they are precluded from maintaining a separate suit by the express words of s. 244.

1883

NAJHAN v. MAHOMED TAKI KHAN.

We, therefore, set aside the decision of the lower Appellate Court, and dismiss the plaintiffs' suit with costs in all the Courts.

Appeal allowed.

APPELLATE CRIMINAL.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

SHADULLA HOWLADAR AND ANOTHER *v.* THE EMPRESS. *

1883
May 7.

Code of Criminal Procedure, (Act X of 1882), s. 309—Trial by Assessors—Evidence—Summing up of Evidence—Delivery of opinions of Assessors—Sessions Judge, Duties of.

The power of summing up the evidence given by s. 309 of the new Code of Criminal Procedure, Act X of 1882, is intended to be exercised in long or intricate cases, and the Sessions Judge should confine himself to summing up the evidence and should not obtrude on the assessors his opinion of the worthlessness or otherwise of certain portions of the evidence.

The Sessions Judge should also conform strictly to the words of s. 309, and require *each* assessor to state his opinion orally.

The Sessions Judge should not utilize the services of the pleader for the prosecution for the purpose of recording his summing up to the assessors. If he is not capable of recording the substance of it himself, he should employ an independent person for that purpose.

THIS was an appeal from a conviction and sentence of the Sessions Judge of Furreedpore. The facts of the case are sufficiently set out in the judgment of the High Court.

Baboo *Grija Sunker Mozoomdar* for the appellants.

The Deputy Legal Remembrancer (Mr. *Kilby*) for the Crown.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—After considering the evidence on the record in this case, we are of opinion that the appellants have been rightly

* Criminal Appeal No. 184 of 1883 against the order of F. J. G. Campbell, Esq., Officiating Sessions Judge of Furreedpore, dated the 12th March 1883.

1883

SHADULLA HOWLADAR v. THE EMPRESS.

convicted under ss. 149 and 304 of the Indian Penal Code. It is clear that they were the ringleaders in a premeditated riot, with the knowledge and intention necessary to bring them within these sections. The mob, of which the appellants were the ringleaders, consisted of about one hundred and twenty-five men, said to have been armed with shields, spears, and clubs. One man was killed, and others were injured.

On these facts we hold that the appellants have been properly convicted, and we also think that the sentences passed on them are not too severe. The appeals are, therefore, dismissed.

It is necessary, however, to make some observations on the procedure adopted by the Sessions Judge. He has taken advantage of the terms of s. 309 of the present Code to sum up the evidence for the prosecution and defence to the assessors. This provision has, for the first time, been introduced into our Code, and in our opinion the object is to enable the Sessions Judge in long or intricate cases to place the evidence in an intelligible form, so as to assist the assessors in arriving at a reasonable conclusion.

In the present case we observe that the Judge seems rather to have taken an opportunity of expressing his opinion in emphatic terms on every single matter put in evidence. He observes on one point: * * * "although you may utterly disbelieve the witnesses, as this Court has done, with regard to those persons (who had been acquitted), but yet *there is no ground for disbelieving them with regard to those men who have been named from the beginning.*"

Now, it is impossible to suppose that the assessors could have been otherwise than very much embarrassed in coming to an independent opinion of their own in the face of the very decided opinion expressed by the Judge. There are other passages in the summing up which might be quoted to a somewhat similar effect.

In the next place we observe that the summing up has been recorded by the pleader for the prosecution and accepted by the Judge as correct. We think that such a course should not have been taken by the Judge, and that if he was incapable himself of recording the heads of the summing up to the assessors, he should

have availed himself of the services of some Court-officer, or directed it to be done by some independent person.

1883

SHADULLA HOWLADAR v. THE EMPRESS.

We next find that, instead of taking the opinion of each assessor, as is required by law, the Judge has received the opinions of all the assessors combined, as delivered through one of them whom he thus regards as the foreman of a jury.

We further observe that four other persons, who were under trial along with the appellants, were acquitted by the Sessions Judge at the termination of the evidence for the prosecution. The grounds on which the judgment of acquittal was based are, that the evidence of identification was unworthy of belief.

Under such circumstances it was the duty of the Judge, before passing judgment, himself to ask for and record the opinions of the assessors on that evidence. The Judge, however, has thought it unnecessary to do so, because he considers that there was "no evidence" against the accused, the fact being that there was evidence which the Judge thought unworthy of belief.

Appeal dismissed.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

SHEO SARAN TATO *v.* THE EMPRESS.*

1883
May 4.

Sentence—Penal Code (Act XLV of 1860), *s.* 75—*Previous Conviction.*

The object of s. 75 of the Indian Penal Code is to provide for an additional sentence, not a less severe sentence, on a second conviction. Recourse should not be had to that section if the punishment for the offence committed is itself sufficient.

THIS was an appeal from the following finding and sentence of the Judge of Shahabad sitting with assessors on the 19th of March 1888:—

"The Court concurring with the assessors finds that the accused person Sheo Saran Tato is guilty as charged, namely, that he on or about the 18th day of February 1883, at Arrah, committed house-breaking by night with intent to commit theft, he having previously, that is to say on the 25th August 1874, been convicted of house-breaking by night in order to the committing of theft, such conviction not having been set aside

* Criminal Appeal No. 207 of 1883, against the order of J. Tweedie, Esq., Sessions Judge of Shahabad, dated the 19th March 1883.