APPELLATE CRIMINAL—FULL BENCH.

Before Sir Murray Coutts Trotter, Kt., *Chief Justice*, *Mr. Justice Devadoss and Mr. Justice Beasley.*

1928, January 27.

VEERAPPA GOUNDAN AND SIX OTHERS, ACCUSED.*

Criminal Procedure Code (V of 1908), sec. 307—Reference under—Question for High Court—Whether Judge's view of jury's verdict justified by the evidence—If not, jury's verdict to be confirmed—High Court's duty not to retry case, de novo, as if no trial in Sessions Court—Jury primarily tribunal to find facts.

On a reference under section 307 of the Code of Criminal Procedure, the only question the High Court will concern itself with is, whether the Judge's view of the verdict of the jury, as being perverse, or unreasonable, or altogether against the weight of the evidence in the case, is justified by the evidence, and if it is of opinion it is not, the High Court will confirm the verdict of the jury. It is not the duty of the High Court to re-try the whole case *de novo*, as if there had been no trial in the Sessions Court at all.

The jury is made primarily the tribunal to find the facts; and it is not for the High Court to interfere with the verdict of the jury unless it is unreasonable.

Solomon v. *Bitton*, (1881) 8 Q.B.D., 176, followed.

REFERENCE under section 307 of the Code of Criminal Procedure, 1898, by the Assistant Sessions Judge of the Coimbatore Division in Case No. 91 of the calendar for 1927.

This Reference coming on for hearing, the Court (PHILLIPS and MADHAVAN NAIR, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

PHILLIPS, J.—Fourteen persons were accused of dacoity and out of them the jury found accused 1, 2, 4, 5, 6, 8 and 9 guilty.

* Reference No. 8 of 1927.

and acquitted the rest. The Assistant Sessions Judge disagreeing with the verdict of guilty has referred this case under section 307 of the Criminal Procedure Code. The Public Prosecutor opposed the reference. Mr. K. Kutti Krishna Menon on behalf of the accused supported it and contended that in a reference under section 307 the whole case was open before this Court and that in the words of the section we should consider the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury come to our own conclusion. His contention was that if on a consideration of all the evidence we differed from the opinion of the jury we were bound to acquit the accused. There is a conflict of decisions as to the exact functions of a Court to which reference under section 307 has been made.

In *Emperor* v. *Chellan*(1) it would appear that the Court was of opinion that this Court should 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 decision really goes little further than the words of the section itself, a major portion of the judgment being devoted to a consideration of the meaning of the word "opinion". In *Public Prosecutor v. Abdul Hameed*(2) it was observed at page 587, "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 it appears that the learned Judges held that there had been misdirection and material irregularity in the procedure. Neither of these cases therefore is really authority for the later decision in *In re Nannikudumban*(3), where a Bench of this Court consisting of SCHWABE, C.J., and WALLACE, J., seems to consider that a reference under section 307 re-opened the case entirely. SCHWABE, C.J., observed:

"I think the result is that this Court, when faced with that duty, had to make up its own mind realizing, of course, that it has a disadvantage in not having seen the witnesses, but has a freer hand than the Court of Appeal generally has; and I think that if the Court comes to the conclusion on that evidence that it should not convict if the case came before it in the capacity

(1) (1906) I.L.R., 29 Mad., 91. (2) (1913) I.L.R., 36 Mad., 585.
(3) (1923) 45 M.L.J., 406.

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of a trying Judge, and in arriving at that conclusion it must give due weight to the fact that other persons have taken other views and have seen the witnesses; in such a case it is the duty of this Court to acquit the prisoner."

