APPELLATE CRIMINAL.

1873
April 29 & 30.

Before Mr. Justice Phear and Mr. Justice Glover.

THE QUEEN *v.* KOONJO LETH AND OTHERS.*

See also 12 B L R 253.

Verdict of Jury set aside—Acquittal Criminal Procedure Code (Act X of 1872). ss. 263, 271, 287, *and* 288.

On a trial by jury before a Sessions Judge, the jury returned a verdict of guilty. The Judge disagreed with the verdict, and submitted the case to the High Court. *Held* that the High Court had power to set aside the verdict of the jury, and to direct an acquittal.

S. 263 of the Criminal Procedure Code (Act X of 1872) explained.

IN this case the prisoners were found guilty by a jury of the offence of dacoity, and some of them, of having stolen property in their possession, knowing it to be stolen. The Judge who tried the case disagreed with the verdict, and accordingly, under s. 263 of the Criminal Procedure Code (X of 1872), submitted the case to the High Court.

Mr. *Ghose* (with him Baboo *Lukhy Churn Bose*) for the prisoners contended that, when a case has been referred by a Judge under s. 263 of the Criminal Procedure Code, the High Court can set aside the verdict of a jury, and direct an acquittal. The section is entirely novel. The disagreement referred to in s. 263 must be disagreement on fact; the Judge can settle any question of law, the jury are concerned with the facts only. An appeal by a prisoner under s. 271, from a verdict of the jury, must be on a question of law, but in that section there is no reference to a disagreement between the Judge and jury, therefore the "appeal" mentioned in s. 263 is to be taken in a wider sense, and the case submitted is to be treated as an appeal on a question of fact, as well as of law. [GLOVER, J. —But what is the meaning of the words in s. 263, "but it

* Reference to the High Court under s. 263 of the Criminal Procedure Code (Act X of 1872) by the Officiating Sessions Judge of Moorshedabad in his letter No. 68, dated the 29th March 1873.

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may convict the accused person on the facts ?"] That is, the High Court may even go so far as to convict a person who has been acquitted by a jury, for it could not have been the desire of the Legislature to procure convictions solely : a remedy for the perverse verdicts of juries is intended, and the High Court can reverse such verdicts whether of acquittal or conviction. The innocent are to be protected, as well as the guilty punished, but no doubt the words might have been more explicit. [PHEAR, J —On a case being referred under s. 287, the High Court can acquit under s. 288, whereas, if the prisoner appealed under s. 271, the High Court cannot do so ; so if a man has been sentenced to transportation for life, the High Court cannot interfere with the findings of fact of the jury, whereas, if he is sentenced to be hanged, it can.] The whole of s. 263 must be read together ; " but it may convict, &c.," may be in opposition to the judgment of the Sessions Judge. At any rate this Court is not bound to convict, there has been no conviction, as no judgment was passed, and the High Court may agree with the Judge below and order the discharge of the prisoners, or pass whatever sentence it may consider proper.

Cur. adv. vult

PHEAR, J. (after shortly stating the facts).—Upon considering the evidence, we find that the prisoners have been recognized by some of the witnesses who have given their testimony ; that certain articles said to have been found in the possession of the prisoners have been identified also by some of the witnesses as articles which had been stolen from the prosecutor in the course of the dacoity ; and there is further a confession made before the Magistrate by Koonjo Leth, one of the prisoners jointly tried with the others, and in this confession, every one of the other prisoners, as well as Koonjo Leth himself, are mentioned as taking part in the dacoity. If there were nothing on the record serving to impeach these several heads of evidence, no doubt the case against the prisoners would be very strong indeed. The Judge, however, has given reasons for thinking that the recognition of the prisoners

