APPELLATE CRIMINAL.

Before Mr. Justice Mitter and Mr. Justice Field.

RONGAI AND OTHERS *v.* THE EMPRESS.* 1883 *Feby.* 27.

Practice—Repeal of Act—Appeal to High Court—Code of Criminal Procedure, Act X of 1872, *s.* 36—*Act X of* 1882, *s.* 408—*High Court, Revisional Jurisdiction.*

On the 9th of December 1882, a person was convicted under ss. 457 and 109 of the Indian Penal Code, and sentenced to three years' rigorous imprisonment by a Deputy Magistrate of Assam, exercising special powers under s. 36 of the old Code of Criminal Procedure, Act X of 1872. The new Code of Criminal Procedure came into force on the 1st of January 1883. The prisoner presented an appeal to the High Court from the conviction and sentence above mentioned on the 23rd of January 1883.

Held, by FIELD, J, (MITTER, J., expressing no decided opinion) that the case was governed by s. 408 of the new Code of Criminal Procedure, and that no appeal lay to the High Court.

Held, by the Court, that the case was a fit one for the exercise of the High Court's Revisional Jurisdiction, and should be dealt with under the powers conferred on the High Court by virtue of that jurisdiction.

IN this case the prisoners were charged by the Deputy Commissioner of Assam with having committed offences under s. 457, ss. 457 and 109, and s. 411 of the Indian Penal Code. The charges were proved to the satisfaction of the Deputy Commissioner, who sentenced the prisoners to three years' rigorous imprisonment on the 9th of December 1882. The Deputy Commissioner was invested with powers under the provisions of s. 36, Act X of 1872. The prisoners appealed to the High Court on the 23rd of January 1883.

Baboo *Hurry Mohun Chuckerbutty* for the appellants.

The following judgments were delivered.

MITTER, J.—In this case three persons—Rongai, Gouri Khan and Beerai—were convicted under s. 457, coupled with s. 109, by an officer exercising the special powers vested in him under s. 36, Act X of 1872. They were each of them sentenced to three

* Criminal Appeal No. 40 of 1883, against the order of H. J. Peet, Esq., Deputy Commissioner of Luckimpore, dated the 9th December 1882.

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years' rigorous imprisonment on the 9th of December last. An appeal was presented to this Court on the 23rd of January last, and on the appeal coming on for hearing before a Division Bench of this Court on the same day, the following order was passed :— "The appeal is admitted, send for the record and issue the usual notices." The case being now called on before us to be heard finally a question has arisen,—whether this Court is competent to hear this case as an appeal against the conviction and sentence of the lower Court. It appears, with reference to the provisions of the old Code, that the provisions of the old Code and those of the new Code are not precisely the same. Under the old Code the test which determined the venue of appeal in cases like the present was whether the officer in the lower Court exercised the special powers mentioned in s. 36. In this case it is clear that the Deputy Commissioner against whose judgment this appeal has been preferred, was exercising the special powers vested in him under s. 36 of the Code of 1872. As Magistrate he could not pass the sentence which was passed in this case, and it is also apparent on the proceedings that he was exercising the special powers under that section. That being so, it is quite clear that under the old Code the appeal lay to this Court, but under the new Code the right of appeal to this Court is restricted only to those cases in which the sentence passed by officers of this description, *viz.*, officers vested with special powers under the provisions of s. 36, requires confirmation by a superior Court. Then, whether under the old Code or under the new Code, it is quite clear that the sentence which was passed in this case did not require confirmation by a superior Court. That being so, it is also quite clear that if the new Code applies, the appeal in this case would not lie to this Court. The last section of the new Code provides that all pending proceedings would be governed by it, and if the present case could be considered as a case pending on the 1st of January 1883, no doubt the new Code would have applied; but, as already stated, the case was disposed of in the lower Court on the 9th December 1882. On the other hand, by s. 2 of the new Code, Act X of 1872 having been repealed, and this appeal having been preferred on the 23rd of January, the appellants could not claim any right of appeal which they had under the old Code,

as that Code was not in force on that day. The section which deals with the right of appeal under the new Code is s. 408, and that section is to the following effect: "Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or other Magistrate of the first class, or any person sentenced under s. 349 by a Magistrate of the first class, may appeal to the Court of Session. Provided that "(a), when in any case an Assistant Sessions Judge or a District Magistrate passes any sentence which is subject to the confirmation of the Court of Session, every appeal in such case shall lie to the High Court." The section says generally that any person convicted on trial by the officers abovementioned may appeal to the Sessions Judge, and in certain cases to the High Court. Therefore, I am inclined to think that the right of appeal in this case would be governed by the provisions of the new Code. That being so, the appellants, as a matter of right, would not be entitled to appeal to this Court; but it seems to me that it is not essentially necessary in this case to decide this question, because whether the appeal lies to the Sessions Judge or to this Court, this seems to be a fit case for the exercise of the revisional powers given to us by the new Code. It is, therefore, not necessary for me to express a decided opinion on this point, but treating the case whether as an appeal or under the revisional powers vested in this Court, it seems to me that the conviction of the lower Court cannot stand.

