APPELLATE CRIMINAL

Before Mr. Justice Pullan

1 32
July, 19.

EMPEROR *v.* DAKHANI AND OTHERS*

Criminal Procedure Code, sections 418, 536—*Trial by jury of an offence triable with assessors—Trial valid—Verdict cannot be treated as opinion of assessors—Appeal lies on matters of law only—Misdirection to the jury—Appeal heard on facts.*

In a charge under section 325/149 of the Indian Penal Code there is only one offence, namely that of rioting in the course of which grievous hurt has been caused, and the essential part of the offence is the rioting. So, in a part of the province where rioting is not an offence triable by a jury but the offence of grievous hurt is so triable, the mere addition of section 325 to section 149 will not make the case, which is essentially one of rioting, a case triable by a jury.

Where a case not triable by a jury has in fact been tried by a jury, under section 536 of the Criminal Procedure Code the trial is not vitiated thereby. The verdict of the jury in such a case cannot, however, be treated as being the opinion of assessors, and by section 418 an appeal can lie on a matter of law only. Where, however, the verdict of the jury was held to have been vitiated by misdirections, the appeal was heard on the facts.

Messrs. *F. Owen O'Neill*, *R. C. Ghatak* and *S. P. Sanyal*, for the appellants.

The Government Pleader (Mr. *Sankar Saran*), for the Crown.

PULLAN, J. :—The seven appellants have been tried in circumstances which give rise to certain questions of law. The charge framed against them was drawn up in the following terms: "That you on or about the 18th day of June, 1931, were members of an unlawful assembly and in prosecution of the common object of beating Bahadur and his son Mahabir some of the

* Criminal Appeal No. 100 of 1932, from an order of Harihar Prasad, Sessions Judge of Allahabad, dated the 28th of January, 1932.

members voluntarily caused grievous hurt to Bahadur and you are thereby, under section 149 of the Indian Penal Code, guilty of causing the said grievous hurt and simple hurts to Bahadur and Mahabir, and thereby committed an offence punishable under section 325/149 and section 148 of the Indian Penal Code." Certain offences are in the Allahabad judgeship triable by a jury. The Sessions Judge, believing that this was a case which under section 269 of the Criminal Procedure Code should be tried by a jury for one of the offences committed, and with the aid of the jurors as assessors for another, empanelled a jury and instructed the jury to give an opinion on the evidence as to the charge under section 325/149 of the Indian Penal Code, and took their opinion as assessors on the charge under section 148 of the Indian Penal Code. This procedure is rendered necessary by the terms of the Criminal Procedure Code where persons are charged with several offences, some of which are triable by a jury and others not. In the present case there is only one offence charged against these persons. It is an offence of rioting in the course of which they caused certain injuries. The Judge had to consider whether that offence was one which could or could not be tried by a jury. In this province all offences of rioting, which are contained in Chapter VIII of the Indian Penal Code, are excluded from jury trial. The Judge appears to have thought that by adding section 325, which is triable by a jury, he brought this case within their jurisdiction. The Judge was mistaken. The charge was not under section 325, but section 325/149, and the wording of the charge shows that the essential part of the offence was rioting. This is indeed inevitable in any case where section 149 is employed, for the basis of that section is that the persons who are held to be jointly responsible for an offence were committing that offence as members of an unlawful assembly and were, therefore, where the offence was one involving the use of violence, as in the present case,

1932

EMPEROR v. DAKHANI.

rioting, within the definition of "rioting" given in the Penal Code. This case, therefore, was not triable by a jury. It was triable by a Judge with the aid of assessors. Section 536 of the Criminal Procedure Code enacts that if an offence triable with the aid of assessors is tried by a jury the trial shall not "on that ground only be invalid". Opinions have been expressed in various High Courts that these words mean that a verdict given by a jury in a case which should have been tried with the aid of assessors can be regarded as the opinion of assessors, and the trial may stand not as a trial by a jury but as a trial with the aid of assessors. This view was held by one of two Judges in *Pattikadan Ummaru* v. *Emperor* (1), and a similar view seems to have been taken by the Calcutta High Court in the case of *Empress* v. *Mohim Chunder Rai* (2). The difficulty in accepting this view is that a jury gives a single opinion. Assessors must give their opinions separately. Consequently the verdict of a jury given as such is not and cannot be the same as the separate opinions of the members of the jury. I have no doubt that on this point I should follow the decision of a Full Bench of five Judges in the Bombay High Court in the case of *King-Emperor* v. *Parbhushankar* (3). I cannot do better than quote the observations of JENKINS, C. J., at page 688 of the report:

"I propose to confine myself to the words of the Code, though, in doing so, I will bear in mind what has been held in the several cases mentioned and discussed in the referring judgment. Section 404 of the Criminal Procedure Code provides that 'no appeal shall lie from any judgment or order of a criminal court except as provided for by this Code or by any other law for the time being in force', and under section 418 'an appeal may lie on a matter of fact as well as a matter of law except where the trial was by jury, in which case the appeal will lie on a matter of law only.' At the same time it is provided by section 536 that 'if an offence triable with

(1) (1902) I.L.R., 26 Mad., 243. (2) (1878) I.L.R., 3 Cal., 765.
(3) (1901) I.L.R., 25 Bom., 680.

the aid of assessors is tried by a jury the trial shall not on that ground be invalid.'

