

QUEEN-
EMPRESS
v.
SUBBABAYA
PILLAI.

Under section 407, Criminal Procedure Code, an appeal lies to the District Magistrate, but, if the District Magistrate has directed that all appeals from Second and Third-class Magistrates in the Kallakurichi taluk shall be heard by the Deputy Magistrate—and we understand this to be the case—it follows that all appeals from their decisions shall be presented to the Deputy Magistrate, and the Deputy Magistrate's Court is the Court to which the appeals ordinarily lie. Had the sanction been granted by the Second-class Magistrate the appeal would, in the ordinary course of things, have been presented to the Deputy Magistrate as the Magistrate having jurisdiction to entertain the appeal. For this reason we consider that the view of the Sessions Judge was correct.

We may point out that the order of the District Magistrate was irregular on another ground. His order directs that the accused be prosecuted before the Head Assistant Magistrate. No such order could be passed under section 195 which must be confined to a grant of sanction, as the District Magistrate had no jurisdiction to act under section 476, since the alleged offence was not brought to his notice in the course of a judicial proceeding. We must therefore decline to interfere and dismiss this petition.

Ordered accordingly.

APPELLATE CRIMINAL.

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

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v.

RAPPEL.*

Penal Code—Act XLV of 1860, ss. 40, 64—Towns Nuisances Act (Madras)—Act III of 1889, ss. 3, 11—Imprisonment in default of payment of a fine.

Where a conviction has taken place under Towns Nuisances Act (Madras), 1889, section 3, a Magistrate has jurisdiction to impose a fine and also to pronounce a sentence of imprisonment in default of payment of the fine.

CASE referred for the orders of the High Court under Criminal Procedure Code, section 438, by H. Moberly, Acting District

* Criminal Revision Cases Nos. 175 and 176 of 1895.

Magistrate of Malabar, being calendar cases Nos. 80 and 114 of 1895 on the file of the Sheristadar-Magistrate of Cochin.

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The case was reported as follows :—

“The accused in the two cases were convicted of having committed nuisances in a public place, punishable under section 3 of Act III of 1889 and sentenced in the one case to a fine of one rupee or, in default, to two days’ simple imprisonment, and in the other case to a fine of eight annas, or in default two days’ simple imprisonment. The legality of the alternative sentences of imprisonment is open to argument. Section 11 of Madras Act III of 1889 says that sections 3 and 4 of this Act shall be read with and form part of Act XXIV of 1859, and in its proceedings, dated 7th December 1866 (1), (see Weir, page 574), the High Court ruled that a sentence of imprisonment in default of payment of a fine imposed under section 48 of Act XXIV of 1859 was illegal.

“On the other hand, section 40 of the Indian Penal Code, as amended by Act VIII of 1882, says that the word ‘offence’ as used in section 64 ‘denotes a thing punishable under this Code, ‘or under any special or local law as hereinafter defined,’ and section 64 of the Penal Code says that ‘in every case of an offence ‘punishable with imprisonment or fine or with fine only, in which ‘the offender is sentenced to a fine, it shall be competent to the ‘Court which sentences such offender to direct by the sentence ‘that, in default of payment of the fine, the offender shall suffer ‘imprisonment for a certain term.’

“Madras Act III of 1889 was passed after the Penal Code was amended by Act VIII of 1882; but Madras Act XXIV of 1859 was passed before the Penal Code became law. Madras Act V of 1865 lays down a special procedure for the recovery of fines imposed under the Police Act, and it has not been repealed. As sections 3 and 4 of Madras Act III of 1889 form part of Act XXIV of 1859, I am of opinion that section 64 of the Penal Code does not apply to them.”

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

The accused was not represented.

JUDGMENT.—The High Court Proceedings of 7th December 1866(1) and 24th April 1873(2) were passed before the Penal Code was amended by Act VIII of 1882, and the effect of the amendment is to make sections 40 and 64, Indian Penal Code, applicable to

(1) 3 M.H.C.R., App. ix.

(2) 7 M.H.C.R., App. xxii.

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offences under the Police Act XXIV of 1859. The incorporation of sections 3 and 4 of Madras Act III of 1889 in Act XXIV of 1859 does not, therefore, now render the provisions of sections 40 and 64, Indian Penal Code, inapplicable.

We think the sentences are not open to any legal objection.

APPELLATE CIVIL.

Before Mr. Justice Best and Mr. Justice Subramania Ayyar.

1895.
April 28, 30.

AJIJUDDIN SAHIB (PETITIONER), APPELLANT,

v.

SHEIK BUDAN SAHIB (COUNTER-PETITIONER No. 2),
RESPONDENT.*

Transfer of Property Act—Act IV of 1882, s. 43—Subsequently acquired interest of mortgagor—Mortgage—Decree against mortgagor's unascertained shares—Subsequent inheritance by the mortgagors of the share of a co-owner—Property belonging to a Muhammadan woman and her four children mortgaged by her and one of her sons to secure the repayment of a loan.

A Muhammadan woman together with her eldest son executed a mortgage comprising the whole of an estate in which her younger children were also entitled to certain shares. The mortgagee brought his suit on the mortgage joining as defendants the younger children as well as the mortgagors and obtained a decree, whereby the mortgage amount was made payable "on the responsibility of the "shares" of the co-mortgagors; the suit was otherwise dismissed and no personal decree was passed. Subsequently the shares of the co-mortgagors were increased by inheritance from one of the other defendants who died before the decree was executed:

Held, that the increased shares of the mortgagors were liable to be sold in execution of the decree.

APPEAL against the order of W. C. Holmes, District Judge of South Canara, in appeal against order No. 40 of 1893, modifying the order of S. Raghunathayya, District Munsif of Mangalore, on execution petition No. 160 of 1893.

Application by the assignee of the decree-holder for execution of the decree in original suit No. 76 of 1890.

A Muhammadan woman and her eldest son mortgaged the whole of certain land in which her three younger children were also entitled to certain shares. The mortgagee filed original suit

* Appeal against Appellate Order No. 9 of 1894.