APPELLATE CRIMINAL.

Before Henderson and Biswas JJ.

1937

May 20.

AFSAR SHAIKH

v.

EMPEROR.*

Reference—Judge, if can be ordered to make a Reference—"Disagreement," Meaning of—Code of Criminal Procedure (Act V of 1898), ss. 306, 307.

The duty of deciding whether the verdict of the jury shall be accepted or not is upon the Judge who presides at the trial and upon him alone. If he decides he ought not to make a Reference, the High Court can not properly direct him to do so.

Ebrahim Molla v. *King-Emperor* (1) followed.

Saroda Charan Mistri v. *King-Emperor* (2) considered.

Per Biswas J. The word "disagrees" in s. 307 of the Code of Criminal Procedure means that the Judge thinks it necessary to express disagreement. Section 307 requires that the Judge must not only disagree but must think it necessary to express disagreement. If he does not so think, his duty is to act as laid down in s. 306, namely, to give judgment according to the verdict. Section 307 must be read along with s. 306.

Where the Judge does not think it necessary to express disagreement, he should be well advised in not advertising the fact of his disagreement.

Ebrahim Molla v. *King-Emperor* (1) referred to.

CRIMINAL APPEAL.

The material facts and arguments appear sufficiently from the judgments.

Suresh Chandra Talukdar, Sudhangshu Bhooshan Sen and *Prem Ranjan Ray Chaudhuri* for the appellants.

The Officiating Deputy Legal Remembrancer, Debendra Narayan Bhattacharjya, for the Crown.

*Criminal Appeal, No. 153 of 1937, against the order of S. C. Datta Additional Sessions Judge of Mymensingh, dated Feb. 2, 1937.

(1) (1928) I. L. R. 56 Cal. 473. (2) (1925) 41 C. L. J. 320.

1937

Afsar Shaikh v. *Emperor.*

HENDERSON J. The appellants have been convicted of murder for causing the death of one Ajim. The prosecution story was that while he was proceeding home after attending the Muktagacha *Bâzâr*, he was waylaid by the appellants and others and killed.

The conviction depends upon the evidence of two witnesses. The learned Judge quite rightly told the jury that unless they believed that these witnesses were telling the truth, they could not convict. The Judge himself regarded this evidence with a great deal of suspicion. He pointed out to the jury everything that could be said against their credibility. In fact, he summed up as strongly as a Judge could in favour of the appellants. In spite of that, the jury decided to believe these witnesses and brought in a verdict of guilty. As the case was properly put before the jury, we cannot interfere.

In support of the appeal, Mr. Talukdar suggested that the learned Judge ought to have made a Reference to this Court and that we should direct him to do so. He apparently took two days' time to make up his mind and finally decided to accept the verdict. There is an *obiter dictum* in the judgment of one of the learned Judges who decided the case of *Saroda Charan Mistri* v. *King-Emperor* (1) to the effect that this Court has power in its revisional jurisdiction to direct the Judge to make a Reference. The correctness of that observation has been doubted in subsequent cases. So far as I understand, such an order has never been passed by a High Court in revision. In my opinion, such an order could not properly be passed. The duty of deciding whether the verdict of the jury shall be accepted or not is upon the learned Judge who presides at the trial and upon him alone. If he decides that he ought not to make a reference, there is an end of the matter.

The appeal, accordingly, fails and is dismissed.

BISWAS J. I agree. Under s. 307 of the Code of Criminal Procedure a Judge is required to refer a

(1) (1925) 41 C. L. J. 320.

1937

Afsar Shaikh v. *Emperor.*

Biswas J.

case to the High Court when he disagrees with the verdict of the jury, and also is clearly of opinion that the ends of justice require that a reference should be made. It is important in this connection to refer to the terms of s. 306, which provides that when the Judge "does not think it necessary to express dis-"agreement with the verdict, he shall give judgment "accordingly". In other words, the Judge may disagree; and yet not think it necessary to express disagreement, and in such a case the section requires that he *shall* accept the verdict. The word "disagrees" in s. 307 must, therefore, mean that the Judge thinks it necessary to express disagreement: otherwise, under s. 306 he shall be bound to give judgment according to the verdict. As to whether he does or does not think it necessary to express disagreement, must obviously be a matter for the Judge himself. It may be that a Judge may think that the jury's appreciation of the evidence is wrong, and still hold that it is not perverse or unreasonable: in that view, though disagreeing in fact, he may not think it necessary to express disagreement. In so refraining from expressing disagreement, he may well be influenced by the consideration that even if he were to make a reference, the High Court was not likely to interfere, unless the verdict was shown to be not merely erroneous, but perverse or unreasonable. It would in my opinion be wrong to say that in so doing the Judge would be acting illegally, as he would be clearly within the terms of s. 306. Section 307 must be read along with s. 306. As already pointed out, the first condition required by s. 307 for a reference is that the Judge should disagree with the verdict, and the second is that he must be clearly of opinion that it is necessary for the ends of justice to refer the case. Now, where the jury bring in a verdict of guilty, but the Judge feels satisfied of the innocence of the accused, it may be said in such a case that the ends of justice clearly require that a Reference should be made; in other words, that the second condition is

satisfied. And yet it would be quite open to the Judge not to make a reference, on the ground already stated, namely, that the High Court would not interfere unless the verdict was perverse. In such a case, the Code contemplates that the Judge should not disagree, that is to say, should not express his disagreement with the verdict, and the first condition would thus be wanting. The reasonable construction of s. 307 from this point of view also would be to hold that mere disagreement would not satisfy the first condition: what it requires is that the Judge must not only disagree, but must think it necessary to express disagreement; for, otherwise, *i.e.*, if he does not so think, his clear duty is to act as laid down in s. 306, namely, to give judgment according to the verdict. In this view of the matter, I entirely agree with Rankin C.J. in *Ebrahim Molla* v. *King-Emperor* (1), that where a Judge does not think it necessary to express disagreement, and must therefore proceed under s. 306, he would be well advised in not advertising the fact of his disagreement. His opinion would in fact be not only unnecessary, but irrelevant, unless he was prepared to make a reference. Disagreement is required to be expressed for the purpose of making a Reference, not for the purpose of giving judgment according to the verdict. I may add in passing that the strictures passed by Rankin C. J. on the Sessions Judge in the above case were probably not deserved, seeing that, as my learned brother informs me, the form of the Sessions statement then in force required the Judges to show in a special column the cases in which they disagreed with the verdict, and still accepted the same. In the present case, the Judge after reflection did not think it necessary to express disagreement with the verdict, hence s. 306 applied, and he was justified in giving judgment accordingly.

Appeal dismissed.

A. C. R. C.

(1) (1928) I. L. R. 56 Cal. 473