APPELLATE CRIMINAL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, Mr. Justice Boddam and Mr. Justice Sankaran Nair.

EMPEROR

v.

CHELLAN AND OTHERS.*

1905 August 29, September 7, 25.

Criminal Procedure Code—Act V of 1898, s. 307—Procedure of High Court on reference under—'Opinion' of jury, what is.

Where the Sessions Judge disagreeing with the jury, refers a case to the High Court under section 307 of the Code of Criminal Procedure, the High Court is to form its own opinion on the evidence. The 'opinion' of the jury in section 307 of the Code of Criminal Procedure is the conclusion of the jury, and not the reasons on which that conclusion is based.

Per Sir SUBRAHMANIA AYYAR, *Officiating Chief Justice*, and BODDAM, J. In references under section 307 of the Code of Criminal Procedure, although it may be expedient to have before the Court the reasons of the jury for the view taken by them, when any have been given, the circumstance that no such reasons have been ascertained does not warrant this Court to decline to go into the evidence and to arrive at its own judgment, after giving due weight to the views taken by the Judge and the jury as to the guilt or innocence of the accused.

THIS was a reference by the Sessions Judge of Salem under section 307 of the Code of Criminal Procedure. The letter of reference is as follows :—

The jury return an unanimous verdict that accused Nos. 1 to 4 are guilty and the others are not. I agree in and accept the verdict in so far as accused Nos. 1 to 4 are held to be guilty and in so far as the eighth accused is held to be not guilty. As regards the eighth accused in addition to the fact that his village was not named, there may be a doubt as to the possession of the item of cloth by him, and there is the circumstance that prosecution thirteenth witness admits that his niece was taken away by this accused's son from which it may be suspected that he has been identified owing to some enmity. In his case also, therefore, I do not want to differ from the jury, and respecting their opinion, I accept it. But I regret that, as regards accused Nos. 5, 6 and 7, I cannot agree with them. The same witnesses that speak about accused Nos. 1 to 4 speak about these accused also. In fact

* Criminal Reference No. 7 of 1905 made by S. Gopalachariar, Esq., Sessions Judge of Salem Division, in Calendar Case No. 65 of 1905.

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the fifth and seventh accused are identified by no less than five witnesses while the sixth is identified by at least three. The village of accused Nos. 5 and 6 has been named in all the complaints and is close to that of accused Nos. 1 to 4 and to the scene of occurrence. Even bearing in mind the fact that no property was found with fifth accused and even doubting the possession of the *mull* by the sixth accused, I see no reasonable grounds for differentiating the case of accused Nos. 5 and 6 from that of accused Nos. 1 to 4, in so far as the direct evidence goes, except that these were arrested not that very night but subsequently. This difference ought not to count for much. As regards the seventh accused, his own village is no doubt at some distance, but he appears to have no settled abode and he admits having come near the place some days afterwards and further admits being in possession of one of the items which he has not proved to belong to him, and which upon the evidence of prosecution fourth witness I hold to be stolen property. There is no particular reason for foisting on him the female's cloth only of the two items. For these reasons I feel bound to refer to the High Court the case of accused Nos. 5, 6 and 7 who will be on remand till final orders are passed.

I acquit eighth accused and direct his release. I sentence each of accused Nos. 1, 2, 3 and 4 to six years' rigorous imprisonment. Prosecution witnesses Nos. 1 to 7 were not stray travellers. They were returning from their place of business, and, if robbers are to waylay such persons, trade will be paralyzed and great discomfort and uneasiness to the villagers will be caused. I therefore sentence them for a year in excess of what I used to do in ordinary dacoity cases.

I have to add that the seventh accused has been previously sentenced to three months' rigorous imprisonment by the Second-class Magistrate of Pennagaram on 19th October 1904 for offences under sections 457 and 380 of the Indian Penal Code in Calendar Case No. 153 of 1904.

The reference was heard before Davies and Benson, JJ., along with the appeal by the accused Nos. 1 to 4, whom the Sessions Judge, agreeing with the jury, had convicted.

The Public Prosecutor in support of the reference.

BENSON, J.—The appellants are the first four accused in Sessions Case No. 65 of 1905. They have been found guilty by

a jury on legal evidence and I can find no misdirection in the Judge's charge to the jury.

The jury has acquitted four other persons, who were charged with accused Nos. 1 to 4. The Sessions Judge has accepted the verdict in the case of the eighth accused for reasons stated by him, but he has referred the case of the fifth, sixth and seventh accused for the orders of this Court under section 307 of the Criminal Procedure Code, as he disagreed with the finding of the jury that they were not guilty. The Sessions Judge states that he is of opinion that these three accused are guilty of dacoity and has recorded the grounds of his opinion as required by law.

