidence of the Civil Surgeon was unsatisfactory merely amounts to this, that it was not of such a decided nature as he could have wished it to have been; the jury, however, formed their own opinion of it: therefore, no further comment is needed.

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I next come to the omission on the part of the Session Judge to examine Jayáppa. The counsel have urged that, as he was the complainant in the case, the Session Judge was bound, under Sec. 360, to take his evidence, and the omission to do so has prejudiced the accused. But in my opinion he was not a complainant; the Session Judge was, therefore, not bound to take his evidence; he was merely an informer, and as such telegraphed to the Subordinate Magistrate, Mr. Middleton, and to the Assistant Superintendent of Police, Mr. Codrington, that a murder had been committed, and that the body should not be buried without being properly examined; and when Mr. Middleton dismissed the case for want of proof, he petitioned the Session Judge to call for the proceedings and order further inquiry. If this man could have given any evidence that would have been of advantage to the accused, there was nothing to prevent their calling him as witness for the defence.

The next objection raised by the counsel for the accused is an important one, namely, the omission of the Session Judge to read over *in extenso* to the jury the evidence of all the witnesses. Although the Criminal Procedure Code is perfectly silent on the subject, the Session Judge was very wrong in not doing so, and the more so as the trial had occupied two days and a half, and the memory of the jury may have stood in need of being refreshed. In every case of a serious nature, the evidence of the principal, if not of all the witnesses, should be read over to the jury when the Session Judge is summing up. Had any of the jury wished to have the evidence of any particular witnesses read over to them, I have no doubt the Session Judge would willingly have read the depositions over to them. Mr. Macpherson, who appeared as counsel for the accused in the Session Court, in his address to the jury, appears to have made up for the omissions of the Session Judge, by reminding the jury of all that was in any way favorable to the accused: so that I do not consider that by this omission of the Session Judge there has been any failure of justice, or that the accused have been prejudiced.

The Session Judge also erred in not complying with the request of Mr. Macpherson to be allowed to cross-examine the witnesses for the prosecution, who had been examined by the Magistrate, but whom the Public Prosecutor thought it unnecessary to call before the Session Court; for although such a practice does not prevail in the Mofussil Courts, owing to the accused persons not understanding the advantage which might possibly be gained thereby, yet being the practice of the Courts in England, it should have been allowed. Mr. Macpherson has not, however, been able to show that any failure of justice has occurred in consequence, or that his clients have been really prejudiced by this refusal.

Next is the discrepancy in the evidence of the witness Náráyaṇ. In the Session Court the counsel for the accused merely asked the witness whether before the Magistrate F. P. he had told the same story as he had told before the Session Court, but did not in any way particularise the discrepancy he alluded to, nor did he ask the Session Judge to record the evidence which the witness had given before the Magistrate F. P.; the Session Judge ought, however, of his own accord to have done so. But here again the counsel for the accused, in his address to the jury, rectified the omission of the Session Judge; after commenting on Náráyaṇ's evidence before the Session Court, he reverted to the witness's deposition before the Magistrate, and the jury judged for themselves as to the degree of credibility to be placed on the witness's statement, and there is nothing to suppose that they did not remember that the witness had deposed that it was dark at the time the struggle was going on.

I will now refer to what Mr. White, the counsel for the accused, laid great stress on, namely, the absence of all motive for the perpetration of the deed, and what he designated as the ridiculous story of witness No. 19, Lakshumaṇ; but this story is not so absurd as it appears at first view. The Session Judge apparently did not understand what the witness alluded to; he, therefore, in his summing up, passed it over with the remark that the jury must judge for themselves what weight should be given to it; whether the

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jury understood what the witness alluded to, and whether they attached any weight to it or not, it is impossible to say, but, as three of them were Bráhmans, they probably understood what was meant. The Session Judge ought to have elicited from the witness Lakshuman what was meant by the expression which he had overheard the accused No. 2 make use of to her husband, the accused No. 1, namely, "In my father's house at Marah (the village in which her father resided) there is treasure: take a servant and kill him;' and if the witness had been unable to explain it (but he evidently understood it, for he absconded), the Session Judge should have sifted the matter thoroughly to ascertain what the killing of a servant could have to do with the fact of there being treasure in the house of the father of the accused No. 2. My brother Gibbs, who sat with me to hear the application of Mr. White for us to call for the papers and proceedings in the case, said that some time ago, during the investigation of a murder case, it had come out that there was a superstition prevailing amongst a certain class of Hindús that if a human being was sacrificed, his or her blood would flow in the direction where hidden treasure was supposed to be buried; if such a superstition does exist, then the motive of the accused in killing the deceased is apparent. There is nothing very startling in the circumstance that those who have the greatest aversion to taking the life of any creature might be led on by superstition, and by the sordid desire to acquire wealth, to offer up human sacrifice. Old treasure is believed to be presided over by a spirit or fiend, and to propitiate this spirit the offering of the blood of animals is considered necessary: this sacrifice is made before the digging for the treasure commences, and there is a belief that the spirit appears in a dream and sometimes demands human sacrifice. As an instance of the extent to which superstition may be carried, I will just allude to a superstition connected with human sacrifices. It is well known that numbers of human beings were in former days buried alive at the time of laying the foundation of fortresses which it was wished to render impregnable, and in one in-

