any difference as the object of internment is to prevent him from doing mischief and not to cut down his liabilities. The case, therefore, must be tried in due course of law.

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ABDUL QUADER v. FRITZ KAPP.

S. K. B.

CRIMINAL REFERENCE.

Before Mookerjee and Sheepshanks JJ.

AKSHOY SINGH

v.

RAMESWAR BAGDI.*

1916

May 29.

Criminal Trespass—High Court, power of, to allow composition of an offence on revision—Criminal Procedure Code (Act V of 1898), ss. 345 (5), 423 (1) (d), 439—Necessity of criminal intent—Entry on land under bonâ fide claim of right—Penal Code (Act XLV of 1860), ss. 441, 447.

The High Court has no power, as a Court of Revision, under s. 439 read with s. 423 (1) (d), to sanction the composition of an offence when entered into after the conviction of the accused.

Adhar Chandra Dey v. *Subodh Chandra Ghosh* (1), *Sankar Rangayya* v. *Sankar Ramayya* (2) and *Emperor* v. *Ram Chandra* (3) followed.

Emperor v. *Ram Piyari* (4), *Naqi Ahmad* v. *King-Emperor* (5), *Nidhan Singh* v. *King-Emperor* (6), *Ram Sarup* v. *Emperor*(7) and *Lall* v. *Emperor* (8) dissented from.

Abadi Begum v. *Ali Husen* (9) distinguished.

To sustain a conviction under s. 447 of the Penal Code, it is necessary to prove not only entry on land in the possession of the complainant but

* Criminal Reference No. 77 of 1916 by G. N. Ray, Sessions Judge of Burdwan, dated May 17, 1916.

(1) (1914) 18 C. W. N. 1212.
(2) (1915) 16 Cr. L. J. 750; 29 Mad. L. J. 521.
(3) (1914) I. L. R. 37 All. 127.
(4) (1909) I. L. R. 32 All. 153.
(5) (1912) 11 All. L. J. 13.
(6) (1904) 1 Cr. L. J. 509, 5 Punj. L. R. 252.
(7) (1910) 11 Cr. L. J. 496; 13 O. C. 161.
(8) (1913) 15 Cr. L. J. 567; 17 O. C. 92.
(9) (1897) All. W. N. 26.

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also one of the intents specified in s. 441. Where a person was charged under ss. 447 and 504 of the Penal Code and convicted only under the former :

Held, that the intent to commit an offence or to intimidate, insult or annoy not having been established, the conviction was bad.

If a person enters upon land in the possession of another, in the exercise of a *bonâ fide* claim of right without any such intent, he cannot be convicted under s. 447, though he may have no right to the land.

Empress v. *Budh Singh* (1), *Re Shistidhur Parui* (2), and *Jurakhan Singh* v. *King-Emperor* (3) followed.

THE accused were tried before a Deputy Magistrate of Burdwan under ss. 447 and 504 of the Penal Code. The complainant alleged that the accused had entered upon his land and erected a fence in order to insult and annoy him. The accused claimed to have erected the same on their own land. The Magistrate held that the evidence was not sufficient to support a conviction under s. 504, but, finding that the land belonged to the complainant and that the accused had encroached thereon, convicted them on the 30th March 1916, under s. 447 and sentenced them to a fine each.

On the 14th April, the accused moved the Sessions Judge to refer the case to the High Court on the ground that it was one of civil and not criminal trespass. On the 12th May, an application was filed by the complainant before the Judge stating that the dispute had been settled, and praying for leave to compound the case. The Sessions Judge thereupon reported the case to the High Court, under s. 438 of the Criminal Procedure Code, recommending the grant of leave to the parties to compound the offence.

No one appeared in the Reference.

MOOKERJEE AND SHEEPSHANKS JJ. This reference, under section 438 of the Criminal Procedure Code,

(1) (1879) I. L. R. 2 All. 101. (2) (1872) 9 B. L. R. App. 19.
(3) (1907) 7 C. L. J. 238.

raises an important question of law which has led to some diversity of judicial opinion.

The petitioners, Akshoy Singh and Akhil Singh, were prosecuted on the complaint of one Rameswar Bagdi before the Deputy Magistrate of Burdwan for offences under sections 447 and 504 of the Indian Penal Code. They were convicted only under the former section and were sentenced to pay a fine of Rs. 10 each, on default to suffer rigorous imprisonment for two weeks. There was also an order under section 545 of the Criminal Procedure Code, that Rs. 5 out of the fine if realized, be paid to the complainant as compensation. This sentence which was passed on the 30th March 1915 was non-appealable. On the 14th April, the petitioners moved the Sessions Judge to call for the record and to recommend to this Court that the conviction be set aside on the ground amongst others that the case was one of civil dispute and not of criminal trespass. The Sessions Judge called for the record and fixed the 12th May for hearing. On that date the complainant filed a petition to the effect that the matter in dispute between the parties had been settled by the intervention of the gentlemen of the locality, that as the case was compoundable it had been compromised, and that his prayer was for leave to withdraw the case. The Sessions Judge reserved his order, and subsequently made this reference with the recommendation that the permission may be given to the parties to compound the case. The question thus arises whether, when an accused has been convicted of a compoundable offence, it is competent to the High Court in the exercise of its powers of revision under section 439 (*1*) of the Criminal Procedure Code, to grant leave to the parties to compound the offence.

