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which it was passed, and does not depend upon the priority of the debt. I decline therefore to remand this case. For the above reasons the appeal is allowed, the decision of the lower appellate Court is reversed, and that of the Court of first instance is restored and confirmed with costs.

BRODHURST, J.—I concur.

Appeal allowed.

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February 7.

CRIMINAL REFERENCE.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

QUEEN-EMPRESS *v.* McCARTHY.

Act III of 1884 (*Criminal Procedure Code Amendment Act.*) *s.* 8 (6)—*European British subject—Trial by District Magistrate with a jury—Procedure "in a trial by jury"—Criminal Procedure Code*, s. 307—*Power of District Magistrate dissenting from verdict to submit the case to High Court—Powers of High Court under* s. 307—*Criminal Procedure Code*, ss. 418, 423 (*d*)—*Defamation—Act XIV of* 1860 (*Penal Code*), s. 499, *Explanation* 4—*Words per se defamatory.*

The effect of cl. 6 of s. 8 of Act III of 1884 (Criminal Procedure Code Amendment Act) is to confer upon the District Magistrate precisely the same authority as the Sessions Judge has, under s. 307 of the Criminal Procedure Code, to submit to the High Court a case in which he disagrees with the verdict of a jury so completely that he considers a reference necessary. The expression "trial by jury" as used in cl. 6 of s. 8 does not only refer to proceedings up to the time when the jury pronounce their verdict, but refers generically to cases triable with a jury as contradistinguished from cases tried with the help of assessors or in any other manner mentioned in the Criminal Procedure Code.

No trial can be, legally speaking, concluded until judgment and sentence are passed, and the trial of a case referred by a Sessions Judge to the High Court under s. 307 of the Criminal Procedure Code remains open for the High Court to conclude and complete, either by maintaining the verdict of the jury and causing judgment of acquittal to be recorded, or by setting aside the verdict of acquittal, and causing conviction and sentence to be entered against the accused.

The provisions of s. 307 of the Criminal Procedure Code are not in any way cut down by ss. 418 and 423; and the High Court has power, under s. 307, to interfere with the verdict of the jury where the verdict is perverse or obtuse, and the ends of justice require that such perverse finding should be set right. The power of the High Court is not limited to interference on questions of law, *i.e.*, misdirection by the Judge, or misapprehension by the jury of the Judge's directions on points of law.

Explanation 4 of s. 499 of the Penal Code does not apply where the words used and forming the basis of a charge are *per se* defamatory; though when the meaning of words spoken or written is doubtful, and evidence is necessary to determine the effect of such words and whether they are calculated to harm a

particular person's reputation, it is possible that the principle enunciated in the explanation might and would with propriety be applied.

THIS was a trial by the District Magistrate of Mussoorie and a jury, of a European British subject, Mrs. Anne McCarthy, under s. 8 of Act III of 1884 (Criminal Procedure Code Amendment Act) for defamation. The complainant was one H. G. Scott, Vice-Chairman of the Municipal Board of Mussoorie. At a meeting of the Board on the 12th November, 1886, which was presided over by the complainant, a resolution was passed, calling on the defendant to pay certain taxes due by her to the Municipality, and was signed by the complainant as Vice-Chairman. A copy of the resolution, signed by the Secretary, was sent to the defendant, who returned it after writing upon it the following words:—"Mrs. McCarthy will take no notice of anything written by H. G. Scott, he already having shown himself a coward, dishonest man, and something worse than either."

These words were the subject of the charge of defamation brought by Mr. Scott against the defendant, and tried by the District Magistrate with a jury consisting of seven persons. The jury, by a majority of four to three returned a verdict of acquittal. Upon this the District Magistrate made the following order:—"The Court differs from the majority of the jury, and considers Mrs. McCarthy has committed the offence of defamation as defined in s. 499 of the Penal Code, and punishable under s. 500. The Court cannot see that any of the Exceptions mentioned in s. 499 are applicable to this case. The records of the case will be submitted to the High Court under s. 307 of Act X of 1882 for orders." The District Magistrate did not record the heads of his charge to the jury, as required by s. 367 of the Criminal Procedure Code.

The *Public Prosecutor* (Mr. *C. H. Hill*) supported the reference.

Mr. *A. Strachey*, for the defendant.

Two preliminary objections were taken on behalf of the defendant to the hearing of the reference. The first was that the District Magistrate had no power, under s. 8, cl. (6) of Act III of 1884, read with s. 307 of the Criminal Procedure Code, to submit the case to the High Court, inasmuch as proceedings subsequent to the verdic were not proceedings "in a trial by jury" to which

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s. 8, cl. (6), applied, but fresh proceedings, in the nature of appeal or rehearing, and taken after the "trial by jury," properly so called, had been concluded. In support of this objection it was argued that s. 295 of the Code clearly implied that the delivery of the verdict was "the conclusion of the trial." The second objection was that, assuming the District Magistrate to be competent to submit the case, references under s. 307 would lie only on a point of law, and the High Court could not reverse the verdict except on the ground of misdirection by the Judge, or of misunderstanding on the part of the jury of the law as laid down by him. It was contended that this followed from the words in s. 307, "in dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal;" these powers, in cases of trial by jury, being defined and limited by s. 418 and s. 423 (*d*) of the Code. Reference was made to s. 263 of the Code of 1872 and the difference between the wording of the last paragraph of that section (1) and that of the last paragraph of s. 307 of the present Code.