stance, when one of the emperors was building the fortress of Bedár, in the Dakhan, he offered a grant of land to the family of any person who would allow himself to be buried alive under the foundation, so as to ensure the fortress being impregnable, and a Hindú actually offered himself as the victim, and I believe that even to this day his family are enjoying the land which was so dearly purchased by the head of the family. I have merely referred to this just to show how far people may be carried away by their superstition.

It was also urged by counsel that there was no proof that the deceased was decoyed into the house. True, but there is proof that the deceased was seen in company with accused No. 4 within twenty-five or thirty cubits of the house in which he was found about two hours afterwards with his throat cut. And with reference to the razor found lying near the corpse, I will merely remark that there is proof that it was not the one which the deceased had borrowed about a week before to shave his father with. There is also the very great improbability that if the deceased had determined to commit suicide if he was detected in the burglary, he would have gone provided with such a clumsy weapon as a razor, instead of a knife or dagger. The counsel for the accused rely on the rulings of the Calcutta High Court, Vol. V., Cr. R., p. 80, and Vol. X., Cr. R., p. 7. The Calcutta Courts have held that improper advice given by a Judge to the jury upon a question of fact, or the omission of the Judge to give that advice which a Judge, in the exercise of a sound judicial discretion, ought to give the jury upon questions of facts, amounts to such an error in law in summing up as to justify the High Court, on appeal or revision, in setting aside a verdict of guilty, provided the accused person has been prejudiced by the error or defect, or that a failure of justice has been occasioned thereby.

After a very careful consideration of all the circumstances of this case, I have come to the conclusion that in the Session Judge's summing up to the jury there was no misdirection—merely a defective summing up, but not to

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such an extent as to amount to an error in law, the accused not having, according to my opinion, been prejudiced; nor has there been any failure of justice. The trial by jury having been introduced by the Legislature into the Mofussil (whetherrightly or wrongly, it is unnecessary for me now to say anything on the subject), we cannot be too careful before we consent to set aside the verdict of a jury, for we shall, as Mr. Prinsep has very properly observed, be jeopardising the administration of the Criminal Law of this country, and opening a door for the escape of criminals. In this case I should have had no hesitation in upholding the conviction, if the trial had been before a Judge and assessors. I, therefore, am of opinion that the petition of the accused must be rejected.

SARGENT, J.:—The appellants in this case were tried on the charge of murder before the Sessions Judge of Puṇá and a jury. A verdict of guilty was returned by the jury, and a sentence of transportation for life passed on all four appellants.

The grounds of appeal from this conviction are—

(1) That the Judge, in summing up, did not state correctly the evidence of the surgeon, Dr. Ogilvie.

(2) That he should have told the witness Náráyan, before he gave his evidence, that he was not under the ban of the Sarkár, or at least that he should have pointed out to the jury that, owing to the circumstances under which the witness was giving his evidence, it was to be received with great caution.

(3) That the summing up was generally defective and insufficient.

(4) That Jayáppá, who petitioned the Session Court for a reinvestigation, should have been examined as complainant, under Sec. 360.

(5) That the Judge refused to allow certain witnesses subpœnaed by the prosecution to be placed in the witness-box for cross-examination.

(6) That he should have told the jury there was no connection between the evidence of Lakshuman and the charge.

(7) That the Judge throughout unduly showed the inclination of his own opinion.

