

(1867) 07 CAL CK 0001
In the Calcutta High Court

Queen

APPELLANT

Vs

Sheikh Bazu and Others

RESPONDENT

Date of Decision : 27-07-1867

Acts Referred:

Citation : (1867) 07 CAL CK 0001

Judgement

Sir Barnes Peacock, Kt., C.J., Bayley, Kemp, Seton-Karr, JJ.—I cannot concur in thinking that the conviction of the prisoners of culpable homicide not amounting to murder can be set aside, and the conviction of murder substituted by this Court either as a Court of Appeal, or as a Court of Revision, and I am of opinion that the case cannot be sent back for a new trial. One of the leading principles of the Code of Criminal Procedure is, that there can be no appeal from a judgment of acquittal, and that this Court cannot, as a Court of Revision, alter the finding of a Court of Session upon any question of fact.

2. An appeal lies upon law or fact: revision is only in respect of matters of law, or too great severity of sentence. On appeal, a judgment of acquittal cannot be reversed; on revision it cannot be reversed upon the ground that the evidence would have warranted the Judge in finding the prisoner guilty of a more aggravated offence than that of which he was convicted.

3. If a prisoner is charged with murder, and also with culpable homicide not amounting to murder, with reference to one and the same act of killing, if he is convicted of culpable homicide not amounting to murder, he is substantially acquitted of murder, and the Court cannot, upon appeal, hold that the evidence was sufficient to warrant a conviction of murder, and alter the conviction accordingly, or reverse the finding and send the case back for a new trial.

4. In the case of Gorachand Gope Ante, p. 443 it was held that this Court, as a Court of Revision, might set aside a judgment of acquittal for error in law, and either pass a proper sentence, or order a new trial, according to the circumstances of the case. The case supposed was one in which the facts found would show that the acquittal was wrong in law, not that the evidence would

have warranted a different finding on the facts.

5. In that case the Court said: "Suppose the decision of a Judge should be monstrously absurd. Suppose, upon an indictment for murdering a child, the Judge and the Assessors should find that the prisoner caused the death of the child by doing an act with the intention of causing its death, and that the case did not fall within any of the exceptions mentioned in s. 300 of the Penal Code. But suppose they should also find that the child was under the age of six months, and the Judge should hold that it was not murder to kill a child under that age, and should therefore acquit the prisoner, and order him to be discharged,--could it be contended that the judgment of acquittal could not be set aside, and that the prisoner should go free for ever? I apprehend that the Court, as a Court of Revision, would clearly have the power to set aside the judgment of acquittal, and declare that, upon the facts found, the prisoner was guilty of murder, and send the case back to the Judge, ordering him to apprehend the prisoner (if he had been discharged) and to pass the proper sentence upon him. If, in the case above supposed, the Judge were to say, it is not necessary to try whether death was caused by an act done with the intention of causing death, because, if it was so caused, the prisoner was not guilty of murder. I find that the child was under the age of six months, and therefore acquit the prisoner. In such a case there would be no finding on the facts, and the Court, as a Court of Revision, would merely set aside the acquittal and order a new trial. I have supposed an error in law which is not likely to occur. I put it merely as an illustration; there are many constructions of law equally erroneous, though not so clearly so."

6. In the case of *The Queen v. Toyab Sheikh* 5 W.R., Cr., 2, this Court held that, by finding the prisoner guilty of culpable homicide not amounting to murder, the Sessions Judge and Assessors had, in substance and effect, acquitted him of culpable homicide amounting to murder, and consequently acquitted him as well of any intention to cause death, as of the knowledge that the act done was so imminently dangerous as to bring the case within the provisions of cl. 4, s. 300 of the Penal Code.