STRAIGHT, J.—This is a reference made by the Magistrate of Mussoorie, under s. 8 of Act III of 1884, read in conjunction with s. 307 of the Criminal Procedure Code. The respondent, Mrs. McCarthy, was charged before him with defamation in respect of a person of the name of H. G. Scott, and she claimed the privilege accorded to European British subjects by Act III of 1884, to have the charge against her tried by the Magistrate with the assistance of a jury. The case was heard and tried in the manner provided in s. 8 of Act III of 1884, and the result was that four out of seven jurors were of opinion that Mrs. McCarthy did not defame Mr. Scott, and the charge was not sustained, the other three holding that the charge was proved. The Magistrate, considering that the case had not been brought within any of the Exceptions to s. 499 of the Indian Penal Code, and being of opinion that the defendant ought to have been convicted, has suspended judgment, and reported the case to this Court, for such orders as it may think proper to

(1) "The High Court shall deal with the case so submitted as it would deal with an appeal, but it may acquit or convict the accused person on the facts as well as law without reference to the particular charges as to which the Court of Session may have disagreed with the verdict, and, if it convict him, shall pass such sentence as might have been passed by the Court of Session."

make under s. 307 of the Criminal Procedure Code. The learned counsel for the respondent has taken two preliminary objections before us,—first, to our jurisdiction to entertain this matter at all, or, putting it more correctly, to the jurisdiction of the Magistrate to refer the case to this Court; and secondly, to the extent of the authority conferred upon us under s. 307 of the Criminal Procedure Code; the effect of the learned counsel's contention being, shortly, that we have no authority whatever to deal with the findings of fact, but our jurisdiction is limited to interfere only upon questions of law. Now, as to the first contention, the learned counsel has laid great stress, and indeed his whole argument rests upon the language of cl. 6 of s. 8 of Act III of 1884, and he contends that, reading the words in cl. 6 of that section, which confers upon the District Magistrate exercising his powers under that Act, powers analogous to those of a Sessions Judge trying with the aid of jurors, the expression "in a trial by jury" as used in the section means proceedings down to the time when the jury have delivered their verdict, and not afterwards, and therefore the Magistrate had no power under the statute to refer to this Court a verdict of a jury with which he disagreed, to be dealt with by us by virtue of the jurisdiction conferred upon us under s. 307 of the Criminal Procedure Code in regard to his disagreement on a matter of fact. This argument of the learned counsel for the respondent was very ingeniously put, but from the first I entertained no doubt that what was contemplated by cl. 6 of s. 8 of Act III of 1884, was to confer upon the District Magistrate precisely the same authority as the Sessions Judge has under s. 307 of the Criminal Procedure Code; and that if, as in the present case, he disagreed with the verdict of a jury so completely that he considered it necessary to submit the case to this Court, he ought to do so, and this Court would deal with that reference by the Magistrate in exactly the same way as it could upon a reference by a Sessions Judge, pure and simple, under s. 307 of the Criminal Procedure Code. Now, it has never been doubted that, under s. 307 of the Criminal Procedure Code, a Sessions Judge has clear authority, if he disagrees with the verdict of a jury on questions of fact alone, to submit the case to this Court, and this Court has under the last paragraph of s. 307 of the Criminal Procedure Code, full power of completing the trial, either by

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upholding the acquittal and directing it to be entered, or setting aside the acquittal and recording a conviction and sentence. The learned counsel, as I have before said, sought to induce us to limit the expression "trial by jury" as used in cl. 6 of s. 8 to that period of time at which the jury pronounced their verdict, and no further. I pointed out at the beginning of the argument that the expression "trial by jury" is one which is used in the Criminal Procedure Code so as to generically refer to the class of cases triable by a Sessions Judge with the help of a jury, and their trial, as contradistinguished from those tried with the help of assessors, or in any other manner mentioned in the Code. S. 307 of the Criminal Procedure Code, to which reference has been made, occurs in Chap. XXIII of the Code, providing for trial before High Courts and Courts of Session, and comes under *F*, headed "Conclusion of trial in cases tried by jury." I do not think that trial by jury or any trial can be, legally speaking, concluded until judgment and sentence are passed; and I am of opinion that in those cases in which the Sessions Judge trying with the help of a jury differs from the verdict of the jury and, suspending judgment, refers the case to this Court under s. 307, the trial cannot be said to have concluded, but remains open for this Court upon the reference by the Judge to conclude and complete it, either by maintaining the verdict of the jury and causing judgment of acquittal to be recorded, or by setting aside the verdict of acquittal and causing conviction and sentence to be entered against the accused. For this reason I do not accept the contention of the learned counsel for the respondent upon his first objection, and I did not require Mr. *Hill*, who represents the appellant, to reply to this part of the argument on behalf of the respondent (1).

