CRIMINAL REVISION.

Before Rankin C. J. and C. C. Ghose J.

CORPORATION OF CALCUTTA

v.

ANANTA DHAR*.

1928

March 27.

Municipality—Continuing Offence—Calcutta Municipal Act (Bengal Act III of 1923), section 488, clause (2) and Schedule XVII, rule 7 (1).

A person once convicted under rule 7 of Schedule XVII of the Calcutta Municipal Act of 1923 cannot be again charged with a continuing offence thereunder read with section 488, clause (2) of that Act, where the offence consisted merely of rethatching, with new *golpatta* the roof of a hut that existed before the commencement of that Act and the roof continued to be of the same inflammable materials that were complained of in the earlier offence.

Marshall v. *Smith* (1) referred to.

CRIMINAL RULE on behalf of the complainant, the Corporation of Calcutta.

A *golpatta* hut at premises No. 12, Nakuleswar Bhattacharya Lane in Calcutta belonged to Ananta Dhar and Basanta Dhar. The hut existed at the commencement of the Calcutta Municipal Act of 1923. The owners having put in new *golpatta* leaves upon the old frame of the roof of the hut in 1926, they were prosecuted under section 488 (*1*) (*a*) of that Act for having committed an offence by contravening the provisions of rule 7 (*1*) of Schedule XVII of the Act and were convicted and sentenced to pay a fine of Rs. 10. The accused, however, did not remove the *golpatta* leaves put up by them and they were again prosecuted under the provisions of section 488 (*2*) of the Act for continuing to commit the offence. The Corporation established its case by oral evidence. The defence of the accused principally was that section 488 does not contemplate a case of continuing offence.

* Criminal Revision, No. 87 of 1928, against the Order of N. N. Gupta, Presidency and Municipal Magistrate, Calcutta, dated August 22, 1927.

(1) (1873) L. R. 8 C. P. 416.

The trial Magistrate accepted the plea of the accused and acquitted them. The Corporation, thereupon, moved the High Court and obtained this rule.

Sir B. L. Mitter (with him *Babu Suresh Chandra Talukdar, Babu Mahendra Kumar Ghose* and *Babu Gopendra Krishna Banerji*), for the petitioner. The gist of the offence under Schedule XVII, rule 7 is to have or possess a hut with roof of inflammable materials. By the 4th column of section 488, the offence has been made a continuing one and the opposite party was liable to pay a daily fine of Rs. 5. The meaning of the said rule plainly is that no one shall have or possess such buildings. After the previous conviction, the opposite party was having or possessing such a building and, therefore, the opposite party was guilty of a continuing offence.

Babu Prabodh Chandra Chatterji, for the opposite party. Rule 7 of Schedule XVII refers to the making or constructing a building and not to possessing the same. In the second column of section 488, the subject matter of the offence is described as "construction of external roofs or walls of buildings "with inflammable materials". If the offence of making or constructing be allowed to be continued after a conviction, a person is liable to a daily fine. The statute makes the offence of making or constructing a continuous offence, provided the making or constructing is allowed to be proceeded with after the first conviction, Possessing or having such a building is not an offence under the Act.

[RANKIN C. J. Have you seen the explanation of section 488, which provides that the entries in the column headed "subject" are not intended to be definitions of the offences, but are inserted merely as references to the subject thereof?]

Yes. Although I cannot argue that the offence must be restricted to the wording under the column "subject," yet I refer to the description under that column simply to show what the legislators themselves thought to be the gist and meaning of the offence.

1928

CORPORATION OF CALCUTTA v. ANANTA DHAR.

The leading case on the subject is *Marshall* v. *Smith* (1). In that case the offence consisted of building a wall and it was held that a mere failure to pull down the wall was not a continuation of the original offence. The facts of the said case are almost similar to the facts of the present case. The case has never been dissented from. After the decision in the said case, section 158 of the Public Health Act, 1875 (38 & 39 Vict. c. 55) was enacted.

