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Court on behalf of the minor, is fatal to the suit; this, if answered in the affirmative, would mean that no evidence, except evidence of express permission, would be admissible to show that the Judge had sanctioned the institution of the suit. We think there is nothing in the nature of the sanction given under s. 3, Act XL of 1858, which takes it out of the general rule of evidence that sanction may be proved by express words or by implication. We are, therefore, unable to hold that the want of express permission is fatal to a suit. At the same time we must say that, according to the practice in the Mofussil Courts, every order is entered in the order-sheet attached to the record, and the proper and regular manner of proving permission would be by the production of the order-sheet or a certified copy thereof.

J. V. W.

APPELLATE CRIMINAL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Beverley.

JASPATH SINGH *v.* QUEEN EMPRESS.*

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Charge to jury—Criminal Procedure Code (Act X of 1882), s. 298—Duty of Judge when the jury are uncertain as to the offence committed—Evidence disbelieved in some parts and accepted in others.

A jury, after retiring, returned to the box, and after unanimously finding both prisoners not guilty of the charges framed against them, stated to the Judge that they thought an offence had been committed by one of the prisoners, but were uncertain as to the section of the Penal Code applicable to his case; the Judge thereupon made over to them a copy of the Penal Code, leaving them to decide under what section the offence fell. *Held*, that he had failed in his duty, and that he should have asked the jury what doubts they had as to the crime which had been committed, and should have explained to them the law and informed them what offence the facts would prove against the prisoner if they believed those facts.

Where the evidence at a trial is in part disbelieved, as to which part it is thought that the witnesses had committed perjury, it is unsafe to accept the evidence of those witnesses in other parts and to convict the prisoner thereunder.

* Criminal Appeal No. 762 of 1886, against the order passed by H. Beveridge, Esq., Sessions Judge of Howrah, dated the 13th of September, 1886.

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JASPATH SINGH and Dino Nath Sen were charged under ss. 304 and 326 of the Indian Penal Code.

At the trial before the Sessions Judge, amongst a large number of witnesses for the prosecution, five spoke to the fact that Jaspath Singh struck the blow (which caused the death of one Tara Chand, deceased) at the direction of Dino Nath Sen. As to the effect of the evidence the Judge, in charging the jury, amongst other things, said: "There are five alleged eye-witnesses of the occurrence, and the question for you to decide is, do you believe these witnesses; if you do believe them there can be no doubt that there is ample proof against the accused; if, however, you do not believe the witnesses, and consider that the real facts have been suppressed, as suggested by the prisoner's counsel, and that there had been a mutual fight, you ought to acquit; but it is only if the real facts have been misrepresented in important matters that you would be justified in throwing over the solid body of evidence adduced."

As regards the law, the Judge charged as follows:—

"If you believe the evidence it can hardly be doubted that the offence is one of culpable homicide; it is well known that the head is a dangerous part of the body to strike especially with a *latti*; the man who struck the deceased must have intended to kill him, or at least knew that it was likely that he would do so; he would therefore be guilty under one of the clauses of s. 304. You may, however, form a different opinion, and may, if you like, find the prisoners guilty under s. 326. If you have any reasonable doubt you must give the prisoners the benefit of that doubt."

The jury eventually acquitted both prisoners of the charges under ss. 304 and 326 of the Penal Code; but thought that Jaspath Singh had committed some offence, although they were uncertain as to the section of the Penal Code under which the offence (if any) fell; thereupon the Judge handed to the jury a copy of the Penal Code, leaving them to apply it to the case against Jaspath Singh. The jury, after retiring, returned and said they were of opinion that Jaspath Singh was guilty of an offence under s. 325 of the Penal Code.

The Judge thereupon, notwithstanding the fact that he had

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never questioned the jury as to the doubts which they had inferentially expressed and had not explained the law as set out in s. 325 to them, sentenced Jaspath Singh to four years' rigorous imprisonment.

The prisoner appealed to the High Court.

Mr. *Ghose* for the appellant contended that the jury having acquitted on the charges under ss. 304 and 326, the Judge should have accepted that verdict; that the conviction under s. 325 was unsustainable on the evidence ; and that the Judge was wrong in leaving the jury to find out from the Penal Code the section under which the appellant, Jaspath Singh, was to be found guilty.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the Crown.

