1886.

QUEEN-EMPRESS v. SAKHÁRÁM BHÁU.

The following is the judgment in Criminal Reference No. 182 of 1885, decided by Birdwood and Jardine, JJ., on the 11th January, 1886, and referred to in the above judgment, the facts being precisely similar :—

Per Curiam :—"This case must be considered with reference to the provisions of the present Code of Criminal Procedure. It falls under clause I of section 235 of the Code. The accused could, therefore, be legally tried at one trial for each of the offences committed by him, and the separate convictions were legal. (See illustration (*b*) of section 235.) But nothing contained in that section affects the Indian Penal Code (XLV of 1860), sec. 71; and the question, therefore, is, whether the case falls also under that section. If it does, a single sentence could only be passed for one of the offences committed. As the accused committed distinct offences, which, when combined, are not punishable under any single section of the Indian Penal Code, section 71 does not, in our opinion, apply to the case. The sentences passed by the Magistrate were, therefore, legal under section 35 of the Criminal Procedure Code (X of 1882); and the papers can be returned."

APPELLATE CRIMINAL.

Before Mr. Justice Nánábhái Haridás and Mr. Justice Jardine.

QUEEN-EMPRESS *v.* MA'NIA' DAYA'L.*

1886.
February 24.

Criminal Procedure Code (Act X of 1882), Sec. 307—Trial by jury—Verdict of acquittal—High Court's power of interference with the verdict of a jury.

In a case referred under section 307 of the Criminal Procedure Code (Act X of 1882) the High Court will not, as a rule, interfere with the verdict of a jury, except when it is shown to be clearly and manifestly wrong.

THIS was a reference under section 307 of the Criminal Procedure Code (Act X of 1882) by J. W. Walker, Sessions Judge of Ahmedabad.

The accused was charged with the murder of a child, and also with dishonestly retaining stolen property, offences punishable under sections 302 and 411, respectively, of the Indian Penal Code (Act XLV of 1860). The jury unanimously found him not guilty of the first offence, but found him guilty of the second. The Sessions Judge, disagreeing with the verdict of acquittal on the charge of murder, referred the case to the High Court under section 307 of the Criminal Procedure Code (X of 1882).

The reference was as follows :—

* Criminal Reference, No. 4 of 1886.

1886.

QUEEN-EMPRESS v. MÁNIÁ DAYÁL.

"I differ from the verdict of the jury, and consider it necessary for the ends of justice to submit the case to the High Court under section 307, Criminal Procedure Code (Act X of 1882).

"The jury convict the accused of dishonestly receiving the ornaments, knowing that they were stolen, and the evidence does not leave the least doubt that the accused had the bangles belonging to the child, and tried to dispose of them.

"The evidence of the child's mother, Muli, was given in a perfectly satisfactory manner, and she proves that the accused was with the child, and gave him some sweetmeats on the evening he disappeared. It is extremely improbable that the child should have been enticed away from his house by a stranger to him; the accused lived a few doors off, and was well known to the child.

"The witness Punja's evidence is trustworthy, and it shows that shortly after the child disappeared the accused denied that he knew anything about the child. The child disappeared on the evening of the 1st December, and the accused made a confession on the 7th, and again before the committing Magistrate on the 14th December.

"The medical evidence is that the child's body had been submerged in water for some time, but that owing to decomposition the exact cause of death could not be stated. The finding of the body in a well, with the bangles from the arms missing, proves clearly that the child was killed for the sake of the ornaments. As the neck ornament and anklets were not removed, the probability is that the murder was committed by one person alone, and that not by a grown-up person.

"The confessions made by the accused, taken with the facts proved in the case, do not leave the least doubt, in my opinion, that the accused killed the child for the sake of his ornaments. I find, therefore, that the offence of murder is established.

"In a case referred by me under section 307 of the Criminal Procedure Code (Act X of 1882) my attention was called by the High Court to the case of *Reg.* v. *Khanderáo*(1), in which it was held that the verdict of a jury will not be set aside, as a rule, unless it be perverse and patently wrong. No written judgment seems to have been pronounced in the case referred by me; but the only inference seems to be that it is useless for a Judge to refer a case to the High Court, where he differs from the verdict of the jury, unless it clearly appears that the verdict was perverse and patently wrong. But if the Judge entirely differs from the verdict, and finds that justice would be defeated by the verdict given, he has no option under section 307 of the Criminal Procedure Code (Act X of 1882), but is bound to submit the case to the High Court. The decision must in all cases turn on an appreciation of the evidence and the probabilities of the case. In the great majority of cases, two views may be formed. It may be impossible to show that either view was perverse and patently wrong, but it may be shown that the one view taken was superficial and inconsistent with the facts, and that the other view should be held proved,—that is, that 'a prudent man ought, under the circumstances of that particular case, to act upon that supposition' (Evidence Act, I of 1872 sec. 3). If a Judge considers that a jury in a Court of Session has taken the wrong view, and

(1) I. L. R., 1 Bom., 10.

that for the ends of justice the other view should be taken, he is bound, it seems to me, to refer the case, for section 307 of the Code provides that the Judge *shall* submit the case, not that he *may* submit the case.

