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This general fund is that specified in cl. 16. The capital is not to be trenched upon. Out of the balance of the income the executors can make payments for religious charities. The bequest is allowable, as the translation runs; and even if the word *dharma* only is used in the original, the parties will hardly dispute it, as it is only the surplus income out of which the expenditure can be made.

For the reason already given I cannot positively decide on the invalidity of the provisions in cl. 18. If children should be born, my decision would not bind them. The eighteenth clause contains an alternative gift of the property, those described to *dharma* or, failing that, to such person as Mamu may direct by making her will. The whole gift, however, would fail in both branches if Mamu should have a child; failing such child the alternative gift comes into play.

[452] The alternative gift to *dharma* fails for vagueness, but effect will be given to the valid one; see cases collected in Theobald on Wills (3rd ed.), p. 406. My decision on cl. 8 governs the gift to Mamu expressed in the same words in cl. 18.

I do not think that cl. 19 raises a question of election. Motivahu's *stridhan* ornaments would not, I think, be properly treated as falling within the clause if there were other ornaments which she wore, and of which the testator had power to dispose. If the point is insisted on by the plaintiff, I must have some evidence before me.

I may probably have overlooked some minor points. If so, the case had better be set down again, or they can be dealt with when the minutes of the decree, which will have to be spoken to, are being settled. Costs of all parties will come out of the estate.

Attorneys for the plaintiff: Messrs. *Conroy and Brown.*

Attorneys for the defendants: Messrs. *Nanu and Hormasji* and Messrs. *Thakurdas, Dharamsi and Cama.*

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Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Jardine and Mr. Justice Candy.

QUEEN-EMPRESS *v.* DADA ANA.* [7th March, 1889.]

Criminal Procedure Code (Act X of 1882), ss. 303, 307, 429—Practice—Procedure—Trial by jury—Power of Judge to put questions to jury under s. 303 after verdict delivered—General verdict—Special verdict—Reference to High Court under s. 307—Power of High Court to interfere with verdict—Judges of High Court differing in opinion—Reference to third Judge under s. 429—Letters Patent, 1865, cl. 36.

A prisoner was tried for murder and acquitted by a majority of the jury. The Sessions Judge disagreed with the verdict and submitted the case to the High Court under s. 307 of the Criminal Procedure Code (Act X of 1882). The Judges of the High Court (Jardine and Candy, JJ.) differing in opinion, the case was laid before a third Judge (Sargent, C. J.), under s. 429, who held that the verdict of the jury should be set aside and that the prisoner was guilty of murder.

[453] *Per* SARGENT, C.J.—It is the uniform practice of the High Court, in cases referred under s. 307 of the Criminal Procedure Code (Act X of 1882), not

* Criminal Reference No. 106 of 1888.

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to interfere with the verdict of a jury, except when it is clearly and manifestly wrong.

There is no true analogy between the discretionary powers conferred on the High Court under this section and that which the Courts of law in England have exercised in interfering with the finding of a jury in a civil actions by directing a new trial on the ground of the verdict being against the weight of evidence. The practice, therefore, of the latter Courts, although very properly regarded as a guide, cannot be resorted to as affording a fixed rule in the exercise of the powers conferred on the High Court by s. 307.

Where a prisoner was charged with murder by administering dhatura poison to the deceased, the majority of the jury found him not guilty. After the delivery of the verdict the Sessions Judge questioned the jury, who, in reply to specific questions on the points, stated through their foreman that the majority had doubts (1) whether the accused had fetched dhatura from a certain field, (2) whether there was dhatura poison in the stomach of the deceased, (3) whether the death of the deceased was caused by dhatura poison. The Sessions Judge differed so completely with the jury on the evidence that he submitted the case to the High Court under s. 307 of the Criminal Procedure Code (Act X of 1882).

Per JARDINE, J.—The verdict of acquittal should be upheld. It was not manifestly wrong or absolutely unreasonable. It was a verdict that reasonable but cautious men might find. The Sessions Judge ought not to have put to the jury, after verdict delivered, the questions which he did put as to their opinions on particular points. In so doing the Sessions Judge exceeded the limits of questioning defined in s. 303 of the Criminal Procedure Code (Act X of 1882). There was no incompleteness nor ambiguity in the verdict and no misconception of any question of law.

Per CANDY, J.—Admitting in the present case that the Sessions Judge was wrong in putting any question to the jury after the verdict was delivered, disregarding the answers to the question and dealing solely with the evidence and probabilities, there seemed to be no reasonable doubt of the guilt of the accused.

The High Court in the exercise of its powers under s. 307 of the Criminal Procedure Code (Act X of 1882) is bound to act upon its own view of the evidence. On a reference by a Sessions Judge the whole case is opened up. When the verdict of the jury is erroneous, the High Court must put it aside and exercise the functions of both Judge and jury, giving due weight to the opinion of the Judge as well as to the verdict of the jury.

When a case like the present depends upon the inferences to be drawn from two or three facts, neither principle nor statute forbids the Sessions Judge from asking the jury to state a plain concise finding on those facts.

Where the Judges of the High Court differed in opinion in a case referred by a Sessions Judge to the High Court under s. 307 of the Criminal Procedure Code (Act X of 1882), the Court, (JARDINE and CANDY, JJ.) directed that the case [454] should be laid before a third Judge of the High Court, being of opinion that the Criminal Procedure Code overrules the provisions of cl. 36 of the Letters Patent, 1865.

[N.F., 13 Cr. L.J. 586=15 Ind. Cas. 1002; F., 19 B. 735 (736); 20 B. 215 (217); 6 Bom. L.R. 258 (261)=Rat. Unr. Cr. Cas. 736 (737); Rat. Unr. Cr. Cas. 710 (713); R., 13 Cr. L.J. 209=14 Ind. Cas. 305=22 M.L.J. 419=11 M.L.T. 367 =(1912) M.W.N. 499.]

THIS was a reference under s. 307 of the Code of Criminal Procedure (Act X of 1882) by H. F. Aston, Sessions Judge of Ahmedabad.

The accused, Dada Ana and Jiba, were charged with murder under s. 302 of the Indian Penal Code (Act XLV of 1860). The jury unanimously acquitted Jiba. As regards Dada, the majority of the jurors found him not guilty.

The Sessions Judge differed so completely with the jury that he thought it necessary, for the ends of justice, to refer the case to the High Court under s. 307 of the Code of Criminal Procedure (Act X of 1882).

Rao Saheb *V. N. Mandlik* (Government Pleader), for the Crown.

Nagindas Tulsidas, for the accused.

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The reference came on for hearing before a Divisional Bench consisting of JARDINE and CANDY, JJ.

The learned Judges differed in opinion as to the verdict to be entered in the case of the accused Dada, while they agreed in acquitting Jiba. The following judgments were delivered :—

JARDINE, J.—The prisoners Jiba and Dada have been twice tried and acquitted on the same facts by different juries in the Court of Session at Ahmedabad, and it is with the evidence and proceedings recorded at the second trial only that we have now to deal. But as the case well illustrates the circumstances under which the institution of trial by jury is maintained in the Mofussil, it will be convenient here to state the results of both the trials and the records of the verdicts. We have lately had an unusual number of similar references, and I think it right, therefore, to examine fully into the law on the subject. The matter is of general importance and, moreover, my learned colleague and myself differ in our views.

At the first trial before Mr. Moscardi, Acting Sessions Judge, and a jury, which began in June last, the only charge was one of murder under s. 302 of the Indian Penal Code, for that the **[455]** accused caused the death of one Kuvar Nathu by administering to him dhatura fruits on or about the 20th March, 1888.

The Sessions Judge charged the jury on the 10th July. He directed the jury to find Jiba not guilty. He propounded six questions, and requested the jury to find separately on each. The record of the delivery of the verdict is as follows :—

Q. " Gentlemen, are you all agreed ?"

A. Foreman—"Yes."

Q. " Do you find the accused Jiba guilty or not guilty ?"

A. " Not guilty."

Q. " Do you find that Kuber Nathu is dead ?"

A. " Yes."

Q. " Do you find that his death was due to poisoning with pounded dhatura seeds administered to him in certain *kichadi* that he ate ?"

A. " Yes."

Q. " Do you find that accused No. 2 (Dada) gathered the dhatura seeds and pounded them ?"

A. " No."

Q. " Then you find the accused No. 2, Dada Ana, not guilty ?"

A. " Yes."

Q. " Do you say that he is not guilty, and that is the verdict of you all ?"

A. " Yes."

Jiba was accordingly acquitted by a unanimous verdict under the Judge's direction.

As to Dada's guilt, however, the Sessions Judge differed from the opinion expressed by the jury, and under s. 307 of the Criminal Procedure Code referred the case, as regarded him, to this Court. The matter was heard by Birdwood and Parsons, JJ., who were of opinion that the Sessions Judge had misdirected the jury, and, after ordering Jiba to show cause

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why the order of acquittal should not be set aside, directed a retrial of both the prisoners for reasons stated in their judgment.

