REVISIONAL CRIMINAL.

Before Young C. J. and Blacker J.

THE CROWN—Petitioner,

versus

PAHLU AND OTHERS (ACCUSED) Respondents.

1938

Nov. 21.

Criminal Revision No. 958 of 1938.

Criminal Procedure Code (Act V of 1898), SS. 294, 309 — opinion of one of the Assessors, based on his personal knowledge gained extra judicially — Whether a de novo *trial necessary.*

At the conclusion of a Sessions trial three of the four assessors expressed the opinion that the accused were not guilty while the fourth stated that all the accused were guilty adding that he had personal knowledge about the matter which he had acquired while the case was under investigation. The Sessions Judge submitted the case to the High Court for orders being of opinion that this expression of opinion by the fourth assessor necessitated a trial *de novo* with the aid of other assessors.

Held, that in the circumstances, there was no necessity to hold a *de novo* trial and the proper course for the Sessions Judge was to ignore the opinion of the assessor and to deliver the judgment in due course if he came to the conclusion that the opinion was improperly expressed *or* that the assessor had been improperly influenced by extra judicial considerations.

That there was nothing illegal in a Judge acting in that manner.

The Crown v. *Lal Singh* (1), distinguished.

Case reported by Mr. G. S. Mongia, Sessions Judge, Shahpur at Sargodha, with his No. 376-J, dated 18th June, 1938.

M. SLEEM, Advocate-General, for Petitioner.

MADAN LAL for S. R. SAWHNEY, for Respondents.

Report of Sessions Judge.

During the trial of this case, three of the four Assessors expressed the opinion that the case against the

(1) I. L. R. (1934) 15 Lah. 20.

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accused has not been established, but the fourth held that the accused are guilty, adding that he had personal knowledge about the matter. This fourth Assessor stated further that he acquired this personal knowledge while the case was under investigation. It is obvious under the circumstances that this fourth Assessor having personal knowledge about the facts of the case was not a proper person to sit as an Assessor in the case. It is expressly enacted in Section 294 Criminal Procedure Code, that if an Assessor is personally acquainted with any relevant fact, it is his duty to inform the judge that such is the case whereupon he may be sworn, examined, cross-examined and re-examined in the same manner as any other witness. It is impossible however, to examine this Assessor as a witness at this stage when the opinions of the Assessors have been recorded already. This has created an awkward situation for the Court, and the question for consideration is as to what the proper procedure would be to adopt under the circumstances.

There are two rulings reported as *Sessions Judge of Tanjore* v. *Thiagaraja* (1) (Calcutta High Court) and *The Crown* v. *Lal Singh* (2) in which the view taken was that where in the course of a trial, it is found that one of the Assessors is an interested person and unfit to sit as an Assessor, there is no provision of law to meet such a contingency. It was held, however, that in such a case the proper course is to refer the case to the High Court to set aside the order appointing the incompetent Assessor and all subsequent proceedings in the trial, and the Sessions Judge will then be asked by the High Court to choose another Assessor and proceed with the trial *de novo*. It appears to me that the views expressed in these rulings must govern the

(1) (1912) 15 I. C. 313. (2) I. L. R. (1934) 15 Lah. 20.

present case. It is true that in both these cases the whole of the prosecution evidence had not yet been recorded when incompetency of the Assessor was discovered while in the present case the whole of the evidence has been recorded, and it was only when the Assessor was expressing his opinion that he declared his own unfitness to serve as an Assessor in the case by saying that he had personal knowledge about the facts of the case. This slight difference between the facts of the rulings cited and those of the present case is, in my opinion, immaterial. It has been mentioned already that in view of the provisions of Section 294, Criminal Procedure Code, this Assessor was certainly incompetent to serve as an Assessor in the case, and if these facts were known at the beginning of the trial, he would certainly have been excluded from the trial. It is of course regretable that the case should now be held up at this stage, but it appears to me that there is no other course open to me but to refer the matter for the orders of the Hon'ble Judges. The records are submitted accordingly with the recommendation that the appointment of Mahr Wali Dad as an Assessor be set aside and a *de novo* trial ordered with the aid of other Assessors.