[RANKIN C. J. Has the Municipality got the power to demolish such a building under the Act?]

I am not sure if the Municipality has got such a power. But even if the Municipality had no such power, the decision of your Lordships will not be affected thereby.

Cur. adv. vult.

RANKIN C. J. In this case a Rule was issued at the instance of the Corporation of Calcutta requiring the opposite party to show cause why a certain order of acquittal passed by the Municipal Magistrate in favour of the opposite party should not be set aside on the ground that the Magistrate had misconceived the law and acquitted the accused on an erroneous hypothesis and assumption.

It appears that the opposite party is the owner of a hut existing on certain premises in Calcutta and that, after the commencement of the Calcutta Municipal Act of 1923, he put new *golpatta* leaves upon the old framework of the roof of his hut. He was accordingly, prosecuted under rule 7 of the 17th Schedule to the Municipal Act, the first clause whereof says that "external roofs or walls of buildings shall "not, after the commencement of this Act, be made of "grass, leaves, mats, canvas or other inflammable "materials".

It appears that the charge against him on that occasion was that he had entirely rethatched the roof of the hut with new *golpatta*. Thereafter the prosecution with which we are now concerned was instituted

(1) (1873) L. R. 8 C. P. 416.

and it was contended on behalf of the Corporation that because the opposite party had not pulled down the *golpatta* roof or altered it in accordance with the requirements of rule 7 of Schedule XVII, he was guilty of a continuing offence within the meaning of the Calcutta Municipal Act and was liable to a daily fine of Rs. 5. The Magistrate has held that the fact that the opposite party has not pulled down the *golpatta* leaves is not a continuation of the offence previously committed by him under rule 7 abovementioned.

The relevant section for the present purpose is first of all section 488 of the Calcutta Municipal Act. It prescribes that certain penalties mentioned in the third column of a schedule thereto shall be incurred by persons who contravene any provisions of the sections or rules of the Act mentioned in that schedule and also by any person who fails to comply with any lawful direction under any of the sections mentioned. Thereafter it prescribes by the second clause "whoever, after having been convicted of any "offence referred to in clause (*a*), (*b*) or (*c*) of sub-"section (1) continues to commit such offence shall "be punished for each day after the first during which "he continues so to offend, with fine which may "extend to the amount mentioned in this behalf "in the fourth column of the said table".

The question is, therefore, whether or not this case comes within the terms of clause (2) of section 488, *i.e.*, whether the opposite party continued to commit the offence of which he was previously convicted under rule 7 of Schedule XVII. This matter must be considered upon the basis of rule 7, which I have mentioned, and the language of clause (2) of section 488. In view of the explanation attached to clause (2) of section 488, it appears to me to be erroneous to put any stress upon the particular words in the second column of the table, which is governed by section 488. I, therefore, pass over the phrase "construction of external roofs or walls of buildings with inflammable materials", which is to be found in that table and go to the fountain-head, that is to say,

1928

CORPORATION OF CALCUTTA v. ANANTA DHAR.

RANKIN C. J.

the terms of rule 7 itself. It is to be observed that that section is not expressed to say that in the case of external roofs or walls of buildings erected after the commencement of this Act the same shall not consist or be suffered to consist of inflammable materials. It is not so expressed. It says that external roofs shall not after the commencement of this Act be made of inflammable materials; and the offence which was committed by the opposite party and for which he was rightly convicted was the offence of making the roof with an inflammable material. The leading case on this subject is the case of *Marshall* v. *Smith* (1) and in that case, which has never been dissented from in England, it was held under a very similar clause that the offence consisted in the building of the wall. It was also held that a mere failure to pull down a wall or rebuild it in accordance with the statutory requirements was not a continuation of that offence. In consequence of that decision, section 158 of the Public Health Act of 1875 was made to provide that "where "the beginning or the extension of the work is an "offence in respect whereof the offender is liable in "respect of any bye-law to a penalty the existence of "the work during its continuance in such a form and "state as to be in contravention of the bye-law shall be "deemed to be a continuing offence". No such provision has been incorporated into the Calcutta Municipal Act and if, therefore, we are to hold that the conduct of the opposite party in suffering the roof to remain is a continuation of the offence of making the roof, we have to do a certain amount of violence to the language of clause (2) of section 488. It is plain as a matter of right reason that suffering the roof to remain is not a continuation of the offence committed, *i.e.*, of making the roof. When one looks at the scheme and the language of the table which follows section 488, one notices that the daily fine is one of Rs. 5 and no doubt it does occur to one that while a person may after conviction continue to erect a roof of inflammable materials a daily fine of Rs. 5 does not

