APPELLATE CRIMINAL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Davies and Mr. Justice Benson.

1903. February 17, 18, 24.

EROMA VARIAR AND ANOTHER (PETITIONERS)

v.

EMPEROR.*

Criminal Procedure Code—Act V of 1898, ss. 195 (7), 407 (2)—Court to which appeals ordinarily lie—Refused to accord sanction—Appeal to Magistrate who has been directed and empowered to hear appeals under section 407 (2).

A Magistrate who has been directed and empowered to hear appeals under the provisions of section 407 (2) of the Code of Criminal Procedure is not the "Court to which appeals ordinarily lie" within the meaning and for the purposes of section 195 (7) of the Code. (BENSON, J., dissenting.)

QUESTION referred to a Full Bench. In Criminal Revision Case No. 539 of 1902, an application was made, by an Inspector of Police, to the Acting Stationary Second-class Magistrate of Walluvanad, for sanction to prosecute Mahadevapandal Variath Eroma Variar and Chakkunkuth Veeran, for an offence under section 211, Indian Penal Code. The Magistrate refused to accord sanction. The Inspector of Police then appealed to the Special Assistant Magistrate of Malabar, who set aside the order of the Sub-Magistrate and granted sanction.

In Criminal Revision Case No. 251 of 1902, Kovilakathillath Krishnan Thangal applied to the Stationary Second-class Magistrate of Kottayam Kasba for sanction to prosecute Kunnath Agnisarman *alias* Kunhumbu Potuval and others under sections 211, 195 and 196 of the Indian Penal Code. The Magistrate refused to accord sanction. An appeal was preferred to the Acting Joint Magistrate of Tellicherry, who accorded sanction.

Against both of these orders, the persons whose prosecution had been sanctioned filed these petitions.

* Criminal Revision Case No. 539 of 1902, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of A. R. L. Tottenham, Special Assistant Magistrate of Malabar, in Criminal Appeal No. 128 of 1902, presented against the order of P. S. Velayudham, Stationary Second-class Magistrate of Walluvanad, in Miscellaneous Case No. 14 of 1902. Criminal Miscellaneous Petition No. 251 of 1902 praying the High Court to revise the order of the Joint Magistrate of Tellicherry.

Mr. *P. K. Nambyar* for petitioners in Criminal Revision Case No. 539 of 1902.

The Public Prosecutor for the Crown.

J. L. Rosario for petitioners in Criminal Revision Case No. 251 of 1902.

Mr. *T. Richmond* for the counter-petitioner.

A ground (among others) upon which revision was asked was that the Joint Magistrate (in Criminal Revision Case No. 251 of 1902) had no jurisdiction to admit and hear the appeal and grant the sanction as the Stationary Second-class Magistrate was not subordinate to him within the meaning of section 195 of the Code of Criminal Procedure.

The case came first before the Chief Justice and Subrahmania Ayyar, J., who made the following

ORDER OF REFERENCE TO A FULL BENCH.—The respondent has raised a preliminary objection that this revision petition cannot be entertained and he has relied on sub-section (5) of section 439 of the Code of Criminal Procedure. For the purpose of dealing with this preliminary objection we assume an appeal lies under section 195 (6) from the order of the Joint Magistrate granting the sanction. Section 439 (5) only provides that revision proceedings shall not be entertained at the instance of the party. It does not preclude the Court from entertaining such proceedings if, apart from the application, the case is one which appears to require the exercise of revisional jurisdiction.

We refer to a Full Bench the question whether a Magistrate who has been directed and empowered to hear appeals under the provisions of section 407 (2) of the Criminal Procedure Code is "the Court to which appeals . . . . ordinarily lie" within the meaning and for the purposes of section 195 (7) of the Code. The case of *Queen-Empress* v. *Subbaraya Pillai*(1) was decided under the Code of 1882. In the present Code the word "may" has been substituted for "shall" in section 407 (2). The Calcutta High Court has held that a Magistrate authorized to hear appeals under section 407 is not the Court to which appeals "ordinarily lie"—(*Sadhu Lall* v. *Ramchurn Pasi*(2)).

