CRIMINAL REFERENCE.

Before Suhrawardy and Costello JJ.

EMPEROR

v.

YAR MUHAMMAD.*

1930

May 15.

Sentence—Appealable sentence, if should be passed on the prayer of the accused—Indian Penal Code (Act XLV of 1860), s. 189.

A court, in passing sentence, should inflict such sentence as the gravity or otherwise of the crime of which the accused has been convicted warrants and merits, irrespective of whether the sentence inflicted will involve a right of appeal or not, even although the accused may pray for an appealable sentence.

Dorasamy Pillai v. *Emperor* (1) doubted and distinguished.

When two constables went at night to the house of a *dâgi*, kept under surveillance pursuant to an order under Regulation 491 of 1895, and called out his name from the public road, and his brother who lived in an adjoining hut came out and threatened to assault the constables for the annoyance caused,

held that it amounted to an offence under section 189 of the Indian Penal Code.

CRIMINAL REFERENCE under section 438 of the Code of Criminal Procedure.

The facts sufficiently appear in the judgment.

No one appeared in support of the Reference.

Debendranarayan Bhattacharya for the Crown.

In this case, the most important question is whether the constables were acting in the exercise of their public functions. The Police Regulations of Bengal, made by the Inspector-General of Police, with the approval of the Local Government, under powers conferred upon him by section 12 of the Police Act (V of 1861), are binding on all police officers. The rules as to surveillance, contained in Chapter XV of Volume I of the Regulations, are rules relating to "the collecting and communicating "intelligence and information" within the meaning of section 12 of the Police Act. The relevant rules

*Criminal Reference, No. 222 of 1929, made by T. I. Nurannabi Chaudhuri, Sessions Judge of Rajshahi, dated Sept. 30, and Nov. 19, 1929.

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are 491 and 495. Clauses (*b*) and (*g*) of rule 495 authorises the deputation of constables to look up the person under surveillance. Under section 23 of the Police Act, the constables were bound to carry out their orders. The constables were, therefore, exercising their public functions and had not exceeded them. It is difficult to apply the decision in the case *Dorasamy Pillai* v. *Emperor* (1) without knowing what the Regulations in Madras were. In any case, that decision is distinguishable. With regard to the second point raised by the learned judge, he was clearly wrong. It is against all principles to suppose that the adequacy or otherwise of the sentence should not depend on the judicial discretion of the court, but on the pleasure of the accused to be sentenced.

COSTELLO J. This is a Reference by the Sessions Judge of Rajshahi in respect of the conviction of a man named Yar Muhammad who was found guilty of an offence under section 189 of the Indian Penal Code and sentenced to a fine of Rs. 50 and in default to rigorous imprisonment for 2 months. The allegation against Yar Muhammad shortly stated was this. He had a brother of the name of Kasim, who had been placed under police surveillance by an order of the Superintendent of Police, dated the 2nd April, 1929. That order was apparently made under the provisions of or rather the directions contained in Regulation 491, clause (*a*) of the Bengal Police Regulations, 1927. The two brothers apparently lived in the same house though they occupied separate huts. On the night of the 5th April, 1929, somewhere about 1 a.m. two constables, named Sital Singh and Afzal Khan, came to the house and called out the name of Kasim. In so doing they were apparently carrying out the kind of duty referred to in Regulation 495, clauses (*b*) and (*g*). Upon hearing the constables, according to the story of the prosecution, somebody inside the house replied telling them to wait and they accordingly did wait. Then the accused Yar Muhammad came out

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of the house with a *lâthi* in his hand and enquired why they came; and they thereupon explained that they were police constables and that they had come to enquire about the *dâgi* Kasim. Upon that, the accused threatened that he would break their heads with a *lâthi* when next they came to look for Kasim. While this was going on, Kasim himself came out and stood by. The constables then went away without making any further trouble and made a report to the head constable who in turn reported to the officer-in-charge. The defence put forward on behalf of Yar Muhammad was that the constables had knocked at the wrong door—that is the door of his house—and not the door of Kasim's house at all and that Yar Muhammad only objected to the loud shouts and that the whole story of threats or assault was a pure exaggeration. He also seems to have set up as an alternative defence that he was not at home on the night in question and that he was away at Milki on process-serving duty. The only witnesses called on behalf of the prosecution were the two constables assaulted, the town head-constable and two other officers from the English Bazar police-station. There was no independent witness on behalf of the prosecution. On the other hand, the defence called two witnesses to support the *alibi* which Yar Muhammad had sought to set up. The magistrate rejected the *alibi* as being false and believed the story of the police constables and accordingly convicted Yar Muhammad.

