SUPREME COURT

Before Bijan Kumar Mukherjea, N. H. Bhagwati and B. Jagannadhadas, JJ.

PREM NATH ALIAS PREM CHAND,—*Appellant*

versus

THE STATE OF DELHI,—*Respondent.*

Criminal Appeal No. 36 of 1953

1953

Dec. 17th

Code of Criminal Procedure (Act V of 1898)—Section 309—Accused charged with five offences committed in one transaction—Tried with the aid of assessors—Assessors' opinion asked on two charges only and not others—Effect of—Conviction in respect of all charges—Whether legal—Section 268—Trial by jury and trial with the aid of assessors—Difference between.

The acused was tried on five charges, two charges under section 302 of the Indian Penal Code, two charges under section 307 of the said Code and one charge under section 19(f) of the Indian Arms Act. He was alleged to have gone to the house of the deceased armed with an unlicensed revolver where he killed two persons and injured another two with that revolver. He was tried with the aid of assessors but the opinion of the assessors was taken only on the charges of murder and not in respect of other charges. He was convicted on all the charges. The question arose whether the conviction was legal having regard to the provisions of section 309 of the Code of Criminal Procedure.

Held, that the failure to ascertain the views of the assessors in respect of all the charges for which the accused was tried is certainly a grave violation of an imperative provision (section 309) of the Code of Criminal Procedure and the conviction in respect of a charge on which the opinion of the assessors was not at all taken would be clearly illegal. But whether the conviction in respect of any other charge for which he was jointly tried but in respect of which the opinion was in fact taken is bad or not, would depend on the facts of each case. The question in each case would be whether there is reason to think that the failure to take the opinion in respect of the other charges was likely to have prejudiced a consideration of the charge in respect of which the opinion was taken. In a case where the charges are so interconnected that the truth or otherwise of the one would reasonably react on the truth or otherwise of the other, such prejudice has to be presumed and the conviction would be illegal.

Held that a trial with the aid of assessors differs from a trial by jury in two fundamental respects. The assessors are to give only their individual opinions and the Judge is not bound to conform to them, while the jury gives its combined verdict either unanimously or by a majority through its foreman and the Judge has no power to ask for opinions of the individual jurors. He is normally bound to follow the verdict of the jury excepting where he adopts the course allowed to him under section 305(3) and (4) or 307(1) of the Criminal Procedure Code. In substance it may be said that the jury forms part of the Court which tries the accused while the assessors only aid the Court in its trial of the accused. This distinction appears to be clearly brought out by the very language used in section 268 of the Criminal Procedure Code. Notwithstanding this fundamental difference it cannot be doubted that the participation of the assessors in the trial as prescribed by law, is an essential feature of the trial in Courts of Sessions for certain offences, and that a trial in violation of the substance of the procedure so prescribed is an illegal trial.

On Appeal from the Judgment and Order, dated the 22nd December 1952, of the Circuit Bench of the Punjab High Court at Delhi in Criminal Appeal No. 25-D of 1952 and Murder Reference No. 60 of 1952 arising out of the judgment and Order, dated the 28th August 1952, of the Court of the Second Additional Sessions Judge, Delhi, in Sessions Case No. 17 of 1952.

For the Appellant: Shri B. C. Misra, Advocate, instructed by Shri Naunit Lal, Agent,

For the Respondent: Shri Jindra Lal, Advocate, instructed by Shri G. H. Rajadhyaksha, Agent.

JUDGMENT

The Judgment of the Court was delivered by

Jagannadhadas, J.

JAGANNADHADAS, J. This is an appeal on a certificate granted by the High Court of Punjab under Article 134(1)(c) of the Constitution against its judgment confirming the conviction of the appellant under section 302 of the Indian Penal Code and the sentence of death passed in respect thereof. The incident which gave rise to the charges against the appellant resulted in four persons receiving gun-shot injuries and they were (1) Bishan Chand, (2) his wife, Mst. Kanta Devi, (3) Bishan Bhagwan, and (4) his sister, Mst. Kamala Devi. Of the four, the first two suc-

