## FULL BENCH (APPELLATE CRIMINAL).

*Before U San Maung, U Bo Gyi and U Thaung Sein, JJ.*

H.C. 1948

*Oct. 26.*

# THE UNION OF BURMA (COMPLAINANT)

*v.*

# MAUNG OHN KYAING (ACCUSED).*

*Conviction under s. 304, Penal Code—Charge to the jury—Misdirection—Reference under s 434, Criminal Procedure Code—Power of the court.*

*Held:* A charge to the jury must be read as a whole. The view of the trial Judge may not coincide with the view of others who merely read the proceedings. If upon the general view taken, the case has been fairly left within the jury's province, it would not be proper to treat such cases as cases of misdirection.

*Channing Arnold* v. *Emperor*, I.L.R. 41 Cal. 1023 *equals* 41 I.A. 149, applied.

Misdirection as used in the Code of Criminal Procedure includes not only an error in laying down the law by which the jury are to be guided but also error in summing up the evidence.

*Imperator* v. *Minhwasayo and others*, 11 Cr. L. J. 13, followed.

It is no misdirection not to tell jury everything which might have been told, but it would be misdirection if the judge had told the jury something which was wrong or which would lead them to a wrong inference.

*Rex* v. *Stoddar* , (1909) 2 Cr. App. R. 217, 246, followed.

It is also the duty of a judge not merely to narrate evidence but also to direct the jury as to the weight which in his opinion ought to be attached to the evidence called at the trial ; but he must at the same time let the jury consider facts for themselves and form their own opinion and draw their own inference.

The provision of s. 434 of the Code of Criminal Procedure is analogous to clauses 25 and 26 of Letters Patent of the High Courts of Calcutta, Bombay and Madras. Under s. 434 of the Code the High Court has power to review the whole case. If the High Court is satisfied that it is reasonably certain that after the exclusion of the inadmissible or improperly admitted evidence or after the exclusion of matters regarding which there has been misdirection, the jury *would* (*not might*) have convicted the accused or in other words a reasonable jury would have brought a verdict of guilty, then the conviction will be up-held.

*H. W. Scott* v. *King-Emperor*, I.L.R. 13 Ran. 141, followed.

*Imperatrix* v. *Pitamber Jina*, I.L.R. 2 Bom. 61 (F.B.) ; *Emperor* v. *Panchu Das*, I.L.R. 47 Cal. 671 (F.B.) ; *Emperor* v. *Puttan Hassan*, I.L.R. 60 Bom. 599 (F.B.), referred to and followed.

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* Criminal Reference No. 68 of 1948 of the High Court, Rangoon.

*Ba Sein* for the complainant.

*Ba Tun* for the accused.

The judgment of the Full Bench was delivered by

U SAN MAUNG, J.—At the Third Criminal Sessions of this Court one Maung Ohn Kyaing was tried by Mr. Justice Aung Tha Gyaw with a jury for an alleged offence of murder punishable under section 302 of the Penal Code for causing the death of Maung Nyun on the 30th of March, 1947. He was unanimously found guilty under section 304 of the Penal Code and was sentenced to suffer seven years' rigorous imprisonment. He filed an appeal against the conviction and sentence but subsequently withdrew the appeal. He then filed an application under section 22 of the Union Judiciary Act read with section 434 of the Code of Criminal Procedure, but his application was rejected by the learned trial Judge on the ground that section 22 of the Union Judiciary Act did not apply as no point or points of law arising in the course of the trial had been reserved by him. On appeal to the Supreme Court of the Union of Burma, the question that arose for decision was whether a reference under section 434 of the Code of Criminal Procedure can be made by the presiding Judge either on his own motion or at the instance of a party after the trial was over, if the Judge did not reserve for reference any point or points of law at the time he passed the sentence. This question was decided by their Lordships of the Supreme Court in the affirmative and the case was remitted to the learned trial Judge for disposal of Maung Ohn Kyaing's application in the light of this decision. Accordingly Mr. Justice Aung Tha Gyaw, who then dealt with the application on its merits, has referred for the decision

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of a court consisting of two or more Judges of this Court the following questions of law :

(1) Whether in the charge to the jury the statement " ယခုအမှုအဖြစ်အပျက်များကိုစဉ်းစားကြည့်ပါလျှင်၊သေသူအား‌တရားခံက မည်သည့်အကြောင်းကြောင့် ဒါးနှင့်ထိုးသွားသည်ဟု သက်သေတယောက်မျှမထွက် ဆိုနိုင်ပါ။ . . . . " implied that it was an established fact that the accused stabbed the deceased but that the motive for the assault could not be gathered from the statements made by the witnesses ; and if so, whether it amounted to misdirection ?