[456] The second trial was held by Mr. Aston, the Sessions Judge, with a jury on a similar charge of murder. On the 7th November, 1888, the verdict was recorded in the following manner:—

"Verdict of the jury—

"In reply to the questions whether they are agreed on their verdict, the jury state, through their foreman, 'we unanimously consider that accused No. 1, Jiba, is *not guilty*. As regards No. 2, Dada Ana, a majority of us hold that he is *not guilty*.'"

Q. "What is the majority as to accused No. 2?"

A. "Four decide that he is not guilty and the fifth that he is guilty."

Q. "What is your finding on the points whether Kuvar Nathu is dead, and whether his death was caused by poison?"

A. "We are agreed that Kuvar Nathu is dead and that his death was most probably caused by dhatura poison."

Q. "Are you agreed that his death was caused by dhatura poison?"

A. "Four of us have doubts whether his death was caused by dhatura poison, and the fifth finds that it was caused by dhatura poison."

Q. "Have you come to any opinion as to whether any part of the confession of either of the accused is true, so far as it incriminates the accused who made it?"

A. "Four of us do not believe that the statements of the accused to the 2nd Class Magistrate at Anand and to the committing Magistrate, so far as they incriminate themselves, are true, statements" (adds, "because they are not sufficiently corroborated").

Q. "Have you come to any opinion as to whether accused No. 2 fetched dhatura from the field of Bhaiji?"

A. "Four of us doubt whether he did."

Q. "Have you come to any opinion as to whether there were any traces of dhatura poison in the contents extracted from the stomach of the deceased?"

A. "Four of us have doubts whether there was dhatura poison in the stomach of the deceased."

[457] The Sessions Judge differed so completely with the jury on the evidence that he considered it necessary, for the ends of justice, to submit the case to this Court. Among other observations on the evidence he recorded the following:—

"That Kuber was poisoned with dhatura seems to me established beyond a shadow of a doubt. The manner in which four of the jurors treat this part of the evidence seems to me to deprive their verdict of the weight I should wish to attach to the opinion of the jury. That any of the jurors should have any doubt left in their minds as to this part of the case would be incomprehensible to me but for the experience I have gained in this Court, that, as a rule, juries in this city will snatch at any excuse, however frail, rather than pronounce a plain decision on the facts in murder cases. As soon as the poison used is shown to have been dhatura there comes powerful corroboration of the truth of the general story told in the earlier confessions."

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For reasons which I will give presently, I am opinion that what this Court has to deal with in a reference under s. 307 where a general verdict of guilty or not guilty has been validly given, is the evidence and the verdict itself, and not the reasons for the verdict derived from answers about particular facts, such as were recorded in this trial.

On the question of fact as to whether dhatura poison caused the death, I am of opinion that the evidence is quite consistent with that theory, and that it is the more probable theory. I refer to the uncontradicted testimony as to the symptoms observed, to the medical observations on dhatura poisoning, and to the report of the Chemical Analyser, that in the vomit and the uneaten residue of the supper there was some organic alkaloid undistinguishable from dhatura. I have also consulted Taylor's and Chevers' works on medical jurisprudence. Assuming, for the sake of argument, that the four jurymen, who had doubts, were wrong on this point, the Court has to see whether on this supposition the crime of murder was brought home to each of the prisoners. In coming to an opinion on this point, the Court has, I consider, to give its due weight to that of the Sessions Judge and of the juror who differed from the majority. As a matter [458] of practice, however, I concur in the words used by Nanabhai, J. In the fully argued case of *Queen-Empress* v. *Mania* (1), that "it has been the uniform practice of this Court not to interfere with the verdict of a jury, except when it is shown to be clearly and manifestly wrong." I have considered the judgments in *Empress* v. *Mukhun Kumar* (2) and in *Queen-Empress* v. *Itwari* (3), and while I have no wish to contest the proposition that in references under s. 307 the discretion of the High Court to interfere may be as wide as stated by West, J., in *Regina* v. *Khanderao* (4), I do not know of any authority which condemns the rule of practice above stated. I am not aware of any good reason for diverging from it, and I doubt whether, in any ordinary case, a Division Bench ought to do so in the present state of the authorities. Since the decision of *Regina* v. *Khanderao* a change in the words of the law has been made which was apparently unnoticed at the hearing of the recent Calcutta case, *Queen-Empress* v. *Itwari* (3). Under s. 263 of the Code of 1872 the Sessions Judge might submit the case to the High Court, if he considered it necessary for the ends of justice to do so. Under s. 307 of the present Code the Sessions Judge shall submit the case if he disagrees with the verdict "so completely that he considers it necessary for the ends of justice to do so." The introduction of the words "so completely" appears to me to indicate the leaning of the Legislature towards the finality of the verdict of a jury. If, as may possibly be argued, s. 307 and s. 423, cl. (*d*), require the High Court to satisfy itself about the verdict and to either acquit or convict, and preclude re-trial, this argument as to the intention of the Legislature becomes of some importance.

The rule we have followed so long seems to me quite conformable to the most recent doctrine expressed by the House of Lords as regards verdicts in civil cases. In *The Metropolitan Railway Company* v. *Wright* (5) Lord Herschell, L. C., said (p. 154): "The case was one unquestionably within the province of a jury: and in my opinion the verdict ought not to be disturbed [459] unless it was one which a jury, viewing the whole of the

(1) 10 B. 497 (502). (2) 1 C.L.R. 275. (3) 15 C. 269.
(4) 1 B. 10 (13). (5) L.R. 11 Ap. Ca. 152.

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evidence reasonably, could not properly find." Lord Watson concurred. Lord FitzGerald said (p. 155): "The question for your Lordships' consideration is whether the evidence so preponderates against the verdict as to show that it was unreasonable and unjust." Per the present Lord Chancellor Lord Halsbury (p. 156):—"If reasonable men *might* find (not 'ought to' as was said in *Solomon* v. *Bitton* (1)) the verdict which has been found, I think no Court has jurisdiction to disturb a decision of fact which the law has confided to juries, not to Judges." This case was cited before the Judicial Committee of the Privy Council in *Commissioner for Railways* v. *Brown* (2).

Applying these principles to the case before us, I find myself in accord with my brother Candy in upholding the unanimous verdict of acquittal of Jiba. Her statements before the two Magistrates were evidence in her favour as well as against her, and must be taken as a whole (*Rex.* v. *Clewes* (3) and other cases collected under s. 29 of Field's Law of Evidence). The statements of the co-prisoner, so far as they implicate her, are evidence of the weakest description—*Queen-Empress* v. *Dosa Jiva* (4); *The Empress* v. *Ashootosh Chuckerbutty* (5); and she denies the most incriminating part of them in her own statement. There is hardly any other evidence as to her connection with the act of poisoning, although there is some as to motive. Under s. 299 of the Criminal Procedure Code, it is the duty of the jury to decide all questions which according to law are to be deemed questions of fact. The jury heard the witnesses and had advantages of the kind mentioned by Sir J. Coleridge in the judgment of the Judicial Committee of Her Majesty's Privy Council in *Regina* v. *Bertrand* (6) which we sitting here have not. If this case were before us on an appeal from an acquitted at a trial with assessors, I should be unable to hold that the acquittal was wrong. The verdict is based wholly on fact, and I do not think it unreasonable. I would, therefore, acquit Jiba.

[460] As regards the verdict in the case of the prisoner Dada, I have the misfortune to differ from my brother Candy, and I will, therefore, review the evidence on the record and state the impression which it has made on my mind. I assume, for the sake of argument, that the four jurymen were unreasonable in doubting that the death was caused by dhatura poison. But whatever might be the cause of death, it was for the prosecution to show Dada's guilt in connection therewith. It is proved that Kuber was taken ill on the 20th March after supper, and that he died next day. On the 21st, about noon, Dada showed the chief constable some dhatura plants in a distant field and on that occasion the owners of the field, Bhaiji and Bhola, said that Dada had been there gathering the pods a few days before. On the 22nd and 23rd March, Dada made his recorded statements to the 2nd Class Magistrate and the committing Magistrate who has first class powers. In these statements he admitted sexual intimacy with Jiba, and a consequent motive to hate Kuber, her husband's brother, instigation by Jiba, the gathering the dhatura pods in the field, and his pounding the seeds at Jiba's house. He went on to say that Jiba cooked the seeds at Kuber's house, that Kuber ate, and that she at the same time in Dada's presence put the pounded dhatura into it. But he exculpated himself from any approval of or participation in the crime, and said that when Jiba had some time before asked him to kill Kuber, he refused, and told

(1) L.R. 8 Q.B.D. 176. (2) 13 Ap. Ca. 133 (134). (3) 4 C. & P. 221.
(4) 10 B. 231. (5) 4 C. 483. (6) L.R. 1 P.C. 520 (535).