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by the witnesses cannot be depended upon ; that the identification of stolen articles is untrustworthy : and that the confession of Koonjo Leth is not a true and real confession, but a confession which has been obtained by some contrivance of the Police, or in such a way at any rate as serves to render it altogether untrustworthy. We concur with the Judge in this view. Indeed, I may say for myself that, if I had to Judge of the facts merely by the testimony of the prosecutor and the other witnesses who have been called on the side of the prosecution, I should almost doubt whether there had been a real dacoity at all. (The learned Judge read and commented on the evidence of the witnesses and the confession of Koonjo Leth, and continued) :— I need not go further in detail into the evidence. I have stated enough, I think, to indicate the ground upon which we entirely concur with the Judge in thinking that the prisoners, excepting the first one, ought not to have been convicted upon the evidence which is on the record. The confession of Koonjo Leth, of course, could not have been legally used against the others at all excepting to such an extent as it was substantially corroborated by unimpeachable evidence *aliunde*. But so far from this being the case, as I have already mentioned, wherever the confession is really tested it is proved to be false. * * * * On the whole, then, we think, as I have already said, the prisoners ought not to have been convicted, and that in the interests of justice, all the prisoners, excepting the first prisoner, ought to be acquitted.

But a question of somewhat of a serious character has arisen as to our powers in this case to acquit. The case comes before us in consequence of the Judge having submitted it to this Court under the provisions of s. 263 of the new Criminal Procedure Code. According to that section :—" In cases tried by jury, * * if the Court disagrees with the verdict of the jurors, or of a majority of such jurors, and considers it necessary for the ends of justice to do so, it may submit the case to the High Court, and may either remand the prisoner to custody, or admit him to bail. The High Court shall deal with the case so submitted as with an appeal, but it may convict the accused person on the facts, and if it does so, shall pass such

sentence as might have been passed by the Court of Session." Do these words, "shall deal with the case so submitted as with an appeal," mean that the case submitted shall be in all respects considered and situated as an appeal. If so, then it is an appeal, if not preferred by the prisoner, yet preferred on his behalf against a conviction of a jury, and s. 271 says:—"If the conviction was in a trial by jury, the appeal shall be admissible on a matter of law only."

In the case before us, the ground upon which the verdict of the jury is sought to be set aside is undoubtedly in substance a matter of fact, and not a matter of law. The construction of these words to mean that the case submitted is to be considered essentially as an appeal seems to be somewhat favored by the words which follow,—"but it may convict the accused person on the facts," because "but" seems to imply something in the way of opposition to, or inconsistency with, what would be the case of an appeal if that "but" was not there. And certainly if the appeal were preferred by the prisoner it would be admissible on matter of law only. At the same time it is also obvious that, in the case of an appeal preferred by the prisoner, the Appellate Court could never have any occasion to convict on the facts, because by the nature of the case, such an appeal must always be an appeal against a conviction already arrived at in the Court below. And in the case of an appeal preferred on the part of the Crown against an acquittal (allowed for the first time by s. 272 of the new Code), it does not appear that there is any restriction imposed relative to the exercise of the discretion of the Appellate Court. Therefore, looking back again to the words of the section which I have already read, it seems to me, on the whole, that the case submitted must, under this section, in the case of a conviction, be intended by the Legislature to be submitted for a wider purpose than simply that of becoming an appeal presented by the prisoner. The words are:—"If the Court disagrees with the verdict of the jurors, or of a majority of such jurors, and considers it necessary for the ends of justice to do so, it may submit the case to the High Court." Now the Court may disagree with the verdict of the jury, either on the ground that the jury had

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not followed its directions on a point of law, or on the ground that the jury had found the facts against what appeared to the Judge to be the weight of evidence. If the Legislature had intended the case which was to be submitted by the Judge in the event of a conviction to be limitted to a point of law only, nothing would have been easier than to have used words which would have made that limitation perfectly unmistakeable. But the words I have read are, on the contrary, general words without any limitation at all; and it seems to me impossible in reason to construe them other wise than as extending to a disagreement with the verdict on matter of fact as well as on matter of law.