(2) Whether the statement " ၎င်းတို့သည်မင်္ဂလာဆောင်မှခဲတိုးရသော ပိုက်ဆံဖြင့် အရက်များဝယ်၍သောက်ကြပြီးလျှင် ရုတ်တရက်အချင်းချင်း ရန်ခိုက်ဒေါသဖြစ်ပြီးလျှင် တရားခံက သေသူအား ဒါးနှင့် တချက်ထိုးပြီး ထွက်ပြေးသည်ဟုသာ ဤအမှုတွင်ပေါ်ပေါက်ပါသည်။" was a misdirection in the absence of any evidence to show that the accused and the deceased had a quarrel, and that the accused stabbed the deceased as a result of that quarrel ?

(3) Whether the statement "တရားခံသည်၊ မည်သည့် အတွက်ကြောင့် သေစေရန်အကြံအစည်ဖြင့် ဒါးနှင့်ထိုးခဲ့သည်ဟုမပေါ်ပေါက်ပါ။ . . ." implied that the stabbing by the accused was an established fact, and if so, whether it amounted to misdirection ?

(4) Whether the statement " မောင်ညံ့ကူးအား တရားခံ အုံးကြိုင်က သေသူ မောင်ညွန့်အား ဒါးနှင့်ထိုးသွားပါသည်ဟု သူ့အား မောင်ဘမြင့်က တဆင့်ပြောခဲ့ဌာနာတွင်သွားတိုင်ပါသည်။ " in dealing with the first Information Report amounted to misdirection as Maung Ba Myint had only told the informant Maung Nyan Ku that he heard that Ohn Kyaing had stabbed Maung Nyun ?

(5) Whether the statement attributed to Maung Ba Myint " သူကအောက်ရုံးတွင်သေသူမောင်ညွန့်အားအုံးကြိုင်ကဒါးနှင့်ထိုး၍ ဘူတာဘက်သို့ ပြေးသည်ဟု ထွက်ဆိုသည်။" was a misdirection as Maung Ba Myint had stated that he did not actually see the assault on Maung Nyun ?

(6) Whether the statement attributed to U Po Thant " မောင်ညွန့်အား ဒါးနှင့်ထိုးသောသူကို မောင်ဘမြင့်က လိုက်သည်ဟု သိရပါသည်။ " implied that the assailant's identity was

established; and if so, whether it amounted to misdirection?

(7) Whether the statement regarding Maung Par that "သက်သေမောင်ပါသည်၊ ဆွဲရာတက်သို့ ပါသေ်လည်း၊ ပဌမ ကျမ်းကျိန် အစစ်ခံစဉ်အခါက ထွက်ဆိုခဲ့သည့်အတိုင်း မှန်ကြောင်း ဝန်ခံပါသည်။" without any reference to the discrepant statements made by Maung Par in his depositions before the committal court and before the trial Court, and without pointing out to the jury the belated examination of this witness by the investigating officer, amounted to misdirection?

Now, the facts, so far as they are necessary for the purpose of this reference, are these: At about noon on the 30th of March, 1947, there was a marriage ceremony at the house of one Ma E Hmyin in Bayathokdi Street within the jurisdiction of Tamwe Police Station, Rangoon. On the occasion of that marriage alcoholic drinks were served to certain men of that locality at the house of Ma E Hmyin's neighbour Maung Nyan Ku (P.W. 3), who was a stone polisher by profession. These drinks were procured with the money obtained by Maung Nyan Ku as "stone-fees" for these men. Among those partaking them were the deceased Maung Nyun and the accused Ohn Kyaing. When the drinking was over at about 11 a.m., the party left Maung Nyan Ku's house and Maung Nyan Ku himself went to purchase certain goods. His assistant Maung Ba Myint (P.W. 3 in the committal court), who remained behind to polish stones at his house, heard shouts of "ဒါးနှင့်ထိုးတယ်၊ ဒါးနှင့်ထိုးတယ်" or words to this effect and on looking up saw the deceased Maung Nyun in the act of falling down near a "zaung-yar" tree inside Maung Nyan Ku's compound. At that moment the accused Ohn Kyaing was seen walking away on the road at a spot about 20 feet away from Maung Nyan Ku's fencing. He

