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BINDO BIBI v. RAM CHANDRA.

BY THE COURT.—The appeal is allowed, the decree of the court below is set aside and the case remanded under order XLI, rule 23, with directions to re-admit the same on its original number and to proceed to hear and determine the same according to law. Costs here and heretofore shall be costs in the cause.

Appeal decreed and cause remanded.

REVISIONAL CRIMINAL.

Before Mr. Justice Piggott.

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April, 7.

*EMPEROR v. MANSUR HUSAIN.

High Court—Revision—Practice—Discretion of Court—Criminal Procedure Code, sections 435 and 439—Act No. XLV of 1860 (Indian Penal Code), sections 448 and 451.

Where at the hearing of an application in revision it appears that the facts established by the record do not justify the conviction of the applicant of the offence of which he has been convicted but do justify his conviction of a minor offence of a similar nature, it is within the discretion of the Court to convict the applicant of such minor offence: but it is also within the discretion of the court to refrain from doing so.

The rule of practice according to which the High Court ordinarily refuses to entertain an application in revision where the applicant might have gone in the first instance to the Sessions Judge or to the District Magistrate, is not a rule of absolutely invariable application, and an order of admission made by a Judge of the High Court under clause (1) of section 435 of the Code of Criminal Procedure, though passed *ex parte*, will be sufficient to take the case out of the operation of such rule of practice.

THE facts of this case were briefly as follows:—

There was a dispute between the complainant and the accused as to the title to and possession over a certain shop. The complainant had placed some bricks in the shop for the purpose of re-construction; the accused removed the bricks and threw them out on to the road. The accused was thereupon convicted by a Magistrate of the second class under section 451 of the Indian Penal Code, and sentenced to one day's simple imprisonment and a fine of Rs. 100. He appealed to the District Magistrate. The District Magistrate came to the conclusion that though the complainant's title and possession were both insecure, yet at the same time the accused had no *bonâ fide* claim of

* Criminal Revision, No. 88 of 1919, from an order of E. F. Sladen, District Magistrate of Bareilly, dated the 31st of December, 1918.

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title or possession, and that the act of the accused was not done by way of asserting such a claim, but with the intention of intimidating and annoying the complainant. The appeal was dismissed, and the accused thereupon applied in revision to the High Court.

Babu *Sital Prasad Ghosh*, for the opposite party, raised a preliminary objection to the hearing of the application for revision. There should have been a previous application for revision to the Sessions Judge who had concurrent revisional jurisdiction in the matter. The applicant should have gone in the first instance to the Sessions Judge in revision. It was an established practice of the High Court not to entertain an application for revision unless a previous application had been made to the lower court having concurrent jurisdiction. The following cases were cited:—*Emperor* v. *Kali Charan* (1), *In the matter of the Queen-Empress* v. *Reolah* (2), *Emperor* v. *Abdus Sobhan* (3). There appeared no special grounds or circumstances taking the case out of the ordinary practice.

Maulvi *Iqbal Ahmad*, for the applicant, submitted that the practice mentioned by the opposite party was not, so far as he was aware, an absolutely rigid one in this High Court; that the case had already been dealt with by two lower courts; that the High Court had every power to entertain the present application, and that, the Court having already admitted the application and sent for the record, the opposite party had no right to raise any objection to the Court examining the record and passing proper orders.

[The preliminary objection was overruled, and the applicant was heard in support of his application.]

The conviction under section 451 of the Indian Penal Code was illegal, inasmuch as the necessary ingredients of an offence under that section had not been established. It was neither alleged nor proved that the applicant intended to commit any particular offence, such as theft, as a sequel to the act of trespass. The section clearly required an intention to commit some

(1) Weekly Notes, 1904, p. 232. (2) (1887) I. L. R., 14 Calc., 887.

(3) (1909) I. L. R., 36 Calc., 643.

offence over and above that of trespass, and it had not been found that the applicant had had any such intention.

Babu *Sital Prasad Ghosh*, for the opposite party, submitted that, even if an offence under section 451 had not been made out, one punishable under section 448 had been amply established. Upon the facts found the sentence was justified, although the conviction might be altered from one section to the other.

PIGGOTT, J. :—The question of law raised by this application is whether, on the facts found by the courts below, Mansur Husain has or has not been rightly convicted of an offence punishable under section 451 of the Indian Penal Code. I hold that he has not. In order to constitute an offence under section 451 aforesaid, the prosecution must first establish all the facts necessary to constitute the offence of simple house-trespass, punishable under section 448 of the Indian Penal Code and must then satisfy the court that, in the particular case before it, the house-trespass was committed in order to the committing of an offence punishable with imprisonment. The offence in question must obviously be something over and beyond the house-trespass itself, otherwise every case falling under section 448 of the Indian Penal Code, would also fall under section 451 of the Indian Penal Code. I do not say that it is absolutely necessary for a conviction under the latter section that the prosecution should be able to satisfy the court as to the particular offence punishable with imprisonment which the accused intended to commit, but facts must be proved of such a nature as to justify the inference that some offence punishable with imprisonment was intended over and above the house-trespass itself. In the present case the courts below have not found, and it does not seem to have been suggested, either before the trial court, or in the court of appeal, that the house-trespass alleged was committed in order to the committing of a further offence either of theft (section 379 of the Indian Penal Code), or of mischief (section 426 of the Indian Penal Code), in respect of the bricks which the accused is alleged to have thrown from the verandah of a ruined shop into the street. The accused has not been tried on the basis of any such suggestion, and I am not prepared to re-consider the effect of the evidence on the record upon this bas[illegible]

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The finding is that the accused intended to intimidate, insult or annoy the complainant. That finding, as it stands, would warrant a conviction under section 448, but not a conviction under section 451 of the Indian Penal Code. I do not say that it might not be possible, upon a proper state of facts, to invoke the aid either of section 506, or of section 504 of the Indian Penal Code, so as to bring an act of house-trespass under the purview of section 451 of the Indian Penal Code, but I am satisfied that the courts below have not attempted to do this in the present case and I do not think they could have done so upon the evidence on the record.

