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neither. Whether Durga Prasad and others conceived their remedy rightly or wrongly, it seems clear that the application of the 18th of February, 1922, was a step in aid of execution, that is, they filed the application in the desire to further their object of executing the decree.

I set aside the order of the lower court, dated the 14th of June, 1927, and direct that court to proceed with the application for execution, dated the 15th of December, 1926. The applicant shall receive the costs of this Court from the opposite party.

Order set aside.

FULL BENCH.

Before Justice Sir Cecil Walsh, Mr. Justice Lindsay and Mr. Justice Banerji.

Before Mr. Justice Boys and Mr. Justice Iqbal Ahmad.

1927 *November*, 11.

1928 *January* 19.

EMPEROR *v.* SHERA AND OTHERS.*

Criminal Procedure Code, section 307—Jury—Power of High Court to revise the verdict of a jury on the merits.

Where a jury has given its verdict on the facts of the case, it is open to the High Court to revise that verdict on a reference by the trial Judge made under section 307 of the Code of Criminal Procedure, where it is not alleged that there has been any misdirection by the Judge or any misunderstanding by the jury of the law as laid down by the Judge. *Wafadar Khan* v. *Queen-Empress* (1), *Emperor* v. *Lyall* (2), *Reg.* v. *Khanderav Bajirav* (3), *Emperor* v. *Chellan* (4), *Emperor* v. *Bhuilotan Singh* (5), and *Emperor* v. *Panna Lal* (6), referred to.

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*Criminal Reference No. 481 of 1927.

(1) (1894) I.L.R., 21 Calc., 955.
(2) (1901) I.L.R., 29 Calc., 128.
(3) (1875) I.L.R., 1 Bom., 10.
(4) (1905) I.L.R., 29 Mad., 91.
(5) (1921) 6 Pat. L.J., 264.
(6) (1924) I.L.R., 46 All., 265.

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THIS was a reference made under the provisions of section 307 of the Code of Criminal Procedure by the Sessions Judge of Benares. The facts of the case are fully set forth in the order of the Bench before which the reference was first laid, which was as follows :

BOYS and IQBAL AHMAD, JJ. :—Eleven persons were charged in connection with a riot which took place in jail. Two were sent up for trial under sections 147 and 326 of the Indian Penal Code and the remaining nine for trial upon charges under section 326/149 of the Indian Penal Code. The trial was held with the aid of a jury. Two of the accused pleaded guilty under section 326 of the Indian Penal Code, the remainder denied their guilt of any offence at all and claimed that they had had nothing to do with the nose-cutting, which was the basis of the charge under section 326, and had at the most clamorously demanded their right to the remedy of certain grievances. The jury accepted this view and found a verdict of guilty against the two men Budhan and Shera, who had admitted the nose-cutting, and they were duly sentenced under section 326 of the Indian Penal Code.

The jury, however, acquitted the remaining nine men of the charge under section 326/149, and all the accused of the charge under section 147. The learned Judge has referred this case under the provisions of section 307 of the Code of Criminal Procedure, it being his view that the acquittal of nine of the accused upon the charge under section 147 of the Indian Penal Code was perverse. In view of the fact that Budhan Khan and Shera will, if this reference is accepted, be convicted of a further offence under section 147 of the Indian Penal Code, the learned Judge has refrained from

passing any sentence at present under section 326 of the Indian Penal Code, in regard to which the jury found these two men guilty.

In his first order of the 2nd of July, 1927, recording the verdict of the jury, the learned Judge says:— "The jury return an unanimous verdict as follows. They find all the accused not guilty of rioting and Shera and Budhan alone guilty of causing grievous hurt under section 326 of the Indian Penal Code according to their plea of "guilty". They are of opinion that the accused only came to the grating to make a complaint about ill-treatment, including short rations, to the District Magistrate. They are not satisfied that any of the accused created any disturbance by throwing bricks. They are not satisfied that any of the accused removed the batons from the latrine and wielded them. They find it as a fact that the two accused committed the offence of grievous hurt under provocation".

It will be seen that the jury were unanimously of opinion that they were "not satisfied that any of the accused created any disturbance by throwing bricks". They were "not satisfied that any of the accused removed the batons from the latrine and wielded them". They were satisfied that "the accused only came to the grating to make a complaint about the ill-treatment". These are very specific findings of fact by the jury that the nine accused did not commit any offence of riot, and the findings are, as we have said, purely findings of fact and not findings arrived at in any way whatever upon any misconception of the law applicable to facts.

