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definite legal question for decision, and that was whether a public right of way existed over this land. There is no definite decision on this point, and the order of the Magistrate is, therefore, *ultra vires*.

I, therefore, allow the application and set aside the order of the Magistrate. It is not necessary for me to pass any further order, because it will be necessary for any person who wishes to have a pronouncement on the existence of a public right of way to obtain a decision in the civil court.

## APPELLATE CRIMINAL

*Before Mr. Justice Kendall*

EMPEROR *v.* JAGDAMBA PRASAD AND OTHERS\*

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June, 8

*Indian Penal Code, sections 366A, 498—Charge under former section, conviction under latter—Complaint by husband indispensable for such conviction—Criminal Procedure Code, sections 199, 238—Husband's giving evidence for prosecution under section 366A can not take the place of a complaint by him under section 498.*

Where an accused is tried on a charge under section 366A of the Indian Penal Code he can not be convicted of an offence under section 498 of the Code in the absence of a complaint made by the husband under that section. The fact that the husband appeared and gave evidence for the prosecution at the trial under section 366A can not take the place of a complaint by the husband which is necessary.

Mr. *P. M. L. Verma*, for the appellants.

The Government Pleader (Mr. *Sankar Saran*), for the Crown.

KENDALL, J. :—This is an appeal by Jagdamba Prasad, Babu Ram, Ganga Sahai and Uman Shanker against their convictions by the Additional Sessions Judge of Aligarh of an offence under section 498 of the Indian Penal Code and their sentences to various

\*Criminal Appeal No. 1170 of 1932, from an order of Sarup Narain, Additional Sessions Judge of Etah, dated the 10th of December, 1932.

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terms of imprisonment under that section. The appeal must be allowed on a legal ground which finds no place in the memorandum of appeal. The appellants were prosecuted by the police as a result of a report which was made under section 366A of the Indian Penal Code, and they were charged under that section. They have, however, been convicted under section 498, although no complaint was made by the husbands of the women in respect of whom the offence is said to have been committed, as required by section 199 of the Code of Criminal Procedure.

This difficulty was considered by the learned Additional Sessions Judge, who overruled the objection raised on behalf of the appellants, holding that as there had been a report under section 366A of the Indian Penal Code and as the husbands had come forward to give evidence, the apparent defect in procedure had been cured. In coming to this decision he relied on the case of *Jatra Shekh v. Reazat Shekh* (1) and also a recent decision by a single Judge of this Court. In the case of *Empress of India v. Kallu* (2) it was held by a single Judge of this Court that where the accused had been prosecuted for rape, it was not open to the court to convict him of adultery when no complaint of adultery had been made by the husband. In the course of that decision STRAIGHT, J., remarked: "It by no means follows as a necessary consequence, that because a husband may wish to punish a person who has committed rape upon his wife, that is, who has had connection with her against her consent, he will desire to continue proceedings when it turns out that she has been a willing and consenting party to the act." The same process of reasoning applies where a report has been made of abduction and the offence found to have been committed is not abduction but only the minor offence under section 498 of the Indian Penal Code.

(1) (1892) I.L.R., 20 Cal., 483.

(2) (1882) I.L.R., 5 All., 233.

In section 238 of the Code of Criminal Procedure it has been laid down that where a person is charged with a major offence but the evidence only proves the commission of a minor offence, he may be convicted of the minor offence although he is not charged with it. But in clause (3) an exception is made to this general rule, namely, "Nothing in this section shall be deemed to authorize a conviction of any offence referred to in section 198 or section 199 when no complaint has been made as required by that section." The decision of the Calcutta Bench which has been relied on by the Sessions Judge has not been followed in a later case, namely *Chemon Garo v. Emperor* (1), where it was decided that when a person has been committed to sessions on a charge preferred by a husband under section 376 of the Indian Penal Code and the husband appears as a witness for the prosecution of the offence of rape, it could not be held that he had made a complaint of adultery within the meaning of section 199 of the Code of Criminal Procedure, and that the court could not convict the accused under section 497 of the Indian Penal Code. Subsequently a Full Bench of the Calcutta High Court in the case of *Tara Prasad Laha v. Emperor* (2) gave judgment on the two questions referred to them, namely (1) Is the word "complaint" in section 199 of the Code of Criminal Procedure limited to "complaint" as defined in section 4 of the Code of Criminal Procedure? and (2) Where a complaint is made by a husband of an offence under section 366 or 376 of the Indian Penal Code, can a charge be added and a conviction be had under section 498 of the Indian Penal Code? The first question was decided by the Bench in the affirmative, and it followed, therefore, that the second had to be answered in the negative. A similar view has been taken by the Madras High Court in the case of

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(1) (1902) I.L.R., 29 Cal., 415.

(2) (1903) I.L.R., 30 Cal., 910.

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*Bangaru Asari v. Emperor* (1) by a Bench of the Madras High Court, in which the decision of STRAIGHT, J., in *Empress of India v. Kallu* (2) was followed and approved. I have not been referred to any decision of a Bench of the Allahabad High Court on the exact point raised in the present case, but the preponderance of authority both of the High Courts of Calcutta and Madras is strongly in favour of the present appellants, and though single Judges of this Court have not always followed the decision of STRAIGHT, J., in *Empress of India v. Kallu* (2), I feel that I am fully justified in holding that it may be considered still to be good law.

The appeal is, therefore, allowed on this legal ground, and it is unnecessary for me to consider the facts of the case. I set aside the order of conviction and the sentences passed by the Additional Sessions Judge, and direct that the appellants be acquitted and released. As they are on bail, their sureties may be discharged.

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### FULL BENCH

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*Before Sir Shah Muhammad Sulaiman, Chief Justice, Justice Sir Lal Gopal Mukerji and Mr. Justice King*

1933  
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IN THE MATTER OF BURMAH SHELL OIL STORAGE AND DISTRIBUTING COMPANY OF INDIA, LIMITED\*

*Stamp Act (II of 1899), section 2(16) and article 35(a)(iv)—“Lease”—Undertaking in writing to occupy immovable property—Construction of document—Lease or license—Whether exclusive possession and enjoyment given.*

Under a bilateral agreement in writing, called an agreement of license, between the Secretary of State for India and the Burmah Shell Oil Storage Company the company was to have the use and occupation of certain railway land belonging to the State, for the purpose of constructing a petroleum storage installation. The company had to pay a certain amount

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\*Miscellaneous Case No. 124 of 1933.

(1) (1903) I.L.R., 27 Mad., 61.

(2) (1882) I.L.R., 5 All., 233.