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her to let Kuber alone. So under the ruling in *Regina* v. *Clewes* (1) the statements told in his favour as well as against him. In the Court of Session he retracted his confessions, and said that he had been induced by bodily ill-treatment to make these statements. There is no evidence of any ill-treatment. A witness, Bhaiji, who owns the field where the dhatura plants were pointed out by Dada, says he came there and said he was gathering the pods to cure his itch. Bhula, the son of Bhaiji, told the Magistrate the same story, but was not cross-examined. At both Sessions trials, where he was cross-examined, he deposed that he only spoke from what his father had told. Now the pointing out of the dhatura plants to the police would be a circumstance of small importance, but **[461]** for the explanatory confessions. The confessions, as also those of Jiba, had been retracted, and Bhula also had retracted or explained away his first story when the evidence came before the jury; and the gathering of dhatura pods by Dada, if a fact, might, but for the confessions, be consistent with the reason he is said to have given, his seeking cure for itch. The jury may have thought reasonably enough, that if Dada meant to join in a murder to be effected by means of dhatura poison, he would have taken precautions to gather dhatura pods in a more clandestine manner, and not have done it openly when two people were about. They may have reasonably disbelieved Dada's statements, that Jiba cooked the supper, it not appearing in evidence that she was in the habit of so doing. They may have thought that Kuber would have been suspicious of a supper cooked by some unknown hand. It will be seen that I take a more favourable view of the sagacity of the jury than is taken by the Sessions Judge. Of the truth of the stories of the witnesses before the jury, the jury were the judges; and although it was the duty of the Judge to point out and of the jury to weigh the fact that the confessions had not been invalidated and that there was no proof of any ill-treatment, I am of the opinion of Nanabhai, J, in *Queen-Empress* v. *Mania* (2), that "it was for the jury to determine what weight to attach to those confessions, as well as to any other portion of the evidence in the case." I think the jury were competent, if not bound, to look at the probabilities and apply to the case their general experience of men and affairs (Taylor on Evidence, p. 1244). The reports show that many confessions are induced by improper means; and that innocent people often accuse themselves falsely is known to the reader of any book on evidence. Conspiracies to ruin people by false charges are not uncommon. I think, then, that it is the duty of the Judge to lay the confessions properly before the jury, pointing out the circumstances bearing for and against their value, but that it is for the jury to form an opinion as to their weight. The retractation of confessions is, as Mr. Justice Straight said in *Queen-Empress* v. *Babu Lal* (3), "an endless source of anxiety and difficulty to those who have to see that justice is properly administered." **[462]** The jury have to bear their share of the burden, and to be extremely cautious, being bound to see if any reasonable doubt remains.

I am of opinion, then, that whether or not the death was caused by dhatura seeds, the evidence laid before the jury was such as might well dispose reasonable men of a cautious turn of mind to have reasonable doubt of the guilt of the prisoner Dada. They cannot be called unreasonable if they followed the example of Mr. Justice Kernan in *Queen-Empress* v.

(1) 4 C. & P. 221. (2) 10 B. 497 (502) (3) 6 A. 509 (543).

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Rangi (1) and required reliable and independent evidence to corroborate, to a material extent and in material particulars, the statements in the retracted confessions. The jurymen, as has been pointed out, were gentlemen of superior education. At the first trial Dada was acquitted by a unanimous verdict. The presumption, therefore, is that the second verdict is not altogether unreasonable, however strongly the confessions made by the prisoners, taken with the medical evidence, excite a suspicion that they are guilty and acted in concert. I notice also that at the first trial Mr. Moscardi invited the jury to consider if the poison used was dhatura or belladonna or other poison.

I think that the Sessions Judge would have credited the verdict of the jury with greater reasonableness if he had looked upon it by itself in the ordinary way. Indeed, in his reasons for referring the case to this Court, he plainly states that his opinion of the verdict was induced by a particular circumstance arising out of a procedure which I have never before noticed in the records coming here from Courts of Sessions. The learned Judge inferred that the four jurymen were prejudiced and unreasonable, because they had doubts whether the death was caused by dhatura poison. On this point I may say that it is part of ordinary experience that ordinary juries sometimes distrust scientific evidence more than do people who have received an education in science. Still we all know that great caution is often requisite in weighing the evidence of experts on a question of poisoning, and no expedient has yet been found for withdrawing the consideration of the scientific evidence from the jury. The average run of men are as likely **[463]** to give a proper verdict on the scientific question as a set of scientific jurors would be, in the opinion of Mr. Justice Stephen, who discusses the subject in chap. 6 of his General View of the Criminal Law of England. I, therefore, look with less disapproval on this answer of the jury than does the Sessions Judge. But if this answer had not been given, it is possible enough that the learned Judge would have agreed with the verdict. Hence the importance of consideration of the following questions:—

1. Whether the Sessions Judge ought to have put to the jury, after verdict was delivered, the questions which he did put as to their findings on particular facts?

2. Whether in determining to agree with or differ from the verdict, he has dealt rightly with the answers?

3. Whether the High Court ought to make use of the answers as an indication of prejudice or unreasonablenes on the part of the four jurors?

I am of opinion that these three questions must be answered in the negative. The answer is of high constitutional importance, and, like most other matters dealing with the integrity of the men who administer justice, we have to search for it in the history of the English Constitution. Questions of an analogous sort arose in the celebrated *habeas corpus* case of Bushell (2) who had been one of the jury in the trial of William Penn and William Mead at the Old Bailey for a tumultuous assembly in 1670. At that trial Bushell and the rest of the jury refused, in spite of menace, insult, and fine, to find any but the general verdict of not guilty. The case is famous, and shows the tenacity with which Englishmen in danger from arbitrary or corrupt Judges have from age to age protested that *Magna Charta* shall not be violated, nor the fundamental laws of the realm set aside. The Judge did not go so far as to treat the verdict

(1) 10 M. 295 (309). (2) 6 Howell's State Trials, 999, 1018, 1019.

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as invalid, yet he fined Bushell and the other jurors, and sent them to Newgate for non-payment. But they were delivered by the *habeas corpus*. Penn had stepped forward at once on delivery of the final verdict of not guilty, and demanded acquittal, which was conceded. *Bushell's case* is discussed in Broom's Constitutional **[464]** Law, and has, I believe, been of authority ever since Vaughan, C. J., delivered the judgment of the Court of Common Pleas. It is apparently the foundation of the decisions of the Indian Courts to which I will refer below, and at any rate they and the Indian procedure law, which they interpret, are consistent therewith. *Bushell's case* is the authority cited for the following out of Bacon's Abridgment. Tit, Verdict F:—"The jurors are not obliged to agree in the reason for finding a verdict as it is found; and if a reason be given by one or more of them, upon a question being asked by the Judge, for finding it as it is found, this is not to be considered or recorded as part of the verdict." The very words of Chief Justice Vaughan are these (1018, 1019):—"The legal verdict of the jury to be recorded, is finding for the plaintiff or defendant, what they answer, if asked, to questions concerning some particular fact is, not of their verdict essentially, nor are they bound to agree in such particulars; if they all agree to find their issue for the plaintiff or defendant, they may differ in the motives wherefore, as well as Judges, in giving judgment for the plaintiff or defendant, may differ in the reasons wherefore they give that judgment, which is very ordinary."

In England the jury may find either a general verdict on the whole matter in issue, or a special verdict on the particular facts. It is the privilege of the jury to find a general verdict. They may refuse to answer questions—*Mayor and Burgesses of Devizes* v. *Clark* (1). The option is that of the jury, not that of the Judge. The reason is that the jury are the judges of the facts, as Coke points out in *Dowman's case* (2) in his commentary to chap. 31 of the Statute of Westminster the Second. The same great lawyer notices that the statute merely declares the more ancient common law, which again is recognized in the Assize of Clarendon in the time of Henry II. If the jury choose to return a special verdict, it must be on the naked facts; it must state positively the facts themselves and not merely the evidence adduced to prove them, and all the facts necessary to enable the Court to give the judgment must be found (Archbold's Pleadings and Evidence in Criminal Cases, 19th ed., 177). By finding a special verdict, the jury protected themselves, leaving the questions **[465]** of law to the separate determination of the Judge, as shown in the notes to *Bushell's case* in the State trials. Whether the findings of fact were sufficient and clear, was often a question raised afterwards, and the complications caused by incompleteness in such verdicts and consequent trouble to Judges are apparent in such cases as *Rex* v. *Royce* (3) and *Rex* v. *Francis* (4) while *Rex* v. *Huggins* (5) is an instance of the determination of the law by the Judges on a long string of facts found in a special verdict by the jury. So in general verdicts there might occasionally be ambiguity, or the jury might exceed their functions. As remarked by Hallam in chap. 13 of his Constitutional History of England, Vol. III, commenting on *Bushell's case* where he takes an illustration which has found its way into s. 299 of our Procedure Code. "Thus," he says (p. 10) "in the common instance of murder or manslaughter, the jury cannot legally determine that provocation to be

(1) 3 Ad. & El. 506. (2) 9 R. 12. (3) 4 Burr. 2073.
(4) 2 Str. 1015. (5) 2 Ld. Rayd. 1574.