It is therefore necessary for us now to consider the entire evidence and, after giving due weight to the opinions of the Sessions Judge and the jury, to either convict or acquit these accused.

[His Lordship then proceeded to discuss the evidence.]

In this state of the evidence, I agree with the Sessions Judge that the guilt of accused Nos. 5, 6 and 7 is established beyond reasonable doubt. There is no record of the reason or reasons why the jury was of opinion that they were not guilty. The law does not require them to give reasons, nor does it empower the Judge to ask them their reasons, though he is empowered to question them in order to ascertain what their actual verdict is, and it is also open to the jury to state their reasons if they desire to do so. In many cases they do this.

It has always, so far as my experience goes, been the invariable practice of this Court to accept a reference like the present under section 307 and to deal with the evidence against the accused, treating the so-called verdict of the jury as their 'opinion' referred to in this section. I have examined the records of all the cases referred under section 307 during the past three years. Their number is 73 I find that in 22 of these the reasons for the verdict of the jury have been recorded or are referred to by the Judge in his letter of reference. But in the remaining 51 cases, there is no record of the reasons, and no reference thereto by the Judge. There is nothing but the bare verdict, yet in not one of these cases did the High Court call on the Judge to ascertain the reasons of the jury or refuse to deal with the reference owing to the absence of such reasons. In all these cases the High Court dealt with the reference on the merits

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and acquitted or convicted the accused. Every Judge now in the High Court and also the Chief Justice, who is on leave and Sir Bhashyam Ayyangar and Russel, JJ. (now retired) took part in one or more of these cases. I am of opinion that the practice is correct.

When the Judge resolves to act under section 307 he is required by law not to record any verdict either of acquittal or conviction. The so-called 'verdict' does not bind him. It becomes for all legal purposes a mere opinion, and this, I take it, is what section 307 refers to when it speaks of the 'opinion' of the jury. In the present case I think that their 'opinion' that the fifth, sixth and seventh accused are not guilty is wrong. I would convict each of these accused Chellan (son of Mari), Karuran, and Venkatraman, and pass on them the same sentence as that passed on the accused Nos. 1 to 4 whom the jury found guilty viz, six years' rigorous imprisonment.

DAVIES, J.—I agree with my learned colleague that this appeal (Criminal Appeal No. 319 of 1905) should be dismissed.

In this case the jury have unanimously found four out of the eight persons, charged with dacoity, guilty, and the appeal of these persons has been dismissed by us. The jury found the others, viz., four persons not guilty of the dacoity.

The Sessions Judge agreed with the jury that one of these four persons was not guilty, but he has dissented from their verdict in regard to the three other men and referred their cases under section 307 of the Code of Criminal Procedure, for our decision.

Our duty under clause 3 of that section is not only to consider the entire evidence, but also to give due weight to the opinions of the Sessions Judge and of the jury. The opinions of the jury cannot mean their verdict, for that is not a mere opinion nor is it styled as such as the opinions of assessors are. The verdict is a final judgment by the jury as to the guilt or otherwise of the persons charged before them, and it is binding on the Judge, while 'opinions' are not so. Besides, it is obvious from the provisions of the Code that the opinions of the jury referred to in clause (3) of section 307 are to be on the same par as those of the Judge, that is, opinions given after the verdict, for the jury are not enabled to pass opinions before their verdict. It is not until after the verdict is delivered and the Judge disapproves of it, that the

jury's opinions are required for submission to this Court to be considered along with the Judge's opinions.

Now, the opinions of the jury in this case are not before us. Apparently the Judge has not taken them, it may be, because no express provision is made to that end. But the legislature in directing that this Court should duly weigh the opinions of the jury gives an implied authority for the taking of such opinions. And the Sessions Judge is advised in future to do so before referring a case under section 307 of the Criminal Procedure Code.

It is now too late to direct such an opinion to be recorded in the case before us. And in the absence of such opinions, we cannot perform the functions, specially cast upon us, of duly considering them. In this particular case, where the Judge agreed with the verdict of the jury as regards five persons out of eight, it requires the most potent arguments to show that their verdict in the case of the other three persons was perverse. I have little doubt that the jury could have given reasons in support of their verdict if they had been asked for them, at least as strong as those given by the Judge against it.

In these circumstances I am not prepared to give any weight to the one-sided opinions of the Judge. And I consider that the verdict of the jury upon the evidence before them should be upheld. The three accused in whose case the reference has been made, that is, the fifth, sixth and seventh prisoners, should therefore be acquitted and their release ordered.