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was holding a handkerchief. Then the crowd gave chase shouting "Ohn Kyaing, Ohn Kyaing" and the accused Ohn Kyaing then ran towards Mahlwagon Railway Station, and eventually escaped. Maung Ba Myint was one of those who took part in the chase. Later, when Maung Nyan Ku returned from the bazaar, Maung Ba Myint reported to him that he saw Ohn Kyaing running away from a spot one fathom away from the place where Maung Nyun fell, and that he had been told that Ohn Kyaing was the assailant of Maung Nyun. Maung Nyan Ku (P.W. 3) then proceeded to Tamwe Police Station where he lodged the first information report (Ex. ə ) to the effect that Maung Nyun had been stabbed by Ohn Kyaing at the wedding house of Ma E Hmyin. The dead body of Maung Nyun, who had immediately succumbed to his injuries, was removed to the General Hospital, Rangoon, the same day and on a post-mortem examination being held the next day by Dr. Ba Than, it was found to have a stab wound on the left side of the chest $\frac{1}{2}''$ below the middle of the collar bone, deep into the chest cavity, penetrating the left lung and injuring the large blood vessels. It was also found to have a lacerated wound, bone deep, on the middle of the lower jaw and a lacerated wound, scalp deep, on the left side of the forehead.

Police investigation was immediately undertaken by Maung Ba Nyein (P.W. 11), the then Sub-Inspector of Police attached to Tamwe Police Station, but the accused Ohn Kyaing, who was found to be absconding, could not be arrested. Action under section 512 of the Code of Criminal Procedure was taken against him, and he was subsequently arrested by Maung Htwe Maung (P.W. 10) on the 21st of November, 1947, and sent up for trial. Maung Ba Myint, who was one of the prosecution witnesses examined in the committal

court, could not be served with summons for his appearance at the trial Court because his whereabouts were unknown. Therefore, his evidence was admitted by the trial Judge under section 33 of the Evidence Act as exhibit (ဃ). So also was the evidence of U Po Thant (P.W 4 in the committal court), who spoke of a quarrel at the marriage *mandat* between Maung Mya and Maung E after the drinking party at Maung Nyan Ku's house; of the taking away of Maung Nyun, Maung E and Tin Hlaing by Maung Nyan Ku, and of the subsequent chase after the man who was pointed out to him by Ba Myint as the assailant of Maung Nyun.

At the trial before Mr. Justice Aung Tha Gyaw, Maung Par (P.W. 12) was one of the most important witnesses for the prosecution. He started by saying that while at about 12 noon of the day of occurrence, he and his friend Maung Ohn Khine were walking in the vicinity of Bayathokdi Street, they heard shouts of "chase, chase" and saw one man being chased by a crowd. He and his friend took part in the vain chase. On return, they found a man lying dead with a stab wound and also heard 4 or 5 persons saying that the deceased was Maung Nyun and that the assailant was Ohn Kyaing. When confronted with the statement made by him in the committal court, this witness admitted that he had formerly stated that he saw Maung Nyun and Ohn Kyaing in the act of struggling with each other and that this struggle took place at the entrance of the compound of the woman who was heard shouting. He also admitted that he had stated that Maung Nyun fell down at a spot 4 or 5 fathoms away from where he had struggled with Ohn Kyaing, and that after Maung Nyun fell Ohn Kyaing ran away in the direction of the top of Bayathokdi Street; on being chased by a crowd

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When cross-examined by the counsel for the accused this witness admitted that he did not actually see Ohn Kyaing and Maung Nyun in the act of struggling, and that the statement to the effect that Maung Nyun fell down at a spot about 4 or 5 fathoms away from where he had struggled with Ohn Kyaing was untrue. He also admitted that he had given chase without knowing the identity of the fugitive. On being re-examined by the Government Advocate, this witness stated that the statements that he saw the deceased and Ohn Kyaing struggling and that the deceased Maung Nyun fell down immediately after the struggle previously made by him in his examination-in-chief were true. However, when questioned by the Foreman of the jury this witness said that although he saw the two men struggling, he did not know who they were and that he only said that they were Ohn Kyaing and Maung Nyun because he was told so by other people after the occurrence had taken place. He also said that he saw the struggle from a distance of about 60 feet, and that accused Ohn Kyaing whom he only knew by sight lived in a street adjacent to his. This witness was examined by the police about two months after the occurrence took place.

