## APPELLATE CRIMINAL.

*Before Sir Ralph Benson, Officiating Chief Justice, and Mr. Justice Ayling.*

THE PUBLIC PROSECUTOR, APPELLANT,

*v.*

ABDUL HAMEED AND TWENTY-TWO OTHERS (ACCUSED IN SESSIONS CASES NOS. 40 AND 55 OF 1911, COIMBATORE), ACCUSED.*

1912. July 24, 25, 26, 29, 30 and August 2.

*Criminal Procedure Code (Act XIV of 1898), ss. 297, 303 and 304—Trial by Court of Sessions—Verdict, how to be taken, where many accused and both jury and assessors charges.*

Section 297, Criminal Procedure Code (Act XIV of 1898) specifically enacts that the Judge shall only charge the jury "when the case for the defence and the prosecutor's reply are concluded." Where therefore the Judge heard arguments and took verdicts as regards certain accused and subsequently went on to hear arguments and take verdicts as regards other accused:

*Held*, that the procedure adopted was irregular.

The verdict of a jury must be taken collectively upon charges triable by jury even where the jury may be sitting as assessors to try other charges triable by assessors.

A jury having delivered a verdict may not be again asked to consider that verdict. It may only be questioned to find out what in fact the verdict is.

Criminal Procedure Code, sections 303 and 304, discussed and explained.

APPEAL under section 417 of the Code of Criminal Procedure, presented against the judgment of acquittal passed on the accused Nos. 1, 2, 3, 4, 5, 8, 9, 10, 12, 14, 15, 17, 18, 19 and 22 in Sessions Cases Nos. 40 and 55 of 1911 by F. H. HAMNETT, the Sessions Judge of Coimbatore and referred under section 307 of the Code of Criminal Procedure by the Sessions Judge of Coimbatore Division in cases Nos. 40 and 55 of the calendar for 1911 as regards accused Nos. 6, 7, 11, 13, 16, 20, 21 and 23.

The facts of this case appear in the judgment below.

The Honourable Mr. *J. L. Rosario*, the Acting Advocate-General, for the appellant.

The Honourable Mr. *T. Richmond* for the accused.

JUDGMENT.—This appeal and reference arise out of what is known as the Coimbatore Mohurrum riot which occurred on the evening of January 12th, 1911. But briefly, the facts are as follows: BENSON, AG. C.J., AND AYLING, J.

January 12th was the last day of the Mohurrum festival, in connection with which it is usual for men and boys to paint

* Criminal Appeal No. 8 of 1912 (Reference No. 17 of 1911).

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and disguise themselves in imitation of tigers and to dance in the public streets. On the afternoon of the day in question the Coimbatore Town Inspector began (so far as appears) to enforce an old order of the District Magistrate embodied in a book of Standing Orders (Exhibit A) prohibiting persons from thus dancing as tigers without license from the police. Between about 5 and 6 P.M. he stopped the dancing of five unlicensed men; the last two of whom are the present second and twenty-third accused. These men were dancing near the station, and to secure compliance with his command the Inspector first took away the "tails" they were wearing and then partially washed the paint of their faces. The two men nevertheless resumed dancing, and the Inspector incensed at their disobedience, appears to have gone out and beaten them with a stick. By this time a considerable crowd had collected and the "taboot" procession in its progress through the town had arrived close to the station. Apparently the processionists sympathised with the "tigers" and declined to proceed unless the tails were restored. Matters began to look serious, and the Inspector, who had retired to his room upstairs in the station, wrote a note to the Reserve Inspector calling for assistance. The exact time at which this note was written and at which it was despatched is not clear; but the Inspector appears to have given the mob to understand that he had sent for the reserve, probably meaning to frighten them. Unfortunately it produced the opposite effect; they realised that if anything was to be done no time must be lost, and made a rush for the station shouting "deen, deen." The small force of constables who endeavoured to stop them was driven back with sticks and stones; and the mob entered the station. Some of the police took refuge upstairs, others in the Station House Officer's room below. This was forced open and a bonfire was made in the road in which a good deal of the station furniture was consumed. The record room was fired and the records burnt; and the staircase was also set fire to, so that the Inspector and his companions upstairs were in considerable danger of their lives. The Inspector escaped by the roof and one or two others from a window, but the remainder, including a European lady, the wife of an European Sergeant of the Reserve Police, were only rescued by the arrival of the Police Reserve at about 7-40, and the dispersal of the mob.

