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to be the rule of English law upon the subject. Unfortunately, my attention was not called either to the rulings of the Courts of India, to which my brother Duthoit has referred at length, nor was it directed to the form in the schedule of the Criminal Procedure Code which expressly provides for the forming of alternative charges of giving false evidence. It goes without saying, that had I been aware of the two Full Bench decisions of the Calcutta Court, I should have hesitated before differing with such high authorities, and should have felt bound, had I differed, to enter fully and explicitly into my reasons for doing so. No useful purpose would be served by my now discussing the rulings of the English Courts which were present to my mind at the time I gave judgment in the case of *Niaz Ali* (1). As I agree with my brother Duthoit, that they are inapplicable in this country, it is enough for me to say that I concur in the order he proposes.

Before Mr. Justice Mahmood and Mr. Justice Duthoit.

1884. *August 7.*

QUEEN-EMPRESS *v.* KANDHAIA AND OTHERS.

Arrest of person required to give security for good behaviour—Escape from such arrest—Conviction for such escape illegal—Act XLV of 1860 *(Penal Code), ss.* 40, 224, 225—*Criminal Procedure Code, ss.* 55, 110, 117, 118.

An order was issued to a police officer directing him to arrest *K* under s. 55 of the Criminal Procedure Code, as a person of bad livelihood. *K*, with the assistance of three others, resisted apprehension and escaped.

Held that *K* was not charged with an "offence" within the meaning of that term as defined in s. 40 of the Penal Code, and that consequently no offence made punishable by s. 224 or s. 225 of the Penal Code had been committed in connection with his evasion of arrest. *Empress* v. *Shasti Churn Napit* (2) followed.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

The *Junior Government Pleader* (Babu *Dwarka Nath Banerji*), for the Crown (appellant).

Mr. *Simeon*, for the respondents.

The Court (MAHMOOD and DUTHOIT, JJ.,) delivered the following judgment :—

DUTHOIT, J.—This is an appeal under the provisions of s. 417 of the Code of Criminal Procedure.

(1) I. L. R. 5 All. 17. (2) I. L. R., 8 Calc. 331.

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For its purposes the facts may be thus stated :—

On various dates in September and November, 1883, the police authorities of the Banda district represented that in mauza Khandia there resided Kandhaia and other persons of bad livelihood, and that unless measures for restraining those persons were taken, serious offences against property in the neighbourhood were to be apprehended.

On the 8th December, 1883, an order was issued by Saiad Sadik Husain, a Magistrate exercising first class powers, to the officer in charge of the Police Station of Khunna in the following terms :—

"Charge, s. 55, Act X of 1882.—*Government* v. *Kandhaia*, Brahman, and *Bhawani*, Nai, residents of mauza Khandia.

"After perusal of the Special Diary noted above, and of the order of the Magistrate of the District of Banda, dated the 1st December, 1883, you are hereby directed to send up (*chalan*) the case in due form (*hasb zabta*) with proof in support of it."

On receipt of this order, on the 9th December, 1883, the Head Constable in charge of the Police Station of Khunna gave to Salig Ram, one of the constables of the station, an order in writing directing him to arrest Kandhaia. Armed with this document, Salig Ram arrested Kandhaia. Kandhaia resisted his apprehension, and, with the assistance of Mohan, Paltu, and Sewak, escaped from the grasp of the constable and fled. This is admitted by the learned pleader who has defended the appeal. The evidence for the prosecution goes to show—this, however, is denied by the learned pleader for the respondents—that, in the course of the escape and rescue, Kandhaia struck the constable with a stick, and Mohan, Paltu, and Sewak hustled him. Later in the day, Kandhaia's arrest was effected by a party which came from the police station for the purpose.

On the 17th December, the Magistrate (Saiad Sadik Husain) held that there was no sufficient reason for requiring security for good behaviour to be furnished by Kandhaia and Bhawani. Kandhaia and Bhawani were therefore discharged. But proceedings were immediately afterwards taken against Kandhaia, Mohan, Paltu, and Sewak, with reference to the events of the 9th Decem-

ber, 1883. Evidence on behalf of the prosecution was recorded, and charges were framed in these terms :—

"I, Saiad Sadik Husain, Magistrate, First Class, hereby charge you Kandhaia, Paltu, Mohan, and Sewak, with the following offences :—

"On or about the 10th December, 1883, at mauza Khandia, you Kandhaia committed an offence under s. 224, Indian Penal Code, *viz.*, the offence of escaping from lawful custody, and you Paltu, Mohan, and Sewak, an offence under s. 225, *viz.*, the offence of rescuing Kandhaia from lawful custody, and of offering resistance. Therefore you Kandhaia have committed an offence punishable under s. 224, and you Paltu, Mohan, and Sewak, an offence punishable under s. 225 of the Indian Penal Code, and these offences are triable by my Court, and I hereby," &c.