The accused to be detained in the judicial lock up pending further orders.

Pronounced in open Court.

The case was referred to a Division Bench by Ram Lall J. by his order dated 2nd Sept., 1938.

RAM LALL J.—This is a reference by the learned Sessions Judge, Sargodha, made in the following circumstances :— RAM LALL J.

At the conclusion of a Sessions trial which lasted for three days the opinion of the four assessors, who

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assisted at the trial, was invited by the learned Sessions Judge. After the first three assessors had given their opinion, the fourth Mehr Wali Mohammad gave his opinion as follows :—

> " All the three accused are guilty. I have personal knowledge about this matter.
>
> *Court question.*—My knowledge was derived about three months ago while the case was under investigation."

The learned Sessions Judge on this stopped the trial and made a reference to this Court recommending that the case be ordered to be tried *de novo* with the aid of a different set of Assessors. The learned Judge was of opinion that the fourth assessor was incompetent and his participation in the trial had rendered the whole proceedings invalid. He relied on two decided cases, one of this Court and another of the Madras Court, though, by an oversight, the learned Sessions Judge says that it was a decision of the Calcutta Court. In the first of these *The Crown* v. *Lal Singh* (1), decided by Mr. Justice Jai Lal, one of the assessors was discovered during the course of the trial to be an active partisan of the accused person and on a reference the High Court set aside the proceedings so far taken, and directed a *de novo* trial with the help of another set of assessors.

In *Sessions Judge of Tanjore* v. *Thiagaraja* (2), quoted with approval by Mr. Justice Jai Lal in the Lahore case referred to above, a Division Bench of the Madras High Court ordered a *de novo* trial in a case where it was discovered, after the trial had commenced, that one of the assessors was an interested party being

(1) I. L. R. (1934) 15 Lah. 20. (2) (1912) 15 I. C. 313.

the son-in-law of the man who was murdered and in connection with whose murder the accused was being arrested when he committed the alleged offence which was the subject of the trial in question.

In both the reported cases it will be observed that the ground on which the assessor was held to be incompetent was that he had a personal bias, in the first case in favour of the accused and in the second in favour of the prosecution.

In the present case when the reference was made to the High Court the accused were served but were not represented before me. Mr. Nand Lal Salooja appeared on behalf of the Crown on the 22nd July, 1938, when the case was first laid before me, and as I was not satisfied that I should accept the recommendation of the learned Sessions Judge, I adjourned the case and requested the learned Advocate-General to address me on the point raised, a point which appeared to me to be one of considerable importance from the legal point of view and of vital interest to the administration. I found that, if I were to accept the recommendation of the learned Sessions Judge, I would create a position which might enable an accused person at a Sessions trial to bring the administration of justice to a perfect standstill. In such a state of things it would not be possible to get a Sessions trial to come to an end without the co-operation of the accused, for it would always be possible for a friend or a relation of an accused person to talk to an assessor about the merits of the case before he gave his opinion as an assessor and so render the proceedings invalid.

On the other hand if an assessor is to be regarded as an essential part of the Court to share in the task

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of a decision in a criminal case before the Court, it is necessary that this decision should be given on matters brought out in evidence at the trial and not on preconceived notions of guilt or innocence or on information received outside the Court.

To accept the reference, therefore, would create grave administrative difficulties but with this aspect I am not really concerned, if I feel certain about the legal position. To reject the reference would possibly render the trial one as held without jurisdiction. In the circumstances I have decided to record my own opinion and refer the whole case for the consideration of a larger Bench to be constituted by the Hon'ble Chief Justice.

My own view is that the reference should not be accepted. It is clear that a juror stands on a higher footing, speaks with greater authority and takes a larger share in the decision of a criminal case than does an assessor and it may be taken as axiomatic, therefore, that in the absence of a specific prohibition an objection that could not be upheld regarding a juror would be ruled out in the case of an assessor. The grounds on which objection can be taken to a juror are specified in section 278 of the Code of Criminal Procedure. The objections that are relevant to the present enquiry are based on the partiality of a juror. Partiality is a valid ground for objection but ' personal knowledge of the facts of the case ' is not specified as one of the objections that can be taken.

