

equitable title, but this cannot prevail against the title of the attaching creditor. I, therefore, dismiss the claim with costs.

1880
GREENII
CHUNDER SEIN
v.
GUDADHUR
GHOSH.

Claim disallowed.

Attorneys for the claimants: Messrs. *Wheeler* and *Sowton*.

Attorney for the attaching creditor: Baboo *Bhoobonmohun Dass*.

APPELLATE CRIMINAL.

Before Mr. Justice Morris and Mr. Justice Prinsep.

THE GOVERNMENT OF BENGAL v. MAHADDI AND ANOTHER.*

1880
May 20.

Verdict on Offence proved though not independently charged—Unanimous Verdict—Dissent of Judge—Procedure in such cases—Code of Criminal Procedure (Act X of 1872), ss. 263, 457—Penal Code (Act XLV of 1860), ss. 149, 325.

The accused were charged under s. 149, coupled with s. 325, of the Penal Code, with, while being members of an unlawful assembly, committing grievous hurt. The jury disbelieved the evidence as to the unlawful assembly, but unanimously found two of the accused guilty of grievous hurt under s. 325.

Held, that such verdict was, under s. 457 of the Code of Criminal Procedure, legally sustainable, although that offence did not form the subject of a separate charge. Section 457 enables a verdict to be given on some of the facts which are a component part of the original charge, provided that those facts constitute a minor offence.

It is only in a case where the jury are not unanimous that a Court may require them to retire for further consideration. Where a verdict is unanimous, it must be received by the Judge, unless contrary to law.

Where a Judge dissents from the unanimous finding of a jury given in accordance with the law, the only procedure open to him to follow is that laid down in the fifth clause of s. 263 of the Code of Criminal Procedure.

THIS was an appeal directed by the Local Government under s. 272 of the Code of Criminal Procedure, from a verdict of acquittal.

* Criminal Appeal, No. 1 of 1880, against the order of R. F. Rampini, Esq., Officiating Sessions Judge of Dacca, dated the 15th October 1879.

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GOVERNMENT
OF BENGALv.
MAHADDI.

*The Deputy Legal Remembrancer (Mr. G. C. Kilby) for
the Government.*

Baboo *Nundalsal Pyne* for the accused.

THE facts of the case appear sufficiently from the judgment of the Court (MORRIS and PRINSEP, JJ.), which was delivered by

PRINSEP, J.—Mahaddi and Panchoo, together with others were charged under s. 149 of the Penal Code, read alternately with ss. 302, 304, and 325 of the Penal Code, that is, with being members of an unlawful assembly at a time when (1) murder, or (ii) culpable homicide not amounting to murder, or (iii) grievous hurt, was caused by some members of that assembly in prosecution of its common object.

The jury absolutely acquitted all except Mahaddi and Panchoo, but with regard to these two men the jury unanimously found that they were guilty only under s. 325, Penal Code,—*i. e.*, of having voluntarily caused grievous hurt without grave or sudden provocation. What then followed is thus recorded by the Sessions Judge:—"The Court informed the jury that there was no charge under this section, and requested the jury to re-consider their verdict. The jury accordingly retired for that purpose. They returned to Court at twelve minutes to four o'clock P. M. The foreman stated they were not unanimous in their verdict against the prisoners. The Court requested them to retire again and consider their verdict. The jury returned at five minutes to four, and the foreman stated that the jury by a majority (the number being three to two) found all the accused not guilty of all the charges."

With regard to the verdict against Mahaddi and Panchoo, the Sessions Judge has further recorded his own opinion that he could not accept that verdict, because "(i) there was no charge against them under this section (325), and (ii) in his opinion there was no evidence under s. 325 against them."

An appeal has been made by Government against the acquittal of Mahaddi and Panchoo, on the ground that the Sessions Judge was bound to accept the unanimous verdict of the jury finding these prisoners guilty under s. 325, Penal Code; that

he was not competent to direct them to re-consider their verdict; that that verdict was a good verdict, although the offence punishable under s. 325, Penal Code, did not form the subject of a separate charge; and that there was evidence on which the jury might have convicted the prisoners under s. 325, Indian Penal Code.

After hearing the Deputy Legal Remembrancer for Government and the Pleader of the prisoners, as well as Mr. Reily as *amicus curiæ*, we are of opinion that, on all these grounds, the Sessions Judge has committed an error of law, and that the unanimous verdict of the jury convicting Mahaddi and Panchoo under s. 325, Penal Code, should have been received.

In our opinion, under the terms of s. 457 of the Code of Criminal Procedure, it was competent to the jury to return a verdict of guilty only under s. 325, Penal Code, although that offence did not form the subject of a separate charge, but was entered in a charge coupled with s. 149, Penal Code. Section 457 of the Code of Criminal Procedure enables a verdict to be given on some of the facts which are a component part of the original charge, provided that those facts constitute a minor offence. Thus in the present case the prisoners were not charged themselves with having caused the grievous hurt, but were charged with being members of an unlawful assembly, some of the members of which, in prosecution of its common object, caused that grievous hurt. The verdict of the jury was, as we understand it, that there was no assembly, but that the grievous hurt was nevertheless caused by these two prisoners. Section 263 requires that "the jury shall return a verdict on all the charges on which the accused is tried." The requirements of the law are satisfied if, in returning their verdict, a jury acting under s. 457 returns a verdict of conviction of a minor offence forming part of one of the charges. The verdict which the Sessions Judge refused to take was in our opinion a good and legal verdict.

Section 263 declares under what circumstances a Sessions Judge may "require a jury to retire for further consideration,"—that is to say, when "the jury are not unanimous." If the jury are unanimous, the verdict must be received unless it is

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contrary to law. If the Sessions Judge disagrees with an unanimous verdict which is not contrary to law, he should proceed as laid down in para. 5, s. 263. In the case now before us there is nothing in the verdict convicting the prisoners under s. 325, Penal Code, which is contrary to law. But as Mr. Reilly very properly brings to our notice, the Sessions Judge might have said to the jury that if they were of opinion that the prisoners could be convicted only under s. 325, Penal Code, they must return a verdict of acquittal, because there was no legal evidence to sustain such a verdict. That was not the manner in which the Sessions Judge treated this case as is shown from the extract from the record which has been quoted, but even under such circumstances the Sessions Judge would have acted contrary to law and afforded just grounds for this appeal, because there is legal evidence which, if believed, would have been sufficient to sustain the verdict. We refer more particularly to the statements which are declared by witnesses to have been made by the wounded man that his injuries were caused by these two prisoners. These injuries have caused his death, and therefore his statements were legal evidence under s. 32 of the Evidence Act, on which the jury might form their verdict.

For these reasons, we direct that the verdict of the jury acquitting Mahaddi and Panchoo be set aside; that in its place the unanimous verdict of the jury convicting Mahaddi and Panchoo under s. 325, Penal Code, be entered on the record; and we do accordingly sentence Mahaddi and Panchoo to seven years' transportation.

The Sessions Judge will issue the usual warrants.

Appeal allowed.
