indicate, is that those damages should be assessed at 3,000 rupees.

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SCHILLER v. FINLAY

Judgment for plaintiffs.

Attorneys for the plaintiffs: Messrs. *Collis* and *Co.*

Attorneys for the defendants: Messrs *Berners, Sanderson* and *Upton.*

[APPELLATE CRIMINAL.]

Before Mr. *Justice L. S. Jackson and Mr. Justice Mitter.*

1870
Sept 20.

THE QUEEN *v.* HARI PRASAD GANGOOLY AND OTHERS, PRISONERS.*

Special Verdict—Trial by Jury—Criminal Procedure Code (*Act* XXV *of* 1861)—*Penal Code* (*Act XLV of* 1860), *ss.* 330, 348.

The prisoners were tried under s. 330 of the Penal Code (for voluntarily causing hurt to a girl) and under s. 348 (for wrongfully confining her). Circumstances of aggravation were alleged, as lifting up and using a sword, of lowering the girl into a well and of pricking her with thorns. The jury in their verdict stated that they disbelieved these allegations and also the charge of illegal confinement, but that they believed that some slaps had been given. The Judge then asked the jury whether they convicted on either, and, if so, which head of charge. They answered that they believed the prisoners had beaten the girl, and that they convicted them under s. 330. *Held* that the question put by the Judge to the jury was a proper one, and not one of law. The conviction was upheld.

Such a case is not governed by the rule of English law as to special verdicts.

THE prisoners were tried by jury before the Court of Session at Zilla Nuddea on charges framed under s. 330 of the Penal Code (voluntarily causing hurt to a girl) and under s. 348 (for wrongfully confining her).

They pleaded Not Guilty.

From the record of the Court of Session it appeared that the jury by their unanimous verdict found one of the accused persons tried on that occasion not guilty, on both heads of charge, and also found the prisoners (appellants) not guilty

* Criminal Appeal, No. 530 of 1870, from an order of the Sessions Judge of Nuddea, dated the 8th June 1870

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on one head of charge, namely that under s. 348 of the Penal Code, but found them severally guilty on the other head of charge under s. 330. They were sentenced to six months' rigorous imprisonment.

A motion was made before the High Court to set aside the verdict, supported by the following affidavit :

"I am the brother of Hari Prasad Gangooly, and I conducted the criminal case of The Queen *v.* Hari Prasad Gangooly and others in the Sessions Court at Nuddea. The jury, when they came to Court, after retiring to return their verdict, informed the Judge that they did not believe the lifting up, or the using of the sword at all, lowering into a well, or pricking with *babla kanta* (thorns) and illegal confinement, but they only believed that *shamanya hurta chappurta mara hoya chilo* (সামান্য চড়টা চাপড়টা মারা হইয়াছিল) that ordinary slaps were given. But the Judge, instead of applying the law himself in the matter, asked the jury whether the case fell under s. 330 of the Indian Penal Code. The foreman, without further retiring with his companions to consult, returned an answer in the affirmative, although no copy of the Penal Code was before them, neither did the Judge point out and explain to them the section in question."

The contention was that the record did not truly represent what had happened ; that the jury had by their finding negatived the principal circumstances of the charge : that they had in fact given a special verdict, which was tantamount to a verdict of not guilty, and which the Judge was bound to receive and record ; and that the Judge, in asking the jury whether they found the prisoners guilty under s. 330, had in fact put to them a question of law, and had thus committed an irregularity which was fatal to the conviction.

Copies of the affidavit and petition accompanying it were sent by the directions of the High Court to the Court of Session, and the Judge was directed to transmit the proceedings, with any observations on the matters stated which he might have to offer ; and, as the Judge, before whom the trial was held, had left the district, it was suggested that the present Judge should take down the statements of the officers of his Court who had been present at the trial.

