security will be vacated, and they will retain the amounts drawn unconditionally. But, if such a suit is filed, the security will enure to the benefit of the respondents' creditors, until that suit terminates in their favour. We modify the order of the learned Judge accordingly. In each of the appeals, the contesting creditors—respondents, who obtained money decrees, will pay the costs of the appellant proportionate to the interests they claim. We make no order as to costs in the original Court.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Horace Owen Compton Beasley, Chief Justice, and Mr. Justice Krishnan Pandalai.

GUNDUTHALAYAN ALIAS THAILAN (ACCUSED), APPELLANT.*

1929, November 22.

Murder—Conviction for—Sentence lesser than death—Circumstance in which High Court will enhance sentence—Notice to show cause against enhancement—Practice relating to.

Where on a conviction for murder the Sessions Court awarded a sentence lesser than death, the High Court will not enhance the sentence, unless it is satisfied that, on the evidence in the case, the sentence of death is the only possible sentence which could have been passed by the Sessions Court.

The practice of issuing notice to show cause against enhancement of sentence at the time of the admission of a criminal appeal is not illegal, and is one which has been very frequently adopted in the Madras High Court. It would, however, be desirable that, when an appeal comes up for admission by an Appellate Court, the records should be sent for before causing a notice to show cause against enhancement of sentence to issue.

---

* Criminal Appeal No. 432 of 1929 and Criminal Revision Case No. 733 of 1929.

GUNDU-THALAYAN, *In re.*

APPEAL against the order of the Court of Session of the Salem Division in Case No. 18 of the Calendar for 1929 and case taken up in revision under section 439 of the Code of Criminal Procedure calling upon the accused to show cause why the sentence of transportation for life passed on him under section 302, Indian Penal Code, should not be enhanced to one of death.

N. S. Mani for accused.

Public Prosecutor (*L. H. Bewes*) for the Crown.

The JUDGMENT of the Court was delivered by

BEASLEY, C.J.

BEASLEY, C.J.—There were two charges against the accused in the Sessions Court of Salem, one of murder under section 302, Indian Penal Code, and the other of causing hurt with a dangerous weapon under section 324, Indian Penal Code. He was convicted of both the offences and was given a sentence of transportation for life in respect of the charge of murder and three months' rigorous imprisonment in respect of the other charge.

When the appeal came up for admission by the High Court, the learned Judge who had to consider it admitted the appeal, as of course is the invariable custom in cases of murder appeals, and at the same time ordered notice to issue to the accused to show cause why the sentence of transportation for life awarded to him should not be enhanced; so that, we have here his appeal against his conviction, and also his appearance on notice to show cause why the sentence passed on him should not be enhanced.

The facts of the case can be stated quite briefly, and they are that in the village of Pavalathampatti there was the usual festival in connection with the Pongal and the procession of bulls in front of the temple, and the custom, according to the evidence, is that the first honours should go to certain persons. In this case,

P.W. 10 was entitled to the first honours, according to the evidence, being so entitled on the hereditary principle. But the accused, who is a distant cousin, questioned P.W. 10's right to enjoy the first honours, there was a dispute about it, and the Goundan headmen thought that it would be better to adjourn the bull play for two days in order that the matter might be settled. Then (there is a conflict about this) the accused is said by the majority of the prosecution witnesses to have objected to any adjournment of the play saying that he was entitled to the honours; and there is evidence that the deceased man also objected to the adjournment saying that the matter might be decided on the spot, that the deceased remonstrated with the accused for interfering with the judgment of the headmen and that the result was a sort of a challenge to him; whereupon, the accused took out his knife and stabbed him on his left nipple inflicting a very serious injury from which he died. At this, P.W. 3 ran forward to interfere and he was also stabbed by the accused, and this forms the subject of the other charge against the accused, namely, causing hurt with a dangerous weapon. The dying man was taken to the Salem hospital. In the meantime, his father, P.W. 6, gave a report to the village munsif in which the accused was charged with the offences. The deceased also made a dying declaration, Exhibit C, to the Stationary Sub-Magistrate in which he sets out the dispute with regard to the honours and states that it was the accused who stabbed him. He died on the 17th, the date of the occurrence being the 15th. Although in his defence the accused denies that he ever stabbed the deceased and says that the crime was foisted on him, the evidence is quite clear and abundantly proves that it was the accused, and none other, who stabbed the deceased, and clearly justifies his conviction of the