WALLACE, J., remarks, that in the case of a reference under section 307 "the question whether the verdict in the case is to be for acquittal or for conviction is entirely open to the High Court, and left open to it to decide after considering the evidence and the opinions of the Judge and the jury. The Court is bound in no way by these opinions, any more than a Judge trying a case with assessors, though he must give due weight to the opinion of the assessors, is bound to follow their opinion. I think we are as a Court bound to decide for ourselves whether the evidence on which the jury based their verdict of "guilty" is in our eyes sufficient to justify such a verdict." From these two judgments it would appear that the learned Judges thought that the case was re-opened and that no particular weight should be attached to the verdict of the jury. A different view has prevailed in Calcutta and in *Emperor* v. *Golam Kader*(1), GREAVES, J., held that a verdict of the jury could only be set aside if it is such that the Court is constrained to feel that no reasonable man could have come to that verdict. Again in *Emperor* v. *Dhananjoy Raha*(2), the prior decisions on the point were refuted and it is observed:

"But the trend of judicial opinion has been in favour of preference of the unanimous verdict of juries on whom the duty is imposed by section 299 to decide which view of the facts is true," and again:

"As we have said, the view propounded in the case of *Queen* v. *Sham Bagdi*(3) still holds the ground, namely, that this Court should not interfere with an unanimous verdict of the jury unless we can say decidedly that we think that it is clearly wrong."

This view was upheld in *Emperor* v. *Har Mohan Das*(4), which appears to be the latest case in that Court and GREAVES, J.'s judgment is cited and approved, although in *Mamat Ali* v. *Emperor*(5), MOOKERJEE, J., who was a party to *Emperor* v. *Dhananjoy Raha*(2), seems to decide the case on the

(1) (1924) 25 Cri. L.J., 1284.
(2) (1923) I.L.R., 51 Calc., 347.
(3) (1873) 13 B.L.R. Appendix, 19.
(4) (1927) I.L.R., 54 Calc., 708.
(5) (1926) 44 C.L.J., 233.

evidence without specifically coming to the conclusion that the verdict was perverse. There are two recent unreported cases of this Court, Reference No. 22 of 1924 and Reference No. 11 of 1925. In the former case COUTTS TROTTER, C.J., and MADHAVAN NAIR, J., adopted the view in *Emperor* v. *Golam Kader*(1) and observed:

"In this country the jury system is part of the law of the land dealing with cases which the legislature has enacted shall be tried by jury. The country has taken that system for better or for worse," and on that ground adopted the view of the Calcutta High Court. In the latter case DEVADOSS and WALLER, JJ., seem to have taken it as settled that they could not interfere unless the verdict is a perverse one. I myself think that these latter views of this Court are in accordance with the law. Section 307 (3) says:

"In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal and subject thereto it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict . . ."

The powers of an Appellate Court are defined in section 423 and clause (2) of that section is, "Nothing herein contained shall authorize the Court to alter or reverse the verdict of a jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him.

It therefore seems doubtful to me whether this Court is intended to be given greater powers under section 307, than it would have in an appeal from the same trial. The jury are the ultimate judges of fact and their opinion is entitled to the utmost weight, and the mere fact that the trial Judgetakes a different view does not seriously detract from the weight of the jury's opinion. When section 307 says that due weight shall be given to the opinions of the Sessions Judge and the jury, it must be kept in mind that the opinion of the jury on a question of fact is entitled to the very greatest weight. It therefore seems to me that in a case of reference it is not within the province of this Court to examine the evidence and decide for itself whether in its opinion the evidence justifies the verdict arrived at, but it should examine the evidence to see whether

(1) (1924) 25 Cri. L.J., 1284.

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upon that evidence the verdict is such as a reasonable man could give. In view of the conflict of opinion on this point and as references are constantly being made it seems desirable to refer the matter for the opinion of a Full Bench.

We therefore refer this case for opinion as to whether the view expressed in *In re Nannikudumban*(1) or the view expressed in Reference No. 22 of 1924 is the correct one.