The witnesses named by the accused persons for their defence were not summoned; but, on the 25th December, 1883, the case was disposed of by a finding, the substantial portion of which is to the following effect :—

"The police had on former occasions made inquiries regarding Kandhaia accused under s. 55, Act X of 1882, and the Court ordered that the accused should be arrested and sent up with the evidence against him. The police deputed Salig Ram, constable, for the purpose. Kandhaia, accused, after having been arrested by Salig Ram, constable, escaped from custody, and Paltu, Mohan, and Sewak, rescued him. The proceedings instituted under s. 55, Act X of 1882, were struck off by the Court for want of proof, and the accused were acquitted. The pleader for the accused in this case has raised the legal objection that, under ss. 224 and 225, it is necessary that the accused should have been charged with, or convicted, of some offence. Had the accused committed any offence and escaped from lawful custody, or given assistance in rescuing offenders, they could be charged under ss. 224 and 225 of the Indian Penal Code; otherwise they cannot be so charged; and as, under s. 40, Act XLV of 1860, the charge under s. 55, Act X of 1882, does not come within the definition of an offence, it is no offence if Kandhaia accused escaped from custody, or Paltu, Mohan, and Sewak rescued him, even supposing that they

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did so. Moreover, to require a man to enter into recognizances or to furnish security for good behaviour, under s. 55, Act X of 1882, is not one of the punishments prescribed by the Indian Penal Code, nor is it a punishment under any special or local law. This point was discussed on two days. After due consideration, I am also of opinion that the charge under s. 55, Act X of 1882, may result in calling for security for good behaviour, or in requiring a man to enter into recognizances to keep the peace, and this is not one of the punishments prescribed by the Indian Penal Code. Moreover, the charge under s. 55, Act X of 1882, was not proved against Kandhaia accused; the investigations made by the police were useless, and their report was wholly false. When the accused were not charged with or convicted of any offence, no charge can be brought against them under s. 224 or s. 225 of the Indian Penal Code. It is therefore ordered that the accused be acquitted, and the case be struck off the list."

In appeal to this Court, it is contended that the Magistrate was wrong in holding that Kandhaia and the other accused persons did not commit offences punishable under ss. 224 and 225 of the Indian Penal Code respectively, and that, at any rate, they should have been convicted of the offence made punishable by s. 353 of the Indian Penal Code—a section which had been alleged against them by the prosecution.

S. 225 of the Indian Penal Code provides that "whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of any other person for an offence ..... shall be punished." &c. Unless, therefore, Kandhaia was charged with an *offence*, there could be no valid conviction of him under s. 224 of the Indian Penal Code, nor of his companions under s. 225.

For the purposes of ss. 224 and 225 of the Indian Penal Code, "offence" is defined in s. 40 of that Code (as amended by s. 2, Act XXVII of 1870) as "a thing punishable under this Code, or under any special or local law as hereinafter defined"; and s. 41 defines a "special law" as "law applicable to a particular subject."

Act X of 1882 is therefore a "special law," and it has been suggested that inasmuch as to require security to be furnished in

the terms of s. 118 of Act X of 1882 is to cast upon a man a burden which not unfrequently compels him to pay money by way of interest or otherwise, and, in default of discharge of the burden, renders him liable to imprisonment, an order directing a person to furnish security for good behaviour is equivalent to declaring such person guilty of an offence; and that the requirements of s. 40 of the Indian Penal Code are therefore satisfied in the case of a person who has been arrested in the terms of s. 55 of the Code of Criminal Procedure.

We are of opinion that this argument is erroneous; for the Penal Code defines an offence as a "*thing punishable*;" and (*a*) a "*thing*" (*cf.*, ss. 32 and 33 of the Code) must be an *act*, or a series of illegal *acts*, or an illegal *omission*, or a series of illegal *omissions*; or, to use the words of Mr. Bentham, "we give the name of *offence* to every act which we think ought to be prohibited by reason of some evil which it produces or tends to produce;" (*b*) "*punishable*" must mean that the commission or omission of the act, the commission or omission of which is prohibited, renders the person who commits or omits it liable to the sanction of the law,—*i.e.*, to "punishment."

