(1928) 08 CAL CK 0036

Calcutta High Court

Case No: None

Dwarika Das Bairagi and Others		APPELLANT
	Vs	
Emperor		RESPONDENT

Date of Decision: Aug. 8, 1928

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 297
- Penal Code, 1860 (IPC) - Section 395

Citation: 118 Ind. Cas. 351

Hon'ble Judges: Jack, J; Charu Chunder Ghose, J

Bench: Division Bench

Judgement

Charu Chunder Ghose, J.

This case comes from Burdwan where the accused in the present appeal and the accused in Criminal Appeal No. 253 of 1928 were tried along with four others before the then learned Additional Sessions Judge of Burdwan and a Jury on a charge u/s 395, Indian Penal Code. The Jury found the present appellants and the appellants in Appeal No. 253 of 1928 guilty of having committed an offence punishable u/s 395, Indian Penal Code. The learned Judge agreeing with the verdict of the Jury sentenced each of the accused to suffer rigorous imprisonment for a period of seven years. In the present appeal the appellant Bench alias Niranjan Ghose has been represented before us by Mr. Mritunjoy Chattopadhyaya. The appellants in Appeal No. 253 of 1928 preferred the appeal from jail and the two appeals have been heard together before us. For the reasons which we are about to give we must set aside the verdict of the Jury and the conviction and sentence and direct retrial of the accused in these two appeals according to law.

2. This course has been forced upon us and we have had no other alternative than to direct re-trial.

3. Mr. Chatterji has argued on behalf of his client that from the charge of the learned Judge to the Jury as it appears on the record before us it could not be said with certainty what was the view on the facts appearing on the evidence which was placed before the Jury and that it could not be called a proper summing up within the meaning of Section 297, Criminal Procedure Code. He further contends that the summing up by the learned Judge after the close of the evidence in the case should be a full and a distinct statement of the evidence on the record with such advice as to the legal bearing of that evidence and the weight which should attach to the several parts of it as sound judicial discretion would suggest and in so far as the present summing up violates the conditions indicated above it amounts to a misdirection within which expression are included also matters of non-direction. It is not necessary to set out therein the charge itself of the learned Judge for the purpose of indicating what that charge is. The charge itself must be referred to in order to fully understand the observations which follow. In our opinion this charge is one which is animadverted upon in the judgment of this Court of Srish Chandra Dutta and Others Vs. Mathura Nath Dutta, and Panchu Das v. Emperor 34 C. 698 : 11 C.W.N. 666 : 5 Cr.L.J. 427. It, no doubt, appears on the face of it to be heads of charge to the Jury and in so far as it consists of heads of charge to the Jury it may be said that there is a technical compliance with the provisions of Section 297, Criminal Procedure Code. It is not however, a charge in such a form as to enable this Court as the final Court of Appeal in cases of trial by a Jury to be satisfied that it was delivered with sufficient fullness as regards the evidence on the record or that it is such as to enable this Court as a Court of Appeal to say for itself that all points of law and fact were clearly and correctly explained to the Jury having regard to the evidence adduced in the case. Now, the explanation of the law bearing on the subject, if it can at all be called an explanation is drastically meagre and we have not been afforded any assistance whatsoever by the learned Judge in the portion of the charge relating to the explanation of the law bearing on the case for the purpose of finding out for ourselves whether the sections were properly explained to the Jury or not. Leaving that aside and confining ourselves to the observations in the charge and the summing up of the evidence on the record it seems to us that the summing up is no more than the barest possible skeleton of the evidence on the record. It is not as indicated above a summing up at all. It is doubtful whether the Jury were afforded any real assistance by the learned Judge when he proceeded to sum up the case to the Jury. The names of the witnesses are mentioned no doubt in the charge. But the interdependence of the evidence given by these witnesses bearing on the charge framed against the accused has not been made clear nor does the summing up of the evidence appear to us in any way connected with the several parts thereof as a whole, as a summing up made with ordinary care would certainly show. But we need not pause here because from the record it has been shown that important points which should have been brought to the notice of the Jury have not been brought to their notice. In our opinion the circumstances to which our attention has been drawn imperatively demand that the accused should have an opportunity of

having the case against them placed before the Jury by another officer and at a second trial.

4. In the first place it is pointed out that there is an important discrepancy between the facts stated in the First Information Report and the evidence of the persons who lodged the First Information in Court and that such discrepancy has not been placed before the Jury. It is pointed out that in the First Information Report lodged at the thana the witness Upendra had stated that even up to the time when the First Information was lodged the names of the dacoits had not been ascertained whereas in his evidence in Court he stated that his elder brother Rajani, witness No. 3, had informed him about the names of the dacoits before he proceeded to the thana to lodge the First Information.

5. In the second place it is pointed out that in the First Information it was stated that the dacoitswho had committed the dacoity in question had worn pieces of cloth ordinarily called galpatta. But so far as it can be ascertained from the evidence of Rajani in Court it was clear that none of the dacoits had worn galpatta. It is further pointed out that if one looks at the evidence of Upendra and Rajani together, while Upendra says that galpattas were worn by the dacoits, Rajani on the contrary is positive that no galpatta was so worn. Rajani is equally positive that he did not furnish the names of the dacoits except perhaps of Dwarka brother of Upendra.

6. In the third place it is pointed out that there is no mention whatsoever in the learned Judge''s charge to the Jury of the names of the several persons who appeared in the First Information as being the persons who had either chased the dacoits or who had come immediately to the place of occurrence after the occurrence itself and had heard from Rajani witness No. 3 the names of the persons who had taken part in the dacoity nor is it pointed out in the charge itself that moat of these persons last referred to had not been called as witnesses in the trial, their names being Surendra Chakraburty, Jyotish Pal, Girija Nath Chatterji, Kalyan Babu, Dhuli Babu, Pran Kristo Chakraburty and Govinda Chakraburty.

7. In the fourth place it is contended that the learned Judge was wrong in stating to the Jury that witness No. 5 corroborates witness No. 4. Witness No. 5 does not speak to the fact of the accused persons meeting together in the house of Niranjan in the evening of the day of occurrence and in so far as witness No. 5 does not speak to that, there is no corroboration of witness No. 4.

8. In the next place complaint is made that the learned Judge told the Jury in clear and unequivocal language that the identification was a genuine one thereby indicating to the Jury that there was very little left of the case for the accused inasmuch as the dacoits had been identified in a satisfactory manner. The learned Judge was not entitled to express his opinion on the question of identification in that forcible and dogmatic manner in which he did because it is clear from the evidence of witnesses Nos. 1, 3, 8 and 13 that the persons accused of having committed the

dacoity in question had been taken after their arrest to the village where the occurrence took place and had been kept for a day near the baitakhana of the complainant before they had been sent up for trial. These are some of the circumstances to which our attention has been drawn showing that there has been non-direction by the Judge--non direction as regards important points to which the attention of the Jury should undoubtedly have been drawn. In the circumstances we think on the plainest consideration of justice that we should interfere in this matter, set aside the verdict of the Jury and order re-trial and we, accordingly, do so and direct that the accused, that is, the appellants in the two appeals mentioned above be re-tried before the present Sessions Judge of Burdwan and a Jury in accordance with law.

Jack, J.

9. I agree.