The learned Sessions Judge in submitting this case to us has raised two points: (1) that by reason of the decision of the Madras High Court in the case of *Dorasamy Pillai* v. *Emperor* (1), the learned magistrate in the circumstances of the case was wrong in convicting Yar Muhammad at all. In the Madras case, the facts were these: "A police constable at "midnight entered upon the premises of a person who "was regarded by the police as a suspicious character, "and knocked at his door to ascertain if he was there,

(1) (1903) I. L. R. 27 Mad. 52, 53-54.

"whereupon he came out and abused and pushed the "constable and lifted a stick as if he were about to "hit the constable with it." On a complaint being preferred under section 353 for using criminal force to deter a public servant in the execution of his duty, it was held that the offence had not been committed. Mr. Justice Bhashyam Ayyanger held "The constable "in entering upon the accused's dwelling house and "knocking at his door at midnight with the intention "of finding out whether the accused, who is regarded "as a suspected character by the police, was in his "house, was technically guilty of house trespass under "section 442 of the Indian Penal Code. The course "adopted by the constable was certainly one which "would cause annoyance to the inmates of the house "and is also insulting to the accused, and under section "104 the accused was justified in voluntarily causing "to the complainant the slight harm which he inflicted "on him and the constable cannot be regarded under "section 99, Indian Penal Code, as acting in good "faith (*vide* section 52, Indian Penal Code) under "colour of his office though his act may not be strictly "justifiable by law." I must confess, so far as I am personally concerned, that I find it difficult to understand what the learned judge really meant. With all due respect to him, I cannot agree with the decision in that case. In my view, on the facts as there set forth the constable certainly was acting as a public servant and I doubt very much whether it can properly be said that he was in any way exceeding his duty merely because he knocked at the door of the accused for the purpose of ascertaining whether he was in fact at home. But even upon the supposition that the Madras decision is right, it seems to me that it does not conclude the matter, because the facts there are so different from the facts of the present case as to enable us to say that the learned Sessions Judge was not correct in thinking that the decision of the Madras High Court was an authority for saying that the present applicant ought not to have been convicted. Upon the evidence as proved before the magistrate

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in this case, it seems that the constables did not in any sense trespass upon the premises of the accused, as it is not suggested that they even knocked at the door of the house. All that they did was to call the name of Kasim while they were outside the house and apparently in the public street. It may be that what they did was not the best possible way of ascertaining whether Kasim was within his house, though in fact it did have that effect, as he himself and his brother came out forthwith. As far as I can see there was no justification at all for Yar Muhammad threatening the constables in the way he did. I am of opinion therefore that he was rightly convicted under the provisions of section 189 of the Indian Penal Code.

The other point which the learned Sessions Judge has submitted to us has also no substance in it He says, under the heading, "The grounds upon "which in the opinion of such court the orders should "be reversed," that the learned magistrate's action in passing a non-appealable sentence in the face of the prayer of the accused for an appealable sentence was improper and open to serious objection. It appears that the accused when he realised or surmised that he was about to be convicted and fined prayed for an appealable sentence. Apparently, he did in fact put in a petition to that effect. The Subdivisional Magistrate thereupon, on the 3rd of August, ordered "File with the record." On the 7th of August, 1929, the magistrate made the following order "Orders not "ready. Put up on 10th August, 1929, for orders," and on that date he made the order convicting the accused and passing the sentence which I have mentioned and from which there was no appeal. The use of the expression "non-appealable sentence" by the Sessions Judge is objectionable. It is quite true that the nature of the sentence does affect the question of whether there is an appeal from the decision of the court which inflicted the sentence: but to say that the court ought to take into consideration the prayer of the petitioner in deciding what is the proper

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sentence, is, in my opinion, wholly wrong and that so far from the magistrate's action being "improper "and open to serious objection" as the learned Sessions Judge said, on the contrary the view of the learned Sessions Judge himself upon the matter is "improper "and open to serious objection." If the view of the Sessions Judge were correct, every person, when about to be sentenced, might apply for the passing of such a sentence as would be appealable. A court, in passing sentence, should inflict such a sentence as the gravity or otherwise of the crime with which the accused has been convicted warrants and merits, irrespective of whether the sentence inflicted will involve a right of appeal or not. A court should weigh the sentence with reference to the crime committed and the circumstances of the case and not with reference to any thing which may happen subsequently. The second ground, therefore, put forward by the learned Sessions Judge, has no substance. We accordingly reject this Reference.

SUHRAWARDY J. I agree.

Reference rejected.

A. C. R. C.