7. They say: "It appears to us that by finding the prisoner guilty of culpable homicide not amounting to murder, the Sessions Judge and Assessors in substance and effect acquitted him of culpable homicide amounting to murder, and consequently acquitted him as well of any intention to cause death, as of the knowledge that the act done was so imminently dangerous as to bring the offence within cl. 4, s. 300, in the same way as they would have acquitted him, if they had expressly found that he caused the death with the knowledge that the act was likely to cause death, but without the intention mentioned in cl. 1, 2, or 3 of s. 300, and without the knowledge mentioned in cl. 4 of that section. If they had expressly acquitted him of murder in that way, it would not have been competent to this Court, either as a Court of Appeal or as a Court of Revision, to find that, according to the evidence, the prisoner caused the death with the

knowledge mentioned in cl. 4, for whether the death was caused with that knowledge or not, was entirely a question of fact. As a Court of Appeal they could not have done so, in consequence of s. 407. As a Court of Revision they "could not have done so, as the error was not one of law, nor was the sentence illegal (see ss. 403, 404, 405 of the Code of Criminal Procedure). However wrong the Court may think that the Sessions Judge and Assessors were in acquitting of murder, they have no power in our opinion, to correct the error. However inadequate they may consider the sentence, they have not, in our opinion, any power to enhance it, as the sentence is one which is authorized by law, for the offence of which the prisoner was found guilty."

8. In that case the question had reference to cl. 4, s. 300. In this, to cl. 3 of the same section. If that decision is correct--and I cannot doubt that it is so--the principle laid down applies equally to cl. 3 as to cl. 4.

9. The present case falls within s. 299; it does not fall within any of the exceptions to s. 300. Still it is not necessarily a case of murder. It does not follow that a case of culpable homicide is murder, because it does not fall within any of the exceptions in s. 300. To render culpable homicide murder, the case must come within the provisions of cl. 1, 2, 3 or 4 of s. 300. In the present case it has been found that there was no intention to cause death. The case, therefore, does not fall within cl. 1. It is not contended that it falls within cl. 2 or cl. 4, consequently it is not murder unless it falls within cl. 3 of s. 300.

10. Was then the act done with the intention of causing bodily injury, and if so, was the bodily injury intended to be inflicted sufficient, in the ordinary course of nature, to cause death? The Judge has not found that the bodily injury intended to be inflicted was sufficient, in the ordinary course of nature, to cause death. He finds expressly that the case does not fall under any of the clauses of s. 300: and the facts found do not show that he was wrong, in point of law, in holding that the case did not fall within any of those clauses. If he had found that the act was done with the intention of causing bodily injury to the deceased, and that the bodily injury intended to be inflicted was sufficient, in the ordinary course of nature, to cause death, the facts so found would have shown that he was wrong in law in holding that the case did not fall within any of the clauses of s. 300; for the facts so found would have shown that it fell within cl. 3 of s. 300. If he had found that fact, the case would have come within the principle, of *Gorachand Gope's* case Ante p. 443; not having found the fact, the case comes under the rule laid down in the case of *The Queen v. Toyab Sheikh* 5 W.R., Cr., 2 above cited. The evidence might have justified the Judge in finding the fact: but that merely shows that his finding did not come up to the point which the evidence would have justified; it cannot authorize this Court to look at the evidence for the purpose of reversing the acquittal of murder, and of convicting the prisoner of that offence.

11. The finding of the Judge that there was no such knowledge as would bring the case within cl. 2 or cl. 4, coupled with his omission to find that the bodily

injury intended to be inflicted was not sufficient, in the ordinary course of nature, to cause death, is not tantamount to a finding that the injury intended was sufficient, in the ordinary course of nature, to cause death, nor can it authorize this Court to find that it was so, and to reverse the Judge's finding that the case did not fall within cl. 3 of s. 300, which was included in his general finding that the case did not fall within any of the clauses of that section.

12. If the Court was right in Toyab Sheikh's case 5 W.R., Cr. 2 in holding that the Judge and Assessors, by finding the prisoner guilty of culpable homicide not amounting to murder, not only acquitted him of an intention to cause death, but also of the knowledge that the act done was so imminently dangerous as to bring the offence within cl. 4, it is clear that a similar finding in the present case must amount to an acquittal of an intention to inflict such bodily injury as would be sufficient, in the ordinary course of nature, to cause death.