MADHAVAN NAIR, J.—I agree. In deciding the case referred to the High Court under section 307 of the Code of Criminal Procedure, I think the trend of opinion in this Court has been not to interfere with the verdict of the jury unless it is clearly and manifestly wrong. As early as 1884 (see 2 Weir, page 589) this Court stated that "upon the decisions of this and other High Courts, we ought not to interfere upon any mere preponderance of evidence, or unless we are satisfied beyond reasonable doubt that the verdict is so distinctly against the evidence that it may be termed a perverse verdict." This principle was cited with approval and the case was followed in Criminal Appeal No. 470 of 1892 (see 2 Weir, page 390). In Reference No. 12 of 1925 referred to him owing to a difference of opinion between two learned Judges, SPENCER, J., after referring to *In re Nannikudumban*(1) in support of the position that a duty was cast upon the High Court of examining the entire evidence and coming to a conclusion as to the effect of that evidence whilst giving due weight to the opinion of the Judge and the jury, stated that "ordinarily the High Court will not interfere with the verdict of the jury unless it is clearly and manifestly wrong and that this is the expression used in *Queen-Empress* v. *Mania Dayal*(2), as to the condition that would justify the High Court convicting an accused who has not been found guilty by the jury or acquitting a person who has been found guilty by the jury." Apparently the learned Judge was not prepared to follow *In re Nannikudumban*(1) to its fullest extent. In the case before us we are asked to interfere on the ground that the preponderance of evidence and the probabilities are in favour of the view taken by the Sessions Judge. The ground urged is supported by *In re Nannikudumban*(1), but is clearly opposed to the principle laid down in the earlier cases and given effect to in the recent decisions of this Court. In Reference No. 22 of 1924 this Court has expressed the view

(1) (1923) 45 M.L.J., 406. (2) (1886) I.L.R., 10 Bom., 497.

that we can only set aside the verdict of a jury "if the verdict is such that the Court is constrained to feel that no reasonable man can come to such a verdict."

Though the whole case referred is left open for consideration by the High Court under section 307 of the Code of Criminal Procedure, I think that in giving due weight to the opinion of the jury, that opinion should not be interfered with unless it is clearly and manifestly wrong. I agree for the reasons given by my learned brother that the question proposed by him may be referred to a Full Bench.

ON THIS REFERENCE—

Public Prosecutor for the Crown.—Section 307 of the Criminal Procedure Code has to be read with section 423 (2). The view that has the greater support is that the verdict of the jury should not be interfered with except in cases of perversity. This view has prevailed for a long time. See *Queen* v. *Wuzir Mundul*(1). The jury are appointed to deal with questions of fact. The power of the High Court to set aside the verdict of the jury cannot be denied; *The Empress* v. *Mukhun Kumar*(2). The test is that laid down in *Solomon* v. *Bitton*(3), "whether the verdict was such as reasonable men ought to have given, and not upon whether the learned Judge who tried the action was dissatisfied or not with the verdict." That principle has been recognized as a guide in the Indian High Courts, *Reg* v. *Khanderav Bajirav*(4). There are some decisions indicating that on a reference the High Court is to form its own opinion on the evidence. I submit that this Court should adopt a middle course and decide in each case what it would do, giving heavier weight to the view of the jury. See *Emperor* v. *Har Mohan Das*(5), *Emperor* v. *Dhananjoy Raha*(6).

K. Kuttikrishna Menon for accused.—The section says weight ought to be given to the opinion of the Judge also. There is no warrant in the statute for the contention that the opinion of the jury should be preferred to that of the Judge. The benefit of the doubt should be given to the accused. In *Emperor* v. *Chellan*(7) the High Court was held free to come to its own conclusion on the evidence. The effect of a reference was to open

(1) (1876) 25 W.R. (Cri.), 25. (2) (1877) 1 C.L.R., 275.
(3) (1881) 8 Q.B.D., 176. (4) (1875) I.L.R., 1 Bom., 10.
(5) (1927) I.L.R., 54 Calc., 708. (6) (1928) I.L.R., 51 Calc., 347.
(7) (1906) I.L.R., 29 Mad., 91.

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up the whole case, *Public Prosecutor* v. *Abdul Hameed*(1). Without considering the entire evidence the High Court would not be in a position to give due weight to the opinions of the Judge and the jury, *Emperor* v. *Lyall*(2). In *Emperor* v. *Yakub*(3) the High Court on a reference went into a consideration of the entire circumstances.

OPINION.

COUTTS TROTTER, C.J.

