APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

1903. February 9.

RAMAKRISHNA REDDI (FIRST PRISONER), APPELLANT,

v.

EMPEROR, RESPONDENT.*

Criminal Procedure Code—Act V of 1898, ss. 269 (3), 309—Sessions Judge sitting with jury—Charges of theft and administering drug—Opinion of only two jurors taken as assessors on second charge—Validity.

At the trial of an accused, before a Sessions Judge and a jury, for theft in a building (an offence triable by a jury) and for administering a noxious substance (an offence triable by assessors), the Judge took the verdict of the jury on the former charge, and took the opinion of only two of them (as assessors) on the latter:

Held, that, under sections 269 (3) and 309 of the Code of Criminal Procedure, the Judge should have taken the opinion of all the jury as assessors, on the latter charge, and that his failure to do so was not an "omission" or "irregularity" to which section 537 applied.

CONVICTIONS for theft in a building and for administering a stupefying substance with intent to facilitate the commission of an offence. Accused No. 1 was charged and tried as aforesaid, under sections 380 and 328 of the Indian Penal Code, before the Sessions Judge sitting with a jury. Accused Nos. 2 and 3 were charged with abetment of theft, under sections 109 and 379. The Judge directed the jury on the charge of theft, and they returned an unanimous verdict of guilty against first accused on the substantive offence, and against the accused Nos. 2 and 3 on the charge of abetment. The Judge then dealt with the charge against first accused under section 328. He took the opinion of two of the jurors, as assessors, on this charge. Their opinion was that the first accused was guilty. The Judge agreed, and sentenced first accused, under sections 380 and 328, to five years' rigorous imprisonment. He sentenced the other two accused to two years' rigorous imprisonment.

All the accused appealed.

The Public Prosecutor in support of the conviction.

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* Criminal Appeal No. 775 of 1902 presented against the sentence and conviction of S. Gopala Chariar, Acting Sessions Judge of Cuddapah, in Case No. 60 of the Calendar for 1902.

JUDGMENT.—As regards the offence of theft with which all the accused were charged, the jury were properly directed by the learned Judge and the appeals of the second and third accused have already been dismissed. With regard to the charge under section 328, Indian Penal Code, the Judge only took the opinion of two of the jurors, as assessors. He ought undoubtedly, under the provisons of sections 269(3) and 309 of the Code of Criminal Procedure, to have taken the opinion of all the jurors as assessors. We do not feel satisfied that his failure to do this can be treated as an "omission" or "irregularity" to which section 537 of the Code of Criminal Procedure applies. We accordingly set aside the conviction under section 328, Indian Penal Code. The Judge passed one sentence in respect of both offences. We modify the sentence by sentencing the accused to four years' rigorous imprisonment under section 380 of the Indian Penal Code.

APPELLATE CIVIL.

Before Mr. Justice Bhashyam Ayyangar.

SOMAYYA, PETITIONER,

v.

SUBBAMMA, RESPONDENT.*

1903. February 13, 16.

Civil Procedure Code—Act XIV of 1882, *ss.* 103, 108 *and* 558—*Application to restore—Prevented by sufficient cause from appearing—Power of Court to restore where sufficient cause not shown.*

The affirmative provisions in sections 103, 108 and 558 of the Code of Civil Procedure that a plaintiff or appellant (as the case may be) may prove that he was "prevented by sufficient cause" from appearing or attending when his suit or appeal was called on and dismissed, do not imply the negative, namely, that an application for restoration cannot be granted unless sufficient cause is shown. The effect of the enactments is that, if sufficient cause is shown, restoration is made obligatory on the Courts, there being no discretion in the matter; whereas, in other cases the merits of the applicant's case will form an important element for consideration when the Court is asked to exercise its discretion.

* Civil Miscellaneous Petition No. 954 of 1902 presented under section 558 of the Code of Civil Procedure for the re-admission, on the file of the High Court, of Civil Revision Petition No. 123 of 1902 dismissed for default of prosecution on the 13th August 1902 (Small Cause Suit No. 745 of 1901 on the file of the Court of the District Munsif of Ellore).