GRESSY *v.* DIRECKZE.

1901.
Sept. 30.

P. C., Colombo, 71,853.

Criminal procedure—Charge laid under s. 315 for voluntarily causing hurt—Examination of witnesses for prosecution—Charge framed under s. 317 for grievous hurt—Magistrate informing accused that, as District Judge, he would try him summarily—Liberty given to accused to cross-examine afresh the witnesses for the prosecution—Regularity of procedure.

Where, upon a charge of voluntarily causing simple hurt, a Police Magistrate recorded evidence and, finding the offence of grievous hurt to be disclosed, informed the accused that he intended as District Judge to try him summarily, and permitted him to cross-examine afresh the witnesses for the prosecution,—

Held, that a conviction resting upon such procedure was not bad, as the accused was on his trial from the commencement, and had the fullest opportunity to cross-examine the witnesses.

THE accused in this case was sentenced to two years' rigorous imprisonment upon a charge of voluntarily causing grievous hurt to one Punchi Singho by means of a knife.

On appeal, *Van Langenberg*, for the accused, raised several objections as to procedure, which are dealt with in the following judgment of the Supreme Court.

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30th September, 1901. WENDT, J.—

The accused in this case has been convicted of causing grievous hurt with a knife to one Punchi Singho, and, having been previously convicted of an exactly similar offence, has been sentenced to undergo rigorous imprisonment for two years, and to receive ten lashes. The offence was committed on the 16th August last, and the charge laid next day against the accused was laid under section 315. The accused was absent on that day, and several of the witnesses for the prosecution were examined by the Magistrate. A warrant was subsequently issued for the arrest of the accused, and he was also proclaimed, after which he surrendered on the 3rd September. He denied all knowledge of the charge, giving the names of four witnesses, who, he said, would prove that he was away at his village Batagama on the day in question. On the accused appearing, the evidence already recorded was read to him, and the witnesses were cross-examined on his behalf by his proctor. The Magistrate then framed a charge against the accused under section 317, and recorded it as his opinion that this charge, which was triable by a District Court, might be summarily tried by him, he being Additional District Judge. He informed the accused that he intended so to try him, and offered to permit the accused to further cross-examine all the witnesses for the prosecution, but accused's pleader did not put any further questions. The trial was adjourned, and one of the witnesses whom the accused had cited was examined by the Magistrate, after which, in defence, the accused himself gave evidence, but called no witnesses.

It was objected on behalf of the accused that upon the Magistrate advising himself that he might try the charge summarily, he ought to have recalled and re-examined all the witnesses for the prosecution. I do not think that was necessary. This was not a case in which, proceedings having commenced as upon an inquiry, the Magistrate afterwards made up his mind to try summarily. In such a case the accused, expecting to be committed to a higher Court, might well have forborne to cross-examine the witnesses at the earlier stage. Here the accused was on his trial from the commencement, and he had the fullest opportunity of cross-examining the witnesses. I think, therefore, there was no irregularity in the procedure.

On the merits the Magistrate has characterized the evidence as overwhelming, and I entirely agree with him. There have been some contradictions in the evidence, which were, I think, to be expected from the circumstances under which the offence was committed. They were not such as to affect the trustworthiness of the witnesses.

1902.
May 25 and June 2 and 16

REX *v.* BABA.

Evidence Ordinance, ss. 57, 60—Right of counsel to read to the jury opinions of experts expressed in a treatise, after intimating to the Judge that he would not call evidence for the accused—Procedure.

Where, in a trial for murder, after the case for the prosecution had been closed, the counsel for the accused intimated to the Court that no evidence would be called for the defence, but in addressing the jury announced his intention to read from Taylor's *Medical Jurisprudence* certain opinions expressed therein relative to homicidal mania,—

Held, that the ruling of the presiding Judge, that the counsel had then no right, under section 60 of the Evidence Ordinance, to read the extracts which he had in view, was correct.

MONCREIFF, A.C.J.—If the learned counsel had produced the book in Court in the course of the case for the prosecution, or by way of evidence, or had put the passages he desired to quote to the medical witness while he was in the box, or in any other way had done what in the meaning of the Evidence Ordinance would amount to production, he would have been in order.

WENDT, J.—If the counsel for the accused had intimated his intention to adduce evidence, and tendered in due course the book as evidence, it would have been his duty to satisfy the Court that the conditions precedent mentioned in the first proviso of section 60 of the Evidence Ordinance had been complied with; and upon the particular passages being tendered, it would have been open to the prosecution to insist that the context of the passages should also be put in as tending to make the meaning of the author clear.

MR. Justice Middleton reserved for the consideration of the other Judges of the Supreme Court the following point, which arose at the trial of the accused at the Galle Sessions holden on the 19th May, 1902.