It was urged by the Government Prosecutor, as a preliminary objection, that the Code of Criminal Procedure provides that if a person be convicted on a trial by jury, the appeal shall be admissible only upon a matter of law; and that the grounds of the present appeal do not amount to an error in law. The question what defect in the Judge's summing up to the jury is proper ground of appeal has been much considered in the High Court of Calcutta, trial by jury having been in force within the appellate jurisdiction of that court for some considerable time; and the conclusion arrived at by a full Court, consisting of Sir Barnes Peacock, Mr. Justice Kemp, Mr. Justice Seton Karr, Mr. Justice Louis Jackson, and Mr. Justice Phear, is expressed in the case of Elahee Buksh, reported in 5 W. Rep., Cr. R. 80, by the Chief Justice in the following terms:—"There can be no doubt that Sec. 379 requires the Judge to sum up properly, and there would be very great danger in holding that there is no remedy by appeal against a verdict of guilty, if it appear clearly to the High Court that a failure of justice has been caused by improper advice upon a question of fact, or by an omission to give that advice which a Judge, in the exercise of a sound judicial discretion, ought to give upon questions of fact, or as to the degree of credit to be given to particular witnesses. It appears to me that it amounts to an error in law in the summing up, which, on appeal, is a ground for setting aside the verdict, subject to the limitation provided by the Code of Criminal Procedure in Secs. 439 and 426, viz., that the appellate court is satisfied that the accused person has been prejudiced by the error or defect, and that a failure of justice has been occasioned thereby;" and further on, after noticing that there are errors of omission as well as errors of commission, such as omitting to call the attention of the jury to the evidence in favour of the accused, concludes "that it certainly is not against the prin-

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ciple or even the letter of the Code, that the Court should have power to set aside a verdict of guilty for an insufficient or defective summing up of the evidence in a case in which, in their judgment, the verdict is not warranted by the evidence." I entirely concur in this exposition of the law. Sec. 379 enacts that the Judge shall sum up the evidence on both sides, and the jury shall then deliver their verdict upon the charge; and that a statement of the Judge's direction to the jury shall form part of the record. The summing up contemplated by this section cannot mean any statement of the evidence which a Judge may, in his caprice, think proper to make to the jury, but a "proper" summing up, by which is to be understood a full and distinct statement of the evidence on both sides, with such advice as to the legal bearing of that evidence, and the weight which properly attaches to the several parts of it, as a sound judicial discretion would suggest. And in so far as the Judge has not summed up "properly," I think an error in matter of law has been committed within the meaning of the Criminal Procedure Act. If, however, every defect in a summing up were to be regarded as ground for setting aside a verdict of guilty, it is clear that the door of escape would be opened wide to criminals. This danger is, however, guarded against by Sec. 426, which enacts that no sentence shall be reversed on account of any error or defect either in the charge or proceedings, unless in the judgment of the appellate court the accused person shall have been prejudiced by such error or defect. There is doubtless some difficulty in saying when a prisoner has been prejudiced; and I am inclined to agree with Mr. Justice L. Jackson that it would not be safe to lay down any rule, although probably in most cases the ends of justice would be satisfied by considering whether if the case had been tried by a judge and assessors the Court would set aside the finding.

In the present case the offence was the most serious one with which a prisoner can be charged, and the evidence was purely circumstantial; it was, therefore, more than ordi-

narily important that the summing up should not only contain a full and detailed statement of the evidence, but intelligent advice as to the bearing of the several parts of the evidence upon the guilt or innocence of the accused, or any of them: and I think, therefore, that the Judge committed an error in confining himself to so very brief a summary of the evidence, and in not giving a more careful analysis of that evidence. It does not appear that anything more was said to the jury than is contained in the statement of the summing up, or that this statement was supplemented by reading the depositions of the most important witnesses—a practice universally adopted by English Judges in serious cases, and which precludes the possibility of the jury coming to a decision without having all the facts fresh in their memory. The omission to do this has resulted, in the present case, in the recollection of the jury not being refreshed on some material parts of the evidence. The first objection relates to an omission of this nature, the Judge having neglected to tell the jury that the surgeon said "he could not state positively as to the wound whether it was self-inflicted or not." This relates to the appearance of the wound, and was material, as showing that there was nothing in the appearance of the wound which negatived the possibility of its having been self-inflicted. The only statement of the witness which the Judge alludes to in his summing up refers exclusively to the possibility of the wound being self-inflicted with the instrument before the Court. There was no objection to the Judge expressing his opinion that the evidence of this witness was unsatisfactory, but he should have been careful to omit no material part of it, if he undertook to give the jury the substance of it and express an opinion on it.

The same remark applies to the evidence of the most important witness, Nárâyaṇ. The Judge confined his remarks to the statement of the witness that he saw the four accused struggling with some one, but omitted to make any reference to the witness's statement on cross-examination that it was dark, that there were other people in the room,

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that the prisoners were nearer to him than the other persons, and it was sufficiently light for him to identify them; and, lastly, that he saw nothing in the accused's hands. This evidence was most material, both for the defence and the prosecution, more especially as regards prisoners Nos. 1 and 2, in determining the weight to be attached to witness's statement that he could distinguish the prisoners as the persons struggling with the deceased. The prisoners were further entitled to the benefit of the statement that he saw nothing in their hands at the time of the struggle.