The judgment of the Court was delivered by

PETHERAM, C.J. (BEVERLEY, J. concurring).—I think that this appeal must be dismissed, and for the reason that this is a finding of the jury with which this Court has no power to interfere, and that if the verdict of the jury is correct, and I must take it to be correct, because, as I have just said, I have no power under the circumstances to interfere with it, the punishment which has been inflicted on the prisoner for killing this man is not too great.

The case comes before us in a way which discloses a state of things as to the mode in which trials by jury are conducted in this country, that is much to be deprecated, and in what I say now I am speaking for myself alone—I do hope that Judges in explaining the law to juries in cases in which juries are to act will take more pains in explaining the sections of the Code, and not leave the Code to the juries for them to find out the meaning of it themselves.

I think that in this case there is a possibility, I will not say probability, that there has been a miscarriage of justice, and if there is, as I think there is this possibility, it arises from the fact that the Judge did not sufficiently explain the law to the jury, and my reason for thinking that there is a possibility of a miscarriage of justice in this case, is, that the Judge in his charge to the jury shows that he had come to the conclusion that the evidence for the prosecution was to be taken as a whole, and that the only thing for the jury to do, if they disbelieve

ed it as a whole, was to acquit the prisoner. The jury did not take that course. They found a verdict which showed that they disbelieved the evidence for the prosecution in certain parts as to which they thought the witnesses were committing perjury, and they say that story is untrue, but they accepted that evidence in other parts, and convicted one of the prisoners upon it. The charge of the Judge shows that that was unsafe, and, speaking for myself, I quite agree with him. I think it absolutely unsafe to take the story of certain witnesses which is shown to be perjured as to a portion and to accept their statements and act upon it. Therefore I think that in this particular case, on the Judge's own view, there is a miscarriage of justice, but as I said before I am not able to interfere on that ground, because the Code gives us no power to interfere with the verdict of a jury in cases where there is evidence to go before them, and in this case there was evidence to go before them.

Then the question is, how far that state of things arose from the fact of the law being insufficiently explained to the jury by the Judge. As the charge was originally drawn against these two men, it was a charge of inflicting injury which either amounted to homicide or grievous hurt, and there was no question before the Judge as to there being any provocation on either of those charges, and the Judge charged the jury from the point of view that they would convict on one of those charges taken simply, and practically his charge amounted to this:—These are the two matters in respect of which these men are being tried, and it will be for you to say whether you believe the evidence for the prosecution. If you do, you must convict the prisoners, but if, on the other hand, you do not believe that evidence, you must acquit them—; and the only matter before the jury was the question of these two substantive charges taken *simpliciter* without any question of mitigating circumstances. It appears, so far as the prisoner before us is concerned, that the jury came in an uncertain state of mind, and they told the Judge that they could not say under what section the offence came. Now, upon that, I think the duty of the Judge was to have asked the jury what doubt they had as to the crime which had been committed, and if he had done that, he would have found that it was not

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a doubt as to whether the offence amounted to culpable homicide or grievous hurt, but a doubt under a totally different section which was not explained to them, as to whether if this man had inflicted hurt he did it under circumstances of grave and sudden provocation. If the Judge had asked that question he would have carried out his duty, and he would have been able to explain to the jury how it is that, in questions of this kind, the substantive offence would be affected by the qualifying clause of the next section. But he did nothing of the kind; instead of doing that, he simply gives the Penal Code to the jury in order that they may read it themselves and apply it in the best way they could. In doing that, I can only say, and I must say it here, that I think that the Judge did not do his duty. I think that it is the duty of a Judge to explain the law to the jury, and to tell them what offence the facts would prove against the prisoner if they believed them, and it is then for the jury to say whether, within the definition given by the Judge, the facts as proved constitute the offence. If the Judge had done that, I do not think that the complications would have arisen which have arisen in this case, and I think this case is a good illustration to show how very important it is that Judges should not leave the Code to the jury in this kind of way for them to read and interpret it for themselves, but as I said before they must explain the law to the jury and tell them, not under what section they are to convict the accused, but in some kind of popular language which they can understand of what offence they are to convict him, whether it be homicide or grievous hurt, or any other. It is for the Judge to construe the law; it is for the jury to find the facts, and I hope that, in future, Judges, in these jury trials, will be careful not simply to leave the Code to the jury but be at the pains to explain it themselves. For these reasons, having in mind that there was evidence of the crime of which the prisoner has been convicted, that the question of fact was for the jury, and that there was no appeal from their verdict. I think that this appeal must be dismissed.

T. A. P. *Appeal dismissed.*