"In the case of *Reg.* v. *Wazir Mandal*(1) the Calcutta High Court held that the verdict of the jury should not be interfered with, except where there is a gross and unmistakeable miscarriage of justice; but in a subsequent case, *Empress* v. *Mukhun Kumar*(2), this ruling seems to have been dissented from (Prinsep's Criminal Procedure Code, sec. 307). It was there held that no fixed rules could be laid down for the exercise of the discretion of the High Court, but that the decision of each case must depend upon its own peculiar circumstances.

"It is plain that the Legislature has placed a jury before a Court of Session on a somewhat different footing and on a distinctly lower *status* than a jury before a High Court, for the unanimous verdict of a jury before a Court of Session may be set aside by the High Court, but such a verdict by a jury before the High Court is conclusive—*Reg.* v. *Khanderáo*(3).

"There is one most important distinction in considering the weight to be attached to the verdict of a jury before the Court of Session. It may be the verdict of a bare majority of one. A Sessions Judge has no power to lock up a jury or discharge a jury which is not unanimous, and cause the accused to be retried. If any decision of a jury before a Court of Session be accepted as conclusive, unless it is shown that the verdict was perverse and manifestly wrong, the result might be that the verdict of one juryman, who constituted the majority, practically outweighted the opinion of the Judge and carried more weight than the finding of eight out of nine jurymen of a jury before the High Court might do. Supposing an ordinary case in which the only question was whether the direct evidence should be believed or not if the case were tried in the High Court, and eight out of the nine jurymen disbelieved the evidence, but the Judge agreed with the ninth in believing the evidence, the verdict of the eight would not prevail, as the Judge could discharge the jury, and the accused would then be retried. But if the case were tried in a Court of Session and three jurymen disbelieved the evidence, but two believed it and the Judge concurred with them, then, if, according to some of the decisions of the High Courts, the verdict of the majority of the jury of one was to be accepted as decisive, unless and until it was shown that the verdict of the majority of the jury was perverse and manifestly wrong—practically an impossibility in the case supposed—the decision would virtually be that of one juryman. It is hardly necessary for me to observe that the persons who serve on juries in the Mofussil are not usually persons of much business experience and knowledge of the world, or of a class and race habitually accustomed to debate questions of public and general interest, or familiar with the dispensing of justice in the Courts. In this district the trial of cases by a jury is limited to murder cases, and it is precisely in this class of cases that in all countries there may be expected to be a strong reluctance to convict and an antecedent prejudice against the evidence produced for the prosecution. And, further, in this district,

(1) 25 Calc. W. R. Cr. Rul., 25. (2) 1 Calc. L. R., 275.
(3) I. L. R., 1 Bom., 10.

1886.

QUEEN-EMPRESS v. MÁNIÁ DAYÁL.

there is a very strong antipathy to the taking of life in any form on the part of a very large and influential class of community. I doubt whether the records of the Court would show that in a single case of murder a Jain assessor has given his opinion for conviction. That a very prevalent belief should insensibly affect persons of other religions as well, especially in a country like India, is natural. A case was tried in this Court in which the jury unanimously convicted of the offence of culpable homicide not amounting to murder, but the case was referred by me to the High Court, although I did not consider that the capital sentence was required, and the accused was convicted of the offence of murder. Apart, however, from any prejudice against a conviction in murder cases which there may be, it appears to me that the Legislature by compelling the Judge to refer a case under certain circumstances to the High Court leaves it open to the High Court to weigh the evidence and decide which view of the facts should prevail.

"I have referred several cases to the High Court on acquittal by the jury, including a case in which the verdict was that of a majority of one, the accused persons were acquitted by the High Court in those cases, but as no written judgment seems to have been pronounced I do not know whether the cases were decided on the merits or not.

"In the present case, I am unable to state that the verdict of the jury is perverse. Whether it is manifestly wrong, is a question of fact. If I had been trying the case with the aid of assessors I should have had no hesitation in convicting the accused of the offence of murder under the provisions of section 302 of the Indian Penal Code (Act XLV of 1860); it seems to me, therefore, that I must hold that the verdict of the jury is wrong, and that for the ends of justice the case must be referred."