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(1) I.L.R., 18 Mad., 487. (2) 7 Calc. W.N., 114.

EROMA VARIAR v. EMPEROR.

The case came on in due course before the Full Bench constituted as above; when the Court delivered the following opinions:—

Sir ARNOLD WHITE, C.J.—Section 407 (1) of the Code of Criminal Procedure provides that "any person . . . . may appeal to the District Magistrate." Sub-section (2) provides that the District Magistrate may direct that any appeal under the section or any class of such appeals [*i.e.*, appeals which by the express words of sub-section (1) are appeals to the District Magistrate] shall be heard by any Magistrate of the first class subordinate to the District Magistrate and empowered by the local Government to hear appeals and thereupon such appeals or class of appeals may be presented to such Subordinate Magistrate, or, if already presented to the District Magistrate, may be transferred to the Subordinate Magistrate. The section also gives power to the District Magistrate to withdraw from the Subordinate Magistrate any appeal or class of appeals which have been presented or transferred. It seems to me that on the true construction of this section the District Magistrate is "the Court to which appeals ordinarily lie" within the meaning and for the purposes of section 195 (7) of the Code. Section 407 (1) in express terms gives a right of appeal to the District Magistrate. The exercise of the power given to the District Magistrate to direct that appeals under the section shall be heard by a Subordinate Magistrate and the power to present an appeal to the Subordinate Magistrate in pursuance of a direction given by the District Magistrate do not constitute the Sub-divisional Magistrate the Court to which appeals under the section "ordinarily lie." The appeal only lies to one Court, viz., the District Magistrate and consequently section 195 (7) (*a*), "where such appeals lie to more than one Court," etc., has no application.

I think the sections in question were rightly construed by the Calcutta High Court in *Sadhu Lall* v. *Ramchurn Pasi*(1). The case of *Queen-Empress* v. *Subbaraya Pillai*(2) may be distinguished on the ground that under the Code of 1882, which was in force when that case was decided, the section ran "such appeal or class of appeals, 'shall' (not, as now, 'may') be presented to such Subordinate Magistrate," etc. It is to be observed that the corresponding

(1) 7 Calc. W.N., 114. (2) I.L.R., 18 Mad., 487.

section of the Code of 1872 (section 266) gives in express terms a right of appeal either to the District Magistrate or to the Sub-divisional Magistrate. The words giving a right of appeal to the Sub-divisional Magistrate were omitted in the Code of 1882. Under the Code of 1872 the Sub-divisional Magistrate exercised an independent appellate jurisdiction. Now he merely exercises a delegated jurisdiction in pursuance of directions given by the District Magistrate.

I think the answer to the question which has been referred to us should be that a Magistrate who has been directed and empowered to hear appeals under the provisions of section 407 (2) of the Criminal Procedure Code is *not* "the Court to which appeals ordinarily lie" within the meaning and for the purposes of section 195 (7) of the Code.

DAVIES, J.—I concur with the learned Chief Justice.

BENSON, J.—Under section 407 (1), Criminal Procedure Code, appeals from Second-and Third-class Magistrates lie to the District Magistrate, but, under the second clause of the section, the District Magistrate may direct that any class of such appeals shall be heard by any Magistrate of the first class subordinate to him who has been empowered by the local Government to hear such appeals. The Code of 1882 enacted that when such an order had been made the appeals "shall be presented to such Subordinate Magistrate" and this Court held that such Subordinate Magistrate was the Court to which appeals ordinarily lay for the purposes of section 195 (7), Criminal Procedure Code (*Queen-Empress* v. *Subbaraya Pillai*(1)). In the present Criminal Procedure Code the word "shall" has been altered into "may" be presented, and the question for consideration is whether such Subordinate Magistrate can still be considered to be the Magistrate to whom such appeals "ordinarily lie" for the purposes of section 195 (7), Criminal Procedure Code, or whether the District Magistrate is the Magistrate to whom such appeals ordinarily lie.