Section 345 of the Criminal Procedure Code treats

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of the compounding of offences and consists of seven clauses. The first clause specifies the offences which may be compounded and mentions the persons who may compound. The second clause specifies certain other offences which may be compounded only with the permission of the Court before which any prosecution for such an offence is pending. The third clause makes compoundable the abetment of or the attempt to commit a compoundable offence. The fourth clause provides that in the case of a person under disability another person competent to contract on his behalf may compound. The fifth clause defines the stage of the proceeding when an offence may be compounded and is in the following terms: "When the accused has been committed for trial, or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is committed, or as the case may be, *before which the appeal is to be heard.*" The sixth clause lays down that the composition of an offence under the section shall have the effect of an acquittal of the accused. The seventh clause finally provides that no offence shall be compounded except as provided by the section. This analysis of section 345 shows clearly that it deals exhaustively with the subject of the composition of offences. With regard to this matter, it defines the persons who may compound, the nature of the offences compoundable, the stage when composition may be made, and the condition under which composition may be effected in the case of some of the offences. The inference is legitimate that, when the Legislature provided in clause (7) that no offence shall be compounded except as provided by the section, the intention was that each of the requirements just mentioned must be fulfilled. Now the fifth clause allows a composition

with the leave of the Court when an accused has been committed for trial, or, when, after conviction, an appeal by him is still pending. There is no reference to a case where after conviction (whether by the first Court or by the Appellate Court where an appeal is allowed by law) an application for revision is pending before the High Court. It cannot be contended for a moment that the Criminal Revisional jurisdiction is included in the Criminal Appellate jurisdiction. It is remarkable that although the Letters Patent divides the civil jurisdiction into original and appellate, thus indicating that the civil revisional jurisdiction is in reality an aspect of the civil appellate jurisdiction [*Secretary of State* v. *British India Steam Navigation Co.* (1).], clauses 22, 27 and 28 of the Letters Patent clearly differentiate between the original, the appellate and the revisional jurisdiction in criminal cases. The Code of Criminal Procedure also plainly distinguishes between appeals and revision, which form the subject of separate chapters (Chapters 31 and 32). By no stretch of language can we consequently hold that clause (5) of section 345 authorises a composition not merely during the pendency of an appeal, but also during the pendency of an application for revision. We must accordingly answer in the negative the question formulated above. The view we take is in accord with that adopted by this Court in *Adhar Chandra Dey* v. *Subodh Chandra Ghosh* (2) and by the Madras High Court in *Sankar Rangayya* v. *Sankar Ramayya* (3). The Allahabad High Court, however, is clearly not of one mind upon this point. The question arose in *Emperor* v. *Ram Piyari* (4).

(1) (1911) 13 C. L. J. 90, 92-97.
(2) (1914) 18 C. W. N. 1212.
(3) (1915) 16 Cr. L. J. 750; 29 Mad. L. J. 521.
(4) (1909) I. L. R. 32 All. 153.

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Richards J., who heard the case in the first instance, thought it very doubtful whether the High Court, in exercise of its powers of revision, had any jurisdiction to allow a composition and directed a reference to a Bench of two Judges for determination of the question. Knox and Keramat Hussain JJ. were satisfied that the High Court had the power and based their view on *Abadi Begum* v. *Ali Husen*(1), a case under section 517 and by no means analogous. No reference was made to the terms of section 345, but reliance was placed upon section 423, clause (*d*) read with section 439. The question arose again in *Naqi Ahmad* v. *King-Emperor* (2) where Tudball J. doubted the correctness of the decision in *Emperor* v. *Ram Piyari* (3) as inconsistent with section 345(5); but as a single judge he felt bound to abide by that ruling. The question came up for consideration again in *Emperor* v. *Ram Chandra* (4) where Knox J. held, without reference to his previous decision to the contrary effect in *Emperor* v. *Ram Piyari* (3), that a Court of Revision cannot allow the composition of an offence which had already resulted in a conviction before the proposed settlement. In the Chief Court of the Punjab, the question was considered in *Nidhan Singh* v. *King-Emperor* (5). Chatterjee J. doubted the correctness of the view that a composition could be sanctioned by a Court of Revision, but felt bound to follow two unreported precedents to the contrary. The matter has formed the subject of discussion in two recent cases before the Court of the Judicial Commissioner of Oudh : *Ram Sarup* v. *Emperor* (6) and *Lall* v. *Emperor* (7) where