In England apparently it is a well settled rule of law that a juryman may be sworn and examined as a witness and is not disqualified, by reason of his having given evidence, from continuing to sit as a juryman and taking part in delivering the verdict. That this

is a well settled rule of practice in England was assumed in *The Queen* v. *Mookta Singh* (1) decided by Mr. Justice Norman and Mr. Justice Mitter as far back as 1870. This dictum was based on the authority of leading cases like that of *Mary Heath* (2) and *Lord Stafford's case* (3). Now, the Legislature in India must be presumed to have been aware of this well-established rule and yet it was not thought fit to make a departure from this rule. The matter was, therefore, left to be determined and the trial to proceed in such circumstances in accordance with that well established rule, namely, that a juror and by analogy also an assessor shall continue to assist at the trial even though he had personal knowledge of the subject. The only section of the Code which deals with an assessor having any personal knowledge of the facts of a case is section 294 and that enacts that such an assessor or juryman should inform the Judge presiding at the trial that he has some personal knowledge and thereafter he would be sworn, examined, cross-examined and re-examined in the same way as any other witness. The section does not go on to say that after he is so examined he is disqualified for sitting as a juryman or an assessor. Now, it appears to me that, if the well-settled rule in England is to be followed that a juror who has been examined under the provisions of section 294 of the Code of Criminal Procedure, could continue to sit as a juror and participate in the decision, I can see no reason for extending to an assessor a disqualification which does not exist in the case of a juror.

Of course it is still open to the learned Sessions Judge to act under section 294 and examine this asses-

(1) (1870) 13 W. R. (Cr.) 60. (2) (1744) 18 Howell's State Trials I, 123.
(3) (1860) 7 Howell's State Trials 1218, 1384.

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sor as a Court witness and it is equally open to him to disregard the opinion given by this assessor if, after examining him, he considers it desirable to do so. Under section 309, Criminal Procedure Code, a Judge is not bound to conform to the opinion of the assessors, and it seems to me to be highly technical to hold that in the circumstances the opinion of an assessor based on personal knowledge in any manner vitiates the trial.

The two reported cases referred to by the learned Sessions Judge were both cases in which the assessor in question had a personal bias in favour of one party or the other and, therefore, he could not be expected to appreciate the evidence properly or to give an impartial decision, and on this ground alone the two reported cases are distinguishable from the present case.

Nothing further need be said regarding the status of an assessor as compared with that of a juror. In the case of jurors there is provision for challenging their appointment but no such provision has been made in the case of assessors, though, in practice, I have known Sessions Judges accepting objections based on reasons of personal bias, or partiality.

The reasoning of the learned Sessions Judge in this reference assumes that an assessor is an essential part of the Sessions Court. This does not appear to me to be correct. The position was considered in *King-Emperor* v. *Tirumal Reddi* (1) where the jurisdiction of the Court was objected to on the ground that an assessor who had been absent for some days during the trial was allowed to resume his seat and gave his opinion at the conclusion of the trial. Mr. Justice Benson there drew a distinction between the functions of a juryman and an assessor and observed that the

(1) I. L. R. (1901) 24 Mad. 523.

jury form a tribunal which delivers a verdict whereas the assessors do not form a body and each acts and expresses his opinion individually. He further pointed out the contrast between the two modes of trial, in the one case the real tribunal being the jury aided and in certain matters directed by the judge and in the other the latter being the sole tribunal aided by each of the assessors. He held, therefore, that the assessors did not form members of the Sessions Court and because that was so the Court in that case was not illegally constituted if an assessor was allowed to resume his seat after an absence of several days and it is apprehended that the same would have been the case if he had never resumed his seat at all.

That an assessor is not a member of the Court is further evidenced by the fact that under the Criminal Procedure Code of 1843 and also of 1861 the relevant section enacted that a trial before the Court of Session and not by jury shall be conducted with the aid of two or more assessors *as members of the Court*. The words "as members of the Court" disappeared in the corresponding section of the Criminal Procedure Code of 1872 and were not repeated either in the Code of 1882 or the present Code of 1898 as amended in 1923.

