

would not have any power to modify them. But we think they are not so. There is no provision similar to that in s. 10 requiring the petition to be dismissed in case of default. We think, therefore, that the Court has some discretion, and that it would be in all cases a reasonable exercise of that discretion, if, when the period for making the deposit expires on a day when the offices of the Court are closed, the deposit were allowed to be made on the day that the offices re-open.

1877

IN THE MAT-  
TER OF THE  
PETITION OF  
SOORJMUKEE  
KOER.

## APPELLATE CRIMINAL.

*Before Mr. Justice Jackson and Mr. Justice McDonell.*

THE EMPRESS OF INDIA *v.* JUDOONATH GANGOOLY.\*

1877

July. 18.

*Criminal Procedure Code (Act X of 1872), s. 272—Appeal—Officer appointed to prefer Appeal—Judgment of Acquittal—Conviction on Charge of Murder of Culpable Homicide not amounting to Murder—Acquittal.*

On the trial by a jury of a person on a charge of murder, the jury found the accused not guilty of the offence of murder, but convicted him of culpable homicide not amounting to murder. The Sessions Judge, although he disagreed with the verdict, declined to submit the case to the High Court under s. 263 of the Criminal Procedure Code. The Local Government, thereupon, directed the Legal Remembrancer to appeal under s. 272 of the Code, and in pursuance of this direction an appeal was preferred by the Junior Government Pleader. *Held*, that the appeal was duly made. *Held* further, that a judgment passed by the Court of Session, following the verdict of a jury acquitting the prisoner, is a judgment of acquittal within the meaning of s. 272. *Held* also, that there being an acquittal on the charge of murder, the appeal lay.

THE prisoner, Judoonath Gangooly, was tried by a jury for the murder of one Dasee Raur. The jury acquitted him of the charge of murder, but convicted him of culpable homicide not amounting to murder. The Sessions Judge, although he remarked that he did not concur with the verdict, declined to submit the case to the High Court under s. 263 of the Criminal Procedure Code. He recorded two separate findings and sen-

\* Criminal Appeal, No. 278 of 1876, against an order of J. O'Kinealy, Esq., the Sessions Judge of the 24-Pergunnahs, dated the 8th May, 1876.

1877  
 EMPRESS OF  
 INDIA  
 v.  
 JUDONATH  
 GANGOOLY.

tences, stating in the first, that the jury had found the prisoner not guilty of murder and directing his discharge; and in the second, stating that the jury had found the prisoner guilty of culpable homicide not amounting to murder, and sentencing him to 10 years' rigorous imprisonment. The Local Government directed the Legal Remembrancer to prefer an appeal to the High Court under s. 272 of the Code, "against the judgment of the Sessions Judge acquitting the prisoner of the charge of murder." In pursuance of this direction, a petition of appeal was presented and filed by the Junior Government Pleader.

Mr. *Ingram* (with him the *Junior Government Pleader* Baboo *Juggadanund Mookerjee*) for the Crown.

Mr. *M. M. Ghose* for the prisoner.

Mr. *Ghose*—There are three objections to the hearing of this appeal: *First*, it has not been preferred by one of the persons mentioned in s. 272. No public prosecutor has as yet been appointed under s. 57 of the Code, and the Junior Government Pleader has not been generally appointed to prefer appeals of this nature, nor was he specially appointed to prefer this particular appeal. [Mr. *Ingram* stated that he was instructed by the Legal Remembrancer. JACKSON, J.—The appeal must be taken to be an appeal by the Government.] *Secondly*.—The prisoner has been convicted, and not acquitted. Where, upon certain facts found, the jury bring in a verdict of guilty of a particular offence, there is no such acquittal as would give a right of appeal under s. 272; that section, it is submitted, applies only to cases of absolute acquittal. *Thirdly*, s. 272 only gives a right of appeal from judgments of acquittal; it cannot, therefore, apply to cases of trial by jury in which there is no judgment; but only the summing up by the Judge, the verdict by the jury, and the sentence or order of the Court. The Code of Criminal Procedure throughout draws a distinction between a "judgment" and a "sentence" or "order." It is doubtful whether an appeal can be maintained on a question of fact. The section is a novel one, and must be construed with the utmost strictness.