With regard to the second objection, that the Judge gave insufficient, if not wrong, advice to the jury as to the evidence of Náráyaṇ, I think that the Judge was right in holding that the evidence of this witness did not, strictly speaking, require corroboration. But although not an accomplice, he was treated as such up to the moment of entering the witness-box, and his evidence was given under almost the same moral conditions as an actual accomplice; and the Judge should, I think, have drawn the attention of the jury more closely than he did to the position in which the witness stood, and to the peculiar circumstances which rendered his evidence less trustworthy than it would otherwise have been. As to the fourth objection, I do not think that Jayáppá was a complainant within the meaning of Sec. 360; the complainant there intended must, I think, be a person who makes a complaint before a Magistrate in order to the issuing of a summons or warrant against any person. Jayáppá merely presented a petition to the Session Judge suggesting the propriety of a second investigation. In any case there is nothing to show that the prisoners were prejudiced by this omission, if it were one.

With respect to the fifth objection, there is no provision in the Criminal Procedure, analogous to English practice, entitling the prisoner to have a witness for the prosecution, who is not called, put in the box for cross-examination; and the Judge, therefore, committed no error in disallowing it. The counsel for the defence might have applied to have the witnesses examined under Sec. 375, or might have com-

mented on the circumstance of their not being examined by the prosecution or tendered for cross-examination.

With respect to the objection that the Judge should have told the jury there was no connexion between the facts deposed to by Lakshuman and the offence with which the prisoners were charged, the Judge would, in my opinion, have acted very wrongly had he done otherwise than leave it to the consideration of the jury, who, from their knowledge of the popular superstitions, could best determine what that evidence was worth.

As to the last objection, that the Judge summed up under a bias, it may be that he allowed the jury to know the inclination of his own opinion. But, as said by Chief Justice Tindal in *Davidson* v. *Stanley*, 2 M. & G., 721: "It is no objection that a Judge lets the jury know the impressions which the evidence has made on his own mind. At all events the party objecting to such a course should show that the impression entertained by the Judge was not justified by the evidence." In the present case the remarks of the Judge are, in my opinion, throughout characterised by great fairness and impartiality, and indicate no undue bias; but he committed, I think, the error of stating the evidence of both sides somewhat too summarily, and thus omitted to draw the attention of the jury to some material parts of that evidence. It remains to consider whether the prisoners, or any of them, have been prejudiced by those omissions in the summing up, or by the remarks the learned Judge addressed to the jury respecting Náráyan's evidence.

Applying the rule suggested by Sir Barnes Peacock, namely, would the Court set aside the finding had the case been tried by a Judge and Assessors, I can entertain no doubt that we ought not to interfere with this conviction. Even if it were right that Náráyan should be regarded as an accomplice, his evidence as to having seen the prisoners engaged in a struggle with a man is amply corroborated as to a struggle having taken place, by the blood on the walls, door, and floor, deposed to by the chief constable Shrinivás, and witness No. 14; and as to the four prisoners being the

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persons engaged in the struggle, by the blood upon their clothes and persons, as deposed to by witnesses Nos. 14 and 15, who arrived at the house immediately after the occurrence. The evidence given by Náráyaṇ in cross-examination, and which the Judge omitted to refer to in his summing up, although it shows indeed that it was dark, contains a distinct statement that it was light enough for him to identify the prisoners, as they were closer to him, being near the door, than the other persons in the room. But the possibility that the witness might be mistaken in the identity of the prisoners is entirely displaced by the state in which the prisoners were found. Indeed if the witnesses 14 and 15 are believed, they were almost found "red-handed." As to the surgeon's deposition, the remark that he could not tell from the appearance of the wound whether it was self-inflicted or no, although a material one, would only have added to the impression which the Judge's remarks must have left on the jury, that the surgeon's evidence decided nothing as to whether it was a case of suicide or murder. Lastly, the statement of Náráyaṇ that he saw no instruments in the hands of the accused during the struggle is not to be wondered at, when it is remembered that it was too dark for the witness to see distinctly, and that the instrument would have been in the hands of only one out of five persons engaged in the struggle. The evidence that a man was seen struggling in the room with the four prisoners, that he was found very shortly afterwards with his throat cut from ear to ear close to where the struggle took place, and the prisoners in the same or adjoining room with blood on their clothes and persons, if accepted as true, is conclusive, unless the incredible supposition be adopted that the man cut his own throat during the struggle; and the circumstance that Náráyaṇ did not see the weapon in the hands of the prisoners cannot reasonably affect the weight of the above evidence. I can, therefore, entertain no doubt that this verdict is not contrary to the evidence, and further that the evidence which was omitted from the Judge's summing up could not reasonably have led the jury to return any other verdict than that of guilty. The appeal must, therefore, be dismissed.