

CRIMINAL REFERENCE.

Before Mr. Justice Tottenham and Mr. Justice Agnew.

1885

QUEEN EMPRESS *v.* TAFULLAH.*

September 12. *Escape from lawful custody—Arrest under Civil Process, Escape from—Criminal liability of officer suffering escape—Penal Code (Act XLV of 1860) s. 223.*

Section 223 of the Penal Code applies only to cases where the person who is allowed to escape is in custody for an offence, or has been committed to custody, and not to cases where such person has merely been arrested under civil process.

TAFULLAH, a peon of the Munsiff's Court, was entrusted with a warrant for the arrest of a judgment-debtor, named Alimulla Sircar, in execution of a decree. He arrested Alimulla, but while bringing him to the Munsiff's Court, Alimulla escaped. The Munsiff thereupon held a proceeding and recorded his opinion that there were grounds for a magisterial enquiry "under s. 651 of the Civil Procedure Code," and forwarded copies of his proceedings to the Sub-Divisional Magistrate, with the request that he would deal with the matter according to law, and an intimation that the peon Tafullah would be sent when notice of the date fixed was received.

The Deputy Magistrate, however, summoned the accused under s. 651 of the Civil Procedure Code, and without framing a charge convicted him under s. 223 of the Indian Penal Code and sentenced him to a fine of Rs. 50, or in default to three months simple imprisonment.

The matter was brought to the notice of the Sessions Judge, who, under the provisions of s. 438 of the Code of Criminal Procedure, referred the case to the High Court, stating his reasons for so doing as follows:—

"Assuming that s. 223 applies, I do not think that the omission to frame a charge caused any failure of justice, for the peon, as is evident from his statement to the Deputy Magistrate, perfectly understood what he was being tried for. It is not, therefore, upon this ground that I refer the case.

* Criminal Reference No. 161 of 1885, made under section 438, by J. Whitmore, Esq., Officiating Sessions Judge of Rungpore, dated the 4th of September 1885.

“ But after the best consideration I have been able to give the matter, I cannot assure myself that s. 223 (as amended by Act XXVII of 1870) applies to the facts. The question turns upon the meaning of the words ‘lawfully committed to custody.’ I have not been able to find any High Court Ruling in point, but I do not think that ‘arrested under a warrant’ and ‘committed to custody’ are interchangeable terms. I do not wish to distinguish between ‘arrest’ and ‘custody,’ but between ‘arrest’ and ‘committal.’ The latter expression seems to be confined to the direct action of a Court itself when the person to be committed is before it. I would base this view on the last para. of s. 336 of the Civil Procedure Code, and upon the language used in the ruling *In the matter of Hastie* (1), where the words ‘one stage only, when a man *has been arrested* (as here) and is brought up for committal, *but has not yet been committed*’ seem to clearly recognise a distinction between ‘arrest’ and ‘committal.’

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“ I need hardly observe that the question whether a Civil Court peon who negligently suffers his prisoner to escape *en-route* is or is not criminally liable under s. 223 of the Indian Penal Code is of considerable practical importance, and as the above considerations seem to me to show that he is not, I would beg to recommend that the Magistrate’s order be set aside.”

No one appeared on the reference.

The opinion of the High Court (TOTTENHAM and AGNEW, JJ.) was as follows :—

We think that the Sessions Judge is right in considering the conviction to be illegal. Section 223 of the Penal Code applies only to cases where the person, who is allowed to escape, is in custody for an offence, or has been committed to custody, and not to cases where such person has simply been arrested under civil process. We, therefore, set aside the conviction and order the fine, if paid, to be refunded.

Conviction quashed.