His Lordship's statement was as follows:—

1. The accused was tried for murder, under section 296 of the Ceylon Penal Code, before me and an English-speaking jury on 19th May, and was defended by Mr. Jayawardene, assigned by me as counsel.

2. The cross-examination of the witnesses for the prosecution tended to show that the defence raised was insanity.

3. The doctor who gave evidence was only asked by counsel for the defence if the accused had been in the house of observation; but, after the doctor's re-examination as to accused's state of mind, counsel for the accused, with my leave, elicited from the doctor that he had never seen a case of what counsel styled homicidal mania.

4. The Crown Counsel closed his case and, upon counsel for the defence stating he had no witnesses, declined to address the jury.

5. Counsel for the defence then began to address the jury, and announced his intention of reading from a book, said by him to be

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written by a well-known scientific authority (Taylor's *Medical Jurisprudence*), certain opinions expressed therein relative to homicidal mania.

6. Counsel for the Crown objected to this, and I, after hearing counsel for the defence, who relied on the proviso to section 60 and sub-section (14) of section 57 of the Evidence Code, and who also referred me to page 377 of Field's *Law of Evidence in British India*, declined to allow this to be done.

7. Counsel for the accused thereupon sat down and refused to continue his address to the jury, on the ground that he had no other defence to offer.

8. I then summed up, quoting and explaining to the jury the opinion of the Judges given to the House of Lords in McNaughton's case, and also drawing their attention to section 77 of the Ceylon Penal Code and to section 105 of the Ceylon Evidence Ordinance. The jury returned an unanimous verdict of guilty of murder, and I passed sentence according to law.

9. I have to submit for the opinion of two Judges of this Honourable Court whether I was right in refusing to allow counsel to read to the jury opinions from a book which (1) had not been proved to be what the learned counsel asserted it was; (2) nor was found to contain the opinion of an expert on homicidal mania; (3) nor had been referred to in any way before, so that, if it did contain opinions which were applicable to the facts of the case under trial, there had been no opportunity for the counsel for the Crown to test or discuss such opinions.

10. I do not think it necessary to send a copy of my notes unless the Supreme Court require them.

The case was argued before Moncreiff, A.C.J., and Wendt, J., on the 25th May and 2nd June, 1902.

H. Jayawardene, for the accused, cited *I. L. R. 10 Cal. 142;* Evidence Ordinance, section 57; *Reg. v. Ramasamy* (*6 Bowle's H. C. Rep. 51*); Field's *Evidence in British India*, note on section 167; *King v. Thegis* (*5 N. L. R. 107*); and referred to pp. 556-576 as those which counsel at the trial intended to read to the jury.

Ramanathan, S.-G., contra.

Cur. adv. vult.

10th June, 1902. MONCREIFF, A.C.J.—

The accused in this case was charged with murder, and was tried at the first Criminal Sessions of the Supreme Court holden at Galle in May, 1902. After the case for the prosecution had closed, counsel for the defence stated that he had no witnesses, and Crown Counsel declined to address the jury.

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I may here deal with a point which arose at the argument. Section 234, sub-section (3), of the Criminal Procedure Code provides that "If the accused or his pleader announces his intention not to adduce evidence, the prosecuting counsel may address the jury a second time in support of his case, for the purpose of summing up the evidence against the accused."

If he declines to do so, he has of course no right to comment on the speech of counsel for the defence. The word in this section is "evidence," and the word used by my brother Middleton, who tried the case, is "witnesses," but the difference, in my opinion, is not material, because Crown Counsel having declined to address the jury, counsel for the defence must have been aware that both the Court and the Crown Counsel assumed that no evidence would be called for the defence. The case submitted by my brother Middleton proceeds as follows:—

"Counsel for the defence then began to address the jury, and announced his intention of reading from a book, said by him to be written by a well-known scientific authority (Taylor's *Medical Jurisprudence*), certain opinions expressed therein relative to homicidal mania.

"Counsel for the Crown objected to this, and I—after hearing counsel for the defence, who relied on the proviso to section 60 and sub-section (14) of section 57 of the Evidence Code, and who also referred me to page 377 of Field's *Law of Evidence in British India*—declined to allow this to be done.

"Counsel for the accused thereupon sat down and refused to continue his address to the jury, on the ground that he had no other defence to offer."

The Judge then summed up, quoting to the jury the opinions of the Judges given to the House of Lords in McNaughton's case, and drawing their attention to section 77 of the Ceylon Penal Code and section 105 of the Evidence Ordinance. The jury found an unanimous verdict of guilty, and sentence was passed according to law.

The Judge has reserved this question,—whether he was right in refusing to allow counsel to read to the jury passages from a book which (1) had not been proved to be what the learned counsel asserted it was; (2) nor was found to contain the opinion of an expert on homicidal mania; (3) nor had been referred to in any way before, so that, if it did contain opinions which were applicable to the facts of the case under trial, there had been no opportunity for the counsel for the Crown to test or discuss such opinions.

