Before Mr. Justice Markby and Mr. Justice Prinsep.

IN RE THE EMPRESS *v.* SAHAE RAE.* 1878 *April* 18.

Criminal Procedure Code (Act X of 1872), s. 263—Verdict—Disagreement in finding of Jurors—Dissent of Judge from Verdict of Majority—High Court, Power of.

An accused struck a woman, carrying an infant in her arms, violently over head and shoulders. One of the blows fell on the child's head, causing death. *Held*, that the accused had committed hurt on the infant under circumstances of sufficient aggravation to bring the offence within the definition of grievous hurt.

Where a jury are not unanimous in their finding, and the Judge dissents from the opinions expressed by them, on the case being referred under s. 263 of Act X of 1872, the High Court is competent to find the prisoner guilty notwithstanding an acquittal by the majority of the jury.

It is the duty of a Judge in sending up a case to the High Court under ss. 263 and 464 of the Criminal Procedure Code, when he disagrees with a verdict of acquittal, to state the offence which, in his opinion, has been committed.

THIS was a reference to the High Court under s. 263 of the Criminal Procedure Code. The prisoner had assaulted a woman, who, at the time of the assault, had a child in her arms, and one of the blows which the prisoner was aiming at the woman fell on the child's head and caused its death.

The prisoner was thereupon charged with (i) culpable homicide not amounting to murder; (ii) of causing death by a rash and negligent act; (iii) grievous hurt; (iv) hurt. No charge was made with reference to the assault upon the mother.

The jury unanimously found that the prisoner had been guilty of an assault upon the woman Chettya; but made no mention of the infant. On being told to reconsider their verdict, three of them announced that they did not believe the child had been killed by the prisoner; but the remaining two were of opinion that the prisoner was guilty of culpable homicide not amounting to murder, of the child.

On account of this finding of the jury, the Officiating Sessions

* Criminal Reference, No. 318 of 1878, from an order of J. F. Browne, Esq., Officiating Sessions Judge of Patna, dated the 29th March 1878.

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Judge of Patna, differing from the verdict of the majority, sent up the case, on the 29th March 1878, to the High Court.

Baboo *Juggodanund Mookerjee* for the prosecution.

Mr. *Twidale* for the prisoner.

The judgment of the Court was delivered by

MARKBY, J.—The facts of this case do not appear to be susceptible of any doubt. The prisoner was employer of a man, named Behary, his wife Chetya, and his sister Foolcoomaree. Some disagreement appears to have arisen as to the payment of the wages due to this family. In the morning in question the prisoner went to the house of Behary, and called Chetya, the wife of Behary, and Foolcoomaree his sister, to execute some work on his behalf. They refused and made use of language which, no doubt, was disrespectful. Therefore, the prisoner, with the shoes which he was wearing, commenced striking Chetya about the head and shoulders. Chetya had at that time a child of a few months old in her arms, the head of the child, as she describes it, being either upon or close to her shoulder. One of the blows delivered by the prisoner fell upon the child's head, and, as was almost certain to happen, the child died in consequence.

The prisoner was charged with culpable homicide not amounting to murder of the child, of causing the death of the child by a rash and negligent act, of grievous hurt to the child, and of hurt to the child; the last two charges being added by the Sessions Judge. There was no charge made with reference to the assault upon the mother.

The result of the trial was, that three of the jury thought that the prisoner should be acquitted altogether; the other two jurors seem to have thought that the accused was guilty of culpable homicide of the child.

The Judge has told us that he differs from the verdict of the majority, who have acquitted the prisoner altogether; but we feel somewhat embarrassed in the matter by this, that he has not told us of what crime in his opinion the prisoner was guilty. Reading ss. 263 and 464 of the Criminal Procedure Code together, we think that it is the duty of the Judge in cases like

this to give us his own opinion, if he disagrees with the verdict of acquittal, as to the exact offence of which he considers the prisoner is guilty. We think that this Court has a right to expect from the Sessions Judge his opinion in a case of this kind. Nevertheless, we think we are still competent to deal with the matter, and the Government pleader, who has appeared before us has very properly not pressed for a conviction of culpable homicide. We are extremely doubtful whether technically the charge of culpable homicide could be supported. But we think we are justified upon the facts proved in finding the prisoner guilty of grievous hurt under s. 322. There being no doubt whatever as to the facts of the case, we have no hesitation in finding the prisoner guilty under that section, notwithstanding that he was acquitted altogether by three of the jury, probably, because they did not fully understand the law upon the subject. No doubt, what the prisoner intended was to inflict some injury upon the mother; and in one sense, he did not intend to inflict any injury upon the child at all; but it seems to me, that the language of s. 321 covers a case in which a man intending to aim a blow at one person strikes another. That section says:—"Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said voluntarily to cause hurt to such person." The very general language of that section was, I think, used expressly for the purpose of covering a case of this kind. I also think that the prisoner is also liable for causing grievous hurt. Section 322 provides that "whoever voluntarily causes hurt, if the hurt which he intends to cause, or knows himself to be likely to cause, is grievous hurt, and if the hurt which he causes is grievous hurt, is said voluntarily to cause grievous hurt." I think, that it is impossible to say, when a man strikes a woman with a child in her arms, and strikes her on that part of her person which is close to the head of the child, that he does not know that he is likely to cause grievous hurt to the child. He must, as a reasonable being, know that nothing is more probable than that the blow which he aims at the woman would fall on the child, and that any blow which would fall

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upon the child's head would be likely to cause such hurt as would endanger the child's life. This is one of the definitions of grievous hurt, and, therefore, in my opinion the prisoner ought to be convicted under s. 322.

Of course, the most important matter in this case is, what is the punishment which the prisoner ought to undergo. The evidence certainly shows that the prisoner's conduct was very violent. There was nothing which could justify his conduct even as regards the mother; and to strike a woman with a child of tender age in her arms is certainly a most unjustifiable act. No doubt, the prisoner never intended to do any injury to the child, but still he has done an act which deserves severe punishment. Under s. 322 of the Indian Penal Code he will be sentenced to rigorous imprisonment for two years.

PRIVY COUNCIL.

P. C.* 1877 *June* 20, 21, 22; *July* 19.

MAHARAJAH PERTAB NARAIN SINGH (PLAINTIFF) *v.* MAHARANEE SUBHAO KOOER AND OTHERS (DEFENDANTS).

[On appeal from the Court of the Commissioner of Fyzabad, Oudh.]

Act I of 1869, *s.* 22, *cl.* 4—*Taloohdar—Treatment of Son of Daughter as a Son—Revocation of Hindu Will.*

Where an Oudh talookdar, not having male issue, is shown to have so exceptionally treated the son of a daughter, as to give him in the family the place, consequence, and pre-eminence which would naturally belong to a son of his own if one existed, and would not ordinarily be conceded to a daughter's son, and has thus indicated an intention that the person so treated shall be his successor, such person will be brought within the enactment of the 4th clause of s. 22, Act I of 1869.

Circumstances affording evidence of such an intention considered.

The will of a Hindu may be revoked by parol, and where definite authority is given by him to destroy his will, with the intention of revoking it, that is in law a sufficient revocation, although the instrument is not in fact destroyed.

THIS was an appeal from a decree of the Commissioner of Fyzabad in Oudh, dated the 24th December 1873, confirm-

* *Present:*— SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.