CRIMINAL APPELLATE.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

EMPEROR *v.* MAVSING BECHAR.*

1903.
February 25.

Criminal Procedure Code (Act V of 1898), section 269—Trial by Jury—Trial with the aid of assessors—Difference in the modes of trial—Accused if prejudiced can complain—Practice—Procedure.

The accused were tried with a jury on charges of murder (sections 302, 109, Indian Penal Code), and with the aid of jurors as assessors on charges of rioting, grievous hurt and hurt (sections 147, 148, 326 and 323 of the Code) respectively.

The Judge charged the jury and asked for their verdict on both the charges in the manner prescribed for jury trials. He agreed with the verdict and sentenced the accused to various terms of imprisonment. The accused appealed on the grounds that the learned Judge erred in omitting to take the opinion of the jurors as assessors on the second charge and to write a judgment.

Held, that the law makes no distinction as to the procedure at the trial between a trial by a jury and one with the aid of assessors except as to the summing up in the case of the former and the manner in which the verdict in the former and the opinions of the assessors in the latter are respectively taken. It is at this latter point that there is a departure of ways, and if the accused who is tried does not intervene at that crucial point, and get the procedure applicable to trials with the aid of assessors enforced, he cannot be heard to complain.

APPEAL from convictions and sentences recorded by Dayaram Gidumal, Sessions Judge of Ahmedabad.

The facts of the case were as follows :—

The accused were tried by the Sessions Judge of Ahmedabad with a jury on charges of murder (sections 302, 109, Indian Penal Code), and with the aid of jurors as assessors on charges of rioting, grievous hurt and hurt (sections 147, 148, 326 and 323 of the Code) respectively.

The jury returned a verdict of not guilty as regards some of the accused: the Sessions Judge accepted the verdict and acquitted them; as regards the remaining accused, the jury returned a verdict of not guilty on the charge of murder but found them

* Criminal Appeal No. 442 of 1908.

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guilty of rioting and causing grievous hurt. The Judge accepted the verdict and sentenced the accused to various terms of imprisonment.

The accused appealed to the High Court, contending, *inter alia*, that the Sessions Judge was in error in treating the trial as though it was a trial by jury on all counts and in treating their verdict on all the counts as the verdict of a jury contrary to the provisions of section 269 of the Criminal Procedure Code, and that the irregularity involved in accepting the verdict at the last moment as a verdict of the jury and not as the opinion of assessors seriously prejudiced the accused.

L. A. Shah, for the accused.

M. B. Chaubal, Government Pleader, for the Crown.

CHANDAVARKAR, J.—The preliminary point urged in this appeal is that the trial having been as a matter of fact conducted by the Sessions Court as one with the aid of assessors, as far as the charges for the offences of which the appellants have been convicted are concerned, the learned Sessions Judge has erred in law in that he omitted to take the opinions of the jurors as assessors in the manner required by the Criminal Procedure Code and to write a judgment. It may be that, as Mr. Shah for the appellants states, throughout the trial both the Judge and the pleaders understood the trial to be one with the aid of assessors, for the purposes of the charges abovementioned. But, however that be, as a matter of fact, after the learned Judge had charged the jury he asked for their verdict on all the charges in the manner required by the provisions of the Code of Criminal Procedure relating to jury trials. At that moment the appellants' pleader might have intervened and asked the Judge to deal with the trial as to the specific charges with which we are concerned in this appeal as one by the Court with the aid of assessors and to take the opinions of the jurors as assessors in the manner provided by the Code. The law makes no distinction as to the procedure at the trial between a trial by a jury and one with the aid of assessors except as to the summing up in the case of the former and the manner in which the verdict in the former and the opinions of the assessors in the latter are

respectively taken. It is at this latter point that there is a departure of ways, and if the accused who is tried does not intervene at that crucial point, and get the procedure applicable to trials with the aid of assessors enforced, he cannot be heard to complain. But that was not done and the Judge was allowed to deal with the whole case as one tried by a jury. Under these circumstances it is too late now for the appellants to urge successfully that the Judge's action should be corrected. We must deal with the appeal as one from the verdict of a jury, to which the Full Bench decision in *King-Emperor* v. *Parbhushankar*[1] applies.

HEATON, J.—I have a few words to add as to the facts of this case. The question we have to determine is a question of fact: whether the trial was by a jury or with the aid of assessors. We find that the Judge charged the jury on the case as a whole and directed them to give a verdict on each of the charges. He did not direct them to give a verdict on the charge of murder only and to give their opinions as assessors on the minor charges. This is the more apparent when we see, as the proceedings show, that the Judge had twice to question the jury in order that he might obtain from them a specific verdict on charges as to which otherwise they would not have given a verdict at all. The record also shows that the verdict of the jury was taken on each charge and that as to no charge at all was their opinion taken as if they were assessors. Then the Judge accepted the verdict of the jury. He wrote no judgment but merely sentenced the accused (the appellants) for those offences of which the jury had found them guilty. That procedure seems to me to show conclusively that the trial was a trial by a jury.

R. R.

(1) (1901) 25 Bom. 680; 3 Bom. L. R. 278.