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misconduct as would have warranted the Court below in setting aside the award, for I do not believe it, and I prefer the statements of the three arbitrators and the umpire, who very plainly gave an account of all that transpired in the cause of the arbitration proceedings, and certainly leave the impression on my mind that Janki Prasad took a conscious, intelligent and voluntary part in the proceedings. This disposes of the second objection. I therefore am of opinion that the award was a good award, and that we have no right to interfere with the decree which was passed in accordance with that award. The appeal is dismissed with costs.

TYRRELL, J.—I concur.

Appeal dismissed.

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December 16.

CRIMINAL REVISIONAL

Before Mr. Justice Straight and Mr. Justice Brodhurst.

QUEEN-EMPRESS *v.* ZOR SINGH.

Act XLV of 1860 (*Penal Code*), *ss.* 380, 454—*House-breaking in order to the commisson of theft—Theft—Separate convictions and sentences—Criminal Procedure Code, ss.* 35, 235—*Practice—Revision—Criminal Procedure Code, s.* 438—*Reference by Magistrate of orders passed by Sessions Judge.*

Under ss. 35 and 235 of the Criminal Procedure Code a Magistrate may legally pass a separate sentence of two years' rigorous imprisonment and fine under each of the sections 379 or 380 and 454 of the Penal Code, for house-breaking in order to the commission of theft and theft, the two offences forming part of the same transaction and being tried together. In such a case, where the prisoner had been three times previously convicted,—*held* that the better course would have been to commit him to the Court of Session under ss. 454-75 of the Code.

But a Sessions Judge trying such a case under s. 379 or s. 380 and s. 454 would under no circumstances be justified in passing a sentence of ten years' imprisonment under the latter part of s. 454 and of four years' imprisonment under s. 380. The latter portions of ss. 454 and 457 were framed to include the cases of house-trespassers and house-breakers who had not only intended to commit but had actually committed theft.

Queen-Empress v. *Ajudhia* (1) and *Queen-Empress* v. *Sukharam Bhan* (2) referred to.

A Magistrate is not justified in referring under s. 438 of the Criminal Procedure Code orders passed by the Sessions Judge on appeal, except in very special cases. *Queen-Empress* v. *Shere Singh* (3) referred to.

(1) I. L. R., 2 All. 644. (2) I. L. R., 10 Bom. 493.
(3) I. L. R., 9 All. 362.

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THIS was a reference under s. 438 of the Criminal Procedure Code, made under the following circumstances. The Joint Magistrate of Etáwah in a case that was before him for hearing, charged one Zor Singh, first, with having on or about the 17th September, 1887, committed house-breaking in order to the commission of theft in the shop of Lala Ram Bania, and with having thereby committed an offence punishable under s. 454 of the Indian Penal Code; and secondly, with having, on or about the 17th September, 1887, committed theft of one anna's worth of cowries in the house of the said Lala Ram Bania, and with having thereby committed an offence punishable under s. 380 of the Indian Penal Code. Zor Singh pleaded guilty to having entered Lala Ram's shop by climbing over the tatti fastened against the door-way, and to having stolen thence the cowries. The Joint Magistrate observed that the accused "has been three times previously convicted and sentenced to seven days' imprisonment, twenty stripes, and two years' imprisonment. I do not think, however, there is any necessity of committing him for trial by the Court of Session, as I have charged him under ss. 454 and 380, Indian Penal Code, two distinct offences having been committed, and separate sentences being legal, [vide *Queen-Empress* v. *Sakharam Bhan* (1)]. I deal with the case therefore according to the provisions of s. 35, Criminal Procedure Code. Prisoner's last conviction was under s. 454, Penal Code. I convict him of an offence under s. 454, Penal Code, and sentence him to two years' rigorous imprisonment and thirty stripes; and I convict him of an offence under s. 380, and sentence him to two years' rigorous imprisonment, to include three months' solitary confinement. The second sentence to follow the first." The prisoner preferred an appeal to the Court of Session, and the Sessions Judge, in disposing of it, observed: "It is true, as remarked by the Joint Magistrate, that the Bombay High Court has held separate convictions in such a case to be legal. But in a similar case the Allahabad High Court set aside the sentence under s. 380: *Queen-Empress* v. *Ajudhia* (2). I prefer to follow the ruling of our own High Court, and set aside the conviction and sentence under s. 380. The accused pleaded guilty to the first charge, and no ground is shown for interference with the conviction under s. 454. Although the

(1) I. L. R., 10 Bom. 493. (2) I. L. R., 2 All. 644.

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value of the property stolen was trifling, the appellant had been three times previously convicted, and the sentence is not too severe."

The Magistrate of Etáwah submitted a letter to the Registrar of the Court, in which he stated the facts above referred to, expressed the opinion that the sentence, as modified by the Judge, was inadequate, and suggested that, as the sentences passed by the joint Magistrate were in accordance with the ruling of a Bench of the Bombay High Court under the Criminal Procedure Code, Act X of 1882, now in force, they should be restored.