cumbed shortly thereafter and the other two survived. The case for the prosecution is as follows. On the 12th of March 1952, there was a ceremony at the house of Bishan Chand, deceased, to which some of his relations were invited. Mst. Satya Devi, the wife of the appellant, was one of such invitees, she being related to Bishan Chand through his predeceased first wife. The feelings between the appellant and his wife, Mst. Satya Devi, were said to have become somewhat strained for about six months prior to this date and Mst. Satya Devi was said to have left her husband and to be living in her parents' house. The appellant having come to know of the presence of his wife at the house of the deceased Bishan Chand, went there at about 3 p.m. and enquired from Bishan Chand whether his wife, Mst. Satya Devi, had come and was actually staying there. Bishan Chand informed him that she did come and had already returned to her place. The appellant went away apparently dissatisfied. He came back again at about 5-30 p.m. and once again enquired about his wife. Bishan Chand reiterated that she was not in his house and invited him to search and satisfy himself. The appellant thereupon is said to have taken out a revolver and shot at Bishan Chand. Mst. Kanta Devi, wife of Bishan Chand seeing her husband shot at, ran towards him and the appellant is said to have fired a shot at her also with the same revolver. He is further said to have fired from it two other shots which struck Bishan Bhagwan (P.W. 3) and Mst. Kamala Devi (P.W. 5), who were both in a room nearby. All these four persons fell down on receiving gun-shot wounds and as already stated, the first two succumbed to the injuries shortly thereafter, while the other two survived after treatment in the hospital. In addition to these four shots, the appellant is said, at the same time, to have fired another shot from the revolver aiming at P.W. 15 but that missed him. At the time, there were at the spot P.W. 1, the mother of the deceased Bishan Chand and also a number of persons who had gathered as invitees at the function and amongst whom were P.W.s. 6, 8, 10, 11 and 12. On a hue and cry being raised, some

Prem Nath alias Prem Chand *v.* The State of Delhi

Jagannadhadas, J.

of the neighbours also ran up to the spot. Out of them, P.W. 13 finding the appellant emerging out of the entrance of the house of the deceased with revolver in hand, caught hold of him. Meanwhile information having reached the police station closeby, the Head Constable, P.W. 24, arrived and took into custody the appellant with the revolver in hand. The case was tried by the learned Second Additional Sessions Judge with the help of four assessors on charges under sections 302 and 307 of the Indian Penal Code and 19(f) of the Indian Arms Act. The evidence against the appellant consisted mainly of that of the eye-witnesses, P.W.s 1, 3, 5, 6, 8, 11 and 12, who were all relations of the deceased Bishan Chand and of P.W. 15, a tenant in the second floor of the building in which the deceased was living. In addition there was evidence as to the appellant having been caught with a revolver in hand and five empty cartridges as also his confessional statement before a Magistrate recorded within less than two hours of the incident.

The defence of the appellant in his statement before the Additional Sessions Judge was that his three sisters had gone to Bishan Chand's house on that day as invitees in connection with the ceremony and that the youngest of them had lost a gold ear-ring while they were there, that he and his father were informed about it and went to the house of Bishan Chand to search for the same at about 5-30 p.m. He said that while they were so searching, Bishan Chand came and asked him as to why he was falsely charging him with theft of the ear-ring, that there was thereupon some altercation upon which Bishan Chand and his wife started throwing firewood upon him from inside the room and that many other persons pounced upon him with intent to assault him. His father got terrified thereat and ran away and the revolver of his father fell down while so running. He picked up the said revolver and was running away when he was captured by the persons there and he fired shots from the revolver in the air in order

Prem Nath alias Prem Chand v. The State of Delhi

Jagannadhadas, J.

to save himself. He had no intention to kill anybody. The appellant did not examine any witnesses to substantiate his defence.

The learned Additional Sessions Judge accepted the prosecution case and convicted the appellant on all the charges for which he was tried and sentenced him to death subject to confirmation by the High Court under section 302 and to sentences of imprisonment in respect of the other charges. On appeal before the High Court, the learned Judges accepted the Additional Sessions Judge's estimate of the evidence and confirmed the conviction and sentence of the appellant in respect of section 302 of the Indian Penal Code. Before the High Court, however, a defect in the procedure was pointed out as vitiating the entire trial and it is with reference to that question that the learned Judges granted leave to appeal to this Court and that is the only point that has been argued before us. The point arises as follows. The appellant was tried on five charges, i.e. two charges under section 302 of the Indian Penal Code relating to murder of Bishan Chand and his wife, respectively, and two charges of attempt to murder under section 307 of the Indian Penal Code relating to P.Ws. 3 and 5, respectively and one charge under section 19(f) of the Indian Arms Act for being found in possession of a revolver with five empty cartridges without a licence. The opinion of the assessors, however, was taken only on the charges of murder but not in respect of the other charges. It is urged that this was contrary to section 309 of the Criminal Procedure Code and vitiates the whole trial. When the objection was taken before the High Court, the learned Judges while being of the opinion that it was a serious irregularity, held that since the opinion of the assessors was taken in respect of the charges of murder, the conviction and sentence in respect thereof could be maintained while the convictions under sections 307 of the Indian Penal Code and 19(f) of the Indian Arms Act had to be set aside. In the circumstances, they considered it unnecessary to order retrial in respect of these charges. It is strenuously urged before us that it was obligatory on the part of the learned Additional Sessions Judge to take the opinion of the

