I would, therefore, vary the decree of the lower appellate Court by allowing to the plaintiff the sum of Rs. 413-5-6 claimed in this second appeal. The plaintiff to have his costs throughout.

The cross-objection is dismissed with costs.

CRUMP, J.:—I agree.

*Decree varied.*

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## APPELLATE CRIMINAL.

*Before Mr. Justice Shah and Mr. Justice Crump.*

EMPEROR *v.* CHANGOUDA PIRGOUDA*.

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*August* 16.

*Criminal Procedure Code (Act V of 1898), section 238—Trial with the aid of assessors—Conviction of the accused for a minor offence which is triable only by a jury—Trial regular—Practice and procedure.*

The accused was tried for an offence punishable under section 302 of the Indian Penal Code, by the Sessions Judge of Belgaum with the aid of assessors. At the close of the trial and after the opinions of the assessors were recorded, the learned Judge was of opinion that though the accused was not guilty of the offence charged, he was still guilty of the minor offence punishable under section 326 of the Code. Accordingly, in the same trial, he convicted the accused of the minor offence, though it was triable in that District only by a jury. On appeal :—

*Held*, that the Sessions Judge was competent to convict the accused of an offence punishable under section 326 of the Indian Penal Code, even though it was triable by a jury.

PER CRUMP, J. :—Section 238 of the Criminal Procedure Code, 1898, invests the Court trying the offence (however consituted) with authority to find as an incident to such trial that certain facts only are proved in the trial which facts constitute a minor offence though such minor offence is not triable by the Court as constituted.

PER SHAH, J. :—The necessary implication of section 238 appears to be that there need be no separate trial with reference to the minor offence. According to the section even the charge is not required to be made.

*Pattikadan Ummaru* v. *Emperor*[1], referred to.

* Criminal Appeal No. 321 of 1920.

[1] (1902) 26 Mad. 243.

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EMPEROR
*v.*
CHANGOUDA.

THIS was an appeal from a conviction and sentence passed by F. K. Boyd, Sessions Judge of Belgaum.

In the District of Belgaum, the offence punishable under section 302 of the Indian Penal Code is triable with the aid of assessors, and the offence under section 326 of the Code is triable by a jury.

The accused was tried by the Sessions Judge for an offence under section 302, with the aid of assessors. The assessors were of opinion that the accused was not guilty of the offence charged. With this opinion, the learned Judge agreed ; but he was further of opinion that the accused was guilty of an offence under section 326. He, accordingly, convicted the accused of the latter offence and passed a sentence of rigorous imprisonment for five years.

The accused appealed to the High Court.

*G. B. Chitale*, for the accused.

*S. S. Patkar*, Government Pleader, for the Crown.

CRUMP, J. :—This appeal raises a point of law which is not entirely free from difficulty. It may be stated as follows :—By virtue of Government Notification No. 7087, dated October 19, 1915, published at page 257 of the *Bombay Government Gazette*, Part I, for 1915 the offence of murder, punishable under section 302 of the Indian Penal Code, is triable before the Court of Session of Belgaum with the aid of assessors and the offence of causing grievous hurt by a dangerous weapon punishable under section 326 of the Indian Penal Code is triable before the same Court by a jury. In the present case the accused stood charged with murder and with no other offence and the offence was therefore triable by the Sessions Court with the aid of assessors. That offence was so tried up to and including the stage of the trial at which the two assessors

recorded their opinions. After those opinions had been recorded the Sessions Judge adjourned the case for judgment. He held that the facts were within the scope of section 326 and not section 302 and therefore, convicted the accused of the former offence.

It is urged in appeal that the conviction is illegal. The argument is that the offence under section 326 was triable by a jury and not with the aid of assessors, and that as it was not tried by a jury the Sessions Judge could not convict the accused under that section.

Apart from the question of procedure it cannot be doubted that the terms of section 238 of the Code of Criminal Procedure, as interpreted by this High Court, are wide enough to permit a Court to convict an accused person charged with murder of an offence under section 326 of the Indian Penal Code, if for instance the Sessions Judge had in this case held the accused guilty of an offence punishable under section 304 of the Indian Penal Code, which is also triable with the aid of assessors, the conviction would clearly be permissible by virtue of section 238 of the Code of Criminal Procedure.

I am unable to find that the exact point now before us has ever been the subject of judicial consideration. There are many decisions as those cases where the trial has been wrongly held *ab incepto* either before a jury or with the aid of assessors as the case may be. But those decisions do not assist us here. As I have said the procedure was strictly in accordance with law up to and including the stage when the assessors gave their opinions. Nor is there any specific direction by the Legislature on the point. In enacting section 536 of the Code of Criminal Procedure the Legislature must be taken to have had in mind cases where the procedure has been wrong throughout. Literally

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read clause (2) of that section covers the present case but here it is obvious that there was no opportunity to take objection, and it is, therefore, difficult to hold that the defect (if any) is cured by that clause.

But in my opinion there is no defect here. The powers given by section 238 to convict of a minor offence are not controlled by those sections which prescribe the procedure to be followed in trying the offence charged. Here the charge was of murder and the trial was regular in point of procedure. The Court, therefore, before which the trial was held had power to convict of a minor offence. This view finds support in the case of *Pattikudan Ummaru* v. *Emperor*[1]. In that case the jury had power to try the offence charged but the conviction was for a minor offence which was not charged and which the jury were not empowered to try. I agree with the remarks of Bhashyam Ayyangar J. as to the scope of section 238 with reference to such cases and those remarks are applicable here, for in this case the Court had power to try the offence charged but the conviction was for a minor offence which was not charged and which the Court had no power to try. I agree that section 238 invests the Court trying the offence (however constituted) with authority to find as an incident to such trial that certain facts only are proved in the trial which facts constitute a minor offence though such minor offence is not triable by the Court as constituted.