[His Lordship having gone through the evidence said]:—

On the whole I do not think that the evidence is sufficient to support the conviction of the prisoners. We accordingly set it aside and direct their immediate release.

FIELD, J.—In this case the appellants were convicted on the 9th of December last by a Deputy Commissioner in Assam exercising the special powers which could be conferred under s. 36 of the Code of Criminal Procedure, Act X of 1872. That the Deputy Commissioner as District Magistrate was exercising these powers appears on the face of these proceedings, and with reference to the provisions of s. 270, Act X of 1872, it is also clear that the District Magistrate was exercising these powers because it appears from the sentence awarded, *viz.*, three years' rigorous imprisonment, that such officer was exercising such

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special powers. As District Magistrate the Deputy Commissioner could only have passed a sentence of two years' rigorous imprisonment. This being so, it is clear that under the provisions of s. 270, just referred to, the appeal lay to the High Court, and not to the Court of Session. But it is to my mind clear that the present Code, Act X of 1882, has altered the law. Section 408 of the present Code enacts thus generally: "Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or other Magistrate of the first class, or any person sentenced under s. 349 by a Magistrate of the first class, may appeal to the Court of Session, provided that when in any case an Assistant Sessions Judge or a District Magistrate passes any sentence which is subject to the confirmation of the Court of Session, every appeal in such a case shall lie to the High Court." Now it is clear to my mind that the words "District Magistrate" here include a District Magistrate vested with special powers under s. 30 of the present Code. It is, therefore, clear that all cases tried by a District Magistrate so vested are, as a general rule, appealable to the Court of Session, unless in any particular case the sentence, being subject to the confirmation of the Court of Session, is appealable to the High Court. Now the sentence passed in the present case is a sentence of three years only; that sentence, according to the old law, and to the new law, did not and does not require confirmation, and therefore it is clear to my mind that under the words of the present Code the appeal in this case lay to the Court of Session, because the sentence passed was not subject to the confirmation of the Court of Session. The appeal was presented to the High Court after the 1st of January, and the question arises whether the High Court has jurisdiction to entertain the appeal so presented. It appears to me that the High Court, as a Court of Appellate Jurisdiction, cannot entertain this case as an appeal. Section 558 of the present Code relates to pending cases. Now this was not a pending case, and, therefore, it does not come within the purview of that section. Then it is contended that s. 6 of the General Clauses Act, I of 1868, will apply. It appears to me that this appeal cannot, within the meaning of that section, be termed a proceeding commenced before the repeal of Act X of 1872. The

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proceedings on the original trial terminated on the 9th of December. The proceeding before us is an appeal, and no such proceeding was commenced before us on the 1st of January. That being so, it appears to me that the case must come under the general language of s. 408, *viz.*, that any person convicted on a trial held by a District Magistrate may appeal to the Court of Session. That language is general; it is in no way restricted to persons convicted after the Code came into operation, and it is sufficiently wide to include the cases of persons convicted before the new Code came into force. This being so, I am of opinion that the appeal in the present case ought to have been made not to the High Court but to the Court of Session. I am, however, quite of opinion with my learned colleague that having regard to the distance of Assam from Calcutta, having regard to the mistakes that may probably be committed upon a change in the law, and moreover having regard to the facts of this particular prosecution, it is a proper case in which to exercise the revisional jurisdiction of this Court. This being so I have concurred in hearing this case as a case taken up for revision. As to the remarks on examination of the evidence, and generally on the merits of the case which have just been made by my learned colleague, I entirely agree, and I think that these appellants must be acquitted and discharged.

Convictions set aside.

APPELLATE CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Mitter.

RAMKRISTO DASS (PLAINTIFF) *v.* SHEIKH HARAIN (DEFENDANT).*

1882 *December* 22.

Suit for Rent—Landlord and Tenant—Registered owner, Suit by where the relationship of landlord and tenant is not shown to exist—Beng. Act VII of 1876, s. 78.

The mere fact of a person being registered under the provisions of Beng. Act VII of 1876 as proprietor of the land in respect of which he seeks to recover rent is not sufficient to entitle him to sue for it.

* Appeal under s. 15 of the Letters Patent against the decree of Mr. Justice O'Kinealy, dated the 13th September 1882, in Appeal from Appellate Decree No. 1549 of 1881.