Mr. *Ingram* for the Government.—The only argument to be drawn from the novelty of the section is, that, inasmuch as its wording is general, the Legislature intended to give the Local Government a general and absolute power of appeal. Under the former Code, which was drawn under the influence of English ideas of criminal justice, the verdict of a jury could only be touched under the revision section; but the present Code provides three ways of interfering with such verdict,—*viz.*, under s. 263, where the Court disagrees with the verdict, under s. 272, and under s. 288. The prisoner has been acquitted upon the charge of murder, and an appeal lies from such acquittal. Under s. 263, the jury are bound to return a verdict on all the charges on which the accused is tried; under s. 452, there must be a separate charge for every distinct offence, and each charge must be tried separately, except in the cases by the Code excepted. Then s. 457 provides for an exceptional case under that section, the accused may be convicted of the offence which he is proved to have committed, although he is charged with a “different” offence; and illustration (b) shows that murder and culpable homicide amounting to murder are different or distinct offences: lastly, s. 461 provides that the Court, in passing judgment, shall distinctly specify the offence of which the accused is convicted. The word “judgment” in s. 272 means what falls from the Court after the verdict; it is the conclusion of a syllogism of which the major premiss is, everyman who commits a particular offence shall be punished in such and such a way; the minor premiss,—this man has committed that offence, and the conclusion is, judgment according to the law. S. 263 shows that there is a judgment in trials by jury: “if the Court does not think it necessary to dissent from the verdict, it shall give judgment accordingly.” S. 271 restricts the right of appeal of an accused person convicted in a trial by jury to matters of law, but there is no such restriction in s. 272. As to the power of appeal under the latter section in trials by jury, see the observations of Phear, J., in *Queen v. Koonjo Leth* (1).

Mr. *Ghose* in reply.

1877

EMPERESS OF  
INDIA7,  
JUDONATH  
GANGOOLY,

The judgment of the Court was delivered by

JACKSON, J.—During the argument we disposed of the first part of the objection taken by Mr. Ghose, who has, at our request, carefully and feelingly advocated the case on behalf of the prisoner. That objection was, that we had not before us an appeal such as is contemplated by s. 272 of the Criminal Procedure Code, inasmuch as the petition of appeal had not been preferred by the Government “prosecutor or other officer, specially or generally appointed in this behalf.” It appeared, and still appears to us, that, under the authority conveyed by the Secretary’s letter to the Legal Remembrancer, the appeal was duly made by one of the Government pleaders, and has been regularly and properly sustained before us by the counsel instructed by, and appearing on behalf of, the Legal Remembrancer.

Mr. Ghose next contended, that in the first place s. 272 was not meant to apply, and did not apply to cases where the accused person has been tried and acquitted by the verdict of a jury; and in the next place that an appeal would not lie, inasmuch as there has not been any operative judgment of acquittal, the prisoner not having been set at liberty, but having been convicted of a minor offence arising out of the same set of facts on which he was charged with murder. We observe that one of these points, *viz.*, what is included in a judgment of acquittal, has been adverted to though not expressly decided by Phear, J. in the case of *Queen v. Koonjo Leth.* (1) But irrespective of that expression of opinion, we ourselves do not entertain the least doubt upon this subject. It appears abundantly from the various sections of the Code of Criminal Procedure relating to judgments, that the judgment passed by the Court of Session following the verdict of a jury which acquits is, undoubtedly, a judgment of acquittal. The Legislature has allowed an appeal in cases of acquittal by the Local Government, under s. 272, in the widest terms, and without any limitation whatever. Then as to the contention that there was no acquittal in this

(1) 11 B. L. R., 14.

case, it appears manifestly from the record that, as regards the particular charge of murder, the prisoner was acquitted, and ordered to be discharged or set at liberty; and that but for the finding of the jury and the sentence of the Court in respect of the other offence included in the charge, the prisoner would, so far as the charge of murder was concerned, have been set at liberty on his acquittal. He was charged with the offence of murder, which is an offence distinct from the offence of culpable homicide not amounting to murder. The Judge not having thought fit to refer the case under s. 263, the judgment stood as a judgment of acquittal. The Local Government is charged with the responsibility of considering in such cases, whether the public interests require that an appeal should be preferred, and as in the exercise of its judgment it has thought fit to prefer this appeal, we think the appeal lies. It remains to consider what decision we ought to arrive at upon the appeal so preferred, and I confess that I should have greatly desired that the learned Sessions Judge who tried the case in the Court below had thought right to set out in the proceedings the grounds upon which he abstained from doing that which the law enjoins him to do under s. 263, and not imposed upon the Judges of the High Court the onerous and painful duty of passing the proper sentence in the case. (The learned Judge proceeded to consider the evidence, and held that the accused was guilty of murder and sentenced him to death.)

1877

EMPEROR OF  
INDIA  
v.  
JUDONATH  
GANGOOLY.

*Appeal allowed.*

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