(1) (1897) All. W. N. 26.
(2) (1912) 11 All. L. J. 13.
(3) (1909) I. L. R. 32 All. 153.
(4) (1914) I. L. R. 37 All. 127.
(5) (1904) 1 Cr. L. J. 509 ; 5 Punj. L. R. 252.
(6) (1910) 11 Cr. L. J. 496 ; 13 O. C. 161.
(7) (1913) 15 Cr. L. J. 567 ; 17 O. C. 92.

the decision in *Emperor* v. *Ram Piyari* (1) was followed without examination of the terms of section 345. It is thus plain that the view that a Court of Revision is competent to grant leave for composition of an offence which has already resulted in a conviction has been followed either with doubt or with reluctance, and always without consideration of the true effect of the provisions of section 345. The supporters of this view have, on the other hand, invoked the aid of section 423, clause (*d*) which authorizes a Court of Appeal to make any amendment or any consequential or incidental order that may be just or proper; but this is clearly of no real assistance. An order for composition can in no sense be said to be a consequential or incidental order. There are further two weighty considerations against the applicability of section 423 (*d*). In the first place, it is an elementary rule for the construction of Statutes that when a special provision, obviously exhaustive in its scope, has been made for a special topic, as in section 345, the scope thereof cannot be indirectly enlarged by reference to a general provision, such as that contained in section 423 (*d*). In the second place, clause (5) was introduced into the Code for the first time in 1898 to meet the effect of the decision in *Empress* v. *Thompson* (2), and clause (*d*) was also introduced into section 423 at the same time; if the Legislature had intended that composition of offences should be allowed during the pendency of an application for revision, section 345, clause (5) might have been suitably framed; it is inconceivable that compositions during appeals should have been expressly mentioned and compositions in revision should have been left to be inferred from section 423, clause (*d*). The position then is that section 439 empowers a

(1) (1909) I. L. R. 32 All. 153. (2) (1879) I. L. R. 2 All. 339.

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Court of Revision, not to exercise all the powers of an Appellate Court, as is sometimes loosely expressed, but only such powers as are conferred on a Court of Appeal by sections 195, 423, 426, 427 and 428, that the power to sanction composition of an offence is conferred on a Court of Appeal, not by section 423 (*d*) or any of the other sections just mentioned but by section 345 (*5*) and, that, consequently, section 439 which defines the powers of the Court of Revision does not confer on it the power to sanction the composition of offences. We hold accordingly that this Court, in the exercise of its revisional jurisdiction under section 439, is not competent to grant leave to compound an offence under section 345 when such composition has been entered into after the conviction of the accused. We are, therefore, unable to accept the recommendation of the Sessions Judge and to grant leave to the parties to compound the case.

In the view we take, it becomes necessary to consider the propriety of the conviction which, as already stated, is assailed on the ground that the case is really one of civil dispute and not of criminal trespass. The allegation of the complainant was that the accused had put up a fence on his land and blocked his way out and that they had done so with a view to insult and annoy him. The case for the accused was that the fence had been erected on their own land. The accused were accordingly charged under sections 447 and 504 of the Indian Penal Code. The Magistrate held that the evidence was not sufficient to justify a conviction under section 504 of the Indian Penal Code. He then proceeded to consider the charge under section 447 of the Indian Penal Code Upon the evidence, oral and documentary, he came to the conclusion that the fence had been erected on the land of the complainant and that the accused had thereby encroached on his

land. He held accordingly that the accused were guilty of criminal trespass. This view cannot be supported. To sustain a conviction under section 447, it is necessary to prove, as required by section 441, not only that the accused entered upon the property in the possession of the complainant, but that they did so with intent to commit an offence or to intimidate, insult, or annoy any person in possession of such property. No such intent has been proved in this case; the intent which was imputed and was made the foundation of a charge under section 504 has not been established. It is well settled, that if a person enters on land in the possession of another in the exercise of a *bonâ fide* claim of right without intention to intimidate, insult or annoy the person in possession or to commit an offence, then, although he may have no right to the land, he cannot be convicted of criminal trespass: *Empress* v. *Budh Singh* (1), *Re Shistidhur Parui* (2), *Jurakhan Singh* v. *King-Emperor* (3). The case before us is clearly one of civil dispute, and the Magistrate has not found the elements essential to sustain a conviction under section 447 of the Indian Penal Code. The result is that we set aside the convictions and sentences and direct that the fines, if paid, be refunded.

E. H. M.

(1) (1879) I. L. R. 2 All. 101. (2) (1872) 9 B. L. R App. 19.
(3) (1907) 7 C. L. J. 238.