APPELLATE CRIMINAL.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

EMPRESS *v.* ISHAN CHUNDRA DE AND ANOTHER.* 1883 *May* 2.

Bengal Excise Act (VII of 1878), ss. 15, 53, 60, 61—Sale by servant of licensed vendor—Cooly employed by servant—Reference to High Court—Revisional Jurisdiction.

The servant of a licensed vendor sold eight quart bottles of country spirit, and employed a cooly to carry them as he directed. The servant was convicted under s. 60, Beng. Act VII of 1878; and the cooly was convicted under s. 61 of the same Act. It was suggested that the servant should have been convicted under s. 53, and that the cooly had committed no offence.

Held, that the conviction of the cooly was illegal, and must be set aside.

Held, also, that the servant was properly convicted, and whether under s. 60 or s. 53 was immaterial.

Queen v. *Ishan Chunder Shaha* (1); and *Empress* v. *Baney Madhub Shaw* (2) followed.

The necessity for altering a conviction from one section to another for cognate offences, when the accused has not been prejudiced by any such error, is no sufficient ground for a reference to the Court of Revision.

THIS was a reference from the Sessions Judge of Tipperah under s. 438 of the Code of Criminal Procedure. The terms of the Reference were as follows :—

Accused No. 1 has been convicted under s. 60, and accused No. 2 under s. 61 of Beng. Act VII of 1878. The former sold eight quart bottles of country spirit, and the latter had them in his possession, *i.e.*, carried them as a cooly by direction of accused No. 1.

It is contended that the conviction of both the accused is illegal, because accused No. 1 was not a licensed vendor, and accused No. 2 might lawfully have had 12 quart bottles in his possession.

With regard to the case of accused No. 1 he is not a licensed vendor, but he is servant to a licensed retail vendor, and sold the liquor as such. Section 60 applies only to sale by licensed vendors, accused ought not therefore to have been convicted under that section. It may be that he has committed an offence punishable under s. 53, and if an appeal lay to this Court, I might perhaps under s. 423 of the Criminal Procedure alter the finding

* Criminal Reference No. 49 of 1883, from the order made by R. Towers, Esq., Sessions Judge of Tipperah, dated the 25th April 1883.

(1) 19 W. R., Cr., 84.

(2) I. L. R., 8 Calc., 207 : 10 C. L. R., 389.

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maintaining the sentence, but as the case is not appealable I cannot do so, and I cannot direct the lower Court to enquire into the offence punishable under s. 53, because I could only make such order in case the accused had been discharged; s. 436, Criminal Procedure. I think I ought, therefore, to submit the case of accused No. 1 to the High Court to be dealt with under s. 439. I am inclined to think that the proper course would have been to prosecute, not him, but his master, under s. 60.

As to accused No. 2 the conviction seems unsustainable. Section 61 of the Excise Act must be read with s. 15, in which the quantity specified is 12 quart bottles. It is stated that the Board of Revenue have made an order, as they are empowered under s. 15, reducing the quantity to six quart bottles, but my attention has been directed to the case of *Empress* v. *Kola Lalang* (1), in which it is shewn that persons, who are not licensed vendors (and it is admitted that accused No. 2 is not one) do not commit an offence by possessing a less quantity than 12 quart bottles, though the quantity they possess may be greater than that authorized by the Board by virtue of the power conferred on them by s. 15. I would, therefore, recommend that the conviction of accused No. 2, who seems an innocent party, be set aside, and the fine ordered to be refunded to him.

No one appeared to argue the case.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—The second defendant must clearly be acquitted on the authority of the judgment of this Court in the case of *Empress* v. *Kola Lalang* (1) in which we concur.

The first defendant has in our opinion been properly convicted whether under s. 60 or s. 53 is immaterial—see *Queen* v. *Ishan Chunder Shaha* (2); *Empress* v. *Baney Madhub Shaw* (3). We would further observe that for reasons stated by the Sessions Judge himself, he need not have referred the case of this prisoner. A necessity for altering a conviction from one section to another for cognate offences when the accused has not been prejudiced by any such error is no sufficient ground for a reference to the Court of Revision.

(1) I. L. R., 8 Calc., 214.
(2) 19 W. R., Cr., 34.
(3) I. L. R., 8 Calc., 207: 10 C. L. R., 389.