BRODHURST, J., (after stating the facts, continued).—The judgment reported in I. L. R., 2 All. 644, was delivered by my brother Straight on the 19th January, 1880, when Act X of 1872 was the Code of Criminal Procedure. He did not rule that a conviction and sentence under each of the sections 380 and 457 of the Indian Penal Code for offences arising out of the same transaction was absolutely illegal, but he held that "in the interests of simplicity and convenience it is best to concentrate the conviction and sentence on the graver offence proved." I notice that a similar view was taken by a Full Bench of the Calcutta High Court in their judgment in the case of the *Queen* v. *Ramcharan Kairi* (1). The head-note is as follows:—"The prisoner was convicted by the Magistrate of two separate offences under ss. 456 and 380 of the Penal Code, and sentenced for both. On appeal the Sessions Judge, holding that the offence proved was under s. 457, ordered a new trial for offences under ss. 457 and 380. *Held* that there ought not to be a new trial, but that the conviction and sentence under s. 380 should be set aside." And Peacock, C. J., in a judgment concurred in by the other learned Judges, observed: "The Magistrate should be cautioned to be more careful in future, and not to split up one single aggravated offence into separate offences." The judgments above referred to of the Bench of the Bombay High Court were delivered by Birdwood and Jardine, JJ., on the 25th February, 1887, that is, since the present Criminal Procedure Code, Act X of 1882, has been in force, and certain alterations have been made in the Code as pointed out by the above-mentioned learned Judges. Illustration 6 to paragraph I of s. 235 shows that,

(1) B. L. R., Sup. vol., p. 488.

if "A commits house-breaking by day, with intent to commit adultery with B's wife, A may be separately charged with and convicted of offences under ss. 454 and 497 of the Indian Penal Code." It admits I think of no doubt that the Joint Magistrate might, with reference to the provisions of ss. 35 and 235 of the Criminal Procedure Code, have tried and convicted Zor Singh for house-breaking in order to commit theft and for theft, and might have sentenced him under the first part of s. 454 of the Penal Code to two years' rigorous imprisonment for house-breaking and under s. 379 of the same Code to two years' rigorous imprisonment for theft. Moreover I am of opinion that the sentences as passed were not illegal, but the best course to have adopted would, in my opinion, have been that which is usual in such cases, *viz.*, to have committed the accused for trial to the Court of Session, under ss. 454-75 of the Indian Penal Code. Although I consider that a Magistrate might legally pass a separate sentence of two years' rigorous imprisonment and fine under each of the sections 379 or 380 and 454 of the Penal Code, I nevertheless think that, were a Sessions Judge trying such a case under the same sections, he would, under no circumstances, be justified in passing a sentence of ten years' imprisonment under the latter part of s. 454 for house-breaking with intent to commit theft, and, with reference to the provisions in s. 35 of the Criminal Procedure Code, of four years' imprisonment under s. 380 for theft in a building, for it appears to me obvious that this could not have been the intention of the Legislature. The offences punishable under ss. 454 and 457 of the Penal Code are, with the exception that the former is committed by day and the latter by night, precisely the same. The latter part of each section enacts that, if the offence intended to be committed is theft, the term of imprisonment may be extended from three and five years to ten and fourteen years respectively. An intent to commit theft would not be punishable until after lurking house-trespass, or house-breaking, had been committed. It is evident that the Legislature never meant that a house-trespasser or house-breaker should be liable to seven and nine years' additional imprisonment, merely because he intended to commit theft. The latter portion of each of those sections was obviously framed to include the cases of house-trespassers and house-breakers who

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had not only intended to commit theft, but had actually committed that offence. To sentence a house-trespasser or house-breaker to the enhanced punishment of ten years' imprisonment under the latter part of s. 454, because he intended to commit theft, and to sentence him also under s. 380 to four years' imprisonment, or any other punishment for theft in a building, would virtually be to punish him twice for the same offence, and would be grossly unjust. Had the Joint Magistrate in the exercise of a wise discretion adopted the course I have above mentioned, that is, had committed Zor Singh under ss 454-75 of the Penal Code to the Court of Session, there would have been no ground whatever for this reference. I think for the reasons recorded by my brother Straight in *Queen-Empress* v. *Shere Singh* (1) that references such as this, by a Magistrate against the order passed in appeal by his superior officer, the Sessions Judge, are generally inconvenient and undesirable, and are only justifiable in very special cases; and having regard to all the circumstances of the case, I do not think that any interference in revision is necessary in the present instance.

STRAIGHT, J.—I entirely concur in the view of my brother Brodhurst, that this is not a case in which we should interfere. Let the Magistrate be so informed.

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December 20.

FULL BENCH.

Before Sir John Edge, K.T., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

QUEEN EMPRESS *v.* IMAM ALI AND ANOTHER.

Act XLV of 1860 (*Penal Code*), *s.* 295—"*Object*" *held sacred by any class of persons*—*Killing cows in a public place.*

The word "object" in s. 295 of the Penal Code does not include animate objects.

In this case two Muhammadans, Imam Ali and Amiruddin, were convicted by Mr. E. T. Lloyd, a Magistrate of Shâhjahânpur, of an offence punishable under s. 295 of the Penal Code (destroying an object held sacred by any class of persons), and were each sentenced to pay a fine of Rs. 25. It appeared that each of the

(1) I. L. R., 9 All, 362.