We have, then, to consider whether we have any power to interfere with these findings of fact.

The powers which we have are obviously those laid down in section 307 (3) of the present Code of Criminal

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Procedure. We are informed that this Court has sometimes interfered under circumstances similar to the present, but we have grave doubts as to our power to so interfere. The powers that we can exercise are "any of the powers which it (the High Court) may exercise on an appeal". The powers which this Court may exercise on an appeal are laid down in section 423 of the Code of Criminal Procedure. Certain powers are specified in sub-section (1) of section 423, but those powers cannot be unconditionally exercised. They are expressly limited in the case of the verdict of a jury to cases where the court is of opinion that there has been a misdirection by the Judge or a misunderstanding on the part of the jury of the law as laid down. So this High Court cannot, in the ordinary exercise of its appellate powers, interfere with the finding of fact by a jury, except as provided by sub-section (2) of section 423.

Is there any thing in section 307 (3) which extends these powers? The sub-section (3) plainly says that this Court can exercise "any of the powers which it may exercise on an appeal". So far, then, it cannot interfere with the finding of a jury on the facts unless there has been some misdirection by the Judge or a misunderstanding of the law by the jury. In this case it is not suggested that there has been either. It is true that section 307 (3) contains later the words: "It shall, after considering the entire evidence, etc., etc.". But these words are preceded by the very definite direction that the consideration of the evidence is to be "subject thereto". That is clearly "subject to the powers which it may exercise on an appeal". We find ourselves entirely unable to give any effect to these words "subject thereto" unless the effect is to incorporate into section 307 the limited powers of the appellate court as laid down in section 423. We should, therefore, have no hesitation whatever ourselves in

holding that we cannot interfere with simple findings of fact by a jury, unless they have been accompanied by a misdirection of the Judge or a misunderstanding of the law by the jury as laid down by the Judge.

This result is in our view not only compelled by the ordinary proper and reasonable view of the meaning of the language of section 307 (3), but we are fortified by the consideration that it is only in accordance with what would seem to be demanded in justice to the accused. It is manifest that at any rate the convicted person cannot appeal against the findings of fact arrived at by a jury, except where the conditions of section 423 (2) are applicable. It would be anomalous indeed if any accused person was wholly deprived of the right of appeal on the facts where he has been convicted, while the Judge was given, so far as the Legislature is concerned, what amounts to an unrestricted right of appeal against a finding of the jury on the facts in favour of the accused person.

This last consideration has not weighed with us in arriving at the proper interpretation of section 307 (3). In our view that section read with section 423 can have only the effect which we have suggested above.

There is a case reported, *Queen-Empress* v. *Mc Carthy* (1), in which it was held that section 307 was not controlled by the limitation in what is now section 423 (2) and was at the date of that decision section 423, clause (*d*), of Act X of 1882. Since, however, that case was decided the law has been amended in Act V of 1898. Section 307 of Act X of 1882 reads: "In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal, but it may acquit or convict the accused of any offence of which the jury could have convicted him upon the charge framed and placed before it, etc.".

(1) (1887) I.L.R., 9 All., 420.

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Here it will be noticed that the limiting words "subject thereto" find no place; but on the other hand the phraseology rather extends the powers of the court than limits them where the phrase follows "but it may acquire or convict, etc.". It is clear therefore that the decision in *Queen-Empress* v. *McCarthy* (1) is of no authority under the new Code.

It is, however, because we are aware that it has at any rate sometimes happened in this Court that Judges have, when declining to interfere on the ground that verdict was not perverse, seemed to imply that they had a power unrestricted by section 423 (2) to interfere on the facts if the verdict was perverse, that we think it necessary to refer this case to a Full Bench. We, therefore, direct that this case be laid before the Hon'ble the CHIEF JUSTICE with a view, if he thinks fit, to its being laid before a Full Bench for determination of the following question :—

Where a jury has given its verdict on the facts of the case, is it open to this Court to revise that verdict on a reference by the trial Judge made under section 307 of the Code of Criminal Procedure, where it is not alleged that there has been any misdirection by the Judge or any misunderstanding by the jury of the law as laid down by the Judge?