Now after the witnesses for the prosecution and the accused Ohn Kyaing (who cited no defence witnesses but gave evidence on behalf of his own defence) was examined, the learned trial Judge proceeded to charge the jury as required by section 297 of the Criminal Procedure Code. He began by telling the jury that in the matter in which the accused Ohn Kyaing was charged with the offence of having stabbed the deceased Maung Nyun it was entirely within their province to come to a decision as to what really took place, as they were the sole judges of fact. As regards the law, he said, it was their duty to be guided by what

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was laid down by him He then proceeded to explain the law relating to culpable homicide and murder as contained in sections 299, 300, 302 and 304 of the Penal Code laying particular stress upon the relevant exceptions to section 300 of the Penal Code. Then, without first summing up the evidence for the prosecution he said, "ယခုအမှု အဖြစ်အပျက်များကို စဉ်းစားကြည့်ပါ လျှင်၊ သေသူအား တရားခံကမည်သည့်အကြောင်းကြောင့် ဒါးနှင့်ထိုးသွားသည် ဟု သက်သေတယောက်ကမျှ မထွက်ဆိုနိုင်ပါ။ ၎င်းတို့သည် မင်္ဂလာဆောင်မှု ခဲတိုးရသော ပိုက်ဆံဖြင့် အရက်များဝယ်၍ သောက်ကြပြီးလျှင် ရုတ်တရက်အ ချင်းချင်း ရန်ခိုက်ဒေါသဖြစ်ကြ၍ တရားခံက သေသူအား ဒါးနှင့်တချက်ထိုးပြီး ထွက်ပြေးသည်ဟုသာ ဤအမှုတွင်ပေါ်ပေါက်ပါသည်။ ဤကဲ့သို့ ဒါးနှင့်ထိုးရမည့် အကြောင်းမှာလည်း တမင်သက်သက် အကြောင်းမဲ့ ရက်ရက်စက်စက်ထိုးခဲ့သည်မ ထိုးခဲ့သည်အကြောင်းများလည်းသက်သေထွက်ချက်တွင် ဘာမျှမပေါ်ပေါက်ပါ။"

These passages have been objected to by the learned counsel for the accused as a misdirection, on the ground that the Judge must be deemed to have directed the jury as an established fact that it was the accused who had committed the assault, though the motive could not be gathered from the evidence of the witnesses for the prosecution, and that the assault took place as a result of a sudden quarrel following a drink of liquor. We have carefully considered these passages with reference to their context and we are of the opinion that although the language in which they are couched is not happy the learned judge did not mean to direct the jury in the sense indicated by the learned counsel for the accused. What the learned Judge appears to have been anxious to impress upon the jury was that this was not a case of premeditated murder and that although there was no direct evidence as to the motive for the assault there was the fact that the stabbing took place on a sudden quarrel following a drink of liquor by several persons at the house of Maung Nyan Ku. The learned Judge's reference to

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exception 4 to section 300 in the paragraph preceding these passages and again in the paragraph in which these passages occur makes it clear that he was anxious to impress upon the jury that even if the accused Ohn Kyaing was the assailant, it was entirely within their province to say that the offence committed by Ohn Kyaing was not murder but only culpable homicide not amounting to murder within the meaning of exception 4 to section 300 of the Penal Code. Therefore, there was no misdirection on the part of the learned trial Judge in his charge to the jury in regard to these passages.

Similarly, in regard to the passage "တရားခံသည် မည်သည့်အတွက်ကြောင့် သေစေရန်အကြံအစည်ဖြင့် ဒါးနှင့်ထိုးခဲ့သည်ဟု မပေါ် ပေါက်ပါ။" which occurs after the learned Judge had taken pains to explain that even if the offence committed was murder punishable under section 302 of the Penal Code, the maximum penalty under the amended law was transportation for life or rigorous imprisonment for ten years as it was not a case of premeditated murder, we are of the opinion that neither did the learned Judge mean to direct nor did the jury understand him to have directed that it was an established fact that the assailant was the accused Ohn Kyaing.

