## CRIMINAL REFERENCE.

*Before Mookerjee and Sheepshanks JJ.*

1916

*June* 14.

KARALI PRASAD GURU

*v.*

EMPEROR.*

*Lurking House-trespass—Theft—Penal Code (Act XLV of 1860) ss. 456 457, 380—Trial for house-trespass and theft under ss. 457, 380, Penal, Code—Disbelief of story of theft—Finding of intention to make immoral proposals—Conviction under s. 456, legality of—Prejudice—Criminal Procedure Code (Act V of 1898) s. 238—Necessity of charging intention in cases under s. 456.—Intention how determined—Rule of construction of decided cases.*

On a trial for offences under ss. 457 and 380 of the Penal Code, although the alleged intention, viz., to commit theft has failed, the Court can, under s. 238 of the Criminal Procedure Code, convict the accused of a minor offence, under s. 456 of the Penal Code, if he has not been prejudiced thereby.

Where on an allegation that the accused entered the room of a widow at night and committed theft, he was tried summarily for offences under ss. 457 and 380, and set up the defence of previous intrigue and entry with such intent at her invitation, but the Court disbelieved the stories of theft and intrigue and found the entry to have been without her consent and in order to make immoral proposals to her to her annoyance :

*Held*, that the conviction under s. 456 of the Penal Code was legal, and that the accused had not been prejudiced in the circumstances.

*Jharu Sheikh* v. *King-Emperor* (1) distinguished.

*Koilash Chandra Chakraburty* v. *Queen-Empress* (2), *Balmakand Ram* v. *Ghansamram* (3), *Premanundo Shaha* v. *Brindabun Chung* (4), *Emperor* v. *Ishri* (5), *Sher Singh* v. *Empress* (6), *Lajji Ram* v. *Queen-*

* Criminal Reference No. 90 of 1916, by C. Tindall, Sessions Judge of Bankura, dated June 6th, 1916.

(1) (1912) 16 C. W. N. 696.
(2) (1889) I. L. R. 16 Calc. 657.
(3) (1894) I. L. R. 22 Calc. 391.
(4) (1895) I. L. R. 22 Calc. 994.
(5) (1906) I. L. R. 29 All. 46.
(6) (1883) Punj Rec. 14.

*Empress* (1), *Ramrang* v. *King-Emperor* (2), *Queen-Empress* v. *Balu* (3) approved.

In determining the question of prejudice, the nature of the case made at the trial, the evidence given and the line of defence of the accused are matters to be taken into consideration.

*Reg.* v. *Govindas Haridas* (4) referred to.

To sustain a conviction under s. 456 of the Penal Code, it is not necessary to specify the criminal intention in the charge. It is sufficient if a guilty intention contemplated by s. 441 is proved.

The intention may be determined from direct evidence or from the conduct of the accused and the attendant circumstances of the case.

*Balmakand Ram* v. *Ghansamram* (5), *Rex* v. *Dixon* (6) referred to.

Every judgment must be read as applicable to the particular facts proved or assumed to be proved.

*Quinn* v. *Leathem* (7) followed.

One Golap Goalini, a young Hindu widow, lodged an information at the thana, on the 26th April 1916, that the accused had entered her room at midnight while she lay asleep in the same bed with her mother, and had removed an ear-ring from her person, when she seized him and raised a cry, that her mother also awoke and caught him, but he escaped naked leaving his *dhoti* behind. The police thereupon arrested him and sent him up before the Deputy Magistrate of Bankura. He was tried summarily for offences under ss. 457 and 380 of the Penal Code, and put forward the defence, supported by some witnesses, that he has been for some time in intrigue with the young woman and had entered her room at her invitation for such purpose. He denied the theft and the ownership of the *dhoti*, and stated that he had left the place stealthily on discovering the mother to be awake.

The Magistrate disbelieved the stories of the theft and previous intrigue, but found that the accused

(1) (1898) Punj. Rec. 12.
(2) (1902) Punj. Rec. 18.
(3) (1886) Ratan Unrep. Cr. C. 293.
(4) (1869) 6 Bom. H. C. 96.
(5) (1894) I. L. R. 22 Calc. 391.
(6) (1814) 3 M. & S. 11, 15.
(7) [1901] A. C. 495, 506.