Before the Full Bench,—

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

The opposite parties were not represented.

The following judgements were delivered by the Full Bench :—

WALSH, J. :—The following question has been referred by a Bench of two Judges, who were considering a reference under section 307 of the Code of Criminal Procedure, where the Sessions Judge had referred the

(1) (1887) I.L.R., 9 All., 420.

matter because he disagreed with the verdict of acquittal by the jury :—

"Where a jury has given its verdict on the facts of the case, is it open to this Court to revise that verdict on a reference by the trial Judge made under section 307 of the Code of Criminal Procedure, where it is not alleged that there has been any misdirection by the Judge or any misunderstanding by the jury of the law as laid down by the Judge?".

Walsh, J.

The reason for the appointment of the Full Bench constituted to answer that question is given in the opinion delivered by the two Judges. They felt a difficulty owing to the presence of the words "subject thereto" in section 307 of the Code of Criminal Procedure, referring, as these words undoubtedly do, to the powers which a High Court may exercise on an appeal. Finding that in hearing an appeal an appellate court is governed by the provisions of sub-section (2) of section 423 of the Code of Criminal Procedure, which provides that the court shall not alter or reverse a verdict of a jury unless it is of opinion that it 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, they felt a grave doubt as to whether a High Court, to which a case is referred under section 307 of the Code of Criminal Procedure, could arrive at a decision other than the verdict of the jury on a question of fact, unless one or other of these conditions had been fulfilled.

The first point to be observed is that the High Court sitting under section 307 of the Code of Criminal Procedure is not sitting as a court of appeal, and in strict phraseology, is not asked to reverse or alter the verdict of a jury.

The second point to be noted is that this difficulty appears to have been felt, or at any rate raised, for the

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first time. A reference to the authorities will show that both before 1896 (a material date as will appear in a moment), and since 1896, the practice of the High Courts has been consistent in deciding these cases, and if they saw fit, High Courts have arrived at a definite decision on a question of fact inconsistent with the verdict of the jury. That is shown by reference to *Wafadar Khan* v. *Queen-Empress* (1), which was before 1896; *Emperor* v. *Lyall* (2) which was after 1896 *Reg.* v. *Khanderav Bajirav* (3) which was before 1896; *Emperor* v. *Chellan* (4) which was in 1905; *Emperor* v. *Bhuilotan Singh* (5) which was in 1921; and, in our own High Court, to the case of *Emperor* v. *Panna Lal* (6), as recently as 1924.

Moreover, Mr. Justice BOYS, in his well-known work on the Code of Criminal Procedure, adopts the relevant portions of the judgement in the case of *Reg.* v. *Khanderav Bajirav* (3) and states that on a reference the whole case is opened out, and the functions of both Judge and jury are cast upon the court, and that this differentiates the position very widely from that of the courts in England.

A further point to be noted is that a change took place in 1896. By an amending Act this section was altered, and although it was not changed in substance, these words "subject thereto" appeared for the first time in sub-section (3). Nobody would contend, and the referring order does not suggest, that without the words "subject thereto" there would be any difficulty at all, and therefore it must be taken that down to 1896, there was no doubt about the existence of this special power of dealing with a case on the merits, and finding facts on the evidence inconsistent with the

(1) (1894) I.L.R., 21 Calc., 955.
(2) (1901) I.L.R., 29 Calc., 128.
(3) (1875) I.L.R., 1 Bom., 10.
(4) (1905) I.L.R., 29 Mad., 91.
(5) (1921) 6 Pat. L. J., 264.
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verdict of a jury, on a reference by the trial court to the High Court. It would be strange if a statutory provision of an exceptional character unknown to the English criminal law, specially provided in India and acted upon in all High Courts, were intended by the Legislature to be taken away completely by a sort of indirect introduction of two small words into a section, the substance of which they were not altering.

As, however, the point has been raised in a concrete form, and has not been precisely raised before, we think we ought to give our reasons by reference to the section itself for disagreeing with the view suggested in the referring order.