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sufficient, which by the settled rules of law is otherwise; nor can they, in any case, set up novel and arbitrary constructions of their own without a disregard of their duty." The law has struggled to maintain the maxim which Lord Mansfield called a rule without any exception, (see Worthington on the Power of Juries, p. 131) which Lord Cockburn calls one of the foundations of our law—*Winsor* v. *The Queen* (1) *viz.*, that it is the office of the Judge to instruct the jury on points of law, and of the jury to decide on matters of fact. The ruling in *Queen* v. *Hari Prasad* (2) by Jackson, J., is consistent with the English law, *viz.*, that "the law does not prescribe any specific form in which the jury are to return their finding, and we are of opinion they are at liberty to deliver it in any form, which they think fit." Thus he allowed a verdict of the special kind as good.

The present law in India is, like that of England, designed to secure a certain and complete finding on the matter in issue at the trial: and both Judge and jury have a duty as regards completeness and certainty. Section 303 of the Criminal Procedure Code is as follows:—"Unless otherwise ordered by the Court, **[466]** the jury shall return a verdict on all the charges on which the accused is tried, and the Judge may ask them such questions as are necessary to ascertain what their verdict is. Such questions and answers to them shall be recorded." On comparing the above with the older law, it appears that the Legislature has not adopted the recommendation of Prinsep, J., in *Empress* v. *Mukhun* (3). The above section enacts the doctrine of the English law which is thus stated by Blackburn, J., in *Winsor* v. *The Queen* (1): "It is the duty of the Judge to take care that the verdict of the jury is not imperfect, and if the jury have omitted completely to answer the questions left to them, he ought to point out the omission and have it corrected. When, however, the Judge receives an imperfect verdict, and discharges the jury, recording that imperfect verdict, it is clear that the Judge has made a mistake; he ought not to have discharged the jury. But once a good verdict is given, the case is *res judicata*." These words are quoted with approval by Sir W. Erle in delivering the judgment of the Judicial Committee of the Privy Council in *Regina* v. *Murphy* (4).

In the case before us the jury appear to me to have fulfilled their duty as so defined, and the Sessions Judge to have exceeded the limits of questioning defined in s. 303. There was no incompleteness nor ambiguity in the verdict returned by the foreman's mouth. There was no misconception suggested of any question of law. There was no sign of any lurking uncertainty in the jury's mind such as was held in *Queen* v. *Sustiram* (5) to justify the Sessions Judge in putting further questions, or to which the ruling in *Queen* v. *Hari Prasad* (2) would apply, which was: "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."

It may fairly be argued that if the law intended, contrary to the reasoning in *Bushell's case*, that the Sessions Judge might **[467]** by question find out the reasons for the jury's verdict it would have used

(1) L. R. 1 Q. B. 289 (303, 318).
(2) 8 B. L. R. 557 (563) = 14 W. R. Cr. R. 59 (62).
(3) 1 C. L. R. 275 (285).
(4) L.R. 2 P. C. 535 (547, 548).
(5) 21 W.R. Cr. R. 1.

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words like "ascertain what the reasons for the verdict are," or made special provision, as for finding that the prisoner was insane at the time of the act charged, as in s. 470, which is conformable to an English statute requiring a special finding thereon. The addition of findings of fact, not essential to a general verdict, seems to me likely to derogate from the general verdict. It invites to questions whether the special findings are commensurate with, or fall short of, or exceed the general verdict. In the case before us the answer is used as argument for fresh trial. Whereas in *Winsor* v. *The Queen* Cockburn, C. J., lays stress on the objection that a prisoner shall not be vexed twice, but shall go free if acquitted by a proper verdict. In *William Penn's case* the arbitrary Judges did not gainsay his contention to that effect made immediately on delivery of verdict. The delivery by the foreman is conclusive—*The King* v. *Wooler*(1). There being no definite rule for questions on particular facts, the special findings will generally fail in regard to the precision sought after in special verdicts, and thus the advantages of both general and special verdicts are likely to be missed where attempts are made to combine them, the law not having provided a procedure adequate to that purpose.

No construction of s. 303 appears in the reported decisions of this High Court, nor has any general rule been framed for guidance of the Courts below, the reason, I believe, being that in the Courts of Sessions in the Presidency of Bombay no general practice of putting questions, except for ascertaining verdicts, has existed. The Registrar has, however, referred to the following in the judgment of West and Nanabhai, JJ., in Criminal Reference No. 36 of 1886 under s. 307, Criminal Procedure Code:—"The Court think that the interrogation of the jury after the delivery of their verdict is highly inexpedient, except as a way to a solution of difficulties which may have embarrassed them." The High Court at Calcutta has several times considered the matter, and on referring to the authorities I find that they preponderate **[468]** towards a strict and limited construction of s. 303, and thus conform to the ancient practice of England. There is the high authority of Couch, C. J., who in *Queen* v. *Meajan Sheik*(2) said: "Let the Judge be informed that he ought not to put questions to any of the jury as to the reasons for the verdict he has given." In *Queen* v. *Sustiram*(3) Phear, J., in delivering the judgment of the Court said: "It is only when it is necessary, in order to ascertain what the verdict of the jury really is, that the Judge is justified under this section in putting questions to the jury. Unless a necessity of this kind truly exists, the questions are not justified in law. No doubt the Legislature thought that it would be very dangerous to give the Sessions Court the power of cross-examining the jury after they had delivered their final verdict, with a view to show that the conclusions at which they had arrived were not logical, or were inconsistent, or in order to provide materials upon which the Judge might be enabled afterwards to dispute the finality of the verdict."

In *Empress* v. *Mukhun* (4) the Sessions Judge differed from the jury, and referred the case under s. 263 of the Code of Criminal Procedure in force before the present Code. The two Judges of the Division Bench differed in opinion, and it was reheard by them sitting with the Chief Justice. Markby, J., was not prepared to recommend that juries should

(1) 6 M. & S. 366.
(2) 20 W. R. Cr. R. 50.
(3) 21 W. R. Cr. R. 1 (2).
(4) 1 C.L.R. 275.

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be questioned by a Judge as to the ground on which their conclusions are passed. Prinsep, J., took contrary view in cautious language, it being *obiter dictum*. There is nothing to show that the High Court issued directions for questioning of juries. In *Hury Churn* v. *The Empress* (1) that learned Judge has since made the following observations about a verdict of a majority, which I quote as a warning of an incidental danger which the practice of asking reasons may give rise to:—

"Section 303, no doubt, empowers the Judge to ask the jury such questions as are necessary to ascertain what their verdict is, but it was never, in our opinion, contemplated that, on ascertaining that the jury were not unanimous, the Judge should make minute **[469]** enquiries to learn the nature of the majority and its opinion, so that he should have the opportunity of accepting or refusing that opinion as a verdict according as it coincides with his own opinion or not. * * * "If we are wrong in concluding this, we think that we are at least bound to express our opinion on the matter so as to prevent any misconception regarding what we consider to be the proper practice. Whatever may have been the individual opinion of the Judge in this matter, if he went so far as to ask the jury what was the exact majority, and what was the opinion of the majority, we think that he ought to have received that verdict without hesitation; and if he differed from it, he should have proceeded as directed by s. 307. If the jury, in the present instance, had been required to retire without having informed the Judge as to the exact result of their deliberation, it is quite possible that on further discussion what was the majority might have become the minority, and we think that, in all fairness to the prisoners, the course indicated by us should be followed."

In *Empress* v. *Dhunum Kazi* (2) the jury returned an unanimous verdict, after which the Sessions Judge put questions to them and recorded their answers about particular facts. The case is very like the present, in that respect. Mr. Justice Norris made the following observations on the procedure:—

"It was urged by the learned pleader who appeared for the Crown that these answers showed that the jury had come to very foolish conclusions upon the evidence, and that, in receiving their verdict, he ought to proceed upon the assumption that these foolish conclusions and these alone had induced them to return a verdict of acquittal. It may be that the conclusions are foolish, but I refuse to consider these answers at all, because I am of opinion that the Judge had no right to put the questions which called forth the answers. The Court is authorized by s. 263 to ask the jury such questions as are necessary to ascertain what their verdict is. In this case the jury has returned a plain, simple verdict of 'not guilty;' it may have been erroneous, but it certainly was not ambiguous, and the duty of the Judge was to receive it and record it without asking any questions about it."

[470] On principle, as well as authority, I am of opinion that we should lean to disregarding the answers to the questions propounded after delivery of the complete verdict in this case. The procedure adopted was new. "*Periculosum est res novas et inusitatas inducere. Eventus varios res nova semper habet*"—Co. Litt., 397A. I think, also, that the argument from inconvenience is weighty in construing s. 303 of the Criminal Procedure Code. The Benches of law and equity have

(1) 10 C. 140 (144). (2) 9 C. 53 (61).

