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for execution though they were not made against the surety or against a co-judgment-debtor, yet they were applications in accordance with law to the proper court. Thus they can be said to comply with the letter of the law as laid down in clause (5). The parties being agreed that the application for execution is governed by Article 182, the only clause which can be made applicable at all is clause (5). I would, therefore, content myself with adopting the position stated in the form of a dilemma in *Badr-ud-din* v. *Muhammad Hafiz* (1).

Srivastava, J.

BY THE COURT (SRIVASTAVA AND NANAVUTTY, JJ.) :— For the reasons given in our separate judgments, we allow this application set aside the order of the lower court and remand this case for trial of the remaining issues to the court below. Costs here and hitherto will abide the result.

Application allowed.

REVISIONAL CRIMINAL

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice E. M. Nanavutty

KING-EMPEROR (COMPLAINANT) *v.* CHHEDA ALIAS CHHEDUA (ACCUSED)*

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January, 19

Criminal Procedure Code (Act V of 1898), section 307—Powers of High Courts in India to interfere with verdicts of jury—English and Indian law, difference between—Verdict of majority of jury manifestly wrong and against weight of evidence on record—Verdict of majority of jury, if to be set aside.

Section 307 of the Code of Criminal Procedure casts upon every High Court in India the duty of both the Judge and the jury and in cases referred to High Courts under section 307 of the Code of Criminal Procedure the trial remains open for the High Court till it pronounces a judgment of acquittal or

*Jury Reference No. 8 of 1932, made by Babu Bhagwat Prasad, Assistant Sessions Judge of Lucknow by his order dated the 28th of November 1932.

(1) (1922) I.L.R., 44 All., 743.

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conviction; but, in spite of this difference, which clothes an Indian High Court with greater powers and responsibilities than superior Criminal courts in England, an Indian High Court will, as far as it is possible, be guided by the principles of English law that the verdict of the jury will not be set aside unless it be manifestly perverse and patently wrong or has been induced by an error of the Judge in his charge to the jury. The principle has been clearly laid down that a High Court will not interfere under section 307 of the Code of Criminal Procedure upon any mere preponderance of evidence, but will only do so when it is satisfied beyond reasonable doubt that the verdict of the jurors or the majority of the jury is so distinctly against the weight of evidence on the record that it may be unhesitatingly described as a perverse verdict or unless it is clearly established that the jurors were wholly led astray in their conclusions upon the case. In a reference under section 307 of the Code of Criminal Procedure the High Court has to form and act upon its view of what the evidence in its opinion proves, but in doing so it will no doubt give due weight to the opinion of the Sessions Judge no less than to the verdict of the jury.

The Government Advocate (Mr. *G. H. Thomas*), for the Crown.

Mr. *Shankar Sahai*, for the accused.

SRIVASTAVA and NANAVUTTY, JJ. :—This is a reference made under section 307 of the Code of Criminal Procedure by the learned Assistant Sessions Judge of Mohanlalganj, Lucknow, against a verdict of the majority of the jurors acquitting Chhedwa Kalwar of an offence under section 376 of the Indian Penal Code.

The case for the prosecution is briefly as follows :

On the 23rd of August, 1932, Musammat Gurgi Pasin, an orphan girl of about 12 years of age, was grazing cattle at midday in a jungle near village Sarayan. The accused Chhedwa Kalwar, Debi Din Lodh, Ram Prasad and Mohan were also grazing their cattle in the same jungle. When Mohan, Ram Prasad and Debi Din went home to take their food, the accused Chhedwa Kalwar and Musammat Gurgi Pasin were left alone in

