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1869 Aug. 18.

Trial by jury—Illegal evidence, admission of—Appeal—Crim. Proc. Code, Sec. 426–Act II. of 1855, Sec. 57.

Appeals from convictions on trials by jury, where illegal evidence has been admitted, should be dealt with on the same principles as appeals in which there has been a misdirections by the Judge or an omission on his part to give the jury proper direction

The Appellate court, where it finds that illegal evidence has been admitted, should consider whether it is such as is likely to have exercised a prejudicial influence on the mind of the jury, and if the court be of opinion that it is so, it will treat the case as if it had been tried by a Session judge with the aid of assessors. if the evidence, (after omitting that portion of it which should not have been admitted) is sufficient to sustain the verdict, the conviction will be upheld

In exceptional cases, where the evidence is of such a character as to suggest the consideration that its real value cannot fairly be appreciated except by a Court which has heard that evidence given, a new trial will be directed.

The prisoner, on the 3rd of march 1869 was tried before F. Lloyd, Session Judge of Puna, and a jury (under Section 471 of the Indian Penal Code), on a charge of using as genuing a forged document (to wit) a false currency note for Rs. 1,000. four out of five jurymen having found the Prisoner guilty, he was by the Judge sentenced to be transported for seven year, and to pay a fine of Rs 3,000. It was also ordered that this sum should be recovered by a sale of the prisoner's property, and Rs. 1,000 given to the Great Indian Peninsular Railway Company, upon whom the fraud had been committed.

From the conviction and sentence the prisoner appealed, and on the 4th of August 1869 the appeal was heard before Warden and Melvill, JJ.

Mr. Culloch (with him *Pandurany Balibhadra*) for the prisoner:—The grounds of appeal are, first, addmission of illegal evidence, and second, misdirection. The evidence of three of the witnesses for the prosecution is more or less hearsay, and should not have been admitted. It is impossible to say what weight it may have had with the jury. The trial it therefore vitiated, and ought to be set aside on this ground alone. But the Session Judge has omitted to give a proper

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direction to the jury. Some of the witnesses speak to a dealing with the false note by Babaji, the prisoner's servant the day before the prisoner is alleged to have passed it but make no mention of the prisoner himself taking any part in that dealing, and yet the Session Judge has omitted to tell the jury that in criminal cases the general liability of the master for the acts of his servant does not exist, and that therefore the evdence regarding the latter did not affect the former. The Session Judge should also have drawn the attention of the jury to the danger of giving implicit reliance to the evidence of Rangnath, the leading witness for the prosecution, and the person whom the prisoner requested to cash the false note. This man was arrested along with the prisoner, but the Magistrate who conducted the preliminary investigation *dismissed* the charge against him. The Session Judge, however, told the jury that he was formally acquitted. He represented him as in a position of safety which he did not occupy as he is still open to a trial, for if the prisoner, Ramswami, should be acquitted, he would most probably be put upon his trial. The Session Judge should, therfore, have cautioned the jury that there was that danger hanging over his head. A new trial should be ordered, as the High Court in an appeal from a conviction by a jury, have no power to go into the evidence

Dhirajlal Mathuradas for the prosecution:—if hearsay evidence has been admitted, it is competent to the Court to set it on one side, and consider whether the conviction can be upheld on the rest: Act II. of *1855, Sec. 57. Reg.* v. *Fattechand Vastachand*(*a*). *Reg.* v. *Elahee Buksh* (*b*).

Cur. adv. vult.

18th August—Melvill, J.:—The appellant, Ramswami, has been convicted by a jury of using as genuine a forged document, and his counsel has urged us to direct a new trial, on the ground of the improper admission of evidence, and of misdirection to the jury. The learned counsel showed conclusively that there had been certain errors of

(*a*) 5 Bom. H. C. Rep. Cr. Ca. 65. (*b*) 5 Calc. W. Rep. Cr. R. 80.

procedure of greater or less importance, and, this being the first appeal of the kind which has come before me, I expressed a wish that judgment might be reserved, in order that I might consider, as a general question, how far such errors render it necessary or right for an Appellate Court to interfere with the verdict of a jury.