Upon the facts of the case I am satisfied that the guilt of the accused is proved. I would, therefore, confirm the conviction and sentence and dismiss the appeal.

SHAH, J. :—The appellant before us was charged with the murder of his uncle Vomgouda committed at

[1] (1902) 26 Mad. 243.

Rajapur in the Chikodi Taluka about an hour before dawn on the 23rd November 1919. He was tried by the Sessions Judge of Belgaum with the aid of assessors. No other charge was framed. The assessors were asked their opinions only as to the charge of murder. They found that the accused was not guilty. The Sessions Judge was satisfied that the accused caused injuries to the deceased; but on the medical evidence he was of opinion that the injuries caused amounted to grievous hurt and that the accused was guilty of an offence punishable under section 326, Indian Penal Code. This being a minor offence he convicted the accused of it, though no charge was framed. He observed in his judgment that this view of the nature of the offence was not put forward in defence and that it occurred to no one except himself and only at the time of his final consideration pending judgment. The accused was sentenced to rigorous imprisonment for five years.

In the appeal it has been urged on his behalf that in the District of Belgaum an offence punishable under section 326, Indian Penal Code, when tried in the Court of Session is triable by a jury under the Government Notification No. 7087, dated 19th October 1915 (published in the *Bombay Government Gazette*, Part I, 1915, page 2579 and in the Criminal Circulars as Supplementary Criminal Circular No. 5), that the course followed by the Sessions Judge has deprived him of an opportunity to claim to be tried by a jury for the offence under section 326, Indian Penal Code, and that there should be a fresh trial by a jury on the charge under that section. On behalf of the Crown it is urged that the trial was valid as no objection was taken under section 536, subsection (2), Criminal Procedure Code; that the irregularity, if any, is condoned by section 537, Criminal Procedure Code, and that under section 238 the Sessions Judge was well within his powers in convicting the

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accused of the minor offence, even though no charge was framed, and even though the minor offence would be triable by a jury if a charge was framed.

It is clear that the present case is not covered by section 536 of the Code. The trial proceeded on the charge of murder, which was triable with the aid of assessors. In the absence of any charge under section 326, Indian Penal Code, it is difficult to say that an offence triable by a jury was tried with the aid of assessors within the meaning of the section. In the present case the view taken by the Sessions Judge came to be known to the accused when he recorded his finding ; and it is difficult to attach any significance to the omission on the part of the accused to raise any objection. Until the judgment was delivered there was nothing to object to. I do not think that a case of this type is contemplated by section 536.

Section 537 of the Code also seems to me to be inapplicable. In view of the express provisions of section 536, I doubt whether the point as to the validity of the conviction based on the ground of the form of the trial is intended to be covered by section 537. Assuming that the words of the section are wide enough to cover such a case I should hesitate to hold that an omission to try the accused by a jury has not occasioned a failure of justice. Section 536 indicates that a trial by a jury is treated as a valuable right, which the parties concerned can insist upon by raising an objection in time to a trial with the aid of assessors. Some of the judgments in *King-Emperor* v. *Parbhushankar*[1] clearly indicate that under the scheme of the Code the trial by a jury is a valuable right: I am concerned with what is indicated by the scheme of the Code and having regard to the importance of the form

[1] (1901) 25 Bom. 680.

of the trial, I should be slow to allow the omission to to be condoned by section 537.

It is clear, however, that under section 238 of the Code, the accused could be convicted of the minor offence. That section provides that when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he is not charged with it. In the present case the trial was perfectly valid, and the trial Court had power under the section to convict the accused of the minor offence. This section has nothing to do with the form of the trial nor with the convicting authority. It provides that an accused person may be lawfully convicted of a minor offence although he is not charged with it. Ordinarily a charge ought to be framed under the provisions of the Code: but in the case of a minor offence a conviction can be recorded without the charge being framed. It seems to me to follow, if the provisions of this section are to be given effect to, that the Court which is competent to try the accused for the higher offence is competent to convict him of the minor offence. If in the case of the minor offence the form of the trial is different from that for the higher offence, as is the case here, and if the tribunal as constituted for the trial of the higher offence is unable to deal with the minor offence on that ground, it seems to me that the operation of section 238 would be unduly curtailed. No doubt where a charge for the minor offence is framed there can be no difficulty. The proper form of the trial can be adopted; and section 269, sub-section (3), provides for dealing with the trial of offences, some of which are triable by a jury and some with the aid of assessors. But where no charge is framed, if there is to be a retrial, if the minor charge happens to be triable by a jury, it seems to me that the provisions of

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section 238 would be nugatory in such cases. The necessary implication of section 238 appears to be that there need be no separate trial with reference to the minor offence. According to the section even the charge is not required to be framed.

The only authority that could exercise the power under the section could be the authority trying the higher offence. There is no express provision in the Code providing for a case of this type. In the absence of any provision indicating the intention of the Legislature to the contrary, I am of opinion that the Sessions Judge was competent to convict the accused under section 326, Indian Penal Code, even though the offence was triable by a jury.

At the same time where the form of the trial depends upon the charge in respect of the minor offence being framed, I think care should be taken to frame the charge, where the facts indicate a reasonable possibility of the minor offence being made out, so that from the beginning the trial may proceed according to the provisions of the Code, and the parties concerned may have an opportunity to object to the trial with the aid of assessors if so advised. In the present case the observations of the learned trial Judge show that the minor offence was not anticipated and that no charge in respect of it could have been framed.

As regards the merits I am satisfied that the Sessions Judge is right in his conclusions. I agree that the conviction and sentence should be confirmed and the appeal dismissed.

*Appeal dismissed.*

R. R.