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the jungle. Musammat Gurgi was sitting in the shade under a bush. The accused Chhedwa Kalwar came up and laid her flat on her back and proceeded to have sexual intercourse with her. When she felt pain she cried out and Debi Din, Mohan and Ram Prasad, who were returning to the jungle after they had had their midday meal, ran up to her on hearing her cries. The accused Chhedwa then left her and ran away. Both parents of Musammat Gurgi are dead and she is living with her uncle Ram Charan, who had gone with the ziladar to collect rents, and on his return to his house at about 4 p.m. he was told by Debi Din Lodh that his niece Musammat Gurgi had been ravished by Chhedwa Kalwar and was lying unconscious in the jungle. Ram Charan at once went and brought Musammat Gurgi back to his house and began applying homely remedies to the injured parts of her body. He then went in search of the chaukidar Mahabir, who came the following day in the afternoon to the house of Ram Charan and took Ram Charan and Musammat Gurgi and the accused Chhedwa, who was found at the door of Lallu Kalwar, to police station Itaunja, where a report was made charging Chhedwa Kalwar under section 376 of the Indian Penal Code. The girl was medically examined by Rai Bahadur Dr. J. P. Modi, Medico-Legal Officer at King George's Hospital at Lucknow at 1 p.m. on the 25th of August, 1932. Dr. Modi found the following injuries on the private parts of Musammat Gurgi:

The labia majora were bruised. The labia minora were red, inflamed and lacerated in the lower part. The hymen was lacerated in the posterior part. The perineum was lacerated, and the injury was $\frac{1}{2}'' \times \frac{1}{2}'' \times \frac{1}{4}''$. The lower posterior wall of the vaginal canal was lacerated, and the injury was $\frac{1}{2}'' \times \frac{1}{4}''$. There was bleeding from these parts on touching or stretching them. There was no discharge from the vagina.

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Dr. Modi also found some yellowish substance like turmeric applied over the pubes vulva. In his opinion the girl was about 12 years of age. She had 28 teeth of which the upper second molar tooth appeared to have partially come out. She had no hair under the armpits and only some soft downy hair over the pubes. Her breasts were not developed at all.

After completing his investigation the station officer of police station Itaunja prosecuted Chhedwa Kalwar under section 376 of the Indian Penal Code and the Joint Magistrate Mr. Barlow committed the accused to the Court of Session to stand his trial on the said charge.

On behalf of the prosecution have been examined in the Court of Session Musammat Gurgi Pasin, aged 12, Debi Din Lodh, aged 18, Kunnha Teli, aged 45, Ram Charan Pasi, aged 35 (the uncle of Musammat Gurgi), Mahabir chaukidar, head constable Ayub Ahmad, constable Ali Sher Khan, Sub-Inspector Muhammad Abdul Hamid, Naik Niaz Ahmad, head constable Bhagwat Prasad, Gayasuddin Naib Nazir and Bindeshwari Prasad, a peon in the Deputy Commissioner's office. The medical evidence of Dr. J. P. Modi recorded by the Committing Magistrate as well as the reports of the Chemical Examiner and of the Imperial Serologist were tendered in evidence by the learned Government pleader on behalf of the Crown.

The evidence of Musammat Gurgi the prosecutrix, who is only 12 years of age, clearly proves that an offence of rape was committed on her by the accused Chhedwa Kalwar. The evidence of the prosecutrix is fully corroborated by the medical evidence of Dr. Modi as well as by Debi Din Lodh and Kunnha Teli. The evidence of Musammat Gurgi has not been shaken in cross-examination, and it is very clear and straightforward. The evidence of Debi Din Lodh is also equally straightforward and has not been shaken in cross-examination. A suggestion was thrown out on behalf of the accused

that it was this witness Debi Din Lodh who had raped Musammat Gurgi. No question has been put to this witness in cross-examination and nothing has been elicited from him, which would in the least manner throw suspicion upon him. Upon the evidence of the prosecution witnesses the guilt of the accused Chhedwa Kalwar has been proved beyond all doubt.

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The accused has pleaded *alibi*. His *alibi* witnesses are D. W. 1 Lassu, D. W. 2 Lachhman and D. W. 3 Lochai or Lochan. D. W. 3 Lochai has deposed that the prosecutrix Musammat Gurgi told him that a he-buffalo had struck her in her private parts. This story is ridiculous on the face of it, and no attempt has been made to elicit any facts in support of the story in the cross-examination of any prosecution witness. The evidence of Lassu and Lachhman Kalwar is full of contradictions and is palpably false.