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for centuries concurred in saying: "In doubtful cases arguments from convenience are of great weight." Per Heath, J., 1 H. Bl. 61, and see Ram's Legal Judgments, 54 *et seq.* "We are bound to look at this case with a view to its effect upon the interest of all other persons." Per Lord Eldon, 1 Dow. and Cl., 297, and see 7 Taunt., R., 496, and 1 Sch. and Lef., 192. Some general reflections are suggested by the following passage in Stephen's General View of the Criminal Law of England, p. 207: "Probably a common juryman would seldom be able to give all his reasons for his verdict in express words. He would often, no doubt, give very bad reasons, and it would scarcely ever happen that he would be able to state the bearings of the evidence with anything like the skill of a Judge or of an experienced advocate, but it does not follow that his opinion may not be well worth having, worth as much as that of many men greatly his superiors in the power of explanation and argument." So that even if the answers of the jury are to be regarded, the inference about unreason or prejudice must be drawn, if at all, with the utmost caution; otherwise the High Court will be continually asked to re-open the facts under s. 307, not because the verdict is clearly and manifestly wrong on the evidence, but because the error, it will be argued, is to be held to exist, on the ground that the jury had a prejudice in their minds, which prejudice is to be presumed, not from misbehaviour, nor because the verdict is wrong on the evidence, but because the jury have found wrongly on one of the many facts given in evidence. This inverted kind of reasoning is a direct invitation to the Judge of the Court where the trial is held to constitute himself judge of particular facts, which, according to most ancient practice and express requirements of s. 299 of the Code of Criminal Procedure, are to be judged by the jury. The general [471] result would, I apprehend, be contrary to the reasoning of the judgment in *Bushell's case*, of which, if part is not law now, much remains. As Judges and juries apply different tests to evidence, the chances of want of finality would be arithmetically greater when particular facts as well as the general verdict were exposed to the criticism of the Judge. The advantage of trial by jury would soon be lost without that of trial by Judges being secured. How immensely important to the general weal is the proper and impartial performance of the judicial duties allotted to Judges and juries, may be seen from the provisions of the declaration of Right, the law which, as remarked by Sir James Mackintosh, constituted the condition on which the Crown of England was tendered to King William III. After the Revolution the Parliament passed Acts, vacating verdicts and judgments which had been returned and passed by corrupt juries on the one hand and corrupt Judges on the other. The great Declaration deals with the partial, corrupt and unqualified persons who had been returned and served on juries. The careful provision of the real remedy, *i. e.*, by securing a proper panel, will be more readily understood on perusal of Chief Justice Vaughan's remarks in *Bushell's case*. Partiality, corruption, even prejudice may taint a verdict or a judgment as well as misbehaviour. But vitiating circumstances of the kind ought not to be presumed, and I think they will be more readily alleged if the presumption is allowed to be based on one of a great many answers given in explanation of reasons for a verdict. As remarked by the Chief Justice in giving the judgment of the Full Bench in the recent case of *Ganesh Narayan Sathe*(1), any attempt to determine "the motives of complainants would open

(1) 13 B. 590 (598).

out a very wide and speculative field of inquiry." The same may be said as to the motives of juries as was said in *Bushell's case*. It would not be difficult to pass beyond the allegation of prejudice to that of corruption as the motive for the verdict, in spite of all the provisions about the choice of panel and the challenge. Such allegations cannot be wholly avoided when dealing with the verdict alone, there may occasionally be circumstances justifying them, but there is more room for them if they [472] may be imputed as regards any reason given by any juryman or by some or all in explanation of his or their view of the facts. They may be more plausibly urged if the different jurors give opposite reasons. If, however, the practice of impugning verdicts in this way became common or general, the duty of sitting on the jury would become irksome, if not dangerous. In *Queen-Empress* v. *Itwari* (1) the learned Judges expressed their dislike to the use of even more harmless terms imputing mere perversity to the opinion of the jury. In placing a strict interpretation on s. 303 of the Criminal Procedure Code, I think, therefore, I adopt the construction which is the most convenient and which most upholds the system under which justice is administered by the aid of juries. Even whereas in the present case it is suggested against a jury of native gentlemen that prejudice against taking away life almost forces them to refrain from finding a prisoner guilty of murder, it is well to remember that learned men of the experience of Lord Cranworth and Mr. Sargent Parry have remarked that juries in England are very indisposed to convict of capital crimes. Where human life pends in the scale, caution becomes a duty, and it may be begging the question to call that judicial virtue a prejudice. The issue must, according to all the authorities, depend on the view taken by the superior Court of Reference of the verdict, not of the reasons for it or for one matter of fact.

The profession will recognize much of this judgment as mere statement of ancient doctrines of the law, but I have dealt with greater fulness on the matters of fact and law involved, because we have not been able to agree after anxious consultation, and because Mr. Justice Candy has informed me that he himself and other officers when presiding in Courts of Sessions have from time to time put questions to the jury, after delivery of the verdict of guilty or not guilty, for the purpose of knowing their opinion on particular questions of fact, not for the purpose of making the meaning of the verdict certain. The result of my examination of the subject is that this practice has no sure warrant of law, and is likely to confuse general and special verdicts, so as to create uncertainty and other evils.

[473] I do not think the verdict acquitting Dada is manifestly wrong or absolutely unreasonable. I think reasonable, but cautious, men might have found that verdict, and for all the reasons contained in this judgment I would uphold the verdict and acquit Dada.

Perhaps any one but myself might argue that the fact of a Judge here concurring with two different juries and holding the verdict to be not manifestly wrong affords some presumption *in favorem vitæ* that it ought to be upheld. But I understand my brother Candy to hold that, in a reference under s. 307, we must exercise independent judgment over the facts, and thus, in fact, though not in name, it seems to me the judgment insensibly, would take the form of determining, not whether the verdict is reasonable, but as in an appeal whether it is right. This test is different to

(1) 15 C. 269.

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that applied in practice by the High Courts and to that most recently asserted to be the proper test by the House of Lords in the cases quoted above; and as it gives opportunity for wide differences of opinion, the ultimate decision gets far removed from the jury.

As we think that where Judges differ in cases referred under s. 307, the proper course is to lay the case, with their opinions, before the third Judge under s. 429, whose opinion then prevails, I follow the practice of the Court in differences under s. 429 in giving my opinion in public; but as Mr. Justice Candy thinks that practice wrong, and does not follow it, I ought out of respect to his opinion to say why I adhere to it. It is well not to diverge from practice without serious reason and some argument. I know of no law, nor rule, nor analogy which makes this practice illegal. As a general principle, judicial acts ought to be performed in public (Broom's Constitutional Law, 2nd ed., p. 147), and reasons delivered in public to the suitors and the counsel. The case of Dada is one of life and death, and as the prisoner or his counsel may wish to move the third Judge to hear him, so I think they may reasonably ask for the reasons of my opinion. Besides, we to-day acquit the other prisoner, Jiba, and about her our opinion is a judgment, and **[474]** generally our reasons ought to be given in open Court,—Judges being, as Coke says, Judges of courts not of chambers (1).

The point as to what procedure we should apply on our disagreement as regards Dada has not been argued. There appears to have been no previous instance of Judges differing on a reference under s. 307. In a case under the corresponding section of the older Code, *Queen* v. *Mukhan*(2), the course adopted by the High Court of Bengal was to lay the case before a third Judge. We are of opinion that s. 307, with perhaps s. 439, applies s. 429 about appeals to a case of reference, and that this seems the justest and best procedure to follow; so we adopt the example of the Calcutta Court, and do not dispose of **[475]** the case in the manner provided by cl. 36 of our

(1) NOTE.—"Formerly a practice of the Common Law Courts was not to give in Court the reasons of their opinion which they returned to the Court of Chancery..... .....In 1774 the Court of King's Bench wholly and avowedly departed from that practice when Lord Mansfield delivering the opinion of the Court introduced it as follows:—'I found it a custom, in cases sent by the Court of Chancery for our opinion, to certify it privately to the Lord Chancellor in writing without declaring in this Court either the opinion itself or the reasons upon which it is grounded. But I think the custom wrong as well as unsatisfactory to the Bar; and, therefore, in the two cases that now wait our certificate and for the future we shall declare our opinion in this Court' (*Wright* v. *Holford*. Cowp., 34). In a case in 1795 the Judges of the King's Bench delivered in Court their opinions previously to sending their certificate, Lord Kenyon, who was then Chief Justice, prefacing his opinion by saying: 'We will certify in this case; but I will now say a few words to show the foundation of my opinion (*Lane* v. *Earl Stanhope*, 6 Durn. & E., 352). See also *Wright* v. *Bond* (2 Bos. & P. New Rep., 129) where the Court of Common Pleas gave in Court the reasons of the certificate which they sent to the Lord Chancellor, Sir J. Mansfield saying: 'It is usual to state the reasons upon which the certificate is to be grounded.'.....The disadvantage and inconvenience of not stating the reasons in Court are thus stated by Sir J. Leach, M. R. (*Badham* v. *Mee*, 1 Myl. & K., 54): 'The practice of the Courts of Common Law not to assign the reasons of their opinion upon cases sent from Courts of Equity is a practice of modern introduction and it is much to be regretted; being at once disadvantageous to the public and inconvenient to the Court directing the case, which is deprived by this practice of the assistance it would derive from the opinion of the Court of Law were the grounds of such opinion disclosed. The object of directing a case is to know the opinion of a Court of law upon the point in question; not indeed that such opinion is to be treated as a decision, but in order that the Court of Equity may be assisted in forming its judgment. (See Ram's Science of Legal Judgment, p. 216)."

