fendant's eventual remedies against Mr. J. G. N. Pogose and his property, tended to improve them most materially; and for this reason we consider that, even assuming the defendant to have been in the position of a surety, the execution of the trust deed did not operate to discharge him.

Upon these grounds we are of opinion that there is no valid defence to this suit, and that the decree of the Court below, although it proceeded upon wrong grounds, should be confirmed.

The appeal is dismissed with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Markby and Mr. Justice Mitter.

THE EMPRESS v. HARAI MIRDHA AND UMED SARDAR.*

1877
Nov. 28.

Criminal Procedure Code (Act X of 1872), s. 263—High Court, Power of—Jury, Verdict of Acquittal by.

Where the jury acquitted the prisoners on the charges framed, but found certain facts which amounted to another offence, and omitted to convict the prisoners of that offence, as provided by s. 457 of the Criminal Procedure Code,—*held*, that the High Court could, on the case coming before them under s. 263 of the Criminal Procedure Code, find the prisoners guilty of such offence.

THIS case was referred to the High Court by the Officiating Sessions Judge of Nuddea under s. 263 of the Code of Criminal Procedure.

The two prisoners, together with four others, were tried before the Officiating Sessions Judge of Nuddea under ss. 302 and 149, and 326 and 149 of the Penal Code. In the case of two of the prisoners, the jury returned a verdict of guilty under s. 326. Two others were found not guilty, but the remaining two, Harai Mirdha and Umed Sardar, though also found not

* Criminal Reference, No. 223 of 1877, from the order of R. Towers, Esq., Officiating Sessions Judge of Nuddea, dated the 19th September, 1877.

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guilty on the charges framed, were found, by a majority of three out of five of the jury, to have been present with the others, but it was added that they only went for the purpose of rioting, which the jury explained to mean "in order to punish the deceased to a certain extent, but not to go as far as to inflict grievous hurt on him."

The facts of the case were as follows :—

The deceased was not on good terms with the people of the zemindar, amongst whom were the two prisoners; the two prisoners with others went to the house of the deceased, and the deceased was enticed out, and received two wounds, either of which the evidence went to show were sufficient to kill him. The deceased ran some distance after he was wounded, and the two prisoners, Harai and Umed, were identified by several witnesses as having, with others, run after the deceased till he fell. Further, Harai and Umed were named to one Badul, who was present when the deceased made his dying declaration as being amongst his pursuers; and although they set up *alibis* in the Court of the Sessions Judge, yet, when previously brought up before the Deputy Magistrate, they admitted they were present, but denied participation in the outrage.

The Sessions Judge being dissatisfied with the verdict of the jury regarding Harai and Umed, submitted their case to the High Court under s. 263 of the Criminal Procedure Code.

The Junior Government Pleader, Baboo *Juggodanund Mookerjee,* for the prosecution.

Mr. *G. Gregory* for the prisoners.

MARKBY, J.—The two prisoners, Harai and Umed, whose case is now before us under s. 263 of the Criminal Procedure Code, were put upon their trial before the Sessions Court on a charge "that being members of an unlawful assembly and in prosecution of the common object of that assembly, they had committed murder." This was a charge under ss. 302 and 149 of the Indian Penal Code. They were also charged "that being members of an unlawful assembly and in prosecution of the common object of

that assembly, they had voluntarily caused grievous hurt." This was under ss. 326 and 149 of the Indian Penal Code. Other prisoners were likewise charged at the same time, and the verdict of the jury as regards these two prisoners was a verdict of acquittal upon both these charges; but in answer to a question put to them by the Sessions Judge, they stated that the two prisoners, Harai and Umed, were in the company of two of the other prisoners, whom they found guilty on the second of the charges I have stated, for the purpose of committing riot, but that they did not commit it, and further, that they were not present in order to commit grievous hurt on the deceased, but only to punish him to a certain extent. The Sessions Judge has declined to record the verdict of acquittal as regards these two prisoners, and has referred the case to this Court in order that these prisoners may be convicted under the second of the two charges which I have mentioned. Now we may say that we have been relieved from all difficulty in this case by the course which has been taken by the Government, and which in our opinion has been very wisely and prudently taken. All that the Government now asks for is a conviction under s. 143 of the Indian Penal Code, that is, that the prisoners now before us were members of an unlawful assembly. That really amounts to this, that we are asked now to carry out the legitimate consequence of the finding of fact at which the jury arrived in respect of these two prisoners. If the Sessions Judge had been so minded instead of referring this case to us, he might, as pointed out by Mr. Justice Mitter in the course of the argument, have pointed out to the jury that their finding was in fact a conviction of an offence under s. 143 of the Indian Penal Code, and that, under the provisions of s. 457 of the Criminal Procedure Code, they were at liberty to find the prisoners guilty under that section. They found the prisoners guilty not of the whole of the offence with which they were charged, but upon that part of the charge which amounts to a different offence. This is not a case in which we are called upon to differ in any way from the conclusion of the jury. We adopt this conclusion, and we are also relieved from necessity of accurately defining what our powers are under s. 263. Whatever may be the exact position

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of this Court in dealing with a reference of this kind under s. 263, as to which we express no opinion, we feel no doubt whatever that this Court has a right to convict a prisoner of any offence which the jury could have convicted him of, upon the charge framed and placed before them. Upon the charge as framed and placed before the jury in this case, the jury could have convicted these prisoners of an offence under s. 143. We, therefore, undoubtedly possess that power ourselves. Accordingly we convict these two prisoners of the offence "that they were members of an unlawful assembly, and thereby committed an offence punishable under s. 143 of the Indian Penal Code," and we direct that they be rigorously imprisoned for a period of six months.

PRIVY COUNCIL.

P. C.* 1877 *July* 7, 10, 11, & 12.

THE ADMINISTRATOR-GENERAL OF BENGAL (PLAINTIFF) *v.* JUGGESWAR ROY AND OTHERS (DEFENDANTS).

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Inadequacy of Consideration—Suit to set aside deed.

A party seeking to set aside a transaction on the ground of inadequacy of consideration, must show such inadequacy as will involve the conclusion that he either did not understand what he was about, or was the victim of some imposition.

THIS was an appeal from a decree of the Calcutta High Court, dated the 25th June, 1875, reversing a decision of the Judge of East Burdwan, dated the 11th June, 1874.

The suit in which the appeal arises was brought by Robert John Jackson, on whose death the Administrator-General of Bengal, as executor under his will, was substituted on the record as plaintiff, to set aside conveyances executed by the said Jackson of certain lands situated in Bengal, on the ground that he was a minor at the time of the execution, and that he was fraudulently induced by certain of the defendants who stood to

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