APPELLATE CRIMINAL.

Before Mr. Justice Brandt and Mr. Justice Parker.

ROWTHAKONNI—*in re.**

1885. July 21. 1886. July 27.

Act IV of 1842—*Act IX of* 1846—*Madras Out-ports Boat Rules of* 1*st October* 1867—*Jurisdiction of Magistrates—Liability of owner under Rule* 7—*Burden of proof.*

Under Act IX of 1846, the Madras Government is authorized to make in respect of ports in the presidency such regulations for the management of boats and such other matters as are provided for by Act IV of 1842 in respect of the Madras Roads, being similar in principle to the provisions of the said Act, but varying in detail as local circumstances may require.

Act IV of 1842, s. 24, empowers a Justice of the Peace of the town of Madras to hear and determine all pecuniary forfeiture and penalties had or incurred under or against that Act:

Held, that it was competent to the Government of Madras to provide that cases cognizable under the rules passed in accordance with Act IX of 1846 should be heard and determined by Magistrates not being Justices of the Peace.

Under rule 7 of the amended rules for the better management of boats, &c., plying for hire at the out-ports of the Madras Presidency, dated 1st October 1867, the owner of a boat is liable to fine on proof of his allowing his boat to ply without the requisite complement of men:

Held, that where it was proved that a boat was plying without its proper crew the absence of proof by the prosecutor that the owner was aware of the fact was no bar to his conviction.

APPLICATION under ss. 435 and 439 of the Code of Criminal Procedure to revise the proceedings of F. H. Hamnett, Acting Head Assistant Magistrate of Madura, confirming on appeal the finding and sentence of P. Venkatéswara Ayyar, Second-class Magistrate of Tiruvadanei, in case No. 849 of 1884.

The facts and arguments are fully set out in the judgment of the Court (BRANDT and PARKER, JJ.)

Mr. *Norton* and *Venkatarámáyyar* for petitioner.

The Acting Government Pleader (Mr. *Powell*) for the Crown.

The judgment of the Court (Brandt and Parker, JJ.) was delivered by

BRANDT, J.—The petitioner, Rowthakonni, owner of boat No. 2 at Thondi, has been convicted by the Second-class Magistrate

* Criminal Revision Case 218 of 1885.

In re ROWTKA-KONNI.

of Tiruvadanei of "plying a boat without the requisite complement of men (an offence) punishable under Boat Rule No. 7," and sentenced to pay a fine of Rupees 25, and in default to ten days' simple imprisonment.

Complaint was laid by a peon of the Sea Customs Office, and his evidence and that of the Assistant Superintendent of Sea Customs constituted the evidence for the prosecution. On this evidence, the Second-class Magistrate found it proved that on the 1st July 1884, when the petitioner's boat brought timber to the shore from a "dhoni," it was manned by one tindal and four lascars only, while under the license it should have been manned by one tindal and six lascars. On being questioned as to this, the tindal replied that the two absent men had gone to Colombo to earn a livelihood there.

The petitioner's defence was that his boat "always is" manned with the full complement of crew, and that this was a wholly false case brought in consequence of personal spite against him on the part of the Assistant Superintendent of Sea Customs. Three witnesses were called for the defence: one deposed to some incident connected with the landing of some cargo from the petitioner's boat on another occasion when the Assistant Superintendent had objected to its removal, and two, the tindal and a lascar of the petitioner's boat, deposed that the latter always has its full crew.

In appeal the Divisional Magistrate gave his reasons for refusing to believe that the charge was a false charge, and, giving credence to the evidence for the prosecution, dismissed the appeal.

The High Court is moved to exercise its powers of revision on the grounds that even admitting that the boat was undermanned, the owner ought not to have been convicted in the absence of proof of knowledge on his part that the requirements of the rule had not been complied with in this particular instance; and that he was entitled to acquittal on the general principle that a master is not criminally liable for criminal negligence on the part of his servant.

At the hearing it was further contended that the Second-class Magistrate not being a Justice of the Peace had no jurisdiction in this case.

No reference is given in the judgments of the Courts below to the rules under which the conviction was had. A summary of

the boat rules for the out-ports of this presidency is given in the Standing Orders of the Board of Revenue, and search having been made we have found in the *Fort St. George Gazette* of the 15th October 1867 a notification, dated the 30th September 1867, containing "amended rules for the better management of boats and canoes plying for hire at the out-ports of the Madras Presidency." The notification does not specify the authority under which these rules are made, but it is recited that they have received the sanction of the Governor-General in Council and come into force on the 1st October 1867.