I understand that the District Magistrate has, in accordance with the universal or almost universal, practice in this Presidency, issued a general order under section 407 (2), Criminal Procedure Code, that all appeals from Second-and Third-class Magistrates within the local jurisdiction of the Sub-divisional Magistrate shall

(1) I.L.R., 18 Mad., 487.

EROMA VARIAR v. EMPEROR.

be heard by that Magistrate. When such an order has been issued the section provides that the appeals may be presented to the Sub-divisional Magistrate and they may also, apparently, be presented to the District Magistrate, who in such case would transfer them to the Sub-divisional Magistrate, unless for some special reason he was willing to hear the appeal himself. The universal, or almost universal, practice in this Presidency has, for the last thirty years, been to present such appeals to the Sub-divisional Magistrate, and the practice has not varied under the Codes of 1872, 1882 and 1898. The language of section 407 is not, it is true, very happy, but when all appeals of a certain class may be, and in practice are, presented to a certain Court, and must be heard by that Court, I do not think it is a great strain on the language to hold that such appeals may be said ordinarily to lie to such Court.

As to the meaning of the word "presented," it may be noticed that there is no section which authorizes an appeal by Government against an acquittal except section 417, and there the right of appeal is given by simply saying that the Government may direct the Public Prosecutor to "present an appeal."

What the section means is that an appeal by Government against an acquittal shall lie to the High Court and may be presented by the Public Prosecutor, etc., but the section merely says that the Public Prosecutor "may present an appeal to the High Court." The words "may present" are here held to necessarily imply that an appeal "shall lie" to the High Court. Having regard to this language and to the long-continued and universal practice in this Presidency, I think that the words "may be presented" in section 407 (2), as in section 417, may be construed to mean "shall lie and may be presented to."

If this interpretation is accepted, then appeals against sentences by Second-and Third-class Magistrates lie to a District Magistrate under section 407 (1), and also lie to the Sub-divisional Magistrate under section 407 (2), provided the District Magistrate has taken action under clause (2). When appeals against convictions lie to more than one Court, then section 195 (7) (*a*) provides that an appeal under section 195 shall lie to the Court of inferior jurisdiction, that is, to the Sub-divisional Magistrate.

I do not think that there is anything in the successive changes made in the language of the Code to militate against this

interpretation. The Code of 1872 (section 266) directed that appeals against convictions by Second-and Third-class Magistrates should lie to the District Magistrate or to a Magistrate of the first class who had been specially empowered by Government to hear such appeals. The Code of 1882, as I read it, and as it was interpreted by this Court in *Queen-Empress* v. *Subbaraya Pillai*(1) directed that they should lie to the District Magistrate or to the Sub-divisional First-class Magistrate in cases where, as in this Presidency, the District Magistrate had issued the necessary orders for that end and the Code of 1898, though it altered "shall" into "may" in section 407 (2), and thus provided two alternative Courts of appeal, yet retained the former law for the purposes of section 195 by explaining that an appeal under that section lay to the inferior of the two Courts.

It may be added that this view is supported by strong considerations of convenience. It would be a hardship to oblige all persons appealing under section 195 to have to resort to the District Magistrate instead of the Sub-divisional Magistrate who is near at hand, and delay in the disposal of such cases and administrative inconvenience would result if the District Magistrate were obliged to hear all such appeals himself, or even to receive all such appeals himself and then transfer them, as he would do in pratically all cases, to the Sub-divisional Magistrate.

I would answer the reference in the affirmative.

Criminal Revision Case No. 251 of 1902 came on for hearing in due course before the Chief Justice and Subrahmania Ayyar, J., who passed the following

ORDER.—According to the ruling of the Full Bench, the order granting the sanction must be set aside.

(1) I.L.R., 18 Mad., 487.