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had entered the room without the woman's consent and in order to make immoral proposals to her to her annoyance, and convicted him under s. 456 of the Penal Code, sentencing him to six weeks' rigorous imprisonment.

The Sessions Judge, while agreeing in the view of the facts taken by the Magistrate, referred the case under s. 438 of the Criminal Procedure Code, on the authority of the ruling in *Jharu Sheik* v. *King-Emperor* (1), recommending a re-trial under s. 456 of the Penal Code.

No one appeared on the reference.

MOOKERJEE AND SHEEPSHANKS JJ. This is a reference under section 438 of the Criminal Procedure Code by the Sessions Judge of Bankura.

The facts material for the determination of the questions raised on this reference may be briefly stated. On the morning of the 29th April 1916, one Golap Goalini lodged an information in the police station at Mejhia that at midnight Karali Prasad Guru had entered her house while she and her mother were asleep on the same bed and that the entry was made with intent to commit a theft of her ornaments. She woke up as soon as her body was touched, and noticed the accused who took her ear-ring from her right ear. She caught his clothes and raised a cry. Her mother awoke, lighted a match and caught the man. He pushed her down, tried to free himself from the hold of the complainant but failed, and ran away naked, leaving his wearing cloth behind. On this information, the police took action, arrested the accused, and sent him up for trial. He was then summarily tried for offences under sections 457 and 380 of the Indian Penal Code, that is, lurking house-trespass by night

(1) (1912) 16 C. W. N. 696.

and theft from a dwelling house. He pleaded not guilty and filed a written statement. The substance of his defenee was that he had for a long time carried on an intrigue with the complainant and had on the night of the incident entered the house at her invitation; he denied the theft of the ear-ring and asserted that the cloth produced in Court had never been worn by him. His story was in effect that as soon as he discovered that the mother of the complainant was awake, he stealthily withdrew from the place in fear. Evidence was adduced on behalf of the prosecution, not only to prove the incident as alleged by the complainant, but also to show that she was a respectable woman and had led a blameless life since the death of her husband 6 or 7 years ago. The accused, on the other hand, brought forward witnesses to depose that he had for some time past carried on an intrigue with the complainant. The Deputy Magistrate came to the conclusion that the incident had happened as narrated by the complainant and her witnesses. He also held that the story of an intrigue between the complainant and the accused, as told by the defence witnesses, was untrue and that the accused had entered that night into the house of the complainant, not to commit theft as she alleged nor to carry on an intrigue at her invitation, as he asserted, but really with a view to make immoral proposals to her and thus to annoy her. In this view the Deputy Magistrate convicted the accused under section 456 of the Indian Penal Code and sentenced him to six weeks' rigorous imprisonment. The accused thereupon moved the Sessions Judge on the ground that the conviction under section 456 was illegal, on the authority of the decision of this Court in *Jharu Sheikh* v. *King-Emperor* (1). The Sessions Judge has accepted this

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contention and has recommended that the conviction may be set aside and the accused re-tried. We have carefully examined the record and arrived at the conclusion that the conviction should be sustained.

The decision in *Jharu Sheikh* v. *King-Emperor* (1), by reason whereof the Sessions Judge felt constrained to make this reference, is, we think, distinguishable. There the accused was charged with offences under sections 457 and 380. As regards the charge under section 457, the intent imputed to him was the commission of theft. The defence was a complete denial of the incident, and the prosecution was said to be due to malice and ill-feeling. In these circumstances, this Court held that no conviction could properly be made under section 456 till the charge under section 457 had been amended. The reason assigned for this opinion was that the accused must have been seriously prejudiced by not knowing what really was the charge against him. It is not necessary for us to express an opinion upon the question whether this view was correct, even in the circumstances of that case. But it is plain that if the Court intended to formulate an inflexible rule of universal application that under no circumstances can a conviction be made under section 456 when the accused has been charged with the commission of an offence under section 457, the view cannot possibly be sustained. Section 238 of the Criminal Procedure Code, which provides that when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it, would clearly be applicable to a case of this character. This view was adopted by West and Nanabhai, JJ. in *Queen-Empress* v. *Balu* (2). There the accused had