From these considerations it follows that the conviction as recorded is bad in law and cannot be upheld. The discretion of this Court in dealing with a case under section 439 of the Code of Criminal Procedure is a very wide one. I have no doubt whatever that it would be within my discretion, while setting aside the conviction affirmed by the courts below, to convict Mansur Husain of an offence punishable under section 448 of the Indian Penal Code and either to maintain the sentence passed by the courts below or to reduce that sentence in such manner as might appear to me suitable. I hold, however, that it is equally within my discretion to decline to do this. I could, if necessary, quote ample precedent for the view that, when this Court is satisfied that the conviction as recorded in any case coming before it in revision is bad in law, it is not necessarily bound to go further into the question whether, upon the facts established by the evidence, a conviction of some lesser offence might or might not be recorded. It is a matter of judicial discretion to be exercised in each case according to the view which the Court may take of the requirements of justice. In the present case I am content to say that, upon an examination of this record, I am not so satisfied that Mansur Husain should be convicted of an offence of simple house-trespass, punishable under section 448 of the Indian Penal Code, as to feel it incumbent on me to direct his conviction under the said section.

The result is that I set aside the conviction and sentence in this case and direct that the fine, if paid, be refunded.

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Before I heard this application on the merits my attention was drawn to the fact that the applicant had come to this Court in revision, when he might lawfully have filed an applicantion in revision in the court of the Sessions Judge. I am fully aware that there is a rule of practice in this Court, according to which the Court ordinarily refuses to entertain an application in revision where the applicant might have gone in the first instance to the Sessions Judge or to the District Magistrate. I believe this rule to be a very reasonable one and one to be observed in the interests of justice. It would be within the power of this Court to call for every record of every criminal case decided by every court subordinate to it, for the purpose, as laid down in section 435 of the Code of Criminal Procedure, of "satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded, or passed and as to the regularity of the proceedings." It is obviously advisable that this Court should make it a rule of practice that a person dissatisfied with any order or proceeding in a court of inferior jurisdiction to that of the Sessions Judge or of the District Magistrate should, in the first instance, obtain the opinion of the Sessions Judge, or of the District Magistrate, on the matter in question, before invoking the jurisdiction of this Court. Such a procedure tends to prevent the time of this Court from being wasted over frivolous or unsustainable applications; it also ensures the further advantage that, if the matter eventually comes before this Court, it comes upon a record containing an expression of opinion by a court of superior jurisdiction, such as that of the Sessions Judge or of the District Magistrate. I am further of opinion that, if such a rule of practice is once laid down, it ought to be enforced evenly and without making capricious exceptions in favour of particular applicants. In the present case there had been a trial in the court of a Magistrate of the second class and an appeal to the court of the District Magistrate. I would not go so far as to hold that the District Magistrate, even when sitting as a court of appellate jurisdiction, is not a Criminal Court inferior to that of the Sessions Judge within the meaning of section 435 of the Code of Criminal Procedure; but I am not prepared to say that the rule of practice above referred to must

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necessarily or invariably be enforced in such manner as to encourage interference on the part of the Sessions Judge with orders passed by the District Magistrate in the exercise of his appellate jurisdiction. At any rate, I regard the circumstances above stated as affording in themselves a reasonable ground for making an exception to the general rule of practice in question. In the present case the application in revision was presented to myself personally and I admitted it. I hold that my order of admission, even though passed *ex parte*, was sufficient to take this case out of the operation of the rule of practice in question. The order of admission was an order under section 435, clause (1), of the Code of Criminal Procedure; it was within the discretion of this Court, and, once passed, it was not open to any party concerned to call it in question.

Application allowed.

APPELLATE CIVIL.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Walsh.

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April, 15.

DWARKA SINGH (DEFENDANT) v. RAMANAND UPADHIA AND OTHERS (PLAINTIFFS) AND BACHCHU SINGH AND OTHERS (DEFENDANTS).*

Act No. I of 1872 (Indian Evidence Act), sections 65,66,90—Secondary evidence of document—Original withheld by party who knew it would be required—Certified copy produced by plaintiff—Presumption as to ancient documents applied in case of a certified copy.

In a suit for redemption of a usufructuary mortgage the plaintiffs tendered in evidence a certified copy of the mortgage bond, which was executed in the year 1876. There was no evidence that they had called upon the defendants mortgagees to produce the original document.

Held (1) that from the nature of the case the defendants must have known that they would be required to produce the original mortgage, which presumably was in their possession, and therefore the certified copy was admissible, and (2) that the presumption allowed by section 90 of the Indian Evidence Act, 1872, could be applied when a certified copy, being admissible, was produced in evidence, in the same way as it could be applied to an original

*Second Appeal No. 419 of 1917, from a decree of Shekhar Nath Banerji, Subordinate Judge of Jaunpur, dated the 30th of January, 1917, modifying a decree of Farid-ud-din Ahmad Khan, Additional Munsif of Jaunpur, dated the 20th of July, 1916.