Act IV of 1842, "Madras Roads—Boat Regulations," an Act for the better management of boats and catamarans in the Madras Roads, and for the amendment of certain harbour regulations provides among other things that no person either as owner or servant shall use, &c., any boat or catamaran to carry passengers, goods or letters in the Madras Roads unless licensed; it provides for the licensing of boats under certain conditions; for penalties for breach of the conditions stated, on conviction before a Justice of the Peace.

Act IX of 1846 is an Act authorizing the Governor of Fort St. George to make from time to time in respect of each port or other place of anchorage in the presidency such regulations for the management of boats and catamarans, &c., and such other matters as are provided for by Act IV of 1842, in respect of the Madras Roads as shall seem to them expedient, "being similar in principle to the provisions contained in the said Act, but varying in detail as local circumstances require such variation."

It is contended by the learned Counsel for the petitioner that the qualification of the officers by whom cases involving questions as to breaches of the regulations or rules are to be tried is a matter of principle, and that it was not competent to the Local Government to provide that such cases shall be cognizable by Magistrates not being Justices of the Peace.

We do not think that the contention is sound. The local circumstances of the out-ports are very different from those of the presidency port. Had the jurisdiction of the Magistracy been considered a matter of first importance, it is reasonable to suppose that the Act would have contained clear words restricting the jurisdiction to Justices of the Peace. There is nothing in the matters made punishable by fine or otherwise which would appear

In re ROWTHAKONNI.

to be of great intricacy or of such importance as to make it essential that they should be adjudicated on by Justices of the Peace alone; it cannot, we think, be said that there is anything in the regulations or rules dissimilar in principle to the provisions contained in the earlier Act. We must further assume that the amended rules of 1867 were made and sanctioned under the authority given in the Act of 1846.

There is more in the other objections urged, viz., that, having regard to the general rule which is that in civil actions a master is liable for the acts of his servants, but not in criminal matters for the negligence of his servants to which he has not personally contributed, the word "allow" in the rule for violation of which the petitioner has been convicted cannot be taken as meaning that the owner is liable for a breach of the rule by his servants, without more, but that there must be some proof of wilful, or intentional, or at least positive neglect to take precautions for compliance with the requirements of the rule, and that there is no proof of such in this case.

The general principle 'when penal consequences are made to follow acts of omission' is, as stated by Keating, J., in *Dickenson* v. *Fletcher*,(1) 'that when such consequences are to follow, there must be something in the nature of an actual neglect or default. That a person should be made liable to a penalty without any neglect or default on his part is contrary to the principle so well established by a great number of cases in which the Court, and especially this Court, have held that penalties are not incurred in the absence of *mens rea*,' and in that case Keating, Brett and Denman, JJ., were agreed, the second not however without considerable doubt, that, when the owner of a mine appointed a competent person to examine and lock the safety lamps required in the mine, but such person delivered out certain safety lamps for use in the mine unlocked, in the absence of personal default on the part of the owner he was not liable to a penalty in respect of the act of the person so employed.

The decision in the particular case was, however, to a great extent based upon the particular words in the 22nd section of the Statute, 23 and 24, Vict. c. 151, "if through the default of the owner or agent" of the mines "any of the general or special rules**

(1) L.R., 9 C.P., 5.

be neglected or wilfully violated by any such owner or agent," and regard was also had to the provision contained in susbequent Statutes by which the Statute under consideration was repealed, and in which it was provided that in the event of any contravention of the provisions of the Act, the owner, agent and manager of the mine shall be guilty of an offence 'unless he proves that he had taken all reasonable means to prevent such contravention.'

It was moreover not unreasonably contended that the Legislature intentionally created an exception to the general rule, and did enact that the owner of a boat licensed under the special Act and Regulations should be personally liable to a money penalty and to imprisonment in default, as the only means of ensuring compliance with the requirements of the case; and the question cannot be disposed of with reference to the general principle of law only, without due regard being had to the actual words and general provisions of the rules, and to the particular subject-matter and intent of the Act.

No boats are allowed to ply without a license, and it is to be presumed that only so many are licensed as it is estimated will suffice for the requirements of the port; there is then, in some sense, a monopoly, and it may well be that in view of the advantages thereby secured, boat owners are willing to subject themselves to considerable liabilities.