Prem Nath alias Prem Chand *v.* The State of Delhi

Jagannadhadas, J.

assessors in respect of all the charges and that in the absence thereof, the entire judgment was vitiated and not only that portion of it which related to convictions under sections 307 of the Indian Penal Code and 19(f) of the Indian Arms Act. For a correct appreciation of the point raised, it is desirable to set out the actual charges on which the appellant was put up for trial before the learned Additional Sessions Judge as also the opinions expressed on them by the assessors.

The charges are as follows:—

"1. That you on 12th day of March 1952, at about 5-30 p.m. or 5-45 p.m. in the house of Bishan Chand in Kucha Natwan did commit murder by intentionally causing the death of Bishan Chand by firing a revolver shot with the revolver, Exhibit P-1, at him, and thereby committed an offence punishable under Section 302, Indian Penal Code and within the cognizance of this Court and I hereby direct that you be tried by this Court on the said charge.

2. That you on 12th day of March 1952, at about 5-30 p.m. or 5-45 p.m. in the house of Bishan Chand in Kucha Natwan did commit murder by intentionally causing the death of Mst. Kanta by firing a revolver shot with the revolver, Exhibit P-1, at her, and thereby committed an offence punishable under Section 302, Indian Penal Code, and within the cognizance of this Court and I hereby direct that you be tried by this Court on the said charge.

3. That you on 12th day of March 1952, at about 5-30 p.m. or 5-45 p.m. in the house of Bishan Chand in Kucha Natwan fired at Bishan Bhagwan with a revolver, Erhibit P-1, with the intention or knowledge and under such circumstances that if by that act you had

caused the death of Bishan Bhagwan, you would have been guilty of murder and that you caused hurt to the said Bishan Bhagwan at the right side of the chest near the shoulder and thereby committed an offence punishable under section 307, Indian Penal Code, within the cognizance of this Court and I hereby direct that you be tried by this Court on the said charge.

4. That you on the 12th day of March 1952, at about 5-30 p.m. or 5-45 p.m. in the house of Bishan Chand in Kucha Natwan fired at Mst. Kamla with the revolver, Exhibit P-1, with the intention or knowledge and under such circumstances that if by that act you had caused the death of Mst. Kamla you would have been guilty of murder and that you caused hurt to the said Mst. Kamla at her right side of chest and thereby committed an offence punishable under Section 307, Indian Penal Code, within the cognizance of this Court and I hereby direct that you be tried by this Court on the said charge.

5. That you on 12th day of March 1952, at about 5-30 p.m. or 5-45 p.m. at the residence of Bishan Chand in Kucha Natwan were found in possession of a revolver, Exhibit P-1, with five empty cartridges without a license and thereby committed an offence punishable under section 19(f) of the Indian Arms Act, XI of 1878".

The opinions of the assessors were recorded as hereunder.

"The trial being now concluded the assessors give their opinion as follows:—

1. *Pt. Amar Nath, Assessor.* The accused is guility of the offence of murder but he had no intention to kill.

Prem Nath alias Prem Chand *v.* The State of Delhi

Jagannadhadas, J.

2. *Shri Raghbir Singh, Assessor.* The accused is guilty of murder.
3. *Shri Lakhmi Chand, Assessor.* The accused had no intention to cause the murder but the murders were committed by him.
4. *Shri Kishan Chand, Assessor.* The accused is guilty of murder".

Section 268 of the Criminal Procedure Code provides that—

> "all trials before a Court of Session shall be either by jury or with the aid of assessors".

Subsequent sections prescribed the provisions relating to each. What is to be done at the conclusion of a trial with the aid of assessors is laid down in section 309 of the Criminal Procedure Code which runs as follows:—

> "309. (1) When, in a case tried with the aid of assessors, the case for the defence and the prosecutor's reply (if any) are concluded, the Court may sum up the evidence for the prosecution and defence, and shall then require each of the assessors to state his opinion orally on all the charges on which the accused has been tried, and shall record such opinion, and for that purpose may ask the assessors such questions as are necessary to ascertain what their opinions are. All such questions and the answers to them shall be recorded.
>
> (2) The Judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors.
>
> (3) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 562, pass sentence on him according to law".

