1869
March 24.

Reg. v. Shek Miya valad Daud.

Trial by Jury—Defective Summing up—New Trial.

Held (*Warden, J., dissentiente*), that the omission of the Session Judge to tell the Jury that the statement of one prisoner is not evidence against his fellow-prisoner is a material error, and one fatal to the trial, notwithstanding that the Session Judge dealt with the evidence against each of the prisoners separately.

The appellant was, with another prisoner, tried by a jury for the offence of attempt to murder, and abetment thereof, before the Session Judge of Puna. The jury found the appellant not guilty of the former, and guilty of the latter charge, and the Session Judge sentenced him to transportation for life. His fellow-prisoner was found guilty of the offence of attempt to murder, and was also sentenced to transportation for life. The latter did not appeal; the appeal of the former was argued on the 17th of March 1869, before TUCKER and WARDEN, JJ.

The Honorable L. H. Bayley (Advocate General) for the appellant.

Dhirajlal Mathuradas, (Government Prosecutor) for the prosecution.—

Cur. adv. vult.

On the 24th of March the following judgments were delivered:—

TUCKER, J.:—I am of opinion that there has been a grave error or defect in the summing up of the Session Judge at this trial, by which the accused Shek Miya valad Shek Daud has been materially prejudiced, and that consequently considerations of justice require that the verdict of the jury so far as it concerns him should be set aside, and a new trial ordered.

The accused has been tried with another man, who in the course of the trial made a statement in which he acknowledged his presence at the scene of the crime, and declared that his companion in the dock had been the instigator of, and principal actor in, the commission of the offence for which they had been both arraigned.

1869

Reg. v. Shek Miya Daud.

The Session Judge, in summing up, treated the case of each accused as distinct, and in referring to the second accused, Shek Miya, made no mention of the statement of the other accused which had been made in the presence of the jury, as he should have done, to exclude that statement altogether from their consideration in forming their opinion of the guilt or innocence of Shek Miya.

There can be no question that the Session Judge should have done this, as nothing was more probable than that persons unacquainted with the rule of law on this subject would allow the statement of one accused incriminating his fellow-prisoner to operate in their minds prejudicially to the other. My brother Warden is of opinion that, as the case against each prisoner was placed before the jury separately, and as no mention was made of the statement of the first prisoner in the summing up of the evidence against the other, the omission of the Judge cannot properly be considered to be an error which prejudiced the accused whose appeal is now before us.

Reluctant as I am to interfere with the verdict of a jury, I am unable to concur in this view. The case is a very peculiar one, and the nature of the circumstancial evidence against Shek Miya rendered it of the utmost importance that the jury should have been directed to reject entirely from their consideration the statement which had been made by the other prisoner. It appears to me in the highest degree probable that the jury did allow this statement to have weight in forming their judgment of the guilt of Shek Miya, and it seems to me that the omission of the Judge to notice and enforce the remark of the advocate for the defence, that the statement of prisoner No. 1 was not evidence against prisoner No. 2, might well have misled the jury into supposing that it was not necessary for them to attend to that observation.

In the case of *The Queen v. Scaife, Smith, and Rooke* (a), which has been cited by the Advocate General, where the deposition of an absent witness was admissible against one

(a) 17 Ad. & E. 238.

1869

Reg. v. Shek Miya.

of several prisoners, who had been found to have procured the absence of the witness, and was not admissible against the others, who were not implicated in keeping the witness out of the way, and the Judge at the trial, admitting the deposion, left it generally to the jury, and did not point out that its contents could be treated as evidence against one prisoner only, and not against the others, and the latter were convicted, it was held unanimously by the Judges of the Court of Queen's Bench that the omission was a sufficient ground for a new trial, and the verdict was set aside, and a new trial granted.

In the judgment of the learned Chief Justice at Calcutta in the case of *Elahee Buksh, appellant* (*b*), he has pointed out as follows:—

"Now, there are errors of omission as well as errors of commission, and I have no doubt that it would form a good ground of appeal against a verdict of guilty if a Judge were to call the attention of a jury to all the evidence against the prisoner, and to omit altogether to allude or call attention to the evidence in his favour. By such a summing up, the Judge would not comply with the requirement of the Code of Criminal Procedure, and a verdict found upon such a summing up ought, I think, to be set aside, if the Court should be of opinion that the evidence was not sufficient to justify a conviction. I put the case merely to try the principle. It appears to me that such an omission, or an omission to follow a practice which is universally adopted by the Judges in England, and is described by Lord Abinger to be 'a practice which deserves all the reverence of law,' would be a ground of appeal against a conviction upon a verdict of guilty based upon such evidence alone, and found by a jury upon such a summing up." (*c*).

It appears to me that the error committed by the Session Judge in this case is of a graver character than the last of the omissions to which Sir Barnes Peacock has referred, and which he considered would have formed a proper ground for setting aside the verdict of a jury; and that the most disastrous consequences would result in the administration

(b) 5 Calc. W. Rep. Cr. R. 80. (c) Ibid p. 88.

1869

Reg.
v.
Shek Miya.

of justice if such an error were not treated as a fatal flaw in a case like the present one.

The order of the Court will, therefore, be, that the conviction and sentence in the case of the accused Shek Miya valad Shek Daud be set aside, and that the said accused be re-tried before a new jury on the previous commitment.

WARDEN, J. :—In accordance with Sec. 36 of the Letters Patent, this case has to be decided by the opinion of the Senior Judge; I must, therefore, place on record that I dissent from my brother Tucker.

The ground on which the learned counsel for the accused has applied to us to set aside the verdict of the jury is that the Session Judge, in his summing up, omitted to warn the jury against attaching any weight to the statement of the accused No. 1 when considering the evidence against the accused No. 2.

There are two or three remarks in the summing up of the Session Judge which have been objected to by the counsel for the accused No. 2 ; but as they are not, in my opinion, of any importance, and as my brother Tucker holds the same view with regard to them, I will confine myself to noticing the above omission, on which the learned counsel has laid so much stress.

Had the Session Judge, in his summing up, blended closely together the evidence against the two accused, I should, without any hesitation, have concurred with my brother Tucker in setting aside the verdict of the jury, and ordering a new trial ; but the Session Judge has, in his summing up, dealt so distinctly with the evidence against each of the accused, has kept one so separate from the other, that I feel thoroughly convinced that the jury, in weighing the evidence against the accused No. 2, have not allowed the statement of the accused No. 1 to bias them ; the accused No. 2 could not, therefore, have been, in any way, prejudiced by the Session Judge omitting to tell them that the statement of one accused ought never to be allowed to tell against the other accused. I am, therefore, very strongly opposed to any interference on our part, and consider that the verdict of the jury ought to be upheld.