I have since had the advantage of reading the judgment of the High Court of Calcutta in the case of *Elahee Buksh* (*ubi supra*), and of a divisional bench of this Court in the case of *Futtechand Vastachand* and three others (*supra*). The conclusions arrived at in these judgments, and in which I generally concur, may be stated, so far as they are applicable to the present case, as follows: 1.—That any misdirection by the Judge, or any omission to give to the jury such advice as to the evidence, as a Judge, in the exercise of a sound judicial discretion, ought to give, amounts to an error in law. 2.—That, nevertheless, the verdict and conviction ought not to be set aside if the prisoner has not been prejudiced by such error; nor should it be set aside if the Court be of opinion that the verdict was warranted by the evidence, and that, upon that evidence, they would have upheld the conviction on appeal, if the trial had been by the Judge with the aid of assessors instead of by jury. The question of the improper admission of evidence did not come under consideration in either of the above cases, but it may be fairly dealt with on the same principles. In the record of almost every case tried by jury in the Mofussil I believe that some evidence would be found which, according to the strict rules of English law, would be inadmissible. I say this without casting any reflection upon the Judges who preside over such trials. They are not legally bound to follow the English law as such, and, as observed by the Indian Law Comissioners in their Fifth Report, much evidence which the English law renders inadmissible because it is likely to mislead a jury, may properly be admitted by a Judge who is trying a case without a jury. It is obvious that a Judge who, in his ordinary work, feels himself unfettered by the more stringent rules of evidence, is likely, on

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the rare occasions on which he presides over trials by jury to allow evidence to be given which might properly convey information to his own mind but which is likely to have undue influence upon a jury, and which, therefore, it would be safer to reject. This likelihood is increased by the circumstance that, in the Mofussil Courts, the duty of objecting to irregular questions is very inefficiently performed by the pleaders. It follows that, as I have said, it is almost certain that some evidence will creep into the record which an Appellate Court will consider to be not properly admissible.

Is then every trial necessarily to be vitiated by the admission of such evidence? If this were so, I think that, to use the words of Sir Barnes Peacock in the case above referred to, "a wide door would be thrown open for the escape of guilty men, and the due administration of the criminal law of this country would be placed in the greatest jeopardy in those districts to which trial by jury has been extended." The duty of the Appellate Court is, in my opinion, first to consider whether the evidence improperly admitted is material and such as is likely to have exercised a prejudicial influence on the minds of the jury. If it be so, then, as it is impossible to know the exact amount of weight which the jury attached to the particular evidence in question, their verdict is so far invalidated that the Appellate Court cannot any longer accept it as a conclusive decision on the facts. But it does not follow that, on this account, the appellant is entitled to be acquitted and discharged, or even to have the advantage of a new trial. Section 57 of Act II. of 1855, and Section 426 of the Code of Criminal Procedur are expressly designed to obviate any such conclusion and to prevent the inconvenience and possible failure of justice which it would involve. If the Appellate Court think that the verdict of the jury is founded, in part, upon evidence which should not have been admitted, or that the Appellant has been prejudiced by some misdirection or omission of proper direction on the part of the Judge, the Appellate Court is at liberty to treat the case as if it had been tried by

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the Judge with the said of assessors, and if it consider that the evidence (after omitting that portion of it which should not have been admitted) is sufficient to sustain the verdict, it is at liberty to cofirm the conviction.

It may happen in some cases that the Appellate Court will think it desirable to order a new trial, because the evidence on the record is of such a character as to suggest the consideration that its real value cannot be fairly appreciated except by a Court which has the advantage of hearing the evidence given. But in all cases in which it is possible to do so satisfactorily, I think the Appellate Court should form its own conclusions on the evidence, and that it should not, save in exceptional instance, direct any trial.

