## CRIMINAL APPELLATE—FULL BENCH.

*Before Sir Arnold White, Chief Justice, Mr. Justice Benson and Mr. Justice Moore.*

1902. September 17, 19, 29.

ERANHOLI ATHAN (ACCUSED), PETITIONER,

*v.*

KING-EMPEROR, RESPONDENT.*

*Criminal Procedure Code—Act V of 1898, ss. 439, 476—"Jurisdiction of High Court to interfere when a Court has taken action under s. 476 of the Criminal Procedure Code."*

Where a Court has taken action under section 476 of the Code of Criminal Procedure, the High Court, as a Court of Revision, has no power to interfere, under section 439.

The reasons for the decision in *Queen-Empress* v. *Srinivasulu Naidu*, (I.L.R., 21 Mad., 124), are not applicable to the amended Code.

QUESTION referred to a Full Bench;—"Whether the High Court, as a Court of Revision, has power, under section 439 of the Code of Criminal Procedure, 1898, to interfere when a Court has taken action under section 476 of the Code of Criminal Procedure."

Three Moplahs were charged in the Court of the Special Assistant Magistrate of Malabar with having kidnapped a boy in order to convert him. Petitioner was called as a witness for the prosecution. After hearing his evidence and giving him an opportunity to make a statement, the Special Assistant Magistrate (for reasons which are not material to the question considered by the Full Bench) passed an order under section 476 of the Code of Criminal Procedure forwarding the records to the Head Assistant Magistrate at Palghat for enquiry, in the meanwhile releasing the petitioner on bail.

Against that order, petitioner preferred this criminal revision petition.

The case first came on for hearing before Sir Arnold White, Chief Justice, and Mr. Justice Moore, who made the order of reference to a Full Bench which has already been set out.

The case came on in due course before a Full Bench constituted as above.

* Criminal Revision Petition No. 146 of 1902, presented under sections 435 and 439 of the Code of Criminal Procedure against the order of A. R. L. Tottenham, Acting Special Assistant Magistrate of Malabar, dated 27th March 1902, in Miscellaneous Case No. 13 of 1902.

Dr. *Swaminadhan* for petitioner.—The High Court has jurisdiction to interfere. Assuming, in the first instance, that *Queen-Empress* v. *Srinivasulu Naidu*(1), which was decided under the Code of 1882, was rightly decided, no such change has been made in the Code of 1898 as would deprive the High Court of the revisional powers which it was held to possess in that case. The only change in the new Code is the introduction of the words "as if upon complaint made and recorded under section 200." These were introduced to meet the requirements of section 190, under which there are only three ways in which a Magistrate can take cognizance of a case. By the amendment, the Magistrate is to treat the proceeding under section 476 as if it were a complaint, and in this way the requirements of section 190 are satisfied. The use of the words "as if" show that a proceeding under section 476 is not really a complaint. Magistrates always had power, under section 195(*b*), to lay complaints like ordinary complainants, so that if a proceeding under section 476 is a mere complaint, the amendment of 1898 is unnecessary. Such a proceeding is, consequently, an order, and, as such, is subject to the revisional powers of the High Court. Moreover, section 435 (3) expressly exempts certain orders from the revisional powers of the High Court, but does not refer to proceedings under section 476. The maxim "expressio unius est exclusio alterius" should be held to apply. If the Legislature intended to effect such an important innovation as the curtailment of the revisional powers of the High Court it would not have expressed its intention in so uncertain a manner. Moreover (if the proceedings of the Legislature could be looked to for guidance), the draft bill contained an express exemption of proceedings under section 476 from revision, but the clause was not incorporated in the Act as passed. The obvious intention was to retain jurisdiction to check the proceedings of Magistrates. Lastly, if called upon, I am prepared to argue that the decision in *Queen-Empress* v. *Srinivasulu Naidu*(1) was correctly decided.

The Acting Public Prosecutor (Hon. Mr. *C. Sankaran Nair*) contended that, under the section as amended, the High Court had no power to interfere, as a Court of Revision, with the Magistrate's order. By section 190 of the Code of Criminal Procedure there are only three ways in which a Magistrate is empowered to take cognizance

(1) I.L.R., 21 Mad., 124.

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of an offence, namely, on complaint, on a police report, or on information received. To enable the Magistrate to take cognizance of a case sent to him by a Court under section 276, the proceeding must come within the meaning of one of these three; and so the Legislature provided that such a proceeding is to be treated as a complaint. That means that it is a complaint, and, being a complaint, it is not an order, and not being an order, the High Court has no power to revise it.

Dr. *Swaminadhan* in reply.

JUDGMENT.—In the case of *Queen-Empress* v. *Srinivasulu Naidu* (1), it was held by a Full Bench of this Court that a High Court as a Court of Revision has power under section 439 to revoke an order under section 476 of the Code of Criminal Procedure. This decision was based upon the ground that where action is taken under section 476 (1) such action is not to be regarded merely as the lodging of a complaint by a public servant, but is to be treated as a proceeding which is tantamount to an order of a Court. In the Code of 1898 the Legislature introduced in sub-section (2) of the section, after the words "such Magistrate should thereupon proceed according to law," the words "and as if upon complaint made and recorded under section 200."

It seems to us that, by the introduction of these words, the Legislature intended to make it clear that when action is taken under sub-section (1) such action is not to be regarded as an order but as the lodging of a complaint. Consequently the reasons for the decision in *Queen-Empress* v. *Srinivasulu Naidu*(1) are not applicable to the amended section.

We think the answer to the question which has been referred to us ought to be in the negative.

On the case again coming on before the Division Bench, the petition was dismissed.

(1) I.L.R., 21 Mad., 124.