And then the section goes on to say:—"And if the Court considers it necessary for the ends of justice to do so." It appears to me that justice may as much require that a verdict of the jury should be revised in a case in which the jury has gone wrong on facts as in a case where it has made a mistake in regard to law. So that, on the whole, I think there is a really no limitation as to the nature of the case which the Judge may send up to the High Court under this section. In other words, I think, he may submit to the High Court a case in which he disagrees with the jury in their finding of facts, as well as a case in which he complains that the jury has not followed his directions as to the law. And I think, that the word "but" may possibly be used not so much in opposition to the word "appeal" in the first part of the passage, as perhaps in opposition to, or enlargement of the enactment of s. 272. According to s. 272, "the Local Government may direct an appeal by the public prosecutor or other officer specially or generally appointed in this behalf, from an original or appellate judgment of acquittal; but in no other case shall there be an appeal from a judgment of acquittal passed in any Criminal Court." Construing the word "but" to be used with reference to this section, it would simply mean that, upon a case submitted by the Judge, the Court may, in the event of an acquittal, convict the accused person on the facts, notwithstanding the general prohibition to be found in the words of s. 272 which I have read. Or, again, it may be used with reference to the situation of a case so submitted by the Judge when it comes up to the High

Court. That situation is peculiar in this respect, namely, that no judgment has been passed in the Court below from which this so to speak appeal has been brought; and this part of the passage may, therefore, mean that, in the event of the Court, upon consideration of the case submitted, being of opinion that there should be a conviction and judgment thereon, it is empowered to pass it as an original Court notwithstanding, and indeed because, there has been none passed in the Court below. However this may be, it seems to me, after the best consideration which I can give to the question, that, on a case submitted by a Sessions Judge under the provisions of s. 263, the High Court can acquit the prisoner if it so thinks fit on the facts, notwithstanding that the jury has found the prisoner guilty.

I construe the words "shall deal with the case so submitted as with an appeal" simply as directing the procedure to be followed, such as regards the notices which are necessary to be served, and so on. And I apprehend that under these words the Court may, if the case calls for it, send for additional evidence; and may deal with the case generally as is provided in Chap. XX with regard to appeals. No doubt, the result of this construction is, that the prisoner is in a better situation with regard to an appeal, if that appeal be made through the intervention of the Judge under s. 263, than if he had preferred it himself, because s. 271 immediately says that, if the conviction was in a trial by jury, the appeal by the person convicted shall be admissible on a matter of law only. But this is not the only peculiarity of a similar kind which is to be found in this new Criminal Procedure Code, because in the event of the conviction of a prisoner by a jury for the crime of murder and sentence of death following thereon, upon the reference which must be made to this Court for confirmation of the sentence, this Court has the power by s. 288 to acquit the prisoner on the facts, although if the prisoner had been sentenced to transporation for life instead of to death, and had simply himself appealed, the Court would not have been able to disturb the verdict of the jury on the facts.

I am, therefore, of opinion that all the prisoners, excepting the first prisoner, should be acquitted and discharged from custody so far as this conviction is concerned. The case is different with

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regard to Koonjo Leth, because he undoubtedly has confessed to having taken a party in the dacoity, and that confession is ample evidence as against him to support the conviction. As it falls upon us to pass sentence upon Koonjo Leth, we think that the sentence should be three years' rigorous imprisonment.

GLOVER, J.—I concur in this judgment except in so far as doubt is thrown upon the occurrence of the dacoity. I see no reason to discredit the evidence on this point, and the jury were satisfied that a dacoity did take place.

Conviction set aside, except with regard to Koonjo Leth.

ORIGINAL CIVIL.

Before Mr. Justice Macpherson.

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May 26.

IN THE MATTER OF THE REGISTRATION ACT, 1871, AND IN THE MATTER OF BUTTOBEHARY BANERJEE.

Registration Act (VIII of 1871), ss. 23, 34, 35, 71, & 73—Effect of Non-appearance within prescribed Time—Refusal to register.

When a document has been presented for registration in due time by one of the executants, but the others have failed to appear within the time prescribed, the registering officer must "refuse to register" as in cases falling under the latter clauses of s. 35, and must record the reasons for his refusal.