The opinion of an assessor thus being an individual expression of his views on the facts of the case intended to assist the judge who is the sole tribunal, it appears to me that the opinion of an assessor which is based on material not brought out in evidence before him but on extraneous information, can be disregarded by the learned Sessions Judge without legal objection, if such disregard does not in any way prejudice an accused person. In the present case the opinion of the assessor which has caused this reference was that the accused

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were guilty and that he had personal knowledge on the subject. If this opinion is disregarded, as in my opinion it should be disregarded, the accused persons cannot be heard to say that they were thereby prejudiced. The question of prejudice is always a question of fact to be proved by the person raising the question and where there is no prejudice even if there is an irregularity the matter is completely covered by the provisions of section 537 of the Criminal Procedure Code.

Courts have disregarded opinions of assessors when they have found that the assessors in question either were unable or unwilling to appreciate the evidence produced. In a case reported as *Sikandar* v. *Crown* (1), the learned Sessions Judge found, after questioning the first assessor, that he had not understood the case. He also stated that this assessor had been somewhat sleepy during the course of the proceedings and he therefore re-addressed the remaining assessors before inviting their opinion. In doing so he had clearly disregarded the opinion given by the first assessor and this course was held to be free from legal objection.

In the present case it appears to me that it is open to the Sessions Judge either to disregard the opinion of the assessor altogether or to use section 540 and examine the assessor as a witness under the provisions of section 294 and consider the effect of any relevant evidence that the assessor may have to give as a witness in the case. But it seems to me that the course suggested by the learned Sessions Judge that a new trial be ordered is not correct.

(1) 36 P. R. (Cr.) 1918.

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Finally, it has been pointed out that the only section under which the High Court could interfere in this matter is section 561-A of the Code of Criminal Procedure. To take action under that section I would have to be satisfied and give a finding that it is necessary to secure the ends of justice that the proceedings should be set aside and a *de novo* trial held. That finding must be arrived at by the High Court and not by the Sessions Judge and I am far from satisfied that an order of the kind recommended by the learned Sessions Judge would be in the interests of justice. I can easily imagine cases, and the present case may well be such a case, where to hold a *de novo* trial would be merely to harass the accused. It is significant in this connection to note that the accused persons though served have not appeared before me to support the recommendation of the learned Sessions Judge, nor have I been able to discover any ground on which I could hold that, apart from a technicality, it would be in the interests of justice to hold a fresh trial. It may well be that to order a retrial at this stage would not only not secure the ends of justice but may tend to defeat those ends.

This case will be laid before the Hon'ble Chief Justice for constituting a Bench of two or more Judges as he thinks fit to decide the question raised and to give necessary directions to the learned Sessions Judge in the matter.

The Judgment of the Division Bench was delivered by—

YOUNG C. J.—The learned Sessions Judge of Lyallpur has referred this case to the High Court for opinion.

At the end of a criminal trial the learned Sessions Judge invited the opinion of the assessors. Three of

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them expressed the view that the accused were not guilty; the fourth said this :—

"All the three accused are guilty. I have personal knowledge about this matter.

Court question.—My knowledge was derived about three months ago while the case was under investigation."

The learned Sessions Judge relying upon the authority of *The Crown* v. *Lal Singh* (1), came to the conclusion that this expression of opinion by the assessor necessitated a trial *de novo*.

We do not take this view of the case. The authority relied on by the learned Sessions Judge was a case where the assessor was found to be an active partisan of the accused and is not therefore an authority governing the facts of this case. Under those circumstances it might have been possible for that assessor, being an active partisan of the accused, to have influenced the other assessors and so possibly to influence the Judge. In this case, however, nothing of the sort has taken place. We are of opinion that the proper course for the learned Judge was simply to ignore the opinion of the assessor if he came to the conclusion it was improperly expressed, or that he had been improperly influenced by extra judicial considerations. There is nothing illegal in a Judge acting in that manner. Under these circumstances we answer the reference accordingly. The case will go back to the learned Judge and he will in due course deliver judgment. As the learned Sessions Judge has been transferred to Campbellpore, we transfer this case to Campbellpore Division for determination by him.

A. K. C.

Reference answered.

(1) I. L. R. (1934) 15 Lah. 20.