(1873) 04 CAL CK 0004

Calcutta High Court

Case No: None

The Queen		APPELLANT
	Vs	
Koonjo Leth and Others		RESPONDENT

Date of Decision: April 30, 1873

Judgement

Phear, J.

Upon considering the evidence, we find that the prisoners have been recognized by some of the witnesses who have given their testimony; that certain articles said to have been found in the possession of the prisoners have been identified also by some of the witnesses as articles which had been stolen from the prosecutor in the course of the dacoity; and there is further a confession made before the Magistrate by Koonjo Leth, one of the prisoners jointly tried with the others, and in this confession, every one of the other prisoners, as well as Koonjo Leth himself, are mentioned as taking part in the dacoity. If there were nothing on the record serving to impeach these several heads of evidence, no doubt the case against the prisoners would be very strong indeed. The Judge, however, has given reasons for thinking that the recognition of the prisoners by the witnesses cannot be depended upon; that the identification of stolen articles is untrustworthy; and that the confession of Koonjo Leth is not a true and real confession, but a confession which has been obtained by some contrivance of the Police, or in such a way at any rate as serves to render it altogether untrustworthy. We concur with the Judge in this view. Indeed, I may say for myself that, if I had to judge of the facts merely by the testimony of the prosecutor and the other witnesses who have been called on the side of the prosecution, I should almost doubt whether there had been a real dacoity at all. (The learned Judge read and commented on the evidence of the witnesses and the confession of Koonjo Leth, and continued):--I need not go further in detail into the evidence. I have stated enough, I think, to indicate the ground upon which we entirely concur with the Judge in thinking that the prisoners, excepting the first one, ought not to have been convicted upon the evidence which is on the record. The confession of Koonjo Leth, of course, could not have been legally used against the others at all excepting to such an extent as it was substantially corroborated by unimpeachable evidence aliunde. But so far

from this being the case, as I have already mentioned, wherever the confession is really tested it is proved to be false. * * * * On the whole, then, we think, as I have already said, the prisoners ought not to have been convicted, and that in the interests of justice, all the prisoners, excepting the first prisoner, ought to be acquitted. But a question of somewhat of a serious character has arisen as to our powers in this case to acquit. The case comes before us in consequence of the Judge having submitted it to this Court under the provisions of s. 263 of the new Criminal Procedure Code. According to that section:--"In cases tried by jury, * * if the Court disagrees with the verdict of the jurors, or of a majority of such jurors, and considers it necessary for the ends of justice to do so, it may submit the case to the High Court, and may either remand the prisoner to custody, or admit him to bail. The High Court shall deal with the case so submitted as with an appeal, but it may convict the accused person on the facts, and if it does so, shall pass such sentence as might have been passed by the Court of Session." Do these words, "shall deal with the case so submitted as with an appeal," mean that the case submitted shall be in all respects considered and situated as an appeal. If so, then it is an appeal, if not preferred by the prisoner, yet preferred on his behalf against a conviction of a jury, and s. 271 says:--"If the conviction was in a trial by jury, the appeal shall be admissible on a matter of law only."

2. In the case before us, the ground upon which the verdict of the jury is sought to be set aside is undoubtedly in substance a matter of fact, and not a matter of law. The construction of these words to mean that the case submitted is to be considered essentially as an appeal seems to be somewhat favored by the words which follow,--"but it may convict the accused person on the facts," because "but" seems to imply something in the way of opposition to, or inconsistency with, what would be the case of an appeal if that "but" was not there. And certainly if the appeal were preferred by the prisoner it would be admissible on matter of law only. At the same time it is also obvious that, in the case of an appeal preferred by the prisoner, the Appellate Court could never have any occasion to convict on the facts, because by the nature of the case, such an appeal must always be an appeal against a conviction already arrived at in the Court below. And in the case of an appeal preferred on the part of the Crown against an acquittal (allowed for the first time by s. 272 of the new Code), it does not appear that there is any restriction imposed relative to the exercise of the discretion of the Appellate Court. Therefore, looking back again to the words of the section which I have already read, it seems to me, on the whole, that the case submitted must, under this section, in the case of a conviction, be intended by the Legislature to be submitted for a wider purpose than simply that of becoming an appeal presented by the prisoner. The words are:--"If the Court disagrees with the verdict of the jurors, or of a majority of such jurors, and considers it necessary for the ends of justice to do so, it may submit the case to the High Court." Now the Court may disagree with the verdict of the jury, either on the ground that the jury had not followed its directions on a point of law, or on the ground that the jury had found the facts against what appeared to the Judge to be the weight of evidence. If the Legislature had intended the case which was to be submitted by the Judge in the event of a