The proper way of viewing a charge by a judge to the jury has been laid down by their Lordships of the Privy Council in *Channing Arnold* v. *Emperor* (1) as follows :

"A charge to a jury must be read as a whole. If there are salient propositions in law in it, these will, of course, be the subject of separate analysis. But in a protracted narrative of fact, the determination of which is ultimately left to the jury, it must needs be that the view of the Judge may not coincide with the views of others who look upon the whole proceedings in black type. It

(1) I.L.R. 41 Cal. *equals* 1023 41 I.A. 149.

would, however, not be in accordance either with usual or with good practice to treat such cases as cases of misdirection, if, upon the general view taken, the case has been fairly left within the jury's province."

The passages referred to in questions No. 1, 2 and 3 should be read with reference to their context and upon a general view taken of the charge made by Mr. Justice Aung Tha Gyaw, we are of the opinion that he had left the case regarding the identity of the assailant of the deceased Maung Nyun fairly within the province of the jury.

The passages referred to in questions No. 4 and 5 occur in the paragraph relating to the reason why the prosecution had alleged that the accused Ohn Kyaing was the assailant. No doubt, the passage "မောင်ညံ့ကူးအား၊ တရားခံအုံးကြိုင်က သေသူမောင်ညွန့်အား ဒါးနှင့်ထိုးသွားပါသည် ဟုသူ့အား မောင်ဘမြင့်က တဆင့်ပြောချ၍ ငွာနာတွင် သွားတိုင်ပါသည်။" and the statement attributed to Maung Ba Myint "သူက အောက်ရုံးတွင် သေသူမောင်ညွန့်အား၊ အုံးကြိုင်ကဒါးနှင့်ထိုး၍ ဘူတာဘက်သို့ ပြေးသည်ဟု ထွက်ဆိုပါသည်။" are serious misstatements of facts. They must have conveyed to the jury the impression that Maung Ba Myint who was never examined as a witness before them but whose statement in the committal court was merely read out to them two days before, was an actual eye-witness to the stabbing of Maung Nyun by Ohn Kyaing. In fact, what Ba Myint stated in the committal court was that when he looked up on hearing shouts to the effect that a man had been stabbed, he saw the deceased Maung Nyun in the act of falling to the ground and the accused Ohn Kyaing walking away from the vicinity of the scene of occurrence to be subsequently chased by a crowd of persons as the assailant of Maung Nyun. According to Maung Nyan Ku also, Ba Myint did not tell him that he actually saw the stabbing but that he

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was merely told that Ohn Kyaing was the assailant of Maung Nyun. No doubt, while reminding the jury that on a consideration of the whole evidence adduced in the case, it was for them to consider whether the accused was or was not the assailant, the learned trial Judge said, "နေ့လည်ကြီးဖြစ်ပျက်သောကိစ္စ၌ မျက်မြင်သက်သေမရှိဘဲနှင့် တရားခံအားဘယ်အတွက်ကြောင့် လွယ်ကူစွာစွပ်စွဲထားသည်ဆိုသည့် အချက်များကို စဉ်းစားရန် အကြောင်းရှိပါသည်။" thus mentioning the fact that there was no actual eye-witness to the stabbing. However, in our opinion, this was quite insufficient to remove the impression already likely to be created in the minds of the jury that Maung Ba Myint was an eye-witness to the crime. In this latter passage, what the learned trial Judge was trying to stress was not that there was no eye-witness to the occurrence but that the occurrence having taken place in broad day light, a wrong person was not likly to be denounced. As pointed out by the learned Judicial Commissioners of Sind in *Imperator* v. *Minhwasayo and others* (1) the expression "misdirection" as used in the Criminal Procedure Code, includes not only an error in laying down the law by which the jury are to be guided, but also an error in summing up the evidence. In the words of Lord Alverstone C.J. in *Rex* v. *Stoddart* (2):-

> "It is no misdirection not to tell the jury everything which might have been told them. Again, there is no misdirection unless the Judge has told them something wrong or unless what he has told them would make wrong that which he has left them to understand."

In this case, the learned trial Judge has told the jury something wrong by saying to them that Maung Ba Myint had stated in the committal court that

(1) 11 Cr. L.J. 13.

(2) (1909) 2 Cr. App. R. 217, 246 [at p. 759 of I.L.R. (1942) Nag. p. 749]

Ohn Kyaing ran away after stabbing Maung Nyun. We therefore consider that there was misdirection inasmuch as the question whether Maung Ba Myint was or was not an eye-witness to the occurrence was an important one.