(2) 1 C.L.R. 275.

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amended Letters Patent, *i.e.*, by the opinion of the senior Judge. The Code, we think, overrules the Letters Patent in this matter. The Court now acquits the prisoner Jiba; and, as regards the prisoner Dada, we direct, under s. 429, that the case be laid before another Judge of this Court.

CANDY, J.—As regards Jiba, the case is one of some difficulty. When the record of the former trial came before this Court, though the Sessions Judge had agreed with the unanimous verdict of acquittal of Jiba, and made no reference in her case, the Judges deemed it necessary of their own motion to order her trial. To justify this there must have been a strong *prima facie* case against her. And no doubt, seeing that there has been no attempt made to contradict the criminal intimacy between her and Dada which she fully admitted before two Magistrates and has not since denied, there are strong reasons for believing that she must have been acting in concert with her paramour. On the other hand, it is not beyond the bounds of possibility that she herself took no part in the crime. The only corroboration of her confessions, which amount to no more than guilty knowledge, is the confession of her fellow-prisoner; and this is corroboration of the weakest kind. Under these circumstances I do not feel justified in interfering with the repeated unanimous verdict of acquittal of Jiba.

I now turn to the case of Dada.

It is clear, upon the authority of decided cases, that this Court will not interfere unless the verdict of the jury be found to be manifestly erroneous (per Mitter, J., in *Queen-Empress* v. *Jacquiet* (1) and to the same effect per Nanabhai Haridas, J., in *Queen-Empress* v. *Mania Dayal* (2), but when the error is manifest, it is none the less incumbent on us to interfere. It is our duty to satisfy ourselves that the verdict of acquittal is proper or at least sustainable; if we find that it is not, the law enjoins on us to set it aside and pass the right judgment ourselves (*Regina* v. *Khanderao Bajirao* (3).) Now in the present case I understand from my brother Jardine that he has no doubt, **[476]** from the evidence on the record, that Kuber died from dhatura poison, and dhatura was detected in Kuber's stomach. The jury in the former trial unanimously found that Kuber died from dhatura poison administered to him in his food. I am of opinion that no reasonable doubt can be had on these points. But these are the points on which the jury in the present case had doubts; and the Sessions Judge said these doubts "would be incomprehensible but for the experience I have gained in this Court that, as a rule, juries in the city will snatch at any excuse, however frail, rather than pronounce a plain decision on the facts in murder cases." A former Sessions Judge of Ahmedabad of equal judicial experience once expressed a similar opinion (2). It is, therefore, specially incumbent on us to scrutinise the conduct of the jury, to see whether "their minds have been influenced by a prejudice which has prevented them from forming a correct judgment" (*per* Garth, C. J., in *Empress* v. *Mukhun Kumar* (4).) It is unnecessary to quote authorities as to how far interference is permissible with verdicts of juries in civil cases in England. "Here the law on these subjects is different, and the difference is very important. * * * On a reference by the Sessions Judge, the whole case is opened up. * * * The functions both of the Judge and jury are cast upon the Court, and this differentiates

(1) 11 C. 85 (91).
(2) 10 B. 497 (499, 502).
(3) 1 B. 10 (14).
(4) 1 C.L.R. 275 (282).

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our position very widely from that of the Courts in England"—*Regina* v. *Khanderao Bajirao* (1). In this light let us examine the facts of the present case.

On the 20th March, Kuber had come home from his field for his evening meal, and after eating it was returning to his field for the night, when he was taken ill. He was carried back to his house, and showed evident signs of poisoning. He was plied with *ghee*, which must have made him very sick, and thus removed some traces of the poison from his stomach. But as he seemed to get worse, he was sent to the dispensary at Anand, which he reached at 4 A.M. on the 21st. About the same time information was sent to the chief constable at Anand. He received it at 6 A.M. on the 21st, and proceeded to Kuber's village that morning. The criminal intimacy between Kuber's brother's [477] wife (accused No. 1) and Dada (accused No. 2) was evidently so notorious that they were at once questioned. There could not have been time for any serious pressure to have been brought to bear on Dada, for by about noon on that day (21st) he had taken the chief constable and police *patil* and *panch* to a field, not in the limits of Gopalpura in which Kuber and the prisoners lived, but in a different village (Mogar), where he pointed out the dhatura plants from which he had gathered the seeds which, when pounded, had been placed in Kuber's food. These plants were close to a hut, and the inmates of the hut stated that Dada knew the place, because he had been employed by the *patidar* to cut the grass the previous season. The chief constable there and then questioned the inmates of the hut, and immediately sent both the accused to the Magistrate at Anand for their confession to be recorded, and the next day committed the case to the First Class Magistrate in charge of the taluka, who was then at Umreth, who on the next day (23rd) took up the case, examined the police *patil* and inmates of the hut (above mentioned) and other witnesses, and then examined the accused, who adhered to their confessions recorded by the Magistrate at Anand on the previous day (22nd). These being the facts, it seems unreasonable to suppose that the police in the few hours at their disposal invented the whole story, suborned the witnesses, and persecuted the accused to make the confession according to the fabricated story. Admitting that the chief constable guessed that dhatura must have been given to Kuber, and that Dada must have been concerned, how did he find out about the dhatura in the limits of another village and the field in which Dada had previously cut the grass, and how did he persuade the inmates of the hut, caste-fellows of Dada, to at once admit that Dada had been there to pluck dhatura? One of those men, Bhula, in the Sessions Court partially retracted the deposition which he had made before the committing Magistrate, but the retractation was made in such a way that, as the Sessions Judge in the latter trial remarked, it was "palpably reckless"; and it is to be specially noted that Bhula did not attempt to explain the inconsistent portion of his deposition, nor did he even hint that the former deposition was caused by pressure from police. Instances are [478] known in which the police make any pretext they can to keep a case in their hands as long as possible and so make evidence; but here the chief constable seems to have acted with commendable promptitude. He arrived on the scene on the 21st, sent off the whole case to the First Class Magistrate on the 22nd, and when he did so he was not even aware that Kuber had died, for the section noted by him in the charge

(1) 1 B. 10 (13).

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sheet was 304, and he corrected it subsequently after hearing of Kuber's death. No doubt it is for the jury to determine what weight to attach to confessions—*Queen-Empress* v. *Mania Dayal* (1), but in so determining they must act reasonably. Here the foreman said: "Four of us do not believe that the statements of the accused to the Second Class Magistrate at Anand and to the committing Magistrate, so far as they incriminate themselves, are true statements" (adds "because they are not sufficiently corroborated"). As regards Dada, this reason is patently wrong. Stronger corroboration can hardly be conceived than his act in taking the police to the field in Mogar and showing the dhatura plants. The jury did not express an opinion, nor was it pleaded in defence, that Dada had not pointed out the dhatura plants in the field at Mogar, or that the inmates of the hut, close to which are the plants, did not at once make the statements which they subsequently repeated to the Magistrate.

The learned pleader in this Court has dwelt on a discrepancy in the confession of Dada and Jiba. Dada said Jiba cooked the food in which the poison was put. Jiba denied this, and said she never cooked Kuber's food, and there was evidence before the Magistrate that Kuber always cooked his own food, and the point was apparently not contested in the Sessions Court. In my opinion, this discrepancy affords a powerful argument for holding that Dada and Jiba were not telling a story taught to them by the police. Otherwise they would have agreed on this elementary point. But it is quite possible that Dada did not know whether Jiba was in the habit of cooking Kuber's food. (Kuber was unmarried, and lived alone within a few paces of his brother, Jiba's husband. When, therefore, he saw that every one knew that [479] he must have been concerned in Kuber's death, as murderers in this country often do, he gave in at once and admitted the crime (compare *Queen-Empress* v. *Babu Lal* (2)), but again, as is so often the case, he tried to shift the blame as much as possible on the woman; and so though he admitted that he had brought the dhatura seeds from the field and had pounded them, he stated that Jiba had cooked the food and put the poison therein. He evidently said this with the object of inculpating Jiba as much as possible and exculpating himself. It may be that the Court would attach very little weight to the exculpatory parts: (*Reg.* v. *Amrito Govinda* (3)). A confession must be taken as a whole and considered along with the admitted facts of the case, and the accused must be judged by his whole conduct. The Court is at liberty to disregard any self-exculpatory statements contained in the confession which it disbelieves: *Imperatrix* v. *Babaji* (4). Next, the pleader referred to an apparent inconsistency as to the *kichadi* being in an earthen or metal vessel, and he argued that it could not be supposed that Kuber would leave his house open, or would eat food prepared by some unknown hand. The answer is that nothing is more probable than that Kuber should prepare food himself in the morning and leave enough for his evening meal in an earthen vessel on his hearth, then go to his field without locking up his room, and in the evening he would return and taking the *kichadi* from the earthen pot he would put in a metal vessel, eating as much as he wanted and leaving the rest. Nothing would have been easier than for Dada watching his opportunity to put the pounded dhatura in the food on the hearth before Kuber returned from the field. I see no improbability in the facts as far as we can ascertain them

(1) 10 B. 497 (502). (2) 6 A. 550. (3) 10 B.H.C.R. 497 (500).
(4) Criminal Rulings, 12th April, 1888 (No. 19).