It must be admitted that if the words "subject thereto" are to be read as incorporating section 423 and as a consequence imposing upon the High Court, in hearing a reference, the limitation contained in section 423, sub-section (2), it would destroy substantially the elaborate provisions of section 307 itself, and defeat the object which we think the language of the section makes quite clear and for which the section was enacted. As we have already said, section 307 creates a special power of reference, turning the High Court for the moment into a Court exercising powers of reference or of a referee, and gives general directions as to how the Court is to be guided in exercising that function. In other words, it deals with the creation of a power independent altogether from the function of an appellate court, and, except by implication, makes no provision for procedure. It says that in a case where the Judge disagrees with the verdict and is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court, he shall do so, recording the grounds of his opinion, and (here,

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it is to be observed, is a provision which throws an important light on the object of the section), when the verdict is one of acquittal, stating the offence which he considers to have been committed. That language is totally inappropriate and inconsistent with a limited power, as suggested, of a High Court, when dealing with a reference where there has been an unsatisfactory verdict by a jury, so as to restrict its consideration to some question of law or misapprehension of law.

The third sub-section of section 307, which finally prescribes the function to be exercised by the High Court in dealing with such a reference, provides that after considering the entire evidence, and after giving due weight to the opinions of the Sessions Judge and the jury, it shall acquit or convict the person charged of any offence of which the jury could have convicted him upon the charge as framed. That language is entirely meaningless if it was not, at any rate, intended to give the High Court not merely a power but a direction to reconsider the entire evidence and what has happened in the court below, and to arrive at an independent conclusion of its own on the question of fact, as well as of law, in the interests of justice.

The question therefore is whether the words "subject thereto" are strong enough and clear enough, as is suggested in the referring order, to override and destroy the other provisions of the section, which, as we have pointed out, are wholly inconsistent with the limitations contained in section 423, sub-section (2). It is true to say that in the interpretation of every section of a Statute a reasonable construction must be given to every word contained therein. Speaking for myself I feel no difficulty whatever in interpreting the words "subject thereto" consistently with the operation of section 307 as it has always been hitherto understood and worked. When it is once borne in mind that the

section itself deals with the functions to be exercised, and does not attempt to deal specifically with the procedure to be followed, all difficulty to my mind disappears. The High Court is not acting as a court of appeal, but it is to be clothed with the powers of a court of appeal as regards its procedure. If the Legislature had intended to limit its function in the way suggested, nothing was easier than to say: "subject to the limitations or provisions contained in section 423, sub-section (2)". It does not even refer to any section. What it says is that the High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto it shall exercise the following functions. I think the emphatic word there is the word "any", and that the object of that part of the sub-section was simply to clothe the High Court, when acting under section 307, with all the powers as regards procedure of a court of appeal, if for good reasons it desires to exercise any of them. The exercise of such powers may be illustrated by reference, not merely to section 423, which requires that it shall hear the appellant or his pleader, if he appears, and provides for other matter, but it would include such a provision as section 426, where, if there has been a conviction and the referring court thought it was wrong, the person charged could be released on bail; or, to give another illustration, section 428, where the High Court, if it thinks additional evidence to be necessary, shall record its reasons, and may either take such evidence itself, or direct it to be taken by a Court of Session. We are clearly of opinion that if it were not for the provision which has caused this reference, it would not be possible for a High Court, adjudicating upon a reference, to ask for or direct additional evidence to be taken, and therefore it follows that the introduction of these words was made in order to empower the High Court to take that or any other step which it

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would take if it were in fact an appellate court hearing an appeal.

It is suggested in the referring order that it would be anomalous for the accused to be deprived of a right of appeal against an adverse verdict on the facts, while the Sessions Judge is given what is called "an unrestricted right of appeal against a finding by the jury on the facts in favour of the accused person". I do not think there is any anomaly. The power of reference under section 307 applies whether the verdict is one of "guilty" or of "not guilty".

For these reasons I think that the question must be answered in the affirmative.

LINDSAY, J. :—I agree, and only wish to add that I consider that the words "subject thereto" in subsection (3) of section 307 should be taken to refer not merely to the word "powers" which precedes them but to the exercise of the powers. That is to say, the High Court, after resort to such of the powers of an appellate court as it may think fit to exercise, shall proceed, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, to acquit or convict the accused.

BANERJI, J. :—I agree.

[On receipt of the Full Bench decision their Lordships of the referring Bench examined the entire evidence in the case in order to see whether the jury were or were not justified in acquitting the accused who were put on trial before the Judge, and came to the conclusion that the offence of rioting in which the accused took part was made out in respect of seven out of the nine accused and passed judgement convicting and sentencing them accordingly.]