The statement attributed to U Po Thant "မောင်ညွန်းအား ဒါးနှင့်ထိုးသောသူကို၊ မောင်ဘမြင့်ကလိုက်သည်ဟုသိရပါသည်။" is not really a misstatement of fact as U Po Thant had stated in the committal court thus:

"When I reached the ground I saw Ko Ba Myint standing and Maung Nyun also standing at the entrance of the house compound. I did not see any injury on Maung Nyun. Then Ba Myint asked me to chase after the man who had stabbed Maung Nyun by pointing out his hand."

In fact, U Po Thant had really meant to say that according to Ba Myint, the man who was to be chased was the assailant of Maung Nyun.

Finally, in regard to the statement in the charge relating to Maung Par, the question referred to us is whether there was misdirection on the part of the Judge who told the jury "သက်သေမောင်ပါသည်၊ ဆွဲရာဘက်သို့ ပါသော်လည်း ပဌမ ကျမ်းကျိန်အစစ်ခံစဉ်အခါက ထွက်ဆိုခဲ့သည့်အတိုင်းမှန်ကြောင်းဝန်ခံပါသည်။ . . . ." without laying any stress upon the discrepant statements made by Maung Par in his depositions before the committal court and in the trial court and without pointing out to the jury that Maung Par was only examined by the police two months after the occurrence took place. The evidence of Maung Par has been alluded to, in detail, in the earlier part of this judgment. Considering what a prevaricating witness Maung Par was, the learned trial Judge should, in our opinion, have directed the jury as to the weight which, in his opinion ought to be attached to Maung Par's evidence,

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especially as this is a point telling in favour of the accused. As it is, the learned trial Judge merely observed that although Maung Par wavered from side to side, the fact remained that he had admitted the truth of the statement made by him in the committal court. As pointed out in the case of *H. W. Scott* v. *King-Emperor* (1) :

> "A Judge in charging a jury does not fulfil his duty if he merely reiterates the evidence given by the witnesses, and then leaves the jury to decide the case one way or another. He should direct the jury as to the weight which, in his opinion, ought to be attached to the evidence called at the trial ; but he must at the same time let the jury consider the facts for themselves, and form their own opinion as to the value to be attached to the evidence of the several witnesses and the proper inference that ought to be drawn from the evidence as a whole."

However, the failure to direct the jury as to the discrepant nature of Maung Par's testimony does not, in our opinion, amount to misdirection as to the discrepancy was glaring enough not to have escaped the notice of the jury at the trial. It must be remembered that the Foreman of the Jury himself took great pains to clarify the situation after this witness had been examined, cross-examined and re-examined by the learned Government Advocate and by the learned Counsel for the defence respectively.

In our answer to the questions No. 4 and 5 we have already said that there was misdirection in regard to the evidence of Maung Ba Myint and in regard to what Maung Ba Myint had told Maung Nyan Ku as to the identity of Maung Nyun's assailant. The point which now arises for decision is what order should this Court pass in the circumstances obtaining in this case. The procedure to be followed when question or questions arising in original jurisdiction of the High

(1) I.L.R. 13 Ran. 141.

Court are reserved under the provisions of sub-section (1) of section 434 of the Criminal Procedure Code is laid down in sub-section (2) of that section, the relevant portion of which runs as follows :

"If the judge reserves any such question . . . the High Court shall have power to review the case, or such part of it as may be necessary, and finally determine such question, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment or order as the High Court thinks fit."

As this provision is analogous to that contained in Clause 26 of the Letters Patent of the High Courts of Madras, Bombay and Calcutta relating to the procedure to be followed in dealing with point or points of law reserved under Clause 25 for the opinion of the High Court by the Judge exercising original criminal jurisdiction of the Court, the decision of these Indian High Courts in cases under Clause 26 of the Letters Patent afford valuable guidance. Now, in the case of *Imperatrix* v. *Pitamber Jina* (1) a Full Bench of the High Court of Bombay held that the High Court, on a point of law, as to the admissibility of rejected evidence, reserved under Clause 25 of the Letters Patent, 1865, had the power to review the whole case and determine whether the admission of the rejected evidence would have affected the result of the trial and a conviction should not be reversed unless the admission of the rejected evidence ought to have varied the result of the trial, *vide* section 167, Evidence Act. The same question was considered by a Full Bench of five judges of the Calcutta High Court in the case of *Emperor* v. *Panchu Das* (2) and it was held that the Court had the power, under Clause 26 of the Letters Patent, to examine the evidence and determine whether, after the exclusion of the inadmissible

(1) I.L.R. 2 Bom. 61 (F.B.) (2) I.L.R. 47 Cal. 671 (F.B.)