Latham (Advocate General) (with him *Púndurang Balibhadra*, Acting Government Pleader) for the Crown:—This Court will not assume that the verdict is right. It will go into the merits of the case and consider whether upon the evidence it is a reasonable verdict. The leading case upon this subject here is *Reg.* v. *Khanderáo Bájiráo*(1), where Mr. Justice West observes that "on a reference by the Session Judge, the whole case is opened up; the functions of both the Judge and jury are cast upon the Court, and it is bound to satisfy itself that the verdict of acquittal is proper, or at least sustainable." The learned counsel referred to *Queen* v. *Rám Churn Ghose*(2); *Reg.* v. *Nobin Chunder Banerjee*(3); *Queen* v. *Haroo Manjhee*(4); *Queen* v. *Gokool Kabar*(5); *Queen* v. *Mussamut Ituarya*(6); *Empress* v. *Mukhun Kumar*(7). The conclusion to be drawn from these cases is that

(1) I. L. R., 1 Bom., 10, at p. 13.
(2) 20 Calc. W. R. Cr. Rul., 33.
(3) 20 Calc. W. R. Cr. Rul., 70.
(4) 21 Calc. W. R. Cr. Rul., 4.
(5) 25 Calc. W. R. Cr. Rul., 36.
(6) 14 Beng. L. R., 54. S. C. 22 Calc. W. R. Cr. Rul., 14.
(7) 1 Calc. L. R., 275.

this Court will not set aside a verdict, if it is a reasonable one, or, as laid down in *Solomon* v. *Bitton*[1], if the verdict is such as reasonable men ought to have given.

[JARDINE, J.:—Suppose the verdict was reasonable, but this Court came to a different conclusion.]

Then the verdict of the jury ought to be upheld. Under section 307 of the Criminal Procedure Code (Act X of 1882), this Court should exercise all the powers of an Appellate Court. In appeal it is the duty of this Court to see whether the conviction is right—*Empress* v. *Protab Chunder Mukerji*[2]—and in reference, whether the verdict is reasonable.

Goverdhanrám M. Tripáti for the accused:—In this case the jury have unanimously acquitted the accused of the offence of murder. Unless this unanimous verdict of acquittal is shown to be "perverse and patently wrong," this Court will not depart from its traditional policy, and set it aside. The necessity for a reference arises only where the disagreement between the Judge and jury is so complete that in the interests of justice the High Court should interfere. That interference is justifiable only where the evidence points to but one conclusion, and the verdict of the jury is violently opposed to that conclusion: in other words, where the verdict is upon the face of it unsustainable. Were this Court to interfere in every case of doubt, in every case where the Sessions Judge happens to differ from the jury—the result would be disastrous. Jurors would sink to the position of assessors, and trial by jury would be virtually at an end. The learned pleader referred to *Queen* v. *Shám Bagdee*[3]; *Queen* v. *Doorwfdhun Shámonto*[4]; *Queen* v. *Koonjo Leth*[5]; *Queen* v. *Nobin Chunder Banerjee*[6]; *Queen* v. *Udya Changa*[7]; *Queen* v. *Wazir Mundul*[8]; *Queen* v. *Mussamut Itwarya*[9]; *Empress* v. *Mukhan Kumar*[10]; *Imperatrix* v. *Bhaváni*[11]; *Reg.* v. *Khanderáo Bájiráo*[12].

(1) L. R. 8 Q. B. D., 176.
(2) 11 Calc. L. R., 25.
(3) 13 Beng. L. R., Appx., 19. S. C. 20 Calc. W. R. Cr., Rul. 73.
(4) 19 Calc. W. R. Cr. Rul., 45.
(5) 20 Calc. W. R. Cr. Rul., 1.
(6) 20 Calc. W. R. Cr. Rul., 70.
(7) 20 Calc. W. R. Cr. Rul., 73.
(8) 25 Calc. W. R. Cr. Rul., 25.
(9) 14 Beng. L. R., 54. S. C. 22 Calc. W. R. Cr. Rul., 14.
(10) 1 Calc. L. R., 275.
(11) I. L. R., 2 Bom., 525.
(12) I. L. R., 1 Bom., 10.

1886.

QUEEN-EMPRESS v. MÁNIÁ DAYÁL.

NÁNÁBHÁI HARIDÁS, J.:—This is a reference by the Sessions Judge of Ahmedabad under section 307 of the Criminal Procedure Code (Act X of 1882). The accused was charged with the offence of murder under section 302 of the Indian Penal Code (Act XLV of 1860), and also with the offence of dishonestly retaining stolen property under section 411 of the same Code.

The jury, upon a consideration of the evidence and of the remarks of the Sessions Judge in summing it up, unanimously held that the accused was not guilty of the first, but was guilty of the second offence charged.

The Sessions Judge in his reference says that although he is "unable to state that the verdict of the jury is perverse," he would have had no hesitation in convicting the accused of murder if he had been trying the case with the aid of assessors.