There are various sections of the Evidence Ordinance which relate to the use of books in the course of a trial, particularly in

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this case sections 57 and 60. Towards the end of section 57 it is intimated that in all the cases enumerated in the first part of the section, " and also on all matters of public history, literature, science, or art, the Court may resort for its aid to appropriate books or documents of reference. " There is a further provision with regard to the course to be taken by the Court when some person calls upon it to take judicial notice of any fact. The Court was not called upon, in this instance, to take judicial notice of any fact, and if it is said that it was called upon, the course pointed out was not followed by the strict production of the book required by the section. I am of opinion that that section does not apply to this case. Then, section 60 provides that all oral evidence must, in all cases whatever, be direct. Certain illustrations are given of that provision, and then the section provides that " the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable. "

The sense of these two provisions induces me to think that, if the learned counsel in this case had in a regular manner produced the book to the attention of the Court in the course of the case for the prosecution, or by way of evidence, or had put the passages he desired to quote to the medical witness while he was in the box, or in any other way had done what, in the meaning of the Ordinance, would amount to production, he would have been in order. But the attitude taken up by him was this: that he had a right in the course of his speech simply to open a book of the scientific description intended by the Evidence Ordinance, and read therefrom such passages to the jury as appeared to him proper, having reference of course to the subject in hand. I think his position was not sound, that he could not do so, that he had practically intimated to the Court that he intended to adduce no evidence, and that, therefore, he was not strictly in a position even to produce the book at that stage without the permission of the Court. I think the learned counsel was wrong, and the ruling of the Judge was right.

We thought, however, that since this case involved a charge of murder, we should look at the passages which counsel intended to read. What we might have done if we had found that those passages ought to have affected the verdict of the jury it is not necessary to say, because on looking at the passages—they are to be found in the edition of 1883, vol. II., pages 556-576—and

reading the evidence in the case, I came to the conclusion that if the jury, upon the evidence as it was placed before them, and after the summing up of the Judge, were of the unanimous opinion that no case of homicidal mania had been made out, the passages intended to be read could not have, and ought not to have, altered their opinion.

For these reasons I am of opinion that the ruling of the Judge must be upheld and the conviction affirmed.

WENDT, J.—

I also think that the ruling of my brother Middleton at the trial was correct. Clearly the defence intimated that it would call no evidence, and, acting on that intimation, the Court offered the prosecuting counsel his opportunity to sum up, of which, however, he did not choose to avail himself. I should not like to lay it down as a hard and fast rule that, by the declaration of that intention at the opening of the defence, the counsel for the prisoner concluded himself from calling evidence at all. If he made that declaration, while all the time intending to put in the passages in question, losing sight for the moment that they would be regarded as evidence, or if in the course of his address to the jury it became clear to him that he should put some evidence before the Court, he might, I think, have applied to the Court for leave to do so, and if his application appeared to be reasonable, I have no doubt the Court would have power to grant it. The counsel for the prosecution would then have been entitled to his right of reply. I think also that the passages from Taylor could only have been put to the jury as evidence, and as such it had to be brought under the provisions of the Evidence Ordinance. Section 57 does not apply, because it was not a case in which the Court wished to inform itself upon some matter mentioned in the section. The evidence could, therefore, only be put in under section 60.

Assuming the defence intimated its intention to adduce that evidence, and tendered the book as evidence in due course, it would have had to satisfy the Court that the conditions precedent mentioned in the first proviso had been complied with; and upon the particular passages being tendered, I conceive it would have been open to the prosecution to insist that the context of the passages should also be put in as tending to make the meaning of the author clear. But nothing of this sort was done; leave to adduce evidence was not asked for, and the book itself was not tendered as evidence at all. The counsel insisted on his right to read extracts from it to the jury. That, I think, he was not entitled to do.

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In view, however, of the circumstances mentioned by the Chief Justice, I have myself gone over the evidence at the trial, in order to ascertain whether the admission in evidence of the passages from the book in question ought to have made any difference in the verdict of the jury, and I am of opinion that it ought not. The proposed evidence after all could only relate to the author's opinion of the inferences to be drawn from proved facts. Now, no exception has been taken or suggested to the summing up of my brother Middleton. He called the jurors' attention to the provisions of the law as to the defence of insanity, and he told them of the opinion of the Judges given to the House of Lords in McNaughton's case. There cannot be said, in any sense, to have been a misdirection. The jury on the facts proved found that the defence of insanity had failed, and I cannot think that hearing the passages of Taylor read to them ought to have, or would have, made any difference in their verdict.

For these reasons the conviction will be affirmed.