QUEEN-EMPRESS v. KAMANDU.

quantity of goods as shall be expressed in the license, a refusal to take which will subject the owner to the loss of hire and suspension of license, if considered necessary. These sections presuppose that the person in charge of a licensed boat is able to count the number of passengers taken into the boat and compare it with the number mentioned in the license and to ascertain the quantity of cargo shipped and compare it with the quantity specified in the license. As all the sections must be read and construed together, I do not consider that the cause assigned by the accused for his refusal, viz., his inability to count, is a reasonable and satisfactory cause within the meaning of s. 14. The accused ought not to have taken charge of a licensed boat unless he knew how to count or was provided by the owner with men who knew how to count for him.

The conclusion I come to is that the refusal of the accused to let his boat on hire unless the shippers provided a tally-man was not a refusal for a reasonable and satisfactory cause within the meaning of s. 14. I am also of opinion that the criminal revision case mentioned by the Session Judge is not in point.

I quite agree with the remarks of Mr. Justice Parker on the Magistrate's procedure.

The result is the conviction will stand, and this Court must decline to interfere on revision.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Brandt.

RATNA MUDALI *in re.**

1886. Dec. 10, 29.

Penal Code, ss. 295, 297—Defiling a place of worship—Trespass on a place of sepulture.

R, a Hindú, had sexual intercourse with a woman within an enclosure surrounding the tomb of a Muhammadan Fakír. He was convicted under s. 295 of the Indian Penal Code:

Held, that in the absence of proof that the place was used for worship or otherwise held sacred, the conviction was bad, and that it should be altered to a conviction under s. 297 of the said Code.

THIS was a case referred for the orders of the High Court under

* Criminal Revision Case 697 of 1886.

s. 438 of the Code of Criminal Procedure by E. C. Johnson, Acting District Magistrate of Chingleput.

The facts necessary for the purpose of this report appear from the judgments of the Court (Muttusámi Ayyar and Brandt, JJ.)

Counsel were not instructed.

BRANDT, J.—The finding is that the accused had sexual intercourse with a woman within an enclosure surrounding a tomb or "in one corner of the sepulchre" under which the remains of a Muhammadan 'Fakir,' venerated by some of his co-religionists, are buried, and that finding must be accepted.

The accused has been convicted under s. 295 of the Indian Penal Code and sentenced to rigorous imprisonment for three months. The District Magistrate is of opinion that the First-class Divisional Magistrate's conviction cannot be supported in law, on the grounds (1) that there is not sufficient evidence on the record that the place is "held sacred by any class of persons," (2) that an intention to insult is not only not proved, but negatived by the evidence as to the time when and the circumstances in which the act was committed, (3) that it is at least doubtful whether a knowledge that any class of persons was likely to consider the act as "an insult to their religion" can legally be imputed to the accused. I concur with the District Magistrate in considering that *the intent* to insult is negatived by the time at which the act was committed, viz., 9 P.M., and by the fact that his detection was the result of a mere chance, and that the only reasonable inference is that the place was selected as one in which the accused might gratify his passion in reasonable hope or on a calculation that he would not be discovered. I am further of opinion that there is not sufficient legal evidence that this place is a place "held sacred by any class of persons," within the meaning of the words as used in s. 295 of the Penal Code; nor that the knowledge that the act, if detected, would be considered an insult to *the religion* of such persons, can be legally inferred.

There is a distinction, not arbitrary, between objects which are objects of respect and even veneration and objects which are held sacred; as an example of the former, I may refer to a place of sepulture (not actually consecrated, as in the case of ground specially consecrated for that purpose according to the rites of Christian churches), as distinguished from a place for worship to the deity or where an idol or altar is kept; and such distinction

RATNA MUDALI *In re*

appears to have been kept in view by the Legislature, for while s. 295 deals with the latter class of objects and places, s. 297 deals more especially with trespasses on places of sepulture and places set apart for the performance of funeral rites and as depositories for the remains of the dead.

Now there is no evidence before us that this place was specially consecrated, and though we are aware that Muhammadans not uncommonly resort to gardens and enclosures where their ancestors or holy men have been buried, for the purpose of saying their prayers, and from time to time to perpetuate the memory of the dead, there is no evidence that this place was so used, and we cannot take judicial notice of the custom.

I am then of opinion that there are not grounds on which it can be held that the accused must have been aware that his act was likely to be considered as an insult to *the religion* of any persons.

There was, however, undoubtedly a trespass in a place of sepulture, and the question is whether the accused must be held to have known that he was likely to wound the feelings of any persons by such trespass, and I am of opinion that the accused must be held to have had sufficient knowledge of the general sentiment and practice of the community amidst which he lived, and that he cannot be excused on the ground that perchance there were no persons specially interested, or none ready to resent the act and prosecute for it, or that his act might as likely as not escape detection; he was detected, and as the event proved there were persons whose feelings were likely to be wounded; the act was the result of culpable heedlessness and disregard for the feelings of others, resulting from a determination to gratify personal lust, despite the consciousness of the consequences of his act if discovered, and failure to exercise that circumspection which it was incumbent on him to exercise: he might then properly be convicted under s. 297, and as the accused will not be prejudiced by substitution of a conviction under that section in lieu of that under s. 295, I would set aside the conviction under the latter section and substitute a conviction under the former.

As regards the punishment, I think it is excessive, any positive intention being negatived, and consider that a sentence of one month's rigorous imprisonment would have sufficed; I would direct that the accused be released from jail on the completion of that period.

MUTTUSAMI AYYAR, J.—In this case the accused, a Hindú, had sexual intercourse with a woman within an enclosure surrounding the tomb of a Fakir at 9 P.M. on the 5th October last. The District Magistrate considers that the accused selected the place as one in which his act was likely at 9 o'clock at night to pass undetected, and that he had no intention of insulting the religion of the Muhammadans in his village, and in this opinion I also concur. Though the primary intention of the accused was to gratify his lust in a place where his act was considered likely to escape detection, I cannot say that he had no knowledge that his act was likely, if detected, to be considered by the Muhammadans to be a defilement, insulting to their religion or to wound their feelings. There is, however, no evidence to show that the tomb in question was used as a place of worship or that any particular object held sacred was defiled, and therefore the conviction under s. 295 cannot be supported. But I also think that upon the facts found a conviction under s. 297 can be supported. The accused committed a trespass on a place of sepulture and knew that his act, if detected, was likely to wound the feelings of the Muhammadans. I do not consider that his belief that the act would probably not be detected would make any difference though it may no doubt well be taken into consideration in awarding punishment. I would alter the conviction to one under s. 297 and reduce the sentence as proposed by Mr. Justice Brandt.

APPELLATE CIVIL.

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

KAVERI (JUDGMENT-DEBTOR), APPELLANT,

and

ANANTHAYYA (DECREE-HOLDER), RESPONDENT.*

1886. Dec. 3, 6.

Transfer of Property Act, ss. 2, 99—*Attachment of property mortgaged prior to* 1882

In 1884, a mortgagee obtained a decree for arrears of interest due under a mortgage deed of 1879 and in execution of the decree attached and applied for the sale of the land mortgaged:

* Appeal against Order 87 of 1886.