"These sections are clear and need no paraphrase. The first question they suggest is, whether in this particular case the trial was by jury. The record leaves no doubt in my mind on this point; for the events of the trial absolutely negative the view that the accused was tried by the court of session with the aid of the jurors as assessors.

"The offence, therefore, though triable with the aid of assessors, was in fact tried by a jury. This irregularity did not invalidate the trial; but did it attract the consequences of section 418? This turns on the precise force in that section of the words 'where the trial was by jury'. Do they mean 'where the trial should have been by jury' or 'where the trial in fact was by jury'? In my opinion the words are themselves the clearest answer to this question; they relate to what actually occurred, not to what should have occurred. An adoption of the rival view would lead to the result that a reversal of the conditions would leave an accused, who was wrongly tried with the aid of assessors, without any right of appeal, though the scheme of the Code shows that in the view of the legislature it is less advantageous to an accused to be tried with the aid of assessors than by a jury. I would under the circumstances answer the reference by saying that in the present case no appeal lies on a matter of fact."

Thus the opinion given by the jury in this case is a verdict which can only be challenged on questions of law.

I have been referred to no case where a trial has been from beginning to end conducted as a jury trial where there was no offence charged which could in law have been tried by a jury. This is, however, the case here, and one of the grounds of appeal is that there has been a misdirection of the jury. In my opinion this objection must prevail. From beginning to end the charge is a misdirection as it required the jury to give an opinion on a riot which a jury cannot be required to give under the law as enacted in this province. It is not the case that the Judge made any attempt to confine the attention of the jury to the causing of grievous hurt,

1932

EMPEROR v. DAKHANI.

He states in his summing up that the law applicable is laid down in sections 141, 142, 146, 147, 148, 149, 323, 325 and 320 of the Indian Penal Code, and he read and explained all those sections to the jurors. The jury therefore were bound to consider this case as a case of rioting, and not as a case of individual assaults; and this is further emphasized by another error made by the Judge in the summing up when he failed entirely to point out to the jury that they were required to give an opinion as to the guilt of each of the persons charged. He has throughout regarded the accused as a body of men and not as individuals. And there is still a third error in his charge when he states that if the jury found the accused not guilty of the graver offence of sections 325 and 148 it would be open to them to find them guilty of the minor offences under sections 323 and 147. But this section 147 is absolutely excluded from trial by a jury. The jury then returned a verdict of guilty in the majority of 3 to 2, and this would normally mean that 3 of the jurors had found all the accused guilty and 2 of them as innocent. It was, however, explained by one of the jurors that this was not their verdict. Consequently the verdict contains a rider to the effect that one of the two dissenting gentlemen held that three of the accused were not guilty, and the others were guilty. In my opinion, therefore, the trial by a jury is vitiated by misdirection. In the circumstances of this case there can be no question of a retrial as the case was not triable by a jury at all, and the jury gave their opinion as assessors on the charge under section 148 which, in my opinion, was the same charge as that which they had tried as a jury under another name. An appeal against this trial with the aid of assessors can be heard on questions of fact, and I have accordingly heard the arguments on behalf of all the seven appellants.

[The judgment then proceeded to deal with the facts and concluded as follows.]

1932

EMPEROR v. DAKHANI.

I accordingly allow the appeals of Baiju and Gharib, set aside their convictions and sentences and declare them to be acquitted. In the case of Dakhani, Bhopua, Chunni, Parshad and Anandi I set aside their convictions and sentences under sections 323/149, but uphold their conviction and sentence under section 147 of the Indian Penal Code. These five men will accordingly surrender to their bail and serve out the remainder of their sentence.

APPELLATE CIVIL

Before Mr. Justice King and Mr. Justice Thom

AMBA SAHAI AND ANOTHER (PLAINTIFFS) *v.* NATHU AND ANOTHER (DEFENDANTS)*

1932 *July*, 21.

Agra Tenancy Act (Local Act III of 1926), sections 3(11), 112, 197—Grove-holder—Right to plant new trees in place of dead or fallen trees—"Improvement"—Interpretation of statutes.

Under the Agra Tenancy Act of 1901, in the absence of a custom or contract to the contrary, a grove-holder had a right to plant new trees in place of those that had fallen down or been cut down, so long as the land retained its character of grove-land, and that right has not been taken away by anything in the new Act. Section 197 of the Act of 1926 does not purport to lay down the rights and liabilities of a grove-holder exhaustively. The right of a grove-holder to maintain the grove by replacing dead or fallen trees is an important incident of the status of grove-holder and the legislature cannot be held to have intended to take away this important right without express words to that effect.

A grove-holder according to the present Act is a tenant, presumably a non-occupancy tenant, and so under section 112 he is not entitled to make an improvement without the written consent of his landholder. But the replacing of dead or fallen trees by the planting of new trees amounts only to "mere repairs" and does not amount to an "improvement" within the meaning of section 3, clause (11). There is a substantial distinction between making a new plantation of trees and maintaining an old plantation.

* Second Appeal No. 1954 of 1929, from a decree of Farid-ud-din Ahmad Khan, Additional Subordinate Judge of Shahjahanpur, dated the 4th of July, 1929, confirming a decree of R. C. Verma, Munsif of Tilhar, dated the 21st of January, 1929.