Under rule 7 the owner alone is liable to fine on proof of his "allowing" his boat to ply without the requisite complement of men; while under rule 8 it is the tindal of any craft loaded with passengers or cargo in excess of the number or tonnage specified in the license who is primarily liable, "every other person who shall be guilty, either as principal or accessory, of the like offence, after having been duly warned by the tindal or owner" being liable to similar punishment.

Under rule 9, if any tindal, after due warning, plies to and from the shore, after notice given by any of the authorities named that is dangerous to do so, 'shall forfeit all hire,' *and the owner shall be subject to suspension of license.*

By rule 15 any owner of a licensed boat *or person deputed by him* who refuses to let such boat for hire without reasonable and satisfactory cause for such refusal is liable to a penalty.

It must be assumed then that the Legislature advisedly made the owner alone liable under the rule under which the petitioner

In re ROWTHAKONNI.

has been convicted; and it only remains to decide, as a point of law, what effect is to be given to the word "allow."

The case is put of an owner being absent from the port in such circumstances that he could not possibly ensure compliance with the terms of the license; but there is no evidence that this was the case here; and there is no need to determine the hypothetical case put. The petitioner's defence was that his boat was fully manned. It is held proved that it was not. And taking the tindal's first statement as true, which it probably is, that the two missing lascars had gone away to Ceylon, there is no evidence that fact was not or might not have been communicated to the owner nor as to the length of time they had been gone.

It was suggested that a boat might leave the shore with a full complement, and that without default on the part of the tindal or possibility of prevention on the part of the master, some of them might leave the boat before it returned to shore; here again there is no evidence that this was so in this case, nor was it suggested as a defence at the trial.

We must then find that the boat was "plying" without a full crew.

Under rule 6, in the absence of registered tindals or lascars, others may be employed "on an emergency and with the permission of the registering officer," but it is not suggested that any notice had been given of the defection of two of the crew, or that any application had been made to register or employ temporarily others in their place.

Having regard to the provisions of the rules as a whole, and to the distinction that is made as to the liability of the owner, and of the tindal in some cases, we must hold that by the word "allow," the Legislature intended to create a liability more extensive than would be implied in such words as "if the owner neglects to ensure that the boat is fully manned," and thereby contravenes the provisions of the rules, he shall be guilty of an offence under the rules "unless he proves that he had taken all reasonable means to prevent such contravention."

We do not say that on proof of such means having been taken the merest nominal fine would not suffice, but we are not prepared to hold, having regard to the peculiar language used, and to rules read as a whole, that it was necessary for the prosecution in this

In re ROWTHAKONNI.

case, to prove the *mens rea*, or that the conviction, on the special facts of this case, is bad in law.

Having regard, however, to the fact that it is not shown that this boat had been plying undermanned before this occasion, or if so, for how long, and in the absence of proof of any personal knowledge on the part of the owner that it had not its full complement, or that there were any special reasons for making an example in this case, we think that the fine, Rs. 25, being half of the maximum amount, is excessive, and we shall reduce the fine to Rs. 10, and direct that the difference be refunded, if the fine has been paid.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Brandt.

KUNHAMED, PETITIONER,

and

CHATHU, RESPONDENT.*

1886. April 16.

Civil Procedure Code, ss. 315, 622.

Where an order was passed under s. 315 of the Code of Civil Procedure directing refund to a purchaser in execution of a decree in a suit in which a second appeal lay to the High Court:

Held, that under s. 622 of the Code of Civil Procedure the High Court could set aside the order because, the judgment-debtor having been found to have a saleable interest, the Lower Court had no power to order a refund.

APPLICATION under s. 622 of the Code of Civil Procedure to set aside an order passed by B. D'Rozario, District Múnsif of Cannanore, under s. 315 of the Code of Civil Procedure.

In execution of the decree in suit 354 of 1880, Chathu Kurup purchased the equity of redemption of certain land, the property of the judgment-debtor in that suit for Rs. 970.

In 1883 he brought suit No. 153, to redeem the mortgage (kánam). It was held, however, that he was not entitled to redeem if the mortgagees elected to exercise their right of purchasing the equity of redemption, inasmuch as they were found to be otti and not kánam holders.

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* Civil Revision Petition 16 of 1886.