I proceed to apply the preceding observations to the case before me. After giving the best consideration in my power to the arguments of the learned counsel for the appellant, I have come to the concusion that he has shown that there has been an improper admision of certain evidence of such a nature that it was likely to exercise upon the minds of the jury an unfair influence, to the prejudice of the accused; and that in summing up to the jury the Judge not only omitted to warn them against allowing themselves to be so influenced, but even mis directed them as to the bearing of the evidence upon the guilt of the accused Ramswami. The portion of the Judge's summing up to which, I allude is as follows:— "Janrav, Babaji, and Dadu Miya have been called to show that Ramswami did make an attempt to pass a thousand rupee note in the Bazar of Solapur, and that one is the note now before the Court. It is quite true, as asserted by the vakil, that these witnesses were not examined until the case had been otherwise concluded, but it is not to be assumed that they are necessarily fasle in consequence, and you must give this evidence what consideration you think it deserves." On turning to the evidence referred to, it appears that (except in one particular, mentioned by witness Janrav) there is nothing to connect Ramswami with the alleged attempt to pass the note in the bazar. The attempt was made by his servant, but the relation of Master

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and servant cannot be admitted as making the act of the servant evidence against the master. The greater part of the evidence of the three witnesses named is mere hearsay, and such hearsay as it is particularly dangerous to submit to a jury. One of the witnesses (Babaji) deposed as follows:—"I know accused and Babaji, accused's writer. About two months ago Babaji showed me a note in the Bazar. He said it was for rupees one thousand, and he wanted change. I said I would not take it without Ramswami's signature, as Babaji told me it belonged to Ramswami. Babaji said it is signed by Ramswami, and showed me a name written in English on the back." It is impossible to say to what extent the jury may have been influenced by such a statement as this, when the Judge allowed them to suppose that it was evidence of an attempt by Ramswami to change the note in the Bazar. I think that the admission of this evidence, and the misdirection in regard to it, constitute an error in the proceedings, by which the accused has been prejudiced: and that he is therefore entitled to have the evidence against him considered by this Court, without reference to the verdict of the jury upon the facts.

After carefully considering the evidence, I feel some difficulty in arriving at a conclusion, not because the evidence is insufficient in itself to sustain the conviction, but because it is of such a character as to render it difficult to pronounce upon its value without having an opportunity of hearing the evidence given. It consists of the deposition of a person who was himself charged before the Magistrate with uttering the forged note, and of the brother and fellow-clerk of this person. I am far from wishing to cast a suspicion upon the truth of their evidence; but it is open to the objection which has been made to it by the appellants counsel, viz, that it is not disinterested, and that the witnesses (or at least two of them) have a manifest reason for wishing to fix the guilt upon another person. It is quite possible that a tribunal which saw and heard these witnesses depose would be fully satisfied of the veracity; but it is difficult for a Court, which has not this advantage to feel

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justified in attaching full credence to the statements of witnesses whose interests it clearly is to make such statements. I think it would be better to order a new trial, partly for the reason which I have mentioned, and partly because I think that further inquiry may have the effect of strengthening the case. The appellant's servant, Babaji, might himself be examined; and corroboration might perhaps be obtained of the statement of Janrav, witness No. 14, that when Babaji was trying to change the note in the bazar, "Ramswami was in his carriage on the road. Babaji got into it, and went away." If this circumstance were established, it would, to a certain extent, be evidence to connect Ramswami with the possession of the note. I would return the proceedings, marking those portions which are open to objection, and order a new trial.

Warden, J.:—I have already, in the case of *Vattechand bin Vastachand* and three others, recorded my opinion as to the course to be adopted when an appeal is preferred to the High Court, on the ground that there has been a misdirection by the Judge, or an omission to give proper advice to the jury. The question of the improper admission of evidence, as my Hon'ble Colleague has just stated, was not taken into consideration in that case, or in the case of *Elahi Buksh* in the Calcutta Weekly Reporter; but I fully concur with him it should be dealt with on the same principles. Acting on this view, I was prepared to go into the evidence, for the purpose of determining whether, after putting on one side the improper evidence admitted by the Judge, viz., the evidence of witnesses Babaji and Dadu Miya, there was sufficient evidence to sustain the verdict of the jury; but in deference to the opinion of my Hon'ble Colleague, I have consented, as an exceptional instance, to direct a new trial; for it is more than probable that by the improper admission of the evidence of the two witnesses, and by the misdirection in connection therewith, the jury may have been greatly influenced in finding a verdict of guilty against the accused.

Conviction and sentence annulled, and new trial ordered.