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Upon the above facts, which are deposed to by 25 prosecution witnesses and are practically beyond dispute, 23 persons who are said to have been members of the mob which attacked the station have been put on their trial for offences under sections 147, 152, 436, 457 and 149, Indian Penal Code. A jury was empanelled to try the charge under section 457, the jurymen sitting as assessors on the other charges. A majority of the jury found eight of the accused (Nos. 6, 7, 11, 13, 16, 20, 21 and 23) guilty of an offence under section 457, and the rest not guilty. The Judge disagreeing with the verdict of "guilty" has referred the case of the above eight persons for the orders of this court under section 307, Criminal Procedure Code; and has acquitted the remaining accused on all the charges. From his judgment and the letter of reference, he appears to be of opinion that no offence whatever has been brought home to any of the accused persons. Government, on the other hand, has appealed against the acquittal of the 15 accused whom the jury found "not guilty."

As far as the case of the eight persons found guilty by the jury is concerned, the effect of the reference is to open up the whole case and to render it our duty to consider whether the evidence against each is sufficient to justify a conviction for all or any of the offences charged. But as regards the others, who have been found "not guilty," we can only go into the evidence, if we find such misdirection in the charge or irregularity in the procedure, as would, in our opinion, have occasioned a failure of justice. This, then, must be the first point for consideration.

Now, as pointed out by the learned Advocate-General, the procedure of the Sessions Judge is distinctly irregular in more points than one. It is thus set forth in paragraphs 5 and 6 of his judgment:

"After the evidence of the prosecution was closed, I asked the vakil for the defence to examine, in the first instance, certain witnesses who he stated would prove clear *alibis* for the eighteenth and nineteenth accused as these witnesses seemed to be the principal witnesses on whom he relied. There was a host of other witnesses cited for the defence, and it seemed to me that the quickest way of getting through the case would be for the vakils and myself to sum up first on the case generally, and then on the case as against each of the accused, one by one, leaving

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it to the jury to say if they wished to hear the witnesses for the defence cited by him or were prepared to find that the prosecution had not made out a case against him. This procedure was followed until the case of the sixth accused was reached. By that time it appeared that too much time was taken up by speeches and as the vakil, who represented all the accused, then stated that he intended examining only a few of the host of witnesses cited, he was asked to examine them at once in a batch. After all these witnesses had been examined, the vakils on both sides summed up once for all. I then summed up first generally on the facts to recall the salient points in the case to the jury, and after that with regard to the evidence for and against each accused person, starting from the sixth accused."

It is no doubt desirable that the case against each of the several accused should be clearly and distinctly presented to the jury, and the procedure laid down in the Code is quite compatible with his being done. But section 297, Criminal Procedure Code, specifically enacts that the Judge shall only charge the jury "when the case for the defence and the prosecutor's reply . . . . are concluded," *i.e.*, after all the evidence has been taken on both sides and counsel on both sides have finished addressing the jury. The Judges charge to the jury in the case of accused Nos. 1 to 5 was clearly premature and contrary to the sections above quoted. The Judge was no doubt swayed by the laudable desire to save time; but, as he himself admits, that object was not attained and as he further acknowledges (paragraph 98 of his charge to the jury) in at least one instance arguments adduced on behalf of one accused (sixth accused) led him to materially alter his view of the reliability of certain evidence against earlier accused, in whose case a verdict had already been recorded.

It may be argued that this irregularity cannot be said in itself to have affected the issue of the case; but the next divergence from the procedure laid down in the Code is of a more serious nature and is opposed to a fundamental principle of the scheme of trial by jury. Section 303, Criminal Procedure Code, says that "the jury shall return a verdict on all the charges" and by "verdict" should be understood the collective opinion of the jury as a body, arrived at after mutual consultation, and ascertained and announced by the foreman. In cases of disagreement

among the jury, the individual opinions of members are never intended to be disclosed. In the present case except in the case of accused Nos. 1, 2, 4 and 5 regarding whom the procedure adopted is not certain, the record makes it clear that no verdict in this sense has been recorded at all. In the case of accused Nos. 6 to 23, the Judge has called on each member of the jury individually to answer a series of questions, of which he was furnished with a typed copy and which run as follows :

"(1) Do you find this accused guilty of any offence? (2) If you find him guilty of any offence, then what do you find was the common object of the unlawful assembly at the time when it is proved by reliable evidence he was last seen in the unlawful assembly? (3) What offences, if any, do you find were committed by the accused personally? (4) Do you find on the evidence that any other members of the unlawful assembly committed any other offences, besides those, which this accused personally committed during the time this accused was a member of the unlawful assembly? (5) Do you find on the evidence that this accused knew that such other offences as were committed by other members of the unlawful assembly during the time he was still a member of the assembly were offences likely to be committed in pursuance of the common object of the assembly at that time?"

