APPELLATE CRIMINAL.

Before Rankin C. J. and Buckland J.

EBRAHIM MOLLA

v.

KING-EMPEROR.*

1928.

Dec. 14.

Jury—Verdict of jury, how to be dealt with by Judge—Criminal Procedure Code (Act V of 1898), ss. 306 and 307, procedure under.

Under sections 306 and 307 of the Code of Criminal Procedure, it is only where the Judge does not think it necessary to express disagreement with the verdict of the jury that he is to give judgment according to such verdict.

Where the Judge does not think it is necessary for the ends of justice to refer the case to the High Court, it is not proper for him, while accepting the verdict, to express disagreement with it.

The dictum in *The Queen* v. *Bahar Ali Kahar* (1) considered.

APPEAL by the accused.

In a trial for arson, there was a unanimous verdict of the jury for conviction of the accused appellant. The Sessions Judge, while expressing doubt as to the guilt of the accused, convicted him, and sentenced him to five years rigorous imprisonment saying "Not agreeing with but accepting the verdict of the jury, I convict the accused."

The accused appealed.

Mr. Asaduzzaman, for the appellants.

The Offg. Deputy Legal Remembrancer (*Mr. Debendranarayan Bhattacharya*), for the Crown.

RANKIN C. J. This is an appeal by one Ibrahim Molla who has been sentenced to five years' rigorous imprisonment, being convicted by the unanimous verdict of the jury for setting fire to a certain building on the 17th March, 1928. It appears that it occurred in the course of *Ramjan* days of this year. There is a good deal of evidence and, if that is believed, it

*Criminal Appeal No. 658 of 1928, against the order of S. K. Sen, Additional Sessions Judge, Faridpur, dated Jun. 26, 1928.

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clearly justifies the finding of the jury. The learned Judge points out that no witness actually states that he saw the accused setting fire to the place. The evidence, if it is believed, is to the effect that the complainant got up in the middle of the night, went outside and saw the accused and his brother Mobarak standing near the hut and about to run away and he also saw the flames coming up. He then cried for help and a number of people came up. These people have given evidence in the case and they say that they saw Ebrahim and his brother Mobarak there. In addition to that there is evidence which has been carefully laid before the jury—evidence as to enmity —and evidence of threat to burn down the house of Nefajuddin, the father of the complainant. This is a question entirely of fact. The learned Judge in his charge has gone through the evidence most minutely. He has put before the jury all the circumstances which he has analysed from every point of view and the only thing that can be said with regard to this charge is that it is full. It is so full and careful that it may be doubted if any ordinary juror could appreciate it in a short space of time. There is one point on which it is said that the learned Judge should have given fuller direction to the jury—viz., with regard to the passage where he says "there is no eye-witness "to prove that the accused set fire to the place." On that it is said that he should have gone and delivered a lecture to them on circumstantial evidence, making it clear that circumstantial evidence must not only be consistent with the guilt of the accused but must be consistent with no other view. It is much more useful to tell the jury that they should not convict the accused until guilt is proved and that evidence which is consistent with his innocence does not prove his guilt. In this case, I am unable to say that there is any important fact which has been misrepresented or overlooked. The learned Judge says "there is "room for doubt as to whether the accused is really "guilty. I see no reason to differ from the unanimous "verdict of the jury however, on what are, after all,

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" questions of fact. Not agreeing with but accepting " the unanimous verdict of the jury I convict the " accused." This is a method of expression which I have noticed before and I cannot notice it again without deploring it. Sessions Judges are under no obligation whatsoever to have or to express their individual opinion upon really disputable questions of fact which are for the jury. If a Judge agrees or disagrees, it is a matter *primâ facie* for himself, but if he disagrees with the verdict of the jury and is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court, he is obliged to do so. If he is not clearly of opinion that the conviction is wrong so as to make it necessary for the ends of justice to submit the case to the High Court, then the position is that described in section 306—" the " Judge does not think it necessary to express dis- " agreement "—and his opinion being on that view irrelevant he will be well advised to keep it to himself. Learned Judges do not seem to appreciate that they are given an over-riding power; not that they may pose as critics, but in order that miscarriage of justice may not take place. In this case there is no reference made under section 307, Cr. P. C., and it does not seem to me that the charge can be attacked as defective or insufficient. In such a matter as a conviction for arson to intimate a doubt upon which one is not prepared to act is to cover the proceedings with all the appearance of injustice and indeed of despair for justice. If the Judge really disagrees with the verdict, i.e., has a settled and considered opinion that the crime has not been proved against the accused, it seems to be clear enough that it is necessary for the ends of justice to refer the case. If he does not think this necessary, his " disagreement " cannot be a reality at all, and the less his inconclusive state of mind is exposed the better, as the law does not require him to interfere. In the case of verdicts of acquittal, cases are fairly common in which the Judge thinks that the jury has taken a more favourable view for the prisoner than he would have taken himself and yet is not

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clearly of opinion that it is necessary for the ends of justice to refer the case. Here too, however, there is a certain indecency in acquitting the prisoner while publishing belief in his guilt. To administer properly sections 306 and 307 of the Criminal Procedure Code, practical good sense is required not only as regards what is to be done, but also as regards what is to be said and as a matter of practical good sense acquittals and convictions raise, for the present purpose, considerations which, while covered equally by the phrase, "the ends of justice," are never quite the same.

As I find a dictum in the case of *Bahar Ali Kahar* (1) still repeated in some text books saying that the Judge should always say whether he agrees with the jury, I would here add that under the Code of 1861 there were no provisions comparable to the present sections 306 and 307, the former of which in particular is an express enactment upon this subject. The case of *Bahar Ali Kahar* was one in which it was held that there was no evidence at all to go to the jury and the observation which has for so long been preserved appears to me to have been inapt and insufficiently considered.

The verdict of the jury must in this case stand and this appeal is dismissed.

BUCKLAND J. I agree.

Appeal dismissed.

O. U. A.

(1) (1871) 15 W. R. Cr. Rul. 46.