COUTTS TROTTER, C.J.—The Code of Criminal Procedure, 1898, is quite definite as to the position of the verdict of a jury in the case of an appeal from the verdict of a jury, which is dealt with in Chapter XXXI. By section 418 it is enacted that "An appeal may lie on a matter of fact as well as a matter of law, except when the trial was by jury in which case the appeal shall lie on a matter of law only." And the same view is emphasized by section 423 (2): "Nothing herein contained shall authorize the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him."

The inference is that the draftsman of the Indian Statute was familiar with the English law as laid down in *Solomon* v. *Bitton*(4) and so far as concerned appeals meant to enact that state of things for India. It may be useful to examine that decision in reference to the state of the law as it then stood. Before the Judicature Act, applications for a new trial on the ground that the verdict of the jury was against the weight of the evidence came before a tribunal whose decision was final unless an appeal was taken to the House of Lords, and that tribunal almost invariably had as one of its

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(1) (1913) I.L.R., 36 Mad., 535.
(2) (1901) I.L.R., 29 Calc., 128.
(3) (1925) 30 C.W.N., 859.
(4) (1881) 8 Q.B.D., 176.

members the Judge who had presided at the trial. If he was "dissatisfied with the verdict of the jury," i.e., did not agree with it, he communicated that to his brother Judges and it is obvious from the reports of the day that that view of the trial Judge carried great weight with the Judges who sat with him. In 1881, when *Solomon* v. *Bitton*(1) was decided, the position was that applications for a new trial came in the first instance before a Divisional Court, one of whose members might be the trial Judge, who could express dissatisfaction with the verdict of the jury and communicate that opinion to his colleagues. But an appeal lay to the newly constituted Court of Appeal, which *ex hypothesi* could not have the trial Judge as one of its members—except of course by the accident of an intervening promotion. *Solomon* v. *Bitton*(1) was tried by LINDLEY, J., as he then was; the jury returned a verdict for the plaintiff, and the application for a new trial came before a Divisional Court of three Judges, of whom LINDLEY, J., was one. He expressed himself as dissatisfied with the verdict; and on that, among other grounds, a new trial was ordered. The plaintiff appealed against that decision to the Court of Appeal, and the case came before JESSEL, M.R., BRETT, and COTTON, L., JJ., none of whom had had any connexion with the trial. They laid down the rule in these words:

"The rule on which a new trial should be granted on the ground that the verdict was unsatisfactory as being against the weight of evidence, ought not to depend on the question whether the learned Judge who tried the action was or was not dissatisfied with the verdict, or whether he would have come to the same conclusion as the jury, but whether the verdict was such as reasonable men ought to have come to."

(1) (1881) 8 Q.B.D., 176.

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That pronouncement, made 48 years ago, has never been questioned in England, and is enshrined in an even more definite form in the Indian Statute, so far as appeals are concerned. Later judicial pronouncements have usually preferred the negative to the positive way of putting it, having regard to the fact that the onus lies upon the party who contends that the verdict of the jury should be set aside; and the task laid upon him is commonly defined as being to show "that the verdict was such as no reasonable men could have come to." Up to 1909 the English authorities, of course, relate to verdicts in civil cases. Appeals on the facts are now possible in England in criminal cases at the instance of the accused, subject to certain safeguards. It is enacted by section 3 of 7 Edw. VII, c. 23.

"A person convicted of an indictment may appeal under this Act to the Court of Criminal Appeal . . . (*b*) with the leave of the Court of Criminal Appeal or upon the certificate of the Judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone . . ."

The English decisions on this section are thus summarized in the last edition of Archbold at page 337 and I have satisfied myself that the summary is accurate.

Verdict against the weight of evidence.

"In order to succeed on this ground it is necessary to show that the verdict is unreasonable or cannot be supported having regard to the evidence. It is not sufficient to show merely that the case against the appellant was a very weak one; . . . nor is it enough that the members of the Court of Criminal Appeal feel some doubt as to the correctness of the verdict . . . nor that the Judge of the Court of trial has given a certificate on that ground."