It is to be seen from the various relevant provisions that a trial with the aid of assessors differs from a trial by jury in two fundamental respects.

Prem Nath alias Prem Chand v. The State of Delhi

Jagannadhadas, J.

The assessors are to give only their individual opinions and the Judge is not bound to conform to them, while the jury gives its combined verdict either unanimously or by a majority through its foreman and the Judge has no power to ask for the opinions of the individual jurors. He is normally bound to follow the verdict of the jury excepting where he adopts the course allowed to him under section 305(3) and (4) or 307(1) of the Criminal Procedure Code. In substance it may be said that the jury forms part of the Court which tries the accused while the assessors only aid the Court in its trial of the accused. This distinction appears to be clearly brought out by the very language used in section 268 of the Criminal Procedure Code. Notwithstanding this fundamental difference it cannot be doubted that the participation of the assessors in the trial as prescribed by law, is an essential feature of the trial in Courts of Sessions for certain offences, and that a trial in violation of the substance of the procedure so prescribed as an illegal trial. An instance of a trial with the aid of assessors in violation of the essentials of section 285 of the Criminal Procedure Code came up for notice of this Court in the case of *Magga and another* v. *The State of Rajasthan* (1). In that case one of the three assessors with the aid of whom the trial commenced was absent at some of the later stages of the trial and a substitute was thereupon allowed to join the other two at that stage. Later, when the person who had previously been absent reappeared, he was also allowed to join, so that at the final stage there were four assessors of whom only two attended throughout. This Court held that the trial conducted in the manner in which it was done in that case was wholly outside the contemplation of the Code and that it was not possible to hold the trial to have been in accordance with law. The Court observed in course of the judgment that the provision in the Code that the opinion of the assessors is not binding on the Sessions Judge cannot lend support to the contention that the Sessions Judge is entitled to

(1) 1953 S.C.R. 973

Prem Nath alias Prem Chand v. The State of Delhi

Jagannadhadas, J.

ignore their very existence. It was further observed that though the Sessions Judge may not be bound to accept their opinions, he is certainly bound to take them into consideration.

Learned counsel for the appellant very strongly relies on this decision of the Court and urges that a Sessions trial in which the opinion of the assessors in respect of all the charges were not taken cannot be said to be a trial duly and validly conducted and that the judgment following such trial is a nullity. A number of cases from the various High Courts have been cited before us which hold that a conviction on a charge in respect of which the opinion of the assessors was not taken is illegal and there can be no doubt about the correctness thereof. But the question presented to us, on the view taken by the High Court, is whether the conviction in respect of a charge is illegal notwithstanding that the opinion of the assessors in respect of that charge was taken, if the opinions in respect of the other charges for which the accused was jointly tried at the same trial is not taken.

The requirement as to the opinion of the assessors having to be taken on all the charges on which the accused has been tried was specifically inserted in section 309 by an amendment of the Criminal Procedure Code in the year 1923. Prior to this amendment the Court was merely enjoined, at the conclusion of the trial, to require each of the assessors to state his opinion orally and to record such opinions. Even this requirement, reasonably construed could certainly indicate the ascertainment of the opinion in respect of all the charges, for that is the only intelligible way of ascertaining their opinion on the entire case. But whatever doubt there may have been, has been removed by the amendment and there can be no longer scope for questioning that this requirement is imperative. But it does not follow that violation thereof nullifies the entire proceedings in a case like the present, where there are several charges tried together. The trial was certainly regular right up to the conclusion and in the concluding step there

has been only a partial violation of the prescribed procedure. The effect of such a partial violation must depend on the facts of each case. The legislative purpose as to the ascertainment of the opinion of the assessors is that their opinion may be available for consideration by the Judge in arriving at his own final judgment. Where a number of charges are tried together, the opinion of the assessors in respect of one of the charges and the conclusion thereupon of the trial Judge may have no reasonable connection with the opinion of the assessors and the conclusion of the Judge in respect of the other charges. For instance under section 234 of the Criminal Procedure Code a person may be tried at the same trial for three wholly unconnected offences if they are of the same kind and are committed within the space of 12 months by the same person. In such a case there is no reason why the conviction in respect of one head of charge on which the opinion of the assessors was taken should be held vitiated on account of the opinion of the assessors not having been taken in respect of the other heads of charge. Where, however, a joint trial in respect of a number of offences is held under circumstances falling under section 235 or 239 of the Criminal Procedure Code, that is, where the various acts constituting the offences form one transaction or are committed in the course of the same transaction, the position may conceivably be different. In such a case the truth or the falsity of one portion of the prosecution case may well have a reasonable bearing on the other. The non-ascertainment of the opinion of the assessors on all such charges which form an integrally connected portion of the transaction may cause prejudice. Consistent opinions of an individual assessor on all such interconnected charges are likely to carry greater weight with the Judge. On the other hand, if the individual opinions so expressed, appear to be somewhat contradictory to each other, it may be the duty of the Judge to exercise his powers of questioning under section 309 of the Criminal Procedure Code and to ascertain the real opinions. In such a case, if a Judge acts on the opinion expressed on a portion