In the case of the third accused, these questions do not appear to have been put; but the individual opinion of each member of the jury has been recorded as to the accused's guilt of an offence under section 457 as well as of offences triable with the aid of assessors. In other words he has treated the jury exactly as if they were assessors in relation to the charge under section 457, except that he has not felt authorised to override the opinion of a majority of them where it is in opposition to his own.

In the case of the third accused, there is a further serious irregularity. As regards the offence under section 457, Indian Penal Code, three of the five jurors expressed individual opinions that the accused was guilty. As already explained, this can hardly be regarded as a "verdict" in the proper sense of the term at all; but if it be so treated, it is perfectly clear and specific and the only course open to the Judge were either to accept it or to refer the case to the High Court under section 307, Criminal Procedure Code. He has done neither: but on the

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day following that on which these opinions were recorded has twice questioned the jury, the second occasion being after a verdict (or what passed for a verdict) of "not guilty" had been returned regarding the fourth accused. Under section 303, Criminal Procedure Code, "the Judge may ask the jury such questions as are necessary to ascertain what their verdict is" and under section 304 "when by accident or mistake a wrong verdict is delivered the jury may before or immediately after it is recorded amend the verdict," but it has been repeatedly laid down that the Judge is only entitled to question the jury as to their verdict where it is ambiguous or incomplete, which was certainly not the case here, nor was it a case within the scope of section 304. The Judge's procedure was therefore at variance with the law, and we may add that even the final answers of three of the five jurors which the Judge interpreted as a verdict of "not guilty," are not consistent with each other on a proper view of the law and can only have been given under a misapprehension of the law in a very important particular to which we shall refer later on.

[Their Lordships here considered at length the Judge's charge to the jury and held that it contained numerous exaggerated and unfair comments upon the prosecution case. The judgment continued] :—

We can only come to the conclusion that the cumulative effect of such comment amounts to positive misdirection which the irregularities in the procedure which we have previously dealt with and in particular the individual questioning of the jury are such as to render it certain that they would exercise a most potent influence over the decision of the jury in the case of all the accused. It therefore becomes necessary to examine the evidence in the case of the acquitted persons as well as in the case of the eight convicted persons referred by the Judge under section 307, Criminal Procedure Code, in order to ascertain whether the verdict was erroneous and amounted to a miscarriage of justice. Their Lordships here considered the evidence and held that in the case of accused Nos. 3, 4, 8, 9, 14, 17 and 22 the acquittal by the jury was erroneous and was due to the misdirection of the Sessions Judge, and under section 423, Criminal Procedure Code, found them guilty of the offences charged.

In the case of accused Nos. 6, 7, 11, 13, 16, 20 and 21 also their Lordships convicted them of all the offences charged. Each

of these accused was sentenced to two years rigorous imprisonment.

Accused Nos. 1, 2, 10, 12, 15, 18, 19 and 23 were acquitted.]

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## APPELLATE CIVIL.

*Before Mr. Justice Sundara Ayyar and Mr. Justice Sadasiva Ayyar.*

V. T. KUNCHI AMMA AND FIVE OTHERS (DEFENDANTS NOS. 2 TO 7), APPELLANTS,

*v.*

V. T. AMMU AMMA AND ANOTHER (PLAINTIFF AND FIRST DEFENDANT) RESPONDENTS.*

1912. August 8 and 9.

*Malabar Law—Want of harmony among some members—Separate living of one—When entitled to separate maintenance.*

A junior member of a Malabar tarwad leaving the tarwad house on the ground that he or she does not feel quite comfortable there or is not able to live there in complete harmony with others so as to ensure happiness is not entitled to separate maintenance if he or she was responsible for the discomfort complained of. When a junior member will be entitled to separate maintenance, considered.

SECOND APPEAL against the decree of K. IMBICHUNNI NAIR, the District Judge of South Malabar at Calicut, in Appeal No. 59 of 1910, preferred against the decree of T. V. NARAYANAN NAIR, the District Munsif of Ottapalam, in Original Suit No. 294 of 1908.

The facts of this case are clearly stated in the judgment.

The Honourable Mr. *J. L. Rosario*, the Acting Advocate-General for the appellants.

*K. P. M. Menon* for the first respondent.

JUDGMENT.—This is a suit by a lady belonging to a Marumakkathayam Nair tarwad in Malabar for arrears of maintenance and the question debated between the parties is whether the circumstances under which she left the house and lived away in a separate house during the period for which she claims maintenance

SUNDARA AYYAR AND SADASIVA AYYAR, JJ.

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* Second Appeal No. 336 of 1911.