The learned counsel for the accused who argued the case on behalf of Chhedwa Kalwar has laid stress on the fact that this is a reference from a verdict of the jurors and this verdict of acquittal given by the majority of the jurors should not be interfered with, except when it appears on the face of the record that there has been a gross and unmistakable miscarriage of justice. No doubt section 307 of the Code of Criminal Procedure casts upon every High Court in India the duty of both the Judge and the jury and in cases referred to High Courts under section 307 of the Code of Criminal Procedure the trial remains open for the High Court till it pronounces a judgment of acquittal or conviction; but, in spite of this difference, which clothes an Indian High Court with greater powers and responsibilities than superior Criminal courts in England, an Indian High Court will as far as it is possible be guided by the principles of English law that the verdict of the jury will not be set aside unless it be manifestly perverse and patently wrong or has been induced by an

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error of the Judge in his charge to the jury. The principle has been clearly laid down that a High Court will not interfere under section 307 of the Code of Criminal Procedure upon any mere preponderance of evidence, but will only do so when it is satisfied beyond reasonable doubt that the verdict of the jurors or the majority of the jury is so distinctly against the weight of evidence on the record that it may be unhesitatingly described as a perverse verdict or unless it is clearly established that the jurors were wholly led astray in their conclusions upon the case. In a reference under section 307 of the Code of Criminal Procedure the High Court has to form and act upon its view of what the evidence in its opinion proves, but in doing so it will no doubt give due weight to the opinion of the Sessions Judge no less than to the verdict of the jury.

Bearing these general principles in mind and applying them to the facts of the present case we are clearly of opinion that the verdict of the majority of the jurors is manifestly wrong and against the weight of evidence on the record. Two of the jurors were of opinion that the accused was guilty of the offence charged. The remaining three held a different opinion. In our opinion upon the evidence on the record there can be no doubt that the verdict of the majority of the jurors was manifestly wrong and perverse. We, therefore, set it aside and convict Chhedwa Kalwar of an offence under section 376 of the Indian Penal Code.

It now remains for us to consider the question of punishment. The learned Additional Sessions Judge was of opinion that the accused Chhedwa should be dealt with somewhat less severely than an ordinary criminal who has reached his majority. The medical evidence shows that the accused Chhedwa Kalwar acted in a most brutal and callous manner. The life of the young girl Gurgi, who is an orphan, has been ruined for ever. The accused has been seen by us and he

appears to be a physically well-developed boy of 17 or 18 years of age. Taking all the facts of the case into consideration we sentence Chhedwa Kalwar for an offence under section 376 of the Indian Penal Code to three years' rigorous imprisonment.

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Reference allowed.

APPELLATE CIVIL

Before Mr. Justice Muhammad Raza and Mr. Justice H. G. Smith

AMINA KHATUN, MUSAMMAT, AND ANOTHER (PLAINTIFFS-APPELLANTS) *v.* KHALIL-UR-RAHMAN KHAN AND OTHERS (DEFENDANTS-RESPONDENTS)*

1933 *January*, 26

Wajib-ul-arz—*Entries in a* wajib-ul-arz *relating to a custom being not concoctions and not containing merely the wishes of the dictators, evidentiary value of—Custom of the exclusion of daughters—Non-enforcement of a well-established custom in one instance, effect of—Evidence Act (I of* 1872), *sections* 21, 32(7), 48, 49 *and* 60—*Persons holding opinion under section* 48, *if necessary to be called as a witness—Statements of deceased persons made after controversy had arisen, admissibility of, under sections* 32, 48 *and* 49—*Evidence of respectable witnesses relating to a custom supported by documentary evidence without proof of specific instances, value of—Admissions of plaintiff's father in a suit to which he was not a party, if evidence in a subsequent suit against plaintiff.*

Evidence, oral or documentary, as to statements of a deceased person as to the custom in a family is inadmissible in evidence under section 32(4) of the Evidence Act if it appears that such statements were made after a controversy as to the custom had arisen. *Garuradhwaja Prasad* v. *Superundhwaja Prasad* (1), referred to. *Ekradeshwar* v. *Janeshwari* (2), relied on.

Section 48 of the Evidence Act read with section 60 of that Act requires that the person who holds the opinion should be

*First Civil Appeal No. 112 of 1931, against the decree of Sheikh Muhammad Baqar, Additional Subordinate Judge of Sitapur, dated the 4th of November, 1931.

(1) (1900) L.R., 27 I.A., 238. (2) (1914) L.R., 41 I.A., 275.