But the Indian Act has provided for another contingency than that of appeal. It gives power to the Sessions Judge to send up a case *suo motu* to the High Court in certain circumstances. Those circumstances are defined in section 307 (i) and are that the Judge should (*a*) disagree with the verdict of the jurors or the majority of the jurors and (*b*) be clearly of opinion that it is necessary for the ends of justice to submit the case. That seems to indicate that something more should be in the Judge's mind than a mere disagreement with the jury, or a mere feeling that he would himself have come to a different conclusion. That something more must be a conclusion that the verdict was one which reasonable men could not have arrived at on the evidence before them.

That being the duty of the Sessions Judge, we have to look at sub-section 3 to ascertain what is the duty of the High Court. The duty is there defined as follows:—"It (i.e., the High Court), shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict the accused." The wording of the sub-section is most unfortunate: it appears on the face of it to leave open the very question which has now arisen for our decision, and to leave us without real guidance upon it. Are we to take it that when the Sessions Judge submits such a case to the High Court, the whole matter is re-opened, and that we are to try the case as if there had been no trial at the sessions at all, or are we to have regard to the principle that the verdict of a jury shall not be upset unless in the opinion of the High Court it is unreasonable, and involves a miscarriage of justice? A Bench of this Court consisting of Sir WALTER SCHWABE, C.J., and WALLACE, J., took the former view, following some earlier authorities in the

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Court. The Calcutta High Court has preponderantly inclined to the latter view. On a direction "to give due weight to the opinions of the Sessions Judge and the jury" when those opinions are in conflict, it is easy to urge that, as they cancel one another, the High Court must go into the matter *de novo*; and the use of an imponderable adjective like "due" deprives us of an assistance which I feel that the statute should have given us.

As has already been said, it must be supposed that the submission by the Judge involves that in his opinion the verdict of the jury was perverse or unreasonable or altogether against the weight of the evidence—whichever phrase be preferred. When the case comes up to the High Court, it seems to us that we can and should, without shirking any duty imposed upon us by the statute, confine ourselves to the question: "Was the Judge's view of the verdict justified by the evidence?" and if we think it was not, to confirm the verdict of the jury. The jury is clearly made primarily the tribunal to find the facts; and when they have found them in one direction or the other, it is not for us to interfere unless the verdict is unreasonable. Assuming that Sessions Judges do not act under section 307 unless that is their view of the verdict in question (and they clearly ought not to act unless it is their view), we think that the duty of the High Court is discharged when it expresses its agreement or disagreement with that view of the Sessions Judge. In this case we think that the Divisional Bench was quite entitled to take the view (as it obviously did) that there was no sufficient material before it to conclude that the learned Sessions Judge was justified in so regarding this verdict and we remit

the case to the Divisional Bench with this expression of our opinion.

[*Ed.*:—The decision of Sir WALTER SCHWABE, C.J., and WALLACE, J., in Reference No. 5 of 1923 (*In re Nannikudumban* (1923) 45 M.L.J., 406) must be regarded as overruled by this decision.]

B.C.S.

APPELLATE CRIMINAL—FULL BENCH.

Before Mr. Justice Ramesam, Mr. Justice Waller and Mr. Justice Jackson.

THIMMAPPA AND ELEVEN OTHERS (ACCUSED), PETITIONERS,

v.

THIMMAPPA (COMPLAINANT), RESPONDENT.*

1928, April 25.

Criminal Procedure Code (V of 1898 as amended by Act of 1923), sec. 162 (1)—"Any such statement," whether inclusive of oral statements.

The words "any such statement" in the first paragraph of clause (1) of section 162, Criminal Procedure Code, cover not only written statements, but oral statements as well.

King-Emperor v. *Maung Tha Din*, (1926) I.L.R., 4 Rang., 72 (F.B.), followed and *Venkatasubbiah* v. *King-Emperor*, (1925) I.L.R., 48 Mad., 640, overruled.

PETITION under sections 438 and 439 of the Code of Criminal Procedure (V of 1898) praying the High Court to revise the conviction and sentence of the Court of Session of Anantapur Division, dated 29th September 1927 and made in Criminal Appeal No. 19 of 1927 preferred against the judgment in C.C. No. 18 of 1927,

* Criminal Revision Case No. 821 of 1927.
Criminal Revision Petition No. 731 of 1927.