(1) (1912) 16 C. W. N. 696. (2) (1886) Ratan Unrep. Cr. C. 293.

been convicted by the trial Court under section 457; on appeal the conviction was altered to one under section 414. The High Court held that section 457 applied to what might be called a composite offence, and, consequently, under section 238 of the Criminal Procedure Code, an accused might be convicted of any element of the composite offence which constituted a minor offence. A similar course was followed in *Emperor* v. *Ishri* (1). There the accused was charged under section 457, but convicted under section 456, as the intent imputed to him was not established; the conviction was sustained by the High Court: see also *Sher Singh* v. *Empress* (2). We are of opinion that the decision in *Jharu Sheikh* v. *King-Emperor* (3) must be limited to its special circumstances, and, in this connection, the warning given by Lord Halsbury L. C. in *Quinn* v. *Leathem*(4), may be usefully borne in mind, namely, "that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found." We cannot, consequently, hold that merely because the intent imputed to the accused to sustain a conviction under section 457 has failed, no conviction can be made under section 456. We are not now concerned with the question whether a conviction under section 457 can be sustained when the specific intent imputed to the accused is not established, but another intent is proved. We are accordingly not called upon to consider the applicability of the class of cases in which it has been ruled that a conviction under

(1) (1906) I. L. R 29 All. 46.
(2) (1883) Punj. Rec. 14.
(3) (1912) 16 C. W. N. 696.
(4) [1901] A. C. 495, 506.

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section 147 cannot be supported unless the common object of the assembly as established by the evidence agrees in essential particulars with that laid in the charge: *Silajit Mahto* v. *Emperor* (1), *Poresh Nath Sircar* v. *Emperor* (2), *Rahimuddi* v. *Asgar Ali* (3). In that class of cases, the weighty observations in *Behari Mahton* v. *Queen-Empress* (4) may be borne in mind; "an accused person is entitled to know with certainty and accuracy the exact nature of the charge brought against him, and unless he has this knowledge, he must be seriously prejudiced in his defence. This is true in all cases, but it is more specially true in cases where (as in a case under section 147) it is sought to implicate him for acts not committed by himself but by others with whom he was in company." We hold, consequently, that although the specific intent, namely, the intent to commit theft, was not established, yet it was competent to the Court to convict the accused under section 456, and the only consideration is, whether the accused has been prejudiced at the trial by the conviction for a minor offence, in conformity with section 238 of the Criminal Procedure Code. In the determination of this question, as pointed out by Couch, C. J. in *Reg.* v. *Govindas Haridas* (5), the nature of the case made at the trial against the prisoner, the evidence that was given and the line of defence set up by him, are all matters to be taken into consideration.

Now it is well settled that to sustain a conviction under section 456 it is not necessary to specify the criminal intention in the charge; it is sufficient if a guilty intention is proved, such as is contemplated by section 441: *Koilash Chandra Chakrabarty* v. *Queen-*

(1) (1909) I. L. R. 36 Calc. 865
(2) (1905) I. L. R. 33 Calc. 295.
(3) (1901) I. L. R. 27 Calc. 990.
(4) (1884) I. L. R. 11 Calc. 106.
(5) (1889) 6 Bom. H. C. R. 76.

*Empress* (1), *Balmakand Ram* v. *Ghansamram* (2), *Premanundo Shaha* v. *Brindabun Chung* (3), *Emperor* v. *Ishri* (4), *Sher Singh* v. *Empress* (5), *Lajji Ram* v. *Queen-Empress* (6), *Ramrang* v. *King-Emperor* (7). In the case before us, the accused admitted his presence at midnight in the house of the complainant. He alleged that he went there by invitation of the complainant with whom he had an intrigue. Evidence was directed at the trial to this point by both the prosecution and the accused, and the question in controversy has been decided. The trial Court has disbelieved the defence witnesses and accepted the prosecution testimony. The Sessions Judge has examined the evidence and has confirmed the view of the Deputy Magistrate. We see no reason to differ from these conclusions. The position then is that the accused is found at midnight in the house of the complainant, a respectable widow, while she is asleep on the same bed with her mother. He is caught, struggles to get off, and ultimately runs away leaving his wearing cloth behind. The explanation he offers for his presence in the house at dead of night and for this singular incident has been rejected. What, then, could have been his intention? The answer is best given in the words of Hill J. in *Koilash Chandra Chakrabarty* v. *Queen-Empress* (1). "What we have then to deal with is the case of a man, a stranger, who, uninvited and without any right whatever to be there, effects an entry in the middle of the night into the sleeping apartment of two women, members of a respectable household, and who, when an attempt is made to capture him, uses great violence