GUNDU-THALAYAN, *In re.*

BEASLEY, C.J.

offence of murder, and Mr. Mani, who appears on his behalf, does not dispute the justice of his conviction. He, however, is concerned with the question of sentence, and argues that, under all the circumstances, the sentence passed by the learned Sessions Judge is the correct one, and that the learned Sessions Judge has properly exercised his discretion in awarding the lesser sentence. What the learned Sessions Judge says about it is contained in paragraph 6 of his judgment. He therein states, "As regards the punishment to be awarded, this appears to be an offence committed without pre-meditation. Some evidence has been adduced for the prosecution that there was ill-feeling between the accused and the deceased on account of a woman called Thailammal, who had been allowing the accused her favours, and whom the accused suspected of becoming intimate with the deceased. I do not attach much weight to this evidence and I do not think that any such enmity was the cause of the stabbing. I find, therefore, that the offence was committed without pre-meditation and on one of these unfortunate momentary impulses which seem to be so common amongst the inhabitants of this district. I consider, therefore, that the accused, who is a young man of 24, may be shown mercy; and the sentence of the Court is that he be sentenced to transportation for life upon the first count under section 302, Indian Penal Code." Those are the reasons given by the learned Sessions Judge, and we think that the proper test to be applied to these cases for enhancement of sentence is whether the only sentence which could have been passed on the evidence was the sentence of death. In a case before a Bench of the Bombay High Court, *Emperor* v. *Mangal*(1), Sir NORMAN MACLEOD, C.J., says this:

(1) (1924) I.L.R., 49 Bom., 450.

"There are many murder cases which come on appeal to this Court in which it has been evident that the Sessions Judges were too lenient and had exercised the discretion which they are given by law too much in favour of the accused. But, as I have already stated, we do not like to interfere except when we think that the sentence of death is the only possible sentence to be inflicted. In this case, although we think that the Sessions Judge ought to have sentenced the accused to death, we are not disposed to proceed with the notice to enhance the sentence."

We are of the opinion that the reasons stated by Sir NORMAN MACLEOD for not interfering with the discretion of the Sessions Judge are sound, namely, that the High Court should not enhance the sentence, unless it is satisfied that the sentence of death was the only possible sentence which could have been passed by the learned Sessions Judge. In this case, although we think that the sentence that should have been passed upon the accused was one of death, we cannot say that it was the only possible sentence which could have been passed. Under these circumstances, we are not disposed to interfere with the punishment awarded by the learned Sessions Judge.

At the same time, we are quite satisfied that the accused was properly convicted of the offence of murder and of causing hurt with a dangerous weapon, and his appeal against his conviction must be dismissed.

Another matter to which our attention was directed by Mr. Mani was that the learned Judge who admitted the appeal ought not, at the time of admitting the appeal, to have caused notice to issue for enhancement of sentence, and that the proper procedure is for the Criminal Bench itself on hearing an appeal, if satisfied that there should be an enhancement of the sentence, to issue notice to show cause against enhancement, and he has referred us to the case in *Emperor* v. *Mangal*(1), to which we have already referred. But, in that case,

(1) (1924) I.L.R., 49 Bom., 450.

GUNDU-THALAYAN, *In re.*

BEASLEY, C.J.

the Bench of the Bombay High Court, whilst holding that this procedure adopted was quite legal, expressed the opinion that it was undesirable. We agree that the procedure is not illegal, and it is one which has been very frequently adopted in this Court. At the same time, we wish to say that, we think, that when an appeal comes up for admission by the Appellate Court, it would be desirable in future if, before causing a notice to show cause against enhancement of sentence to be sent, the records of the case were sent for. We think that would be more regular than merely reading the judgment of the learned Sessions Judge and issuing notice, as was done in this case, though, no doubt, sufficient of the facts appear in that judgment.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Horace Owen Compton Beasley, Chief Justice, and Mr. Justice Krishnan Pandalai.

1929, December 9.

SANKARALINGA THEVAN, PRISONER (ACCUSED), APPELLANT.*

First information report—Statements in—Purposes for which can be used—Variation between statement of witness in first information report and statement in Sessions Court—Effect of.

Statements in the first information report can only be used for the purpose of contradicting or corroborating a witness and for no other purpose.

If a witness in the Sessions trial makes a statement different to that attributed to the witness in the first information report, that discredits the evidence of the witness to that extent in the

---

* Referred Trial No. 158 of 1929.