Prem Nath alias Prem Chand v. The State of Delhi

Jagannadhadas, J.

of the case covered only by one of the charges without the benefit of the opinions on the other integrally connected charges, it may well turn out that he has not had the benefit of the real opinion in respect of the material charge upon which he convicts. In view of these considerations, the legal position appears to be as follows. The not taking of the opinion of the assessors in respect of all the charges for which the accused was tried is certainly a grave violation of an imperative provision of the Code. A conviction in respect of a charge on which the opinion of the assessors was not at all taken would be clearly illegal. But whether the conviction in respect of any other charge for which he was jointly tried but in respect of which the opinion was in fact taken is bad or not, would depend on the facts of each case. The question in each case would be whether there is reason to think that the not taking of the opinion in respect of the other charges was likely to have prejudiced a consideration of the charge in respect of which the opinion was taken. In a case where the charges are so interconnected that the truth or otherwise of the one would reasonably react on the truth or otherwise of the other, such prejudice has to be presumed and the conviction would be illegal.

In the present case all the acts which constitute the subject-matter of the various charges, namely, the possession of an unlicensed fire-arm by the appellant and the commission of two murders and two attempts to murder with that fire-arm not only constitute part of one transaction but are in such quick succession and are so integrally connected that the truth or falsity of one is bound to react on the other. In these circumstances it cannot be said that the not taking of the opinion of the assessors in respect of charges relating to attempt to murder and the possession of unlicensed fire-arm would not have prejudiced the appellant. We are, therefore, unable to agree with the view taken by the High Court that the conviction of the appellant under section 302 of the Indian Penal Code in this case can be maintained merely

because the assessors' opinion in respect of that charge was taken. The conviction and sentence of the appellant must accordingly be set aside and there must be a retrial of the appellant in respect of all the charges for which he was previously placed on trial before the Sessions Judge.

CIVIL MISCELLANEOUS

Before Kapur, J.

M/s. BANWARI LAL-SHAM LAL,—*Petitioners*

versus

REGISTRAR OF TRADE MARKS, BOMBAY AND ANOTHER,—*Respondents*

Civil Miscellaneous No. 683 of 1952

1953

Dec. 28th

Trade Marks Act (V of 1940)—Section 46—Aggrieved person—Meaning of—Section 6—"Geographical name"—Meaning of—Whether registrable as a distinctive word—"Distinctive" and "Adapted to distinguish"—Meaning of—Section 46—Discretion exercised by Registrar—Interference by Court—Principles stated.

A. C. and Sons were the registered owners of trade mark "Landra" in respect of their chaff-cutting machines. The petitioner made an application to the Registrar of Trade Marks for registering the trade mark "Nanra" in respect of his chaff-cutting machines. A. C. and Sons opposed the application and the Registrar refused the registration. The petitioner made an application in the High Court for rectification and correction of the Register under section 46 of the Trade Marks Act, 1940, against the Registrar of Trade Marks and A. C. and Sons. The issues tried in the case were :—

(1) Is the petitioner an aggrieved person within the meaning of section 46 of the Indian Trade Marks Act of 1940?

(2) Is not "Landra" a geographical name and, therefore, not registrable?

(3) Is the trade mark "Landra" distinctive of the goods of respondent No. 2 ?

Held (1) That the petitioner is an "aggrieved person" within the meaning of section 46 of the Trade Marks Act, 1940, as he is in the same trade as respondent No. 2 and his application for registration of the trade mark "Nanra" had been opposed by respondent No. 2 and refused by the Registrar which has put a restraint on his legal rights.

(2) That a word is not debarred from registration as a distinctive word merely because it is geographical. If a word is geographical name, it cannot be registered under paragraph (d) of section 6, but it can, nevertheless, be registrable under paragraph (e).

(3) The words "geographical name" are not equivalent to the "name of any place" and a word does not become a