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HOGARTH
SHIPPING
Co., LTD.,
v.
MITSUI
BUSSAN
KAISHA,
LTD.,
In re.
BUCKLAND J.

the position of an executing Court and is not a Court in which such sums or debts may be recovered, to employ the language of the section. Those words in my opinion refer to the Court which adjudicates as to the actual debt or claim. There is no question but that the claim in other respects conforms to the terms of the section, but for these reasons I do not think that it is open to this Court to grant interest at this stage to the applicant under the Interest Act.

The application is therefore dismissed with costs.

Attorneys for the applicants: *Pugh & Co.*

Attorneys for the respondents: *Orr, Dignam & Co.*

A. P. B.

CRIMINAL REVISION.

Before Suhrawardy and Duval JJ.

MADHAB CHANDRA SAHA

v.

EMPEROR.*

1926

March 22.

Summary Trial—Complaint of offence not triable summarily—Omission to frame a charge in appealable warrant cases—Criminal Procedure Code (Act V of 1898), ss. 262 (1), 263 and 264.

A summary trial in which an appeal lies is governed by s. 264 of the Criminal Procedure Code, and the only record thereunder is a judgment containing the particulars set out in s. 263. No formal charge is required to be drawn.

Natabar Khan v. King-Emperor (1) not followed on the point.

Where, after taking the evidence-in-chief of the prosecution witnesses the trial Magistrate, on objection taken that the offence was not triable

* Criminal Revision No. 169 of 1926, against the order of T. H. Ellis, Additional Sessions Judge of Dacca, dated Jan. 15, 1926.

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summarily, recorded a finding that the case was under s. 457, first part, of the Penal Code, though he was doubtful as to what was the intention :—

Held, that the omission to frame a charge did not prejudice the accused and justify the reversal of the conviction, having regard to section 535 of the Code.

The petitioner was tried by Mr. A. H. Chowdhury, a first class Deputy Magistrate at Manikganj, and convicted and sentenced, under section 457 of the Penal Code, on the 5th September 1925, to nine weeks' rigorous imprisonment.

The facts of the case were as follows. On the 3rd July 1925, one Kuki Bewa lodged a vernacular petition of complaint against the petitioner under sections 456 and 457 of the Penal Code in the following terms, as appeared from the translation set out in the third paragraph of the petition to the High Court :—

"I was sleeping at night in my bed-room by bolting the doors. The accused opened the said bolted door from outside, entered the room, and with evil intention touched my body, whereupon I woke up and began to strike the accused with a piece of bamboo"

In her *examination under section 200* of the Criminal Procedure Code, cited in the judgment of the High Court as the "complaint", she stated :

"While I was sleeping in my room, Madhab (accused) entered my room by opening the door and touched my body. I at once took up a bamboo piece and hit him and shouted... .."

In her *examination-in-chief* on the trial, taken on the 8th August, she said :—

"He entered my hut having opened the bolt and touched my breast..... he wanted to dishonour me."

After the examination of the other witnesses on the same date, objection was taken by the accused that the offence disclosed was one under section 354 of the Penal Code which was not triable summarily, whereupon the Magistrate recorded the following order :—

I have heard the evidence. I find it is under section 457, first clause, and as such triable summarily. It may be that the accused touched her body to dishonour her, but it might also be for theft or any such thing.

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Upon the question of the intention of the accused in entering the complainant's room, the Magistrate's finding was as follows: "the accused entered her hut and touched her in order to commit an offence punishable with imprisonment The whole trend of the evidence showed that it was not any outrage of modesty that was committed, but that it was or might be the intention".

The petitioner appealed to the Sessions Judge who upheld the conviction and sentence, without finding any specific intention, and merely stated "*that the charge had been proved*".

The petitioner then obtained the present Rule.

Mr. Monnier (with him *Babu Satish Chandra Chowdhury*), for the petitioner. The jurisdiction of the Magistrate to try a case summarily depends on the *complaint*, unless found at the outset to be false or exaggerated: *Kailash Chunder Pal v. Joynuddi* (1). The vernacular complaint here alleged that the accused "*touched her with evil intention*". In her examination under section 200 of the Code she, no doubt, merely stated that he "*touched her body*", but if the Magistrate had only examined her properly by questioning her where he touched her body, the statement mentioned in her examination-in-chief that he "*touched her breast*" would have been brought out. The examination, even as it stands, did not negative the allegation in the complaint, and the Magistrate was, therefore, bound to consider what offence was made out on the complaint: *Bishu Shaik v. Saber Molla* (2). The act of touching the breast is clearly within section 354, as read with illust. (f) to section 350 of the Penal Code. In the next place the Magistrate is bound to frame a charge in an appealable case. Under section 262 (1)

(1) (1900) 5 C. W. N. 252.

(2) (1902) I. L. R. 29 Calc. 409.

the procedure of a warrant case (which the present one was) must be followed. That section 262 (1) requires a charge in appealable cases *follows conclusively* from section 263. The first paragraph of section 263 *itself* contemplates the framing of a charge under section 262 (1), because it provides that such charge is not necessary in non-appealable cases. Unless a formal charge was necessary under section 262 (1), the exemption under the first part of s. 263 from the obligation to frame it in non-appealable cases is wholly superfluous and meaningless. I rely strongly on section 263 to show that a charge must be framed in appealable cases. Section 264 refers only to the judgment and has nothing to do with charges. Sub-section (2) must be read with sub-section (1), and clearly means that the judgment shall be the only record of the "*substance of the evidence and also the particulars mentioned in section 263*" as stated in the first sub-section of section 264. If sub-section (2) is read as excluding the framing of a charge, even in appealable cases, the construction will make the first paragraph of section 263 inconsistent with section 264 (2) and render the words "*or frame a formal charge*" in the former section not only surplusage but absolutely meaningless. The construction would also be inconsistent with other parts of the Code—see s. 256 (2) which applies to summary trials. The point has been already decided in *Natabar Khan v. King-Emperor* (1). Nextly neither Court was able to find any specific intention in entering the hut. If a charge under section 457 of the Penal Code had been framed, the Magistrate would have been bound to specify the intention. A charge of an offence thereunder must set out the intention: there must be proof of it, and the omission to find the intention specifically vitiates the conviction and sentence, as

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held in *Balmakand v. Ghansamram* (1). The same view was taken in *Jharu Sheikh v. King-Emperor* (2). The accused has thus been prejudiced not only by the omission of the charge, but also by the absence of any specific finding of intention, and section 535 has no application to such a condition of things.