The officiating Judge sent up what appeared to their

Lordships a very meagre return ; but it contained a statement of the person who had acted as foreman of the jury on the trial which was in the following words:

"I was foreman of the jury that tried Hari Prasad Gangooly. We said to the Judge that we did not believe the evidence as to letting down a well or as to pricking with thorns. The Judge then asked us whether we convicted on either head, or, if so, which head. We said we believed the prisoner had beaten the girl, and that we convicted under s. 330. I cannot at all be certain whether I, or any of us, used the word "*shamanya*." I certainly said '*char chapar*.'"

Mr. *Anstey* and Mr. *Ghose* for the prisoners.

Mr. *Anstey*, in support of the motion contended that the verdict of the jury amounted to a verdict of not guilty. The prisoners were charged with voluntarily causing hurt under s. 330, and with wrongfully confining the girl under s. 348 of the Indian Penal Code. The verdict was that the prisoners had merely committed an assault by slapping the girl. The prisoners should have been at once released upon this special verdict. It was improper for the Judge to question the jurors as to whether they convicted the prisoners, and, if they did, under which of the sections mentioned. The facts found by, the jury, *viz.*, the slaps given to the girl, could not support a conviction under s. 330 which is one of causing hurt. The Judge should have decided this himself as it was a question of law and not have left it to the jury—*Elliot* v. *The South Devon Railway* (1). The prisoners were not charged with assault merely, the verdict, therefore, amounted to one of not guilty. The jury are not bound, nor are they competent, to find prisoners guilty under any particular section, but they are simply to give their verdict upon a question of fact upon the evidence. Where they do this unmistakeably as in this case their opinion ought not to be asked upon a question of law. The Judge is bound to take the verdict of the jury as it is given without putting questions the answer to which referred to a particular section of the law. All considerations of this

(1) 2 Ex., 725.

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kind must be dealt with in the same way as in England. There is no difference between a jury here and one in England, except where the law makes special provisions in regard to juries here. The English rule therefore must govern all questions regarding special verdicts. Even if the conviction is good the punishment is too severe.

Mr. *Ghose* on the same side.—The verdict of a jury when once given must be accepted as it is. The *Queen* v. *Gorachand Ghose* (1). The verdict in this case amounted to a special verdict, and the Court has no power to add to or vary a special verdict as given by the jury—*Dean of St. Asaphs Case* (2); *Rushel's Case* (3); *Messenger's Case* (4); *Rex* v. *Francis* (5). Hawkins' Pleas of the Crown, under the head of Special Verdicts.

JACKSON, J. (after stating the facts as above and adverting to the statement made by the foreman of the jury, continued)—This statement it will be seen does not agree precisely with the allegations of the affidavit and petition; but it undoubtedly shows that a communcication took place between the Judge and the jury which has not been made to appear on the record. Baboo Aushutosh Chatterjee, a vakeel of this Court, who was then at Krishnaghur and was retained for the defence of the petitioners, has since furnished us with a memorandum of his recollection of the circumstances. He differs in only one particular of any importance from the foreman of the jury, in that he represents the Judge as having asked the jury whether they considered the case to fall under s. 330, Indian Penal Code, while the foreman's account of it is that the Judge asked whether they intended to convict under either head of charge, and if so, under which. The foreman's account appears to us the more probable, it was committed to writing three weeks earlier than that of the pleader, and besides, the foreman, as being the person to whom the question was addressed, is perhaps

(1) 3 B. L. R., F. B., 1.
(2) 21 Howell's St. Tr., 847, 951, *et. seq.*
(3) 8 Bac. Abr., Tit. Verdict, 101.
(4) Kelyng's Rep., 72.
(5) 2 Str., 1015.

the most likely to remember it accurately. The affidavit indeed contains a similar statement as to the Judges question relating exclusively to s. 330, but the affidavit is that of the brother of the chief accused, and consequeutly that of an interested party, and moreover it is to be observed that it was the Judge's business to arrive at the finding of the jury on the second head of charge as well as on the first, and in point of fact there is a verdict of not guilty recorded on the second as there is one of guilty under the first head of charge; and we therefore think the Judge must have put the question as to both. The matter indeed is only of importance as bearing on the possibility of the jury's answer being brought about by a sort of suggestion from the Judge that they should give a verdict of guilty under s. 330.