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which should lead us to presume that the confessions were false. The jury do not seem to have rejected them as police-made, but to have doubted them as uncorroborated. In Dada's case I have shown that there is corroboration. Assuming that Bhula and Bhaiji, (the inmates of the hut in Mogar), are not credible witnesses, still there is the prompt and decisive action of Dada in taking the police [480] to the field, pointing out the dhatura plants and repeating his confession before two Magistrates. There is admittedly no ground for believing Dada's allegation in the Sessions Court that he was induced by bodily ill-treatment to make the confessions: the facts point the other way. The presumption is, therefore, in favour of the truth of the confession (*Reg.* v. *Balvant Pendharkar* (1). With regard to confessions, which are such an important factor in criminal trials in this country) I do not think that any hard and fast rule can be laid down. The circumstances of each case must be weighed. In the present case there is no apparent reason for doubting the truth of Dada's confessions; therefore we are bound to act upon them.

I would, agreeing with the Sessions Judge and one juror, convict Dada of culpable homicide amounting to murder.

I have not, in the above remarks, considered the case of *Queen* v. *Itwari Sahe* (2) which was not brought to my notice till I had nearly concluded this judgment. It supports me in the opinion which I had formed, that this Court, in the exercise of its powers under s. 307 of the Criminal Procedure Code (Act X of 1882), is bound to act upon its own view of the evidence. The verdict of the jury being erroneous we must put it aside and exercise the functions both of Judge and jury, giving due weight to the opinion of the Judge as well as to the verdict of the jury. On a consideration of all the circumstances in the case, I cannot but concur with the two Sessions Judges, who heard the witnesses, and who were completely convinced of Dada's guilt. I am also so convinced.

I come to this conclusion equally on a consideration solely of the evidence on the record, and I have no doubt that that conclusion was arrived at by the referring Sessions Judge, quite apart from the answers given by the jury to the questions put by him. The first paragraph of the grounds of his reference shows this distinctly. He then proceeds to criticise the jury's doubt as to whether Kuber's death was caused by dhatura poison, and concludes:—" I do not, therefore, feel that hesitation [481] which I should naturally be disposed to feel about disagreeing with the opinion of a jury at a second trial." It is clear that the evidence on the record completely convinced him of Dada's guilt. The same may be said of the late Sessions Judge; and if reference is made to the former verdict, in order to draw a presumption that the second verdict is not altogether unreasonable, reference should also be made to the opinion of the former Sessions Judge, who was evidently convinced, solely from the evidence that Dada was guilty.

It seems unnecessary, therefore, to discuss *Bushell's case* (3), *Magna Charta*, the Declaration of Rights and similar ancient authorities, especially as it is more than doubtful whether such authorities were present to the minds of the Indian Legislature when enacting the provisions of the Criminal Procedure Code specially adopted for India relating to the verdict of the jury, and the duty of the Sessions Judge when completely disagreeing with it. Trial by jury is a recent institution in India; the Judge

(1) 11 B.H.C.R. 137. (2) 15 C. 269. (3) 6 Howell's State Trials, 999.

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may differ from the jury as to the facts—*Reg.* v. *Khanderav* (1). In the *Queen* v. *Hari Prasad* (2) Mr. Justice Jackson considered "the assumption quite unfounded," that the "trial by jury spoken of in 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 he refused to refer to a number of English cases, *Bushell's case* being amongst them. He said: "We are of opinion that when 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.*"

Is there any distinct provision in the Criminal Procedure Code preventing the Sessions Judge from asking the jury a single question when once a plain unambiguous verdict has been delivered? The questions referred to in s. 303 are only such as are necessary to ascertain what the verdict is. In cases tried **[482]** with assessors the Judge is bound to record the opinion of each of the assessors, but in giving judgment he is not bound to conform to those opinions (s. 309). There is no similar provision in s. 307 which deals with the procedure when the Sessions Judge disagrees with the verdict of the jurors. It may, therefore, be argued that the Legislature did not intend that the Sessions Judge should ask any question to the jury beyond those referred to in s. 303. On the other hand, it is evident that a concise opinion, showing the ground of the verdict of the jury, may be of the greatest use to the Sessions Judge. If it is particularly necessary when the Judge differs from the assessors that he should be careful to be intelligible and precise in recording their opinions, it would seem that in the far greater responsibility of differing from the jury it is still more necessary that he should have a precise and intelligible idea as to the points of difference. I concur generally with the remark of Phear, J., in *Reg.* v. *Sustiram Mandal* (3) that it would be very dangerous to give to the Sessions Court the power of cross-examining the jury after they have delivered their final verdict with a view to show that the conclusions at which they had arrived were not logical or were inconsistent, or in order to provide materials upon which the Judge might be enabled afterwards to dispute the finality of the verdict; in other words, that it would be most wrong for the Judge to cross-examine the jury so as to try and argue out their verdict. But when a case, like the one before us, depends upon the inferences to be drawn from two or three facts, it seems to me that neither principle nor statute forbids the Sessions Judge from asking the jury to state a plain concise finding on those facts. Speaking for myself, with a recent and intense sense of the responsibility cast upon a Sessions Judge, when he has to determine whether it is necessary to express disagreement with the verdict of the jurors, I may deliberately record my opinion that a clear and concise idea as to the grounds of the verdict is of the greatest aid in the furtherance of justice. On the one hand, it may show the Sessions Judge that the verdict is not unreasonable; on the other, it may indicate on the part of the jury such an inability to appreciate the evidence that **[483]** the Sessions Judge will have less hesitation in disagreeing with the verdict.

(1) 1 B. 10 (13).
(2) 8 B.L.R. 557 (562)=14 W.R. Cr. R. 59.
(3) 21 W.R. Cr. R. 1.

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It is true that in the case of *Queen* v. *Meajan Sheik* (1) the order of the Calcutta High Court was "let the Judge be informed that he ought not to put questions to any of the jury as to the reasons for the verdict he has given." That is the only reported record of the case. There is nothing to show the nature of the case or of the questions. On the other hand, in *Empress* v. *Mukhun* (2), Prinsep, J., held that the law did not prevent the Judge from questioning the jury as to the grounds on which they based their verdict. And in the case of *The Queen* v. *Udya Changa* (3) Macpherson and Glover, JJ., remarked that "the Judge never took the trouble to ascertain on what ground it was that the jury arrived at the verdict which they gave." The fact is that this recent institution of trial by jury in India is a compromise. The name of what was once the palladium of English civil rights was given, but the essential characteristic—finality of the verdict—was withheld. The marks of a compromise are found in the statute and in the authorities. The Judge is neither expressly permitted nor forbidden to put a question to the jury after a plain unambiguous verdict has once been delivered. In the opinion of some Judges, such a procedure is unwarrantable; in the opinion of others it is consistent with the special provisions which throws on the Sessions Judge the responsibility of reference to higher authority. If an analogy can be sought for in English law to a reference under s. 307 it is when a case is referred by a trying Judge to the Court for consideration of Crown cases reserved. In such cases, after a verdict has been delivered, the Judge often asks the jury for findings on certain facts to guide him in his reference. My own opinion is that we should do nothing which may tend to hamper Sessions Judges in the discharge of their onerous and responsible duties, and that, in the absence of any express provision of the law to the contrary, a clear and concise finding of the jury on the main facts should be allowed even though a verdict of not guilty has been delivered. [484] In the present case, if we disregard the answers to the questions propounded after delivery of the verdict, I still can come to no other conclusion than that the verdict is manifestly wrong. This is my conclusion, because on the evidence on the record I am convinced of Dada's guilt. And this, too, was evidently the opinion of the referring Judge, apart from any prejudice caused by the answers of the jury.