The party desiring registration ought to apply to the Register before the period for registration has gone by, either to register or to refuse to register, so as to enable him in case of refusal to take further proceedings under s. 73. So soon as it appears that the prescribed time has gone by, and the executing parties have not appeared, the order of refusal should be made at once.

APPLICATION under s. 73 of the Registration Act 1871, to establish the petitioner's right to have a deed of conveyance to himself registered. The document was executed on the 6th October 1871, and was presented for registration by one of the executants on the 18th January 1872: the other executants did not then appear before the Registrar, and shortly after left Calcutta, to which they did not return till August or Septembe

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1872. On the 7th April 1873, the Registrar refused to register the deed on the ground of such non-appearance, and on the 19th April, the petitioner applied for a copy of the reasons for his refusal. That copy was granted on the 21st April, and the present petition was filed on the 7th May.

Mr. *Bonnerjee*, for the petitioner, contended that he had strictly complied with the requirements of the Registration Act, and was entitled to enforce registration. The deed had been presented within the prescribed period, and it was impossible for the petitioner to move in the matter until the Registrar had made his order of refusal.

Mr. *Fergusson*, for the executants, who had not appeared before the Registrar, opposed the application on the ground that it was out of time.

MACPHERSON, J.—I think this application must be refused as being out of time. It is an application, under s. 73 of the Registration Act, 1871, to establish the petitioner's right to have a certain document registered. The document was executed on the 6th of October 1871 ; it was presented for registration on the 18th of January 1872 ; upon the 7th of April 1873, the Registrar recorded his reasons for refusing to registrar it ; upon the 19th of April, the petitioner applied to the Register for a copy of his reasons, which was granted on the 21st ; and the petition now before me was filed upon the 7th of May. Under the Registration Act, it is ordinarily necessary that a deed should be presented for registration within four months from the date of its execution, and no document can be registered unless the persons executing it, or the representatives, assigns, or agents of such persons, appear before the registering officer within the time allowed for presentation. If the registering officer refuses to register, it is his duty at once to make an order of refusal, and to record his reasons for such refusal : and any person who is aggrieved by the order so made may, within thirty days from the date of the order, make such an application as the petitioner has now made to me. S. 23 directs that in ordinary cases presentation for registration shall be within four months. S. 34 directs that

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no document shall be registered unless the parties executing it shall appear before the Registrar within the time allowed for presentation. S. 71 enacts that the registering officer who refuses to register a document shall make an order of refusal, and record his reasons for such order: and s. 73 provides that an application to the Civil Court, in order to establish the right to have the documents registered, must be made within thirty days from the order of refusal. Under certain special circumstances the time for presentation, or for the appearance of the executing parties, may be extended: but there are no such special circumstances in this case. S. 34 does not expressly say that, in the event of the parties not appearing before the Registrar within the time allowed, he is to "refuse to register" the document. It merely says that the document shall not be registered. I think it clear, however, that in such a case, when the document has been presented in due time, the registering officer must "refuse to register" just as in cases falling under the latter clauses of s. 35, and must record the reasons for his refusal. The order of refusal should be made at once, as soon as it is apparent that the prescribed time, has gone by, and the executing parties have not appeared. That delay in making the order of refusal might lead to most dangerous consequences is shown by the circumstances of this very case, where the petitioner comes in May 1873, and attempts to enforce the registration of a document executed on the 6th of October 1871, and the registration of which ought to have been completed (if at all) in February 1872. It is said the petitioner could not move till the Registrar made his order of refusal. But he must be taken to have known the time within which registration ought to have been completed, and should have applied to the Registrar at once, either to register, or to refuse to register, so as to enable him within thirty days to take further proceedings.

The application must be dismissed with costs.

Application dismissed.

Attorney for the petitioner: Baboo *Nemy Chunder Bose.*

Attorney for the opposing executants: Mr. *Carruthers.*