But, for the purposes of an order under s. 118 of the Code of Criminal Procedure, evidence of the commission or omission of an act is not necessary—proof of general repute (s. 117 of the Code) is all that is required—and the order calling upon a person to furnish security is what Mr. Bentham calls a "preventive remedy," a contrasted with a "penal remedy" or a "punishment." Mr. Bentham defines "*punishment*" as "an evil resulting to an individual from the direct intention of another, on account of some act that appears to have been done or omitted;" and he adds:—"An evil resulting to an individual, although it be from the direct intention of another, if it be not on account of some act that has been done or omitted, is not a 'punishment.'" S. 110 of the Code of Criminal Procedure does not set out any act, the omission or commission of which renders the person committing or omitting it liable to punishment; nor ought a Magistrate, when passing an order in the terms of s. 118 of the Code of Criminal Procedure, to have any direct intention of inflicting punishment; for the object

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of s. 118 of the Code of Criminal Procedure is, to use the words of Macpherson, J., in *Umbica Proshad's case* (1), "the prevention, not the punishment, of crime; and, with that object, it authorizes Magistrates to take from certain persons good and sufficient security for their good behaviour. But it is solely for the purpose of securing good behaviour that" the section "can be used; and any attempt to use it for the purpose of punishment for past offences is wrong, and not sanctioned by the law."

We must hold, therefore, that Kandhaia was not charged with an *offence* within the meaning of that term as defined in s. 40 of the Indian Penal Code, and consequently that no offence made punishable by s. 224 or s. 225 of the Indian Penal Code was committed in connection with his evasion of arrest. With the apparent anomaly of providing in s. 55 of the Code of Criminal Procedure for the arrest of the persons described in (*b*) and (*c*) of that section, and of making no provision similar to those of s. 651 of the Code of Civil Procedure, and of s. 225 A. of the Indian Penal Code (s. 9, Act XXVII of 1870), for punishing them for breaking their arrest, we are not here concerned. Our duty is to administer the law as it stands; and we have the satisfaction of noting that the Calcutta Court—*The Empress* v. *Shasti Churn Napit* (2)—has taken the same view of the law as we do.

So much as regards the acquittal under ss. 224 and 225 of the Indian Penal Code.

As regards the omission to try the accused persons on a charge under s. 353 of the Indian Penal Code, we observe that if, in the terms of s. 56 of the Code of Criminal Procedure, an order for the arrest of Kandhaia was given to Salig Ram by his superior officer, and if, in the execution of his duty in carrying out that order, criminal force was used to him, an offence made punishable by s. 353 of the Indian Penal Code was committed by the persons who used such force. We think that the Magistrate should have tried the accused persons under s. 353 of the Indian Penal Code. But the record is at present incomplete, as the witnesses for the defence have not been examined. We reverse the finding of acquittal, and direct a re-trial of the accused on a charge under s. 353 of the

(1) 1 Calc. L. R., 271. (2) I. L. R., 8 Calc. 331.

Penal Code by the Magistrate of the Banda District, or by such other competent Magistrate of that district, other than Saiad Sadik Husain, whom the Magistrate of the District may nominate for the purpose.

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APPELLATE CIVIL.

1884 August 7.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.

GHAZIDIN (DECREE-HOLDER) *v.* FAKIR BAKHSH (JUDGMENT-DEBTOR).*

Execution of decree—Civil Procedure Code, ss. 243, 244 (c), 545—Order in stay of execution a matter "relating to execution" of decree—Order appealable—Order restoring judgment-debtor to possession after execution—Order illegal.

The provisions of s. 244 of the Civil Procedure Code govern equally the procedure of the Court which passed the decree, when executing such decree, and the Court to which the decree is sent for execution. *Cooke* v. *Hiseeba Beebee* (1) referred to.

All orders staying execution of decrees, whether passed by the Court which passed the decree, or by the Court to which it is sent for execution, are "questions arising between the parties to the suit in which the decree was passed, and relating to the execution" thereof, within the meaning of s. 244 (*c*) of the Civil Procedure Code, and, as such, appealable, irrespective of the provisions of s. 588. *Kristomohiny Dossee* v. *Bama Churn Nag Chowdry* (2) and *Luchmeeput Singh* v. *Sita Nath Doss* (3) followed.

The widest meaning should be attached to clause (*c*) of s. 244 of the Civil Procedure Code, so as to enable the Court of first instance and the Court of appeal to adjudicate upon all kinds of questions arising between the parties to a decree and relating to its execution.

There is no provision in the law which empowers the Court passing a decree to set aside the proceedings under which the decree-holder has already been placed in possession in execution of his decree. The provisions of s. 243 of the Civil Procedure Code have no reference to a case in which execution has already been carried out, and the decree-holder placed in possession of the property decreed to him.

On the 24th December, 1883, Chauharja Bakhsh Singh and others, mortgagors, obtained in the Court of the Subordinate Judge a decree against Fakir Bakhsh, mortgagee, for redemption of mortgage and possession of the mortgaged lands, conditioned on their depositing in Court Rs. 3,328 within one month from

* First Appeals Nos. 24 and 25 of 1884, from orders of Babu Ram Kali Chaudhri, Subordinate Judge of Allahabad, dated the 4th March and 18th March, 1884.

(1) N.-W. P. H. C. Rep., 1874, p. 181.
(2) I. L. R., 7 Calc. 733.
(3) I. L. R., 8 Calc. 477.