DUVAL J. In this case the accused was put on his trial under section 457 of the Indian Penal Code and tried summarily. The charge against him was brought by one Kuki Bewa who in her statement of complaint said "while I was sleeping in my room Madhab entered my room by opening the door and touched my body. I at once took up a bamboo piece and hit him and shouted. Drawn by my cries there came Pagal and others. The accused ran away but was seen by Gada and Pagal." The Magistrate thereupon proceeded to try the accused summarily under section 260 of the Criminal Procedure Code, and in the end the petitioner was sentenced to nine weeks' rigorous imprisonment. The conviction and sentence were upheld in the Court below.

In this Court this Rule has been obtained on two grounds: (i) that the learned Magistrate was wrong in law in trying the case summarily; and (ii) that the accused was prejudiced by the omission to frame a charge, specially as the intention has not been definitely found by either of the Courts below, and the accused did not get sufficient information of the charge he was to meet in his defence. In respect of the first ground there is no doubt that an offence under section 457 of the Indian Penal Code can be tried summarily. But it is argued that here there was complaint not only under section 457 of the Indian Penal Code but also under section 354—an

(1) (1894) I. L. R. 22 Calc. 391, 403. (2) (1912) 16 C. W. N. 696.

offence which cannot be tried summarily. The complaint has been set out above, and it does not show what was the intention of the accused in forcing his way into the hut that night, whether it was to commit theft or simple assault, or an aggravated form of assault, and the learned Sessions Judge has found that there is no evidence as to what was the actual offence which the accused intended to commit; but both the Courts below found that the accused did commit the offence of house trespass by night with intent to commit an offence punishable with imprisonment. I find no reason why the Magistrate should have to assume that an offence under section 354 was intended or committed. At the time of complaint no such cause of action was alleged. In my opinion, therefore, there was no illegality in trying the case summarily and this ground must fail.

As to the second ground, the procedure of the Magistrate was as follows: He recorded the evidence-in-chief of the prosecution witnesses, and after that recorded "I find it is a case under section 457 of the "Indian Penal Code, first part". He then proceeded to cross-examine the witnesses, and took the plea of defence and then examined the defence witnesses. It is urged that it is necessary in summary trials in which an appeal lies that there should be a formal charge. It appears that summary trials of cases in which an appeal lies are governed by section 264 of the Criminal Procedure Code. The procedure for the trial is prescribed in section 262 (1); "The procedure in warrant cases shall be the procedure followed in warrant cases, except as hereinafter mentioned". Section 264 of the Criminal Procedure Code says that "in every case tried summarily by a Magistrate or Bench in which an appeal lies, such Magistrate or Bench shall, before passing sentence, record a judgment embodying

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“the substance of the evidence and also the particulars mentioned in section 263. Such judgment shall be the only record in cases within this section.” In the present case the Judge has exactly carried out that procedure. He has recorded the particulars set out in section 263 of the Criminal Procedure Code and has written a judgment. The only point is that he has not framed a formal charge. Now, apart from anything else, under section 535 of the Criminal Procedure Code mere omission or irregularity in the charge will not justify a reversal of an order of the lower Court, unless, in the opinion of the Court of appeal or revision, a failure of justice has in fact been occasioned thereby. So speaking for myself, as it was perfectly clear to the accused from the evidence on the record and the examination-in-chief what case he had to meet, I cannot hold that the mere failure to frame a charge has vitiated the conviction and sentence. But it is urged that in view of an observation in the ruling in the case of *Natabar Khan v. King-Emperor* (1), it is necessary in an appealable summary trial to frame a charge. In that particular case the Magistrate had before him a man charged under section 379 without recording evidence, as is necessary in a warrant case: he accepted the plea of guilty and convicted the accused, without taking any evidence, on his own plea and without framing a charge. The learned Judges of this Court set aside the conviction and sentence on two grounds; first stating that there was no exemption from framing a charge in a case tried summarily in which the sentence passed is appealable: and, further, as under section 262 of the Criminal Procedure Code the procedure was that of a warrant case, the accused could not be convicted merely on his own plea. As I read section 264 of the Criminal Procedure Code I have

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considerable doubt as to whether there is any provision in law requiring the framing of a charge under section 264 in a summary trial, whether an appealable sentence is passed or not, for section 264 states exactly what the record shall consist of, and that is a judgment embodying the substance of the evidence and the particulars set out in section 263. In section 263 it will be seen that it is not necessary to record the evidence of witnesses or to frame a formal charge. This case, however, to which I have referred, was also decided on another ground, that is, the absence of any evidence being recorded at all. There is also the provision of section 535 to which I have also referred. For these reasons I do not hold that, owing to omission to frame a charge, especially when here at the close of the prosecution evidence in-chief the Magistrate laid down exactly what was the charge, *i.e.*, an offence under section 457 of the Indian Penal Code, first part, the trial has been vitiated. I would, therefore, discharge the Rule.

SUHRAWARDY J. I agree.

E. H. M.

Rule discharged.

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