QUEEN-EMPRESS v. SIVARAMA.

arisen apparently from the practice of Sessions Courts not trying prisoners on the charges framed by the committing magistrates, but on charges framed at the Sessions trial. The Sessions Judge evidently thought that the words "before a charge has been framed" in s. 494 of the Code of Criminal Procedure mean before the Sessions Court has framed a charge. But the charge referred to in s. 494 is evidently the charge mentioned in s. 210 and in s. 271 (see also s. 226). A prisoner once committed to Sessions on a charge cannot be discharged, but must be acquitted or convicted. The only way to remedy the defect now is to set aside all proceedings, including the erroneous order of discharge, and direct a new trial from that point.

The Court (Kernan and Wilkinson, JJ.) delivered the following

JUDGMENT.—The prisoner was charged for the same offence that he is now charged with in case No. 19 of 1887 before the Sessions Judge on the 22nd day of July 1887. The charge was withdrawn by the Public Prosecutor by permission of the Sessions Judge. The result was that under s. 494(*b*) the prisoner should have been acquitted. But he was merely discharged by the Sessions Judge. This procedure was wrong. The Sessions Judge should have referred the matter to the High Court to quash the committal as he thought the sanction insufficient.

As the prisoner was entitled to be acquitted on the charge, the second charge for the same offence, though on a new sanction, is bad. We must, therefore, reverse the conviction in the present case.

APPELLATE CRIMINAL.

Before Mr. Justice Kernan and Mr. Justice Muttusami Ayyar.

1888. April 17.

QUEEN-EMPRESS against NIRIGHAN AND ANOTHER.*

Criminal Procedure Code, s. 35—Penal Code, ss. 71, 72—Separate convictions for different offences in the same transaction.

An accused person was convicted under s. 457 of the Penal Code of house-breaking by night in order to commit an offence (mischief and assault), and also

* Criminal Revision Cases Nos. 87 and 88 of 1888.

under ss. 426 and 352 for the offences of mischief and assault and punished separately for each offence. These offences formed parts of one transaction :

Held, that the sentences were legal.

CASES referred by H. M. Winterbotham, Acting District Magistrate of Malabar.

The facts were stated as follows :—

Regarding the first case, the Joint Magistrate remarks—

"In this case the Sub-Magistrate has convicted and punished the accused under s. 457 of house-breaking by night with intent to commit mischief and assault, and has also convicted and punished the accused for the offences of mischief and assault separately.

"These latter sentences are illegal under the High Court ruling in criminal appeal No. 352 of 1873 (Weir's Digest, p. 381), where it was held that the law forbids two punishments for an offence so compounded that one substantive offence is the aim of the other and evidentiary matter of the intent necessary to constitute that other.

"This ruling of the Madras High Court was, however, passed under the late Code of Criminal Procedure. The Bombay High Court have lately discussed the legal question and have decided that the double punishment is legal under the present Code X of 1882—*Queen-Empress* v. *Sakharambhai*(1).

"The point is one of almost daily occurrence, and it seems to me to be of great importance that it should be ascertained whether the law on the point is the same now under Act X of 1882 as it was declared to be by the Madras High Court under the Code before in force.

"In my humble opinion the ruling of the Bombay High Court is the one that should be followed. An offence under s. 457, Indian Penal Code, is complete when a man commits house-breaking by night in order to the committing of assault or mischief, and if he proceeds further and actually commits assault or mischief, he then commits distinct offences punishable under ss. 352 and 426 of the Indian Penal Code, and these subsequent offences do not cease to be distinct offences because they also furnish evidence of the intention necessary to constitute the first offence."

The Public Prosecutor (Mr. *Powell*) for the Crown.

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(1) I.L.R., 10 Bom., 493.

QUEEN-EMPRESS v. NIRICHAN.