The reference again came on for hearing under the provisions of section 429 of the Code of Criminal Procedure before the Bench constituted as above, in consequence of the difference of opinion between Davies and Benson, JJ. The Court delivered the following

JUDGMENT.—Sir S. SUBRAHMANIA AYYAR, Offg. C.J., and BODDAM, J.—The ordinary dictionary meaning of the word 'opinion' in law is "the formal decision of a Judge, an umpire, a councillor or other party officially called upon to consider and decide upon a difficulty or dispute." The term, so far as we are aware, is not used to denote the *reasons* for the decisions themselves and we see nothing in the language of clause 3 of section 307 of the Criminal Procedure Code, to take the word 'opinions' in it to mean other than the respective conclusions of the jury and the Judge. The use of the word 'opinions' in the

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clause in preference to the term verdict was probably owing to the conclusion of the jury in the circumstances lacking the effect which would attach to it if there were no difference between the jury and the Judge in the matter. The first paragraph of section 307 itself is practically conclusive in favour of this view, as there, 'opinion' is used in contradistinction to the 'grounds' for such opinion. Section 305 of the Code also supports 'the same view.' It provides *inter alia* for cases of disagreement in trials in High Courts and the expression employed there too is 'opinion.' The context of course precludes the word being understood as meaning the grounds for the conclusion instead of the conclusion itself. Now it is conceded that when the Judge and the jury agree the latter cannot be compelled to give reasons for their decision. And section 303 which permits questions to be put to the jury in order to ascertain what their verdict is, negatives by implication a power on the part of the presiding Judge to question them otherwise. First to assume that the word 'opinion' in section 307, clause 3, means the reasons for the conclusion and next on such assumption to argue that the Code authorises the Judge in such cases to compel the jury to give them is not a legitimate mode of construction. The practice of the Court as shown by a large number of cases in which some or other of all the Judges of this Court have taken part and in which they proceeded to decide the references, though no reasons for the conclusion of the jury were elicited and submitted, is in accordance with the view we are taking. It follows therefore that, expedient as it may be to have before this Court, when any have been given, the reasons of the jury for the view taken by them in a particular case, the circumstance that no such reasons have been ascertained does not warrant this Court to decline to go into the evidence and to arrive at its own judgment after giving due weight to the views taken by the Judge and the jury as to the guilt or innocence of the accused.

[Their Lordships then discussed the evidence.]

Differing from the jury we convict the fifth, sixth and seventh prisoners and sentence them each to six years' rigorous imprisonment.

SANKARAN NAIR, J.—The learned Judges who first heard this reference have differed in their opinion. Mr. Justice Davies holds that it requires powerful reasons to show that the jury's verdict,

upheld with reference to five of the accused is perverse with reference to the other three and as their opinion for their conclusion which he considers to be distinct from their verdict is not before us, it is impossible to say they are wrong upon the one-sided opinion of the Judge alone, the Code requiring us to give due weight to the opinion of the jury; Mr. Justice Benson holding that the verdict is their opinion came to the conclusion that on the evidence the accused are guilty. I concur with the Officiating Chief Justice and Boddam, J., in holding that once the case is referred to the High Court under section 307 we have to form our own opinion on the evidence. [After going into the evidence, his Lordship agreed with the jury and acquitted the accused.]

APPELLATE CRIMINAL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Sankaran Nair.

ARUNACHELLAM CHETTIAR, PETITIONER,

v.

CHIDAMBARAM CHETTI, RESPONDENT.*

1905 July 18.

Criminal Procedure Code—Act V of 1898, s. 147—Construction of the words "concerning any land"—Landlord and tenant—Right of tenant to enclose cultivable land by a wall.

The enclosing by a tenant of cultivable lands by a wall instead of hedge is not *primâ facie*, an interference with the landlord's rights and ought not to be interfered with under section 147 of the Code of Criminal Procedure by a Magistrate, being a matter to be settled by a Civil Court. In such cases, if a breach of the peace is apprehended, security must be taken from the party in possession.

The words "concerning the use of land" in section 147 of the Code of Criminal Procedure cannot be qualified and the section construed as if it contained words that the user to which the dispute relates is a user by a party other than the party in possession.

The Empress v. *Ganapat Kalwar*, (4 C.W.N., 779), not followed.

Subba v. *Trincal*, (I.L.R., 7 Mad., 461), referred to and followed.

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* Criminal Revision Petition No. 75 of 1905, presented under sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the order of A. Thompson, Esq., Sub-Divisional First-class Magistrate of Ramnad Division, in Miscellaneous Case No. 29 of 1904.