conviction to be limited to a point of law only, nothing would have been easier than to have used words which would have made that limitation perfectly unmistakable. But the words I have read are, on the contrary, general words without any limitation at all; and it seems to me impossible in reason to construe them otherwise than as extending to a disagreement with the verdict on matter of fact as well as on matter of law.

3. And then the section goes on to say:--"And if the Court considers it necessary for the ends of justice to do so." It appears to me that justice may as much require that a verdict of the jury should be revised in a case in which the jury has gone wrong on facts as in a case where it has made a mistake in regard to law. So that, on the whole, I think, there is really no limitation as to the nature of the case which the Judge may send up to the High Court under this section. In other words, I think, he may submit to the High Court a case in which he disagrees with the jury in their finding of facts, as well as a case in which he complains that the jury has not followed his directions as to the law. And I think, that the word "but" may possibly be used not so much in opposition to the word "appeal" in the first part of the passage, as perhaps in opposition to, or enlargement of, the enactment of s. 272. According to s. 272, "the Local Government may direct an appeal by the public prosecutor, or other officer specially or generally appointed in this behalf, from an original or appellate judgment of acquittal; but in no other case shall there be an appeal from a judgment of acquittal passed in any Criminal Court." Construing the word "but" to be used with reference to this section, it would simply mean that, upon a case submitted by the Judge, the Court may, in the event of an acquittal, convict the accused person on the facts, notwithstanding the general prohibition to be found in the words of s. 272, which I have read. Or, again, it may be used with reference to the situation of a case so submitted by the Judge when it comes up to the High Court. That situation is peculiar in this respect, namely, that no judgment has been passed in the Court below from which this so to speak appeal has been brought; and this part of the passage may, therefore, mean that, in the event of the Court, upon consideration of the case submitted, being of opinion that there should be a conviction and judgment thereon, it is empowered to pass it as an original Court notwithstanding, and indeed because, there has been none passed in the Court below. However this may be, it seems to me, after the best consideration which I can give to the question, that, on a case submitted by a Sessions Judge under the provisions of s. 263, the High Court can acquit the prisoner if it so thinks fit on the facts, notwithstanding that the jury has found the prisoner guilty.

4. I construe the words "shall deal with the case so submitted as with an appeal" simply as directing the procedure to be followed, such as regards the notices which are necessary to be served, and so on. And I apprehend that under these words the Court may, if the case calls for it, send for additional evidence; and may deal with the case generally as is provided in Chap. XX with regard to appeals. No doubt, the result of this construction is that the prisoner is in a better situation With regard to an appeal, if that appeal be made through the intervention of the Judge under s. 263, than if he had preferred it himself, because s. 271 immediately says that, if the conviction was in a trial

by jury, the appeal by the person convicted shall be admissible on a matter of law only. But this is not the only peculiarity of a similar kind which, is to be found in this new Criminal Procedure Code, because, in the event of the conviction of a prisoner by a jury for the crime of murder and sentence of death following thereon, upon the reference which must be made to this Court for confirmation of the sentence, this Court has the power by s. 288 to acquit the prisoner on the facts although if the prisoner had been sentenced to transportation for life instead of to death, and had simply himself appealed, the Court would not have been able to disturb the verdict of the jury on the facts.

5. I am, therefore, of opinion that all the prisoners, excepting the first prisoner, should be acquitted and discharged from custody so far as this conviction is concerned. The case is different with regard to Koonjo Leth, because he undoubtedly has confessed to having taken a part in the dacoity, and that confession is ample evidence as against him to support the conviction. As it falls upon us to pass sentence upon Koonjo Leth, we think that the sentence should be three years'' rigorous imprisonment.

Glover, J.

I concur in this judgment except in so far as doubt is thrown upon the occurrence of the dacoity. I see no reason to discredit the evidence on this point, and the jury were satisfied that a dacoity did take place.