On these materials we have to determine

1*st*. Whether the proceedings are defective and void in law?

2*nd*. Whether the conviction is in accordance with the real intention of the jury?

The points taken by the learned Counsel for the prisoners were these:—that the prisoners were entitled to their discharge by reason of the omission of the Court below to record the special verdict which in truth the jury returned, and which the Court was bound to receive; that the jury certainly meant a verdict under one of the general exceptions contained in s. 95, Indian Penal Code, being in other words a verdict of acquittal: that the Judge was not competent to put to the jury a question of law, and that the enquiry as to s. 330 was such a question; that the first verdict of the jury, which was their real verdict, was one of not guilty, as the prisoners were not on their trial for assault which was the only offence of which the jury found them guilty; that the jury were not absolutely bound to find one way or the other; that the jury were not competent to find the prisoners guilty under a particular section of the Penal Code, and that as the jury had acquitted the prisoners, there could be no new trial. It was also objected that the Judge had not properly summed up the evidence, and lastly that, supposing the verdict and conviction to be supportable, the sentence was excessive and cruel.

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The arguments addressed to us were chiefly based on the assumption that the "trial by jury" spoken of in s. 322 of the Code of Criminal Procedure is the system of trial by jury prevalent in England, except where and in so far as it is expressly modified by the provisions of the Code, and accordingly a number of English cases were cited, and English law books were referred to (Hale, Hawkins, Bacon's Abridgment, &c.) We have not thought it necessary to examine those cases, partly because we consider the assumption quite unfounded, and partly because they generally did not touch the point under consideration, but related to the powers of a Court to vary or add to a verdict once recorded. The trial by jury spoken of in s. 322, Code of Criminal Procedure, is, we have no doubt whatever, the mode of trial described in the 23rd and 25th chapters of that Code, and nothing else. It was observed that the word juror was not defined in the Code, and from this the inference was said to follow that we must resort to the English definition of juror as being familiar, and well ascertained. But neither is the term assessor defined, and it will hardly be contended that we shall derive any information as to the meaning of this term from the English Criminal law. The fact is, as most people conversant with the criminal law of Bengal are aware, that both notions, that of juror and that of assessor, are taken, greatly modified and expanded no doubt, from the Bengal Regulation VI of 1832, which made, so to say, the first breach in the system of "trial and punishment under the provisions of the Mahomedan Criminal Code." A reference to cl. 4, s. 3 of that Regulation will show with what sort of functions the Legislature of that day clothed persons who were called jurors. Under the Code, no doubt, in the places, and in respect of the class of offences, and for such period of time as the Executive Government directs, the jury of British India decides upon the facts in criminal trials. But jurors who are not *jurati* at all, who may determine by a prescribed majority, and whose functions may cease at any time on the publication of an order in the Gazette, are clearly not the jurors, nor is the system of trial in such circumstances the system of England. We are of opinion that, when the proceedings upon a trial by jury in the Mofussil are consistent with a reasonable construction of that part of

the Procedure Code where such trial is provided for, the proceedings are good in the absence of any distinct ruling to the contrary, and ought not to be examined by the light of English rules of procedure.

By s. 379, Code of Criminal Procedure, it is provided that after the Judge's summing up "the jury shall deliver their finding upon the charge." Now the charge must certainly mean the whole charge, and, in respect of offences under the Indian Penal Code, the section which relates to the offence is an essential portion of the charge. S. 234 is in these words. "The charge shall describe the imputed offence as nearly as possible in the language of the Indian Penal Code and shall refer to the section under which such offence is punishable." The jury are thus apprized that the heads of charge fall respectively under particular sections of the Penal Code and the Judge's direction to the jury in the case before us opens with the statement that the accused are charged with such and such offences under the sections specified.