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evidence, the residue was sufficient to justify the conviction. Two of the learned Judges composing the Bench (Mookerjee and Chaudhuri JJ.) expressly held that section 167 of the Evidence Act applies to criminal cases as well and makes it incumbent on the Court to investigate whether, independently of the evidence wrongly admitted, there is sufficient evidence to support the verdict of the jury. However, as to the criterion to be observed in making such an investigation, the Full Bench was divided, the majority holding that the Court will not substitute its own finding for the verdict of the jury, and that it must consider whether the evidence improperly admitted was of such a nature that it possibly may have considerably influenced the minds of the jury, and whether it was reasonably certain that the jury *would*, not *might*, have acted on the unobjectionable evidence if the wrongly admitted evidence had not also been presented to them.

In our opinion, section 167 of the Evidence Act cannot in terms apply to cases reviewed by a High Court under sub-section (2) of section 434 of the Criminal Procedure Code. When a question of law is referred to a High Court under sub-section (1) of section 434 by a Judge of the High Court exercising original criminal jurisdiction, the objection regarding the admissibility of evidence is directly raised only before the trial Judge and not before the Court subsequently reviewing the case; and the phrase "If it shall appear to the Court before which such objection is raised" occurring in section 167 of the Evidence Act seems to us to connote that such a question should be directly raised before that Court. A Court reviewing a case under sub-section (2) of section 434 of the Code of Criminal Procedure is not a Court of appeal or revision, which, apart from the Court of original jurisdiction, seem to be the only Courts before which objection

regarding admissibility of evidence can be raised under section 167, Evidence Act.

However, although section 167 of the Evidence Act does not in terms apply to a case reviewed under sub-section (2) of section 434 of the Code of Criminal Procedure the principle underlying that section should be applied to such a case. For analogy see *Emperor* v. *Puttan Hassan* (1) where a Full Bench of the Bombay High Court held that although section 537 of the Criminal Procedure Code does not in terms apply to a case dealt with under Clause 26 of the Letters Patent the principle underlying that section should be applied and that where there has been no illegality in the mode of trial, but some irregularity exists in the process of trial, the Court of review is not entitled to set aside the verdict or judgment unless it is satisfied that the irregularity has led to a miscarriage of justice or has prejudiced the accused.

As observed by Mookerjee J. in *Emperor* v. *Panchu Das* (2) :

"A grave responsibility consequently rests upon the Court when it is called upon to review the case on the evidence under Clause 26 of the Letters Patent read with section 167 of the Indian Evidence Act. The evidence improperly admitted might have chiefly influenced the jury to return a verdict of guilty, and the rest of the evidence, which might on paper appear to the Court sufficient to support the conviction, might have been regarded by them, isolated from the foreign matter improperly introduced, as wholly insufficient to justify an inference of guilt. In such circumstances, the right principle to adopt is to ask ourselves, whether we can feel certain that, on the residue of the evidence, a reasonable jury would have brought in a verdict of guilty."

This observation is not inapposite although we are now dealing with a case of misstatement of fact in the

(1) I.L.R. 60 Bom. 599 (F.B.) (2) I.L.R. 47 Cal. 671 (F.B.)

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charge to the jury and not with admission of inadmissible evidence. The only difference is that instead of totally excluding Ba Myint's evidence, we should consider what would be the effect if the evidence of Ba Myint in the committal court had been correctly summarised to the jury by the learned trial Judge. Adopting the criterion laid down by Mookerjee J. in the case cited above we have come to the conclusion that a reasonable jury *would*, not merely *might*, in the case now under consideration, have brought in a verdict of guilty as against the accused Ohn Kyaing. Considering that the occurrence took place in broad day light the jury would have accepted as substantially true, the evidence given by Maung Par (P. W. 12) in the committal court in spite of the fact that he tried to prevaricate in the trial court. The evidence of Ba Myint correctly presented to them would have served as a strong piece of corroborative evidence. The fact that the accused Ohn Kyaing was chased from the vicinity of the scene of occurrence and that he subsequently absconded would have weighed heavily against him in the minds of the jury.

For these reasons we consider that no interference on our part is called for. The conviction of Ohn Kyaing under section 304 of the Penal Code and the sentence of seven years' rigorous imprisonment are confirmed.