The Court (Kernan and Muttusami Ayyar, JJ.) delivered the following judgments :—

KERNAN, J.—The decision in *The Queen* v. *Noujan*(1) was made on the Criminal Procedure Code of Act X of 1872. Illustrations (*n*) and (*p*) to paragraph 3 of s. 454 were relied on by the Court as evidencing the rule that, although there might be separate convictions for different offences committed in a series of acts in the same transaction, yet there could only be punishment inflicted to the measure of the largest amount awardable for any one of the offences. In the Act X of 1882, although the first portion of the illustrations (*n*) and (*p*) in the former Act are to be found in illustrations (*b*) and (*c*) to paragraph 1 of s. 235, yet the part of the illustrations (*n*) and (*p*) in the former Act, which limits the punishment to that for one offence only, is not re-enacted. Section 71 of the Penal Code is not interfered with by s. 235 of Criminal Procedure Code. But in neither of the two cases before us did the different offences, when combined, constitute an offence. Therefore s. 71 does not apply. I think the sentences imposed in each case were legal.

MUTTUSAMI AYYAR, J.—In criminal revision case No. 88, the accused was convicted at one trial of three offences punishable under ss. 354, 380, and 451 of the Indian Penal Code. In criminal revision case No. 87 the accused was found guilty of offences punishable under ss. 352, 426 and 457 of the Penal Code. The several offences formed parts of one criminal transaction, and the second-class Magistrate passed separate sentences for each of the offences. The question referred to us is whether separate sentences can be lawfully passed. I would also answer the question in the affirmative. Section 235 of the present Code of Criminal Procedure contains only rules of criminal pleading in regard to joinder of charges, and reading cl. I, together with illustrations (*b*) and (*c*), it is clear that separate convictions for the several offences were perfectly legal.

As to the punishments to be awarded, the rule is now to be found in s. 35 of the Code of Criminal Procedure and in ss. 71 and 72 of the Indian Penal Code. According to s. 35, separate sentences awarded in the cases before us were legal. And s. 71 has no application, for the several offences are not parts of one

(1) 7 M.H.C.R., 375.

and the same offence as shown by the illustration (*a*) of that section. Nor do the cases before us fall either under cl. III of s. 235 of the Code of Criminal Procedure or s. 72 of the Indian Penal Code.

On comparing s. 235 with the corresponding section of the former Code of Criminal Procedure, it will be observed that the rules for assessing punishment, which cls. II and III of s. 454 contained, are omitted in the present Code, and illustrations (*b*) and (*c*) of s. 235, cl. I of the present Code appeared in the former Code as illustrations of s. 454, cl. III. This modification clearly indicates an intention on the part of the Legislature to provide, by s. 235, rules of criminal pleading only and to leave the rules for assessing punishment to be found in s. 71 or 72 of the Indian Penal Code and s. 35 of the Code of Criminal Procedure. The ruling in *The Queen* v. *Noujan* had reference to the provisions of the former Code of Criminal Procedure, and it is no longer applicable. I do not, however, desire to be understood as saying that it may not usefully be kept in view for the purpose of seeing that the aggregate sentence is not excessive or unnecessarily severe.

APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

HAYES *in re.* *

1888. July 27, August 1.

Jurisdiction of High Court—Foreign Jurisdiction Act, 1879, *ch. II—European British subjects in Bangalore—Justices of the Peace for Mysore.*

* The Civil and Military Station of Bangalore is not British territory, but a part of the Mysore State, and the Code of Criminal Procedure is in force therein by reason of declarations made by the Governor-General in Council in exercise of powers conferred by the Foreign Jurisdiction and Extradition Act, 1879.

Justices of the Peace for the State of Mysore are also Justices of the Peace for Bangalore, and both the Civil and Sessions Judge and the District Magistrate of Bangalore being such Justices of the Peace, are, by virtue of s. 6 of the said Act, subordinate to the High Court at Madras.

APPLICATION to the High Court under s. 526 of the Code of Criminal Procedure for the transfer of a criminal case from the Court of the District Magistrate of the Civil and Military Station

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Criminal Miscellaneous Petition No. 41 of 1888.