The law does not prescribe any specific form in which the jury are to return their finding, and we are of opinion that they are at liberty to deliver it in any form which they think fit, and if that finding is not exhaustive as to the facts in issue which go to make up the charge or charges, we have no doubt whatever that it is competent to the Judge, and is indeed his duty, to put such questions to them as shall elicit a complete finding. We also think with advertence to the observations already made, that a question whether they find the accused guilty of the charge under one of the sections named, and if so under which, is unobjectionable, where it is clear that the jury have the distinction between such sections present to their minds, and that putting such a question is not putting to them a question of law. It is merely a short way of stating something quite familiar for the moment to the questioner and the person questioned, and it is inconsistent with common sense to require that a question so put should contain every word of the section referred to, which would be needful if this objection is good for anything.

It cannot be doubted indeed that the record should contain an accurate statement of every communication between the Judge

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and the jury, and it appears certain that in this respect the record of the case before us is defective; but it is also manifest that the accused have not been prejudiced by the omission, and that being so, s. 439 precludes any interference with the conviction on this ground.

We therefore think the trial is not vitiated in point of form by anything which took place, and we also think that the Judge sufficiently complied with the requirements of the law that he should sum up the evidence. The summing up is not perhaps very masterly, nor such as to satisfy criticism, but that, we apprehend, is given to few Judges in the Courts of Session, nor is it an invariable accomplishment of Judges elsewhere, but the Judge in this case has recapitulated what the witnesses said, has pointed out how it bears upon the charges, has drawn attention to what he considered its weakest parts, and given what appear to us very sensible suggestions to the jury in respect of the conclusions to be drawn from the evidence. We cannot therefore say that there has been any failure on this head either.

The question remains whether the verdict as recorded is any other than what the jury really intended, and we think there is in truth no pretence for saying so. Much stress has been laid on the fact that the jury expressly negatived the specific acts of violence alleged, such as the use of a sword, the pricking with thorns, lowering into a well, and so fourth; and in the use which may perhaps be conceded to have taken place of the word "*shamanya*" as qualifying the beating which they found to have been committed.

It has been supposed that the Bengali word in question means "slight," and that the jurors meant by this a beating so slight as to bring the case within the meaning of s. 95 of the Indian Penal Code, although the improbability of the jury having meant to find any such thing, which was not even suggest on the prisoner's behalf in the course of the trial, is obvious enough. Upon such a point the opinion of this Bench may perhaps be entitled to some weight, and we think that more probably the word was used in its proper acceptation of "ordinary," or "common" so as to mean a beating with a man's natural weapons of offence, to wit, his hands and feet,

and this opinion we consider is borne out by the almost concluding words of the Judge's direction, in which he refers to the other acts charged as probably circumstances of exaggeration. Those acts if proved would no doubt have greatly aggravated the offence, but they are not essential to the crime of causing "hurt" for striking with the hands, even with the open hand, might very well, and probably did, cause "hurt," that is bodily pain, to a child of tender years; and when as above intimated, the jury in our opinion knew very well what they were doing when they brought in a finding of guilty under s. 330, that makes their meaning unmistakeable, both as to the hurt, and as to the intent.

We therefore think the finding and conviction on all points unimpeachable. We have only further to consider the sentence passed, and here we think the Judge has not given effect to the finding of the Jury, which expressly negatives all the circumstances beyond a beating and slapping, for the purpose stated, and then the relationship between the parties must not be lost sight of, for although it does not appear that the accused were in any position of authority over the girl, yet the chief accused is undoubtedly a near relation, and on these findings the sentence passed, six months' rigorous imprisonment with added fine, is in our opinion much too severe: rigorous imprisonment in particular, we think ought not to have been inflicted. Considering therefore that the accused underwent imprisonment of that description for nearly three months, we think they ought not to return to jail, but ought to be discharged on payment of the fines imposed.

The sentence passed by the Court of Session is therefore altered to one of imprisonment for two months and a half, which the accused have already suffered, and they are therefore to be discharged on payment of the fine, and in default they will be further imprisoned, but not rigorously, for the space of two months each.

Sentence modified.