meaning of section 100 of the Transfer of Property Act of 1882 to the extent of the amount decreed."

By section 7 of the Code of Civil Procedure the small cause court has no jurisdiction to execute decrees against immovable property. The creation of a charge upon the property, however, is something entirely different from the execution of a decree against the property. The attachment of immovable property would be a step in execution. The creation of a charge is not a step in execution and it is clear therefore in my judgment that a small cause court, though it has no jurisdiction to attach an immovable property, has jurisdiction to create a charge thereon.

In the result the application is allowed and the order of the small cause court is set aside. The record will be returned to the small cause court with a direction that it should dispose of the application for the creation of a charge on the defendant's immovable property according to law. The applicant is entitled to his costs in this application.

APPELLATE CRIMINAL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Niamat-ullah

EMPEROR *v.* MANJIA AND OTHERS*

1936 *October,* 29

Criminal Procedure Code, sections 306, 307—*Jury's verdict of guilty—Judge doubtful and inclined to give the benefit of doubt to accused—Proper procedure—Judge should not convict but should disagree with verdict and refer the case to High Court—Appeal from conviction in such case—Powers of appellate court—Criminal Procedure Code, sections* 423(2) *and* 561A.

Where the Sessions Judge, at a jury trial, is doubtful about the guilt of the accused and is distinctly of the opinion that the benefit of the doubt should be given to him, then if the jury returns a verdict of guilty, the Judge is disagreeing with

*Criminal Appeal No. 309 of 1936, from an order of S. Iftikhar Husain, First Additional Sessions Judge of Cawnpore, dated the 24th of March, 1936.

1936

EMPEROR v. MANJIA

the verdict, and the proper course for him is to express such disagreement and refer the case to the High Court under section 307 of the Criminal Procedure Code; and if he refrains from doing so, and convicts the accused, under a misapprehension that he has no power to disagree with the verdict and refer the case unless he can be certain in his own mind of the absolute innocence of the accused and the complete falsity of the complaint, he takes an erroneous view of the law and the accused is prejudiced thereby.

In an appeal from the conviction in such a case the High Court can not, by reason of the provisions of section 423(2) of the Criminal Procedure Code, alter or reverse the verdict of the jury except on the grounds mentioned therein, and the proper order to pass is to set aside the conviction and sentence and to send back the case to the Sessions Judge for consideration whether he would express disagreement with the verdict and make a reference under section 307 or uphold the verdict and pronounce judgment accordingly. Such an order is amply justified by the provisions of section 561A of the Code.

Where, however, the Judge, not being under any such misapprehension of the law as is mentioned above, entertains some doubt about the guilt of the accused but nevertheless, having regard to all the circumstances, does not think it necessary to express disagreement with the verdict, the case comes under section 306 of the Code and he is bound to give judgment according to the verdict.

Mr. *Gopi Nath Kunzru*, for the appellants.

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

SULAIMAN, C.J., and NIAMAT-ULLAH, J.:—This is a criminal appeal from an order of the Additional Sessions Judge of Cawnpore, convicting the accused under section 452 of the Indian Penal Code in pursuance of the jury's verdict of guilty. The accused were charged with several offences which were triable with the aid of assessors, and only the offence under section 455 of the Indian Penal Code was triable by a jury. The learned Judge came to the conclusion that the accused should have been given the benefit of doubt as regards the other offences and he acquitted them. As to the offence under section 455 he came to the conclusion that the

facts constituted an offence under section 452 of the Indian Penal Code, and upholding the verdict of the jury convicted them under that section. But what happened was that the learned Judge in his own mind was not satisfied that the complaint was false; nor was he satisfied that the accused were innocent. He felt some doubt in his mind, and, if the accused had been triable with the aid of assessors, he would most probably have given the benefit of the doubt to the accused. The actual words used by him are: "As I am not of opinion that the complainant's case is false and my opinion is simply that the case is doubtful, I think I cannot refer the case to the Hon'ble High Court and therefore must agree with the majority of the jurors that the accused are guilty under section 452." Towards the end of the judgment he has again remarked: "So far as the jurors' view is concerned, I have said above that I cannot but agree with them, and therefore I hold the accused guilty under section 452."

It is, therefore, obvious that the learned Additional Sessions Judge thought that unless he were of the definite opinion that the complaint was false and that the accused were innocent, he had no power whatsoever to disagree with the verdict of the jury and refer the case to the High Court under section 307 of the Code of Criminal Procedure. He apparently thought that in a case where he was doubtful and would himself be prepared to give the benefit of the doubt to the accused it could not be said that he disagreed with the verdict of the jury and had therefore no jurisdiction to refer the case to the High Court. In this view he was certainly wrong. All that sections 306 and 307 provide is that the Judge should disagree with the verdict of the jury, that is to say, if the jury's verdict is that the accused is guilty or not guilty and the Judge is of a contrary opinion he can refer the case to the High Court unless he does not think it necessary to express his disagreement. Where a Judge is doubtful and is distinctly of

1936

EMPEROR v. MANJIA

the opinion that the benefit of the doubt should be given to the accused, then certainly he is of the opinion that the verdict of the jury should be that he is not guilty. If, therefore, the jury returns a verdict of guilty, he is disagreeing with the verdict of the jury even though he may not be certain in his own mind of the absolute innocence of the accused and the complete falsity of the complaint. As the learned Judge took an erroneous view of the sections and felt that he had no power to refer the case to the High Court, the accused have been prejudiced.