With regard to my brother Jardine's concluding remark, I regret extremely that we do not agree as to the powers and duty of this Court on a reference under s. 307. It seems clear to me that in such a reference we must exercise independent judgment on the facts. "On a reference by a Sessions Judge the whole case is opened up"—*Regina* v. *Khanderav* (4). There has been no change in the law since the case of *Regina* v. *Khanderav* (4), the addition of the words "so completely that" being simply in accordance with the decision in *Imperatrix* v. *Bhawani* (5) which interprets the old s. 263. The same view was taken in *Queen-Empress* v. *Itwari Saho* (6). Mr. Justice Prinsep said: "In the *Mukhun Kumar's case* (2) the Court set aside an acquittal, convicted of murder, and sentenced the accused to be hanged. It was in every way a decision which must be supposed to have been present to the mind of the Legislature when the new Code of Criminal Procedure was passed. There is no indication, however, in that Code of any intention

(1) 20 W.R. Cr. R. 50.
(2) 1 C.L.R. 275.
(3) 20 W.R. Cr. R. 73 (75).
(4) 1 B. 10 (13).
(5) 2 B. 525 (526).
(6) 15 C. 269.

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that the discretion of the Court should be limited in the manner approved of in some of the older cases and disapproved of in *Mukhun Kumar's case* (1), and we think that the Legislature must have intended that the powers conferred by s. 307 should be fully, as they must, no doubt, be cautiously exercised." A perusal of the whole report of *Mukhan Kumar's case* shows a striking resemblance between the facts and points in that and the present case. There the prisoner was charged with murder and was acquitted by the unanimous verdict of the jury. The Sessions Judge disagreed with this verdict and submitted the case under s. 263 (now s. 307) of the Criminal Procedure Code. The case was [485] originally heard by Markby and Prinsep, JJ. They were agreed that the words of s. 263 leave the discretion of the Judges uncontrolled, and that no fixed rules could be laid down for the exercise of that discretion according to one's own conscience. The case mainly depended upon the confession of the prisoner, which was retracted in the Sessions Court. Markby, J., held that it was for the jury to accept or reject that confession, and that the High Court should not interfere. Prinsep, J., held that if the jury disbelieved the prisoner's confession, they acted most capriciously, and not in the proper exercise of their duty. He said: "Where there is on the face of a confession, as there is in the present case, evidence of its being a truthful and voluntary confession and when it is corroborated by all the evidence which the nature of the case admits, I think that the verdict of a jury in disagreeing with such confession is a wrong verdict, and that in the ends of justice that verdict should not receive its ordinary legal effect." The case was, therefore, referred to a third Judge (the Chief Justice), who said: "here we have a complete circumstantial and apparently genuine confession of the offence by the prisoner. The Magistrate before whom it was taken is convinced of its truth and sincerity. The confession is confirmed by what seems to me a perfectly reliable evidence. The Sessions Judge has recorded his opinion that the verdict of the jury is wrong; and I confess it appears to me almost impossible to account for the verdict of the jury from anything like reasonable grounds." Thus the majority of the Court being in favour of conviction, the prisoner was sentenced to death.

Admitting, then, in the present case, that the Sessions Judge was wrong in putting any question to the jury after the verdict was delivered, disregarding entirely the answers to the questions, dealing solely with the evidence and the verdict itself, looking simply at probabilities, and applying my general experience of men and affairs, I cannot find any reasonable doubt as to Dada's guilt.

In consequence of this difference of opinion between the Judges composing the Divisional Court, the case was referred, under s. 429 of the Code of Criminal Procedure, to the Chief Justice.

JUDGMENT.

[486] SARGENT, C. J.—The finality of the verdict of the jury is by s. 307 of the Code of Criminal Procedure made subject to the power of the Sessions Judge who presides at the trial (when he disagrees with the verdict of the jurors so completely that he considers it necessary for the ends of justice) to submit the case to the High Court, which is, in dealing with the case, to exercise any of the powers which it may exercise, on an appeal. This is a most important departure from English law and

(1) 1 C. L. R. 275.

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practice, and was undoubtedly dictated by the circumstance that trial by jury in this country was an experiment, which it was necessary to safeguard against a miscarriage of justice, by allowing the case to be referred under certain circumstances to the highest judicial authority. There is, therefore, no true analogy between the discretionary power thus conferred on the High Court under the above section and that which the Courts of law in England have sparingly exercised in interfering with the finding of a jury in civil actions by directing a new trial on the ground of the verdict being against the evidence, and the practice, therefore, of the latter Courts cannot be resorted to as affording a rule in the exercise of the powers conferred on the High Court by s. 307. This is, I believe, the gist of Mr. Justice West's remarks in *Regina* v. *Khanderav* (1). However, I entirely agree with Mr. Justice Nanabhai, whose long experience is entitled to great weight, that it has been the uniform practice of this Court not to interfere with the verdict of a jury except when it is shown to be clearly and manifestly wrong (*Queen-Empress* v. *Mania Dayal* (2)), and such a practice ought, in my opinion, to be followed.

In the present case the evidence leaves no doubt that the deceased Kuber Nathu was taken ill on the evening of the 20th March after partaking of his evening meal and died at the dispensary at Anand to which he had been carried by the orders of the police *patil* in the course of the next day; that the chief constable received information of what had happened at 6 A.M. of the morning of the 21st, and at once proceeded to Kuber's house where he examined both the accused; that Dada in the course of the day took him to a field and pointed out dhatura **[487]** plants from which he said he had gathered dhatura seeds; that on 22nd March the accused were taken before the Second Class Magistrate, when they both confessed that a conversation had taken place between them with respect to putting the deceased to death owing to his jealousy of the intimacy which they admitted existed between them; that the accused Dada brought dhatura seeds from the fields and pounded them, and that they were put into the deceased's food and that the deceased ate it and became unconscious, but each says that the other put the seeds into the food. The witnesses Bhaiji and his son Bhula deposed as to the accused Dada being employed in cutting grass on the fields, and having taken seeds from dhatura plants in one of the fields, on the plea that he required them for the itch. Lastly, the deceased's symptoms as spoken to by the police *patil* and other witnesses who saw him on the evening of the 21st and by the Parsi apothecary of the dispensary at Anand and the discovery of the alkaloid in the remains of the food, and the report made by the Chemical Analyser to Government, to whom they had been sent by the Parsi apothecary, can leave no reasonable doubt that the deceased was poisoned by dhatura.

Had the case concluded there, the above evidence could, I apprehend, leave no reasonable doubt that the accused Dada had either been a party to a conspiracy with Jiba to poison Kuber, or had himself poisoned him by putting the dhatura into his food. At the first trial, however, both the accused withdrew their confessions, and said they had made them owing to fear of being beaten or to having been beaten and tutored by the *faujdar*. There is, however, no circumstance in the case which makes this statement in the least probable. There was no delay in making the enquiries into the case or bringing the accused before the Second Class Magistrate. The

(1) 1 B. 10 (13). (2) 10 B. 497.

confessions were such as the accused, if guilty, might be expected to make in their desire to throw the blame on one another after their arrest, and are corroborated by the evidence of Bhaiji and his son and the notoriety as to the intimacy between them which is spoken to by nearly all the witnesses. There is, therefore, in my opinion, no reason whatever for doubting the truth of the confessions.

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[488] Upon the whole of the evidence I am of opinion that the guilt of Dada is so clearly made out that it becomes the duty of this Court to set aside the verdict of the jury and find the prisoner guilty of murder.

The case being thus sent back to Mr. Justice Jardine and Mr. Justice Candy their Lordships passed the following order:—Following the opinion of the Chief Justice, to whom the case was referred under s. 429 of the Code of Criminal Procedure, the Court convicts the prisoner Dada of murder under s. 302 of the Indian Penal Code and sentences him to transportation for life.

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15 B. 488.

APPELLATE CRIMINAL.

Before Mr. Justice Scott and Mr. Justice Jardine.

IN RE CLIVE DURANT. [2nd August, 1889.]

Practice—Petition for prisoner's admission to bail—Form of petition—Petition containing defamatory allegations against trying Magistrate and other public officers.

When a prisoner applied to the High Court to be admitted to bail pending the disposal of his appeal, and the petition contained defamatory allegations, consisting (*inter alia*) of irrelevant attacks on the trying Magistrate and other officers in the service of the Government of India, the Court refused to allow the petition to be filed, and ordered it to be returned.

[Appl., 22 M. 155 (161); **R.**, 19 B. 51 (67); Rat. Unr. Cr. Cas. 786 (789).]

THE applicant, Clive Durant, was convicted by Lieutenant Newmarch, Cantonment Magistrate of Secunderabad, of defamation under s. 500 of the Indian Penal Code, and sentenced to four months' simple imprisonment.

Against this conviction and sentence Clive Durant appealed to the High Court, and at the same time presented a petition for his release on bail.

In this petition he complained of the manner in which a former application of his had been disposed of by a Divisional Bench of the High Court. The petition also contained attacks, which were quite irrelevant, on the trying Magistrate and on the private and public conduct of other officers of high rank in the service of the Government of India.

[489] This petition was rejected, for the reasons contained in the following judgment of the Court:—

JUDGMENT.

SCOTT, J.—In the matter of Clive Durant, a prisoner in Secunderabad Jail, two applications are before us. The first is an application to be admitted to bail. The libel for which the petitioner is in prison, is on the face of it grossly defamatory. He says it was justified in fact, and that