(1) (1889) I. L. R. 16 Calc. 657.
(2) (1894) I. L. R. 22 Calc. 391.
(3) (1895) I. L. R. 22 Calc. 994.
(4) (1906) I. L. R. 29 All. 46.
(5) (1883) Punj. Rec. 14.
(6) (1898) Punj. Rec. 12.
(7) (1902) Punj. Rec. 18.

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in the effort to make good his escape. Under such circumstances, we think the Court ought to presume that the entry was effected with an intent such as is provided for by section 441 of the Indian Penal Code." In the language of Pigot, J. in *Premanundo Shaha* v. *Brindabun Chung* (1), "the position of the accused and all the facts preclude any notion of his going there to steal or for any purpose save his own pleasure; the facts are good evidence of an intent and of an intrusion on privacy within the meaning of section 509 of the Indian Penal Code, and, therefore, the intent to commit an offence within the meaning of section 441 is made out." To the same effect are the observations of Banerjee, J. in *Balmakand Ram* v. *Ghansamram* (2), and of Turner, C.J. in *Re Samban* (3). As was pointed out by Banerjee, J., the intention may be determined as well from direct evidence as from the conduct of the party concerned and the attendant circumstances, for, as Lord Ellenborough, C.J. said in *Rex* v. *Dixon* (4), "it is an universal principle that when a man is charged with doing an act, the intention is an inference of law resulting from the doing the act." We are further clearly of opinion that the accused has been in no way prejudiced and will gain nothing by a retrial. If a retrial is directed, if he is charged under section 456, if it is alleged that the trespass was committed with intent to commit an offence under section 509, if he urges in defence that he entered into the premises at the invitation of the complainant with whom he was on terms of intimacy, what will be the question for investigation?—the very question which has now been determined on evidence adduced on behalf of the complainant and the accused. We feel no doubt

(1) (1895) I. L. R. 22 Calc. 994, 998.
(2) (1894) I. L. R. 22 Calc. 391.
(3) (1881) 1 Weir 533.
(4) (1814) 3 M. & S. 11, 15.

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whatever that, in these circumstances, it would not be right to direct a retrial and afford a possible opportunity for the manufacture of perjured evidence. As regards the sentence, we are of opinion that it does not err, by any means, in the direction of severity. The offence committed was very serious. The complainant is a respectable woman, and though she occupies a humble station in life, she is entitled to the full protection of the law. The accused, on the other hand, is said to be well-connected and is a person of means and some position, but that is a good reason why he should not be treated with misplaced leniency. Unless exemplary sentences are passed in these cases, persons who are inclined to run the risk of detection in the commission of such offences are not likely to be deterred. We accordingly decline to interfere in the exercise of our revisional jurisdiction, and direct that the accused be called upon to surrender, so that he may serve out the remainder of the term of imprisonment.

E. H. M.

## APPELLATE CIVIL.

*Before Sanderson C. J. and Newbould J.*

KALI PRASANNA SIL

*v.*

PANCHANAN NANDI.*

1916

*March 17.*

*Jurisdiction—Leave to withdraw suit by the Appellate Court—Subsequent Suit—Res Judicata—Civil Proceaure Codes (Act XIV of 1882), s. 373 (Act V of 1908), O. XXXIII, r. 1.*

The plaintiff brought a suit for the declaration of his title in respect of certain rights and for other reliefs. This suit was dismissed by the Court

* Appeal from Appellate Decree, No. 1354 of 1913, against the decree of Ashutosh Banerjee, Subordinate Judge of Burdwan, dated Sep. 12, 1912, confirming the decree of Benode Behari Mukerjee, Munsif of Kalna, dated Jan. 16, 1912.