13. It is said that the Judge has not found that the injury intended to be inflicted was not sufficient, in the ordinary course of nature, to cause death. Suppose that he had expressly found that it was not sufficient, it is clear that this Court could not have altered his finding, in that respect, for the purpose of altering his conclusion, that the prisoner was guilty of culpable homicide not amounting to murder, or in other words, of reversing his acquittal of murder, and of convicting the prisoners of that offence. Suppose a jury in a special verdict had found the facts as the Judge has done. It is clear that such a verdict would not have amounted to a verdict of guilty of murder, and that the Court could not have supplied the necessary fact by finding that the injury intended to be inflicted was sufficient, in the ordinary course of nature, to cause death. Nor could the Court have presumed that the jury intended to find that fact in the affirmative, merely from their omission to negative it. It would be much more reasonable to infer (if the law allowed inferences at all in such a case) that the jury considered that their omission to find in the negative would never be considered to amount to a finding in the affirmative.

14. I am clearly of opinion that this Court cannot add a fact to the finding of a Judge or jury in the case of acquittal, even if the omission was contrary to the weight of evidence, any more than it cause reverse or set aside a judgment of acquittal, if it is clearly contrary to the evidence. The appeal will therefore be dismissed as regards the three prisoners named above.

15. The Magistrate was wrong in sending up joint charges against persons who took part in the riot on opposite sides, for the two parties had not a common object. The Judge, however, took a right view of the case as regards the prisoner Bazu in deciding whether he was innocent or guilty. This prisoner has had a fair trial; he has not been prejudiced by the error of the Magistrate; and in my opinion there is no ground for setting aside the verdict, or reversing the conviction or sentence. The appeal must be dismissed as regards this prisoner.

Phear, J.

16. I agree generally in the judgment of the Chief Justice.

17. We cannot interfere under the circumstances of the case of Motee Mondul, Seeboo, and Megha, unless we see, on the facts found by the Judge, that he has committed an error of law. It is said that he has committed such error by finding facts which amount to the crime of murder on the part of the prisoners, and yet acquitting them of that crime. I do not think that he has found facts sufficient to support a charge of murder. On the contrary, he finds expressly that this case does not fall under any of the clauses of s. 300. If this finding stood alone, it seems to me that it would, without doubt, be taken to amount to a negating of the facts mentioned in those clauses as material to the, crime of murder. Then is there anything in the rest of the judgment to modify it? I think not. The Judge no doubt goes on to expressly negative the facts of two of those clauses, and omits at the same time to say anything with regard to those of the third, although he finds that death was caused by the bodily injury intended to be inflicted; and, no doubt, if that injury was in itself such as would, in the ordinary course of nature, be sufficient to cause death, the requisites of that third clause would be complied with; still he stops short of here saying in words that it was so sufficient.

18. I cannot from his silence in this place, coupled though it be with his express denial of the facts in the other clauses, infer that he meant to affirm the sufficiency of the injury, in the ordinary course of nature, to cause death. This being so, it seems to me that his previous general finding is untouched, and therefore it is impossible for me to say that he has made the error in law which has been alleged.

19. As to Bazu's case, I think it was extremely improper that this prisoner should have been tried jointly with the other prisoners.

20. The (sic) with which he was charged was entirely distinct from those (sic) against them. So far was he from having any common purpose with them in regard to the conduct which formed the basis of the charges, that he and they were clearly members of bitterly hostile parties respectively. However, I do not see from the materials before me, that any injustice has been done to the prisoner by reason of the irregularity of the trial; and, indeed, I am disposed to believe that he has, under the peculiar circumstances of the case, been rather advantaged thereby than otherwise. I therefore do not think that there is here any sufficient reason for ordering a new trial.

Macpherson, J.

21. On further consideration I think (as regards the first three prisoners) that, as the Sessions Judge has expressly said that the case does not fall within any of the clauses of s. 300, he must be held to have found (however erroneously) such a state of facts as does not amount to murder, and to have acquitted the prisoners of that offence, notwithstanding the apparent modification of his first finding by his subsequent more detailed finding as to the knowledge and intention with which the act which caused the death was done. I, therefore,

concur in the opinion that we cannot, as a Court of Appeal or Revision, alter the finding or acquittal, and convict the prisoners of murder.

22. As regards the prisoners Bazu, I remain of the opinion which I expressed in referring his case to a Full Bench for decision.

Loch, J.

I concur with Mr. Justice Macpherson regarding the three prisoners convicted of culpable homicide not amounting to murder. With regard to the prisoner Bazu, I think the preferable course would have been to have committed him separately; but I see no sufficient grounds under the circumstances to order a new trial.