It has been the uniform practice of this Court not to interfere with the verdict of a jury, except when it is shown to be clearly and manifestly wrong. I am far from being satisfied that it is such in this case. On the contrary, I am disposed to think that it is quite right, and that no other could have been safely arrived at upon the evidence. The Sessions Judge relies upon the confessions of the accused before the Magistrates subsequently retracted. But it is for the jury to determine what weight to attach to those confessions, as well as to any other portion of the evidence in the case. Besides, taking the confessions as they stand, I do not think they are in any way inconsistent with the verdict returned by the jury. The accused does not admit that he either threw the deceased into the well in which the dead body was found, or assisted any one in doing so, and there is no evidence that he did either. He admits, however, that he was present when another person (whom he names) stole certain ornaments from the deceased during his life-time; that he assisted him in doing so; and that he was present when that other person afterwards threw the deceased into the well. He also admits that the next day he was given by the latter some of those ornaments to sell, but that on account of his age (thirteen or fourteen years) no one would buy them of him, and that he, therefore, returned them to that other person. There is no evidence whatever, as already observed, that the accused was

concerned in the murder. Under these circumstances, it seems to me the only reasonable conclusion to arrive at is that which the jury have come to. Before we could convict the accused of murder, we must be satisfied, beyond all reasonable doubt, that the accused committed that offence. Upon the evidence in this case, and having regard to the unanimous view taken of it by five reasonable men,—for we may take the jury in this case to consist of such,—it would be most unsafe to jump to the conclusion that the accused was guilty of murder from his subsequent possession of property stolen from the deceased's person, which fact, though evidence of another offence, is perfectly consistent with the hypothesis of the accused's innocence of the offence of murder.

Agreeing with the jury, therefore, I would acquit the accused on the first and convict him on the second charge, and sentence him to three years' rigorous imprisonment.

JARDINE, J.:—I do not think the jury have been shown to be wrong on the merits. As regards their verdict, convicting of dishonest receipt of stolen property, they have applied the usual presumption arising from recent possession,—a presumption confirmed by the confessions. But I think it would be unsafe to draw the presumption that the prisoner was the murderer from the facts that he had been in possession, and had twice tried to sell the bangles which had been worn by the deceased child when last seen alive. The confessions do not amount to an admission of the prisoner being the murderer. They imply that the prisoner joined with another to entice the child to the neighbourhood of the well, but with a view to theft, and not to murder. The intention and act of murder are imputed in the confession to this other person; and it is proved that the bangles were ultimately found in the house where the latter lived. The facts pointed out by the Judge are consistent with the theory that the prisoner was induced by some older person to entice the child. The inference that if an older person had been present, the other ornaments would have been taken off the child, is not put higher by the Sessions Judge than a probability. The jury may, however, have thought it improbable that so young a lad would attempt so great a crime at all or unaided; and may have thought it probable that the other person

1886.

QUEEN-EMPRESS v. MÁNIÁ DAYÁL.

might, on the child beginning to cry, have felt alarm, and to avoid discovery have thrown the child into a well, without waiting to pull the anklets off the legs. In the absence of evidence, it is not a necessary assumption that the prisoner had previously joined in a plan to murder. The confessions indicate that the murder may have been committed by the other person in order to stop the child's cries and prevent the probable discovery. The theory set forth in the confession may have been thought by the jury the most probable, because there is nothing but a suggestion of the prisoner's having hid the bangles in the house where they were found, to invalidate the inference arising from that finding, *viz.*, that there was some other person concerned. We have heard the whole case argued and the evidence read. I am of opinion that here are many considerations which might induce a jury of reasonable men to take the confessions as a whole, and to refrain from convicting the prisoner of the murder. I would, therefore, acquit him of that offence, and convict him of the offence under section 411 of the Indian Penal Code (Act XLV of 1860).

Verdict of the jury upheld.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nánábhái Haridás.

1886.
January 25.

TRIMBAK RAVJI, (ORIGINAL PETITIONER), APPELLANT, *v.* NÁNÁ AND OTHERS, (ORIGINAL OPPONENTS), RESPONDENTS.*

Execution—Decree—Sale in execution—Civil Procedure Code (Act XIV of 1882), *Secs.* 274 *and* 289—*Omission to beat drum—Material irregularity.*

Omission to have a drum beaten as required by sections 274 and 289 of the Civil Procedure Code (Act XIV of 1882) *held* to be a material irregularity so as to render a sale held in execution of a decree liable to be set aside.

THIS was an appeal from an order passed by Ráv Sáheb Tribhuvandás Lakhmidás, Second Class Subordinate Judge of Satára, in Miscellaneous Application No. 68 of 1884.

On the 2nd October, 1884, the appellant's interest in certain property was put up for sale in execution of a money decree for

*Appeal No. 26 of 1885 from order.