Then Mr. *Strachey* contends that, looking to the terms of s. 307 in conjunction with ss. 418 and 423 of the Criminal Procedure Code, in hearing a reference made by a District Magistrate, our hands are tied, as far as facts are concerned, and we can only deal with the reference if there has been error in law in the proceedings below. For one moment speaking as to the policy of this provision, I have no doubt it was felt by the Legislature

(1) See *The Queen* v. *Castro*, L. R., 9 Q. B. 350, where it was held, dissenting from the opinion of the Judges in *O'Connell* v. *The Queen*, 11 Cl. & F. at p. 250, that the word "trial" includes passing sentence.—REP.

that in this country, wherever the jury system was introduced, such system being a novel one and its application being likely to be attended in its infancy at least by considerable difficulties, it was imperatively necessary to provide some safeguard against miscarriage of justice, so that in cases where the jury delivered a perverse or obtuse verdict, the District Judges should be afforded an opportunity of reporting to this Court, as the ends of justice required that such perverse finding should be set right by this Court. This Court, in my opinion, has distinct power to interfere in such cases under s. 307, and I do not think that this power is in any way affected by s. 418, or anything that appears in the appeal chapter. That section solely and entirely relates to appeals, either by the accused who has been convicted, or by the Local Government who are impeaching an order of acquittal. Mr. *Hill* in his argument conceded, what I pointed out, namely, that on an appeal from an acquittal by a jury by Government, such an appeal would probably be governed by cl. (*d*) of s. 423, and it would have to be limited to questions of law; *i. e.*, misdirection by the Judge or misapprehension of the directions of the Judge by the jury on points of law. But this is not so here; this is a case directly falling within s. 307, and I do not think that the clear provisions of that section are in any way curtailed or cut down by ss. 418 and 423; and, though a reference by a Magistrate under s. 307, read in conjunction with s. 8 of Act III of 1884, it stands on an identical footing with cases where the District Judge disagrees with the verdict of a jury; and I hold that we can question the verdict of the jury and disturb it, if it is proper to do so. Now, whether in a reference by a Judge (which under s. 8 of Act III of 1884 would also include a District Magistrate), it is proper that we should interfere with a verdict of acquittal, I have before this taken occasion to say from this Bench that except under strong circumstances, where the facts of the case coerce me to disturb it, or where there is obvious misapprehension of law applicable to the facts, I am strongly opposed to touching the unanimous decision of the tribunal appointed by law to determine the guilt or innocence of accused persons; and I do myself, and as far as I am aware my brother Judges also, religiously recognise this principle. In the present case, however, four jurors acquitted the respondent, and three were in favour of conviction,

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and if we can for a moment treat the Magistrate's view of the case as the voice of a juryman, his opinion, adverse to the respondent, makes four of one opinion, and four of another as to the guilt of the accused. In the present case there is and can be no real controversy as to the facts, and the only question is whether the words, "Mrs. McCarthy will take no notice of anything written by H. G. Scott, he already having shown himself a coward, dishonest man, and something worse than either," written by the respondent upon a copy of the resolution of the Municipal Board, were defamatory, within the meaning of s. 499 of the Indian Penal Code, and were published by her. Now, although we had addressed to us some remarks by the learned counsel for the respondent, founded on good sense, as to the operation of Explanation 4 of s. 499, they are answered by the observation that that Explanation does not apply where the words used and forming the basis of a charge are *per se* defamatory. When an expression, used verbally or in writing, is doubtful as to its significance, and some evidence is necessary to decide what the effect of that expression will be, and whether it is calculated to harm a particular person's reputation, it is possible that the principle enunciated in Explanation 4 of s. 499 might, and would with propriety, be applied. But in this case there is no question as to the significance or meaning of the words written. They are distinctly defamatory, within the meaning of s. 499, and as such, whether they were written in haste or in anger, the respondent is clearly responsible, and unless she can show that her case falls within any of the Exceptions to the section, it was and is impossible for her to resist a verdict of guilty. Looking to the cross-examination of Mr. Scott, I find nothing there to show any justification or excuse within the Exceptions to s. 499, nor has anything of the kind been established by her own statement in the Court below.

[His Lordship proceeded to discuss the evidence, and came to the conclusion that the verdict of acquittal must be quashed, and the defendant convicted of defamation; but that, taking all the circumstances into consideration, a fine of Rs. 10 would meet the justice of the case.]

TYRRELL, J.—I concur.