APPELLATE CRIMINAL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

QUEEN-EMPRESS *v.* MA'DHAVRA'O.*

1894. *December* 12.

Criminal Procedure Code (Act X of 1882), Secs. 298 and 302—Jury—Verdict —Special verdict—Duty of Judge—Practice—Procedure.

The accused was tried for rape. The jury, after considering their verdict, announced through their foreman that the accused "did the act with consent." The Sessions Judge thereupon, without requiring them to reconsider their verdict or giving them any fresh directions, asked them whether they found the accused guilty or not guilty. The jury again retired and brought in a verdict of guilty, upon which the Sessions Judge sentenced the prisoner to three years' rigorous imprisonment.

Held, reversing the conviction and sentence, that the first verdict of the jury being a special verdict, and there being no real ambiguity about it, the Sessions Judge was bound under section 302 of the Code of Criminal Procedure (Act X of 1882) to record the verdict and apply the law thereto.

Held, also, that the second verdict could not be sustained, as there was nothing to show that the Sessions Judge gave the jury any fresh directions, or explained to them that a finding that the woman had consented was tantamount to an acquittal.

APPEAL by the accused from the conviction and sentence recorded by W. H. Crowe, Sessions Judge of Poona.

The accused was tried by the Court of Sessions on a charge of rape. At the close of the trial the jury having considered their verdict, stated through their foreman that the accused "did the act with consent." The Judge without desiring them to reconsider their verdict, or giving them fresh directions, required them to say whether they found the accused guilty or not guilty.

The jury again retired and subsequently brought in a verdict of guilty, with a recommendation to mercy. Whereupon the Judge sentenced the prisoner to three years' rigorous imprisonment.

The accused appealed to the High Court.

Macpherson (with him *N. G. Chandávarkar*) for the accused:—The first finding of the jury amounted to a verdict of not guilty. That verdict ought to have been recorded and the prisoner discharged. It was the duty of the Judge to apply the law to the facts as found by the jury. He was wrong in asking the jury

* Criminal Appeal, No. 320 of 1894.

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to return a second verdict without explaining to them the law on the subject. The second verdict, therefore, cannot stand.

Ráo Sáheb *Vásudev J. Kirtikar*, Government Pleader, for the Crown:—The second verdict being the final expression of the opinion of the jury ought to prevail. If not, the Sessions Judge should be called upon to report under what circumstances they returned their second verdict, apparently inconsistent with the first, and what they really meant by it. There is no evidence of consent, and possibly, on second thoughts, they abandoned that theory and returned a verdict of guilty without any qualifying words.

JARDINE, J.:—The prisoner Mádhavráo was on trial for rape. The jury having retired to consider their verdict returned to Court and announced through their foreman that the prisoner "did the act with consent." This is what is called a special verdict: it is at the option of the jury to return a verdict in that form—*Queen-Empress* v. *Dádá Aná*[1]. There is no real ambiguity about it, as the question whether the consent was induced by fear or fraud seems not to have come in: and the Sessions Judge might have, and according to the rulings of the High Court at Calcutta—*Queen* v. *Joy Kisto Gossámy*[2]; *The Government of Bengal* v. *Mahaddi*[3]; *Empress* v. *Dhunum Kázi*[4]—was bound under section 302 of the Code of Criminal Procedure to record the verdict, and apply the law thereto. As said by Vaughan, C. J., in *Bushell's* case[5], "in special verdicts, the jury inform the naked fact, and the Court deliver the law."

The question whether, when the complainant, an adult woman, had consented to the act, the offence of rape within the meaning of the Indian Penal Code had been committed, was a question of law which it was the duty of the Sessions Judge to decide under section 298 of the Procedure Code; and not one for the jury. See Plowden's R. 114 that the function of the Judge is not merged in the jury. The learned Judge for some reason, not apparent on the record, then required the jury to say whether Mádhavráo was guilty or not guilty. It does not appear that

(1) I. L. R., 15 Bom., 452 at p. 465.
(2) 7 Cal. W. R., 22 Cr. Rulgs.
(3) I. L. R., 5 Cal., 871.
(4) I. L. R., 9 Cal., 53.
(5) 6 Howell' State Trials, 999; Vaughan's R. 135.

he required them to re-consider their first verdict, as has been held to be a legal course in England—*Reg.* v. *Meany*[1], or that he gave them any fresh directions or explained to them that a finding that the woman consented was tantamount to acquittal. The jury again retired and brought in a verdict of guilty with a recommendation to mercy; whereupon the Sessions Judge convicted and sentenced the prisoner. There are no express words on the record, nor anything except the formal verdict implying that the jury had changed their mind, nor any suggestion that the consent being induced by fear or fraud, the special verdict was incomplete.

We are of opinion under these circumstances, and especially the absence of any fresh directions to the jury, that the second verdict cannot be allowed to stand. The statements made by the woman to the Magistrate have in two important particulars been abandoned by her as a witness at the trial: and we are not disposed to infer on the evidence that the first verdict of the jury was wrong. The Government Pleader does not press for a new trial. The Court, therefore, acquits and discharges the prisoner.

Conviction quashed.

(1) 9 Cox. C. C., 231.

CRIMINAL REVISION.

Before Mr. Justice Jardine and Mr. Justice Ránade.

IN RE JAMNA'DA'S BHUKHANDA'S.*

1894. *December* 13.

Nuisance — Noise — Music in neighbouring house — Bombay District Police Act (Bombay Act IV of 1890), *Sec.* 48, *Cl.* (*b*)—"*Near a street*"—*Meaning of the words—Power of the police to regulate the playing of music in private houses—Construction.*

(1) Section 48, clause (*b*) of Bombay Act IV of 1890 does not empower the District Superintendent or Assistant Superintendent of Police to stop music in private houses.

* Criminal Application for Revision, No. 292 of 1894.

(1) Section 48, clause (*b*) of Bombay Act IV of 1890 provides as follows:—"The District Superintendent or an Assistant Superintendent may regulate and control, by the grant of licenses or otherwise, the playing of music, the beating of drums, tom-toms or other instruments and the blowing or sounding of horns or other noisy instruments *in or near a street*."