(1) (1873) L. R. 8 C. P. 416.

seem to be a very adequate or convenient method of coping with that particular form of persistency in illegal conduct. At the same time it is possible to have a case where a person continues to erect or make a roof with inflammable materials after conviction and it cannot, therefore, be said that the Court is obliged by the frame of the table to extend the proper and ordinary meaning of the words "continues to commit such offence" found in clause (2) of section 488. I quite appreciate that it is a serious matter for the Corporation to be told that they have not the power to obtain a conviction in a case of this sort under clause (2) of section 488. Also I am the last person to be unduly influenced by any archaic notion as to a strict construction to be applied to a statute which deals with many very complicated matters. Speaking for myself, if I am satisfied that the meaning of what the legislature has said is to make this kind of conduct a continuation of the offence under rule 7, mere correctness of language would not deter me from giving effect to the intention of the legislature. In the present case, however, I am not of opinion that there is sufficient in the language employed by the legislature to justify the Court in regarding this kind of conduct as a continuation of the offence within the meaning of clause (2) of section 488. It seems to me that if the Corporation has not sufficient power, where any works are erected contrary to the Act, to order them to be removed and in default of compliance to remove them itself at the expense of the owner, the sooner it takes power to act in that way, the sooner it will be equipped with what is necessary to protect the city from conflagration. Again, if it is thought useful to have the power of a daily fine in such a case, the sooner the Corporation goes to the legislature for a clause on the lines of section 158 of the Public Health Act of 1875 the better. It is not only difficult, but it is in some respects objectionable that a matter of this sort should be dealt with by a court of law straining the plain words "continues to commit "such offence" so as to supply the Corporation with a

1928

CORPORATION OF CALCUTTA *v.* ANANTA DHAR.

somewhat drastic power. In my judgment the result of a consideration of the Calcutta Municipal Act is that I am satisfied that the view taken by the Magistrate is not only consistent with authority but is correct, and I think that this Rule ought to be discharged.

GHOSE J. I agree.

S. M.

Rule discharged.

CRIMINAL REFERENCE.

Before Rankin C. J. and Mukerji J.

EMPEROR

v.

NAGAR ALI.*

1928

April 3.

Reference—Jury, trial by—Reference to High Court against verdict of the jury, when should be made—Interference by the High Court, when justified.

Mere disagreement between the Sessions Judge and the jury on findings of fact is not a sufficient ground for a Reference to the High Court.

The Sessions Judge will not, as a rule, be justified in making a Reference to the High Court in disagreement with the verdict of the jury, in a case in which it cannot be said that the jury unreasonably came to a verdict on the evidence in the case.

Interference by the High Court in a case of this description would render trial by jury useless.

CRIMINAL REFERENCE.

This was a Reference by Mr. N. L. Hindley, Sessions Judge of Tippera.

Nine persons were tried by him and a jury of five the accused being charged under sections 399 and 402, I. P. C. The verdict of the majority of the jurors amounted to a unanimous verdict in the case of two accused in favour of "not guilty" and a verdict of

*Jury Reference, No 54 of 1927, by N. L. Hindley, Sessions Judge of Tippera, dated Sept. 13, 1927.