Of course, where the Judge is doubtful and nevertheless he does not think it necessary to express disagreement with the verdict of the jury, then the case would come under section 306 of the Code of Criminal Procedure and he is bound to give judgment according to the verdict. In such a case the learned Judge labours under no misapprehension as to his jurisdiction to refer the case to the High Court but merely considers that having regard to all the circumstances it is not necessary in that case for him to express disagreement with the verdict of the jury. The present case was not one of that kind as the learned Judge does not appear to have applied his mind to this aspect of the case and has not said that he does not consider this a fit case where it is necessary to express disagreement. He has merely held that he is helpless in the matter and cannot refer the case to the High Court and must agree with the verdict of the jury.

The difficulty that arises in this case is one of procedure. Had the reference come to us under section 307 of the Code of Criminal Procedure we would have jurisdiction to exercise all the powers conferred by the Code on an appellate court, including the power to set aside the verdict of the jury and substitute another verdict for it or order a retrial or discharge the accused. But the case has not come up before us under section 307 but has come up by way of an appeal under section 418, sub-

section (1) on a matter of law, namely that the learned Judge has erroneously supposed that he had no jurisdiction to disagree with the verdict.

But the powers of an appellate court are governed by section 423, sub-section (2) of which provides that nothing in that section shall authorise the court to alter or reverse the verdict of a jury unless it is of opinion that such verdict 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 by him. Obviously in the present case there has neither been a misdirection by the Judge nor a misunderstanding on the part of the jury of the law as laid down by the Judge. It, therefore, follows that the appellate court has no power to alter or reverse the verdict of the jury. The reason is obvious. In cases coming under section 307 the Judge who heard the evidence is in the first instance of the opinion that the verdict is wrong, and if the appellate court is also of the same opinion it is empowered to set aside that verdict. But when the case comes by way of an appeal under section 418 where the Judge himself has not differed, the legislature has provided that there should be no interference by the appellate court with the verdict of the jury, unless there has been either a misdirection or misunderstanding mentioned therein.

The question is whether, if we not only set aside the convictions and sentences but also set aside the verdict of the jury and order a retrial, we would be altering or reversing the verdict. The word "altering" might mean substituting another verdict for the verdict of the jury, but the word "reversing" would include the setting aside of that verdict or making it null and void. If a retrial *de novo* were ordered, then the necessary effect would be to reverse the verdict of the jury. We, therefore, think that as an appellate court we cannot set aside the verdict of the jury and order a retrial. It is unnecessary for us to consider whether the revisional power conferred by section 439 is subject to the same res-

1936

EMPEROR v. MANGTA

triction, because there is nothing to prevent this Court from setting aside the convictions of the accused and the sentences imposed on them by the Additional Sessions Judge who accepted the verdict of the jury. If the case is sent back to the sessions court, the learned Additional Sessions Judge would re-examine the matter carefully and then come to the conclusion whether he should or should not disagree with the verdict of the jury. If he thinks that he should not disagree with the verdict or that it is not a case in which it is necessary to express disagreement, he would forthwith convict the accused accordingly. If, however, he is of the opinion that the case should be referred to the High Court under section 307 because he disagrees with the verdict and the case is so referred, we would have power to reconsider the case on its merits and pass suitable orders. The new section 561A amply justifies the order which we propose to make.

We, therefore, set aside the convictions of the accused and the sentences passed on them and send the case back to the court of the Additional Sessions Judge to readmit the case to its original number on the file and after hearing the arguments consider whether he would express disagreement with the verdict or not, and, accordingly, either make a reference under section 307 to the High Court or uphold the verdict and convict the accused and pass suitable sentences.

APPELLATE CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice Ganga Nath

1936 *November*, 5

RASHIK LAL AND OTHERS (PLAINTIFFS) *v.* RADHA DULAIYA (DEFENDANT)*

Limitation Act (IX of 1908), articles 141, 143—Hindu widow allotted some property for her life for maintenance—Condi-

*Second Appeal No. 788 of 1934, from a decree of A. H. Gurney, District Judge of Jhansi, dated the 28th of July, 1934, reversing a decree of K. N. Joshi, Subordinate Judge of Jhansi, dated the 8th of April, 1933.