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January 16.

FULL BENCH.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

EMPRESS OF INDIA *v.* KAMTA PRASAD.

Security for keeping the peace—Magistrate of the District—Appellate Court—Act X of 1872 (Criminal Procedure Code), s. 489.

The Magistrate of a District, when exercising the powers of an Appellate Court, is competent to make an order under s. 489 of the Criminal Procedure Code requiring the appellant to furnish security for keeping the peace.

ONE Kamta Prasad and two other persons were convicted by a subordinate Magistrate at Cawnpore of voluntarily causing hurt, an offence punishable under s. 323 of the Indian Penal Code, and were severally sentenced to one week's rigorous imprisonment. They appealed to the Magistrate of the District, Mr. J. W. Cornwall, who affirmed the convictions, directing, as regards Kamta Prasad, that on the expiration of his sentence he should be brought up to enter into his own recognizances of Rs. 100, and to give two sureties of Rs. 50 each, to keep the peace for one year, and in default be simply imprisoned for one year. The Sessions Judge of Cawnpore, Mr. W. Barry, being doubtful whether a Magistrate of the District, acting as a Court of appeal, has power to call upon the appellant to furnish security for keeping the peace, referred the case to the High Court for orders.

The case was laid before Stuart, C.J., and Brodhurst, J., and the question submitted by the Sessions Judge was referred by those learned Judges to the Full Bench, their orders being as follows:—

BRODHURST, J.—The point of law that has been referred by the Sessions Judge of Cawnpore is whether "the Magistrate of the District, as an appellate Court, can lawfully, under ss. 280 and 489 and 490, Criminal Procedure Code, in a case of hurt, call upon the appellant to give security and find sureties to keep the peace."

I concur with the Judge that "such an order cannot be called a punishment or enhanced punishment within the meaning of s. 280, Criminal Procedure Code," for the punishments there referred to are only those to which offenders are liable under s. 53,

Indian Penal Code, *viz.*, death, transportation, penal servitude, imprisonment—rigorous and simple—forfeiture of property, fine, and whipping. Although it is not actually stated in ss. 489 and 490, Criminal Procedure Code, that an appellate Court is empowered to require personal recognizance and security to keep the peace, yet that it is thus empowered is, I think, to be inferred from the whole tenor of these sections; and more especially so, first, from the wording of cl. 2, s. 489; secondly, from the reference in cl. 3 to the High Court; and, thirdly, from the last clause of the section. The wording of cl. 2, *viz.*, "the Court or Magistrate by which or by whom such person *is convicted, or* the Court or Magistrate by which or by whom *the final sentence or order in the case is passed*, apparently refers to a Court of Session or Magistrate of a division of a District, or Magistrate of the first class, both in its or his original and appellate jurisdiction. The powers conferred upon the High Court under the two sections seem also to relate to its appellate jurisdiction, for there is a special Act "to regulate the procedure of the High Courts in the exercise of their original jurisdiction," and, moreover, in this Act there is a chapter headed "Of security for keeping the peace." The last clause of s. 489 also appears to me to apply to a case such as that under notice, in which a report for recognizance and security to keep the peace was not submitted, under the last clause but one of the section, by the Magistrate of the third class who signed the judgment, but an order on the subject was subsequently added by the Magistrate of the District when disposing of the case on appeal.

I may also observe that, admitting that the Deputy Magistrate has in his decision stated the facts of the case correctly, he has shown good cause why he should have reported the case to the Magistrate of the District to take recognizance and security from Kamta Prasad. The Magistrate, in disposing of Kamta's appeal, might, under s. 280, Criminal Procedure Code, have enhanced that appellant's sentence from one week to one year's rigorous imprisonment and fine, *i. e.*, he might have enhanced the punishment by more than fifty times; and under these circumstances it would be anomalous if a Magistrate of a District might not, in disposing of such an appeal, rectify the omission of his

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inexperienced subordinate by passing orders upon the appellant under ss. 489 and 490, Criminal Procedure Code.

For the reasons above mentioned, I consider that in an appeal from a conviction for any offence specified in cl. 1, s. 489, Criminal Procedure Code, the appellate Court is competent to require the appellant to give a personal recognizance under s. 489, and security under s. 490, Criminal Procedure Code, to keep the peace; but as the law on this point is not as clear as is desirable, and as the matter at issue has not, so far as I am aware, ever been disposed of by any High Court, I think a reference on the subject may advantageously be made to the Full Bench for the authoritative ruling that has been solicited.

STUART, C.J.—This is a case reported to us by the Judge of Cawnpore for revision, and the question for our consideration relates to the validity of the order made by the Magistrate in the appeal to him from the order of the convicting Deputy Magistrate; in other words, whether the order passed by the Magistrate in his appellate capacity was or was not within his powers.

The first Court convicted all of the three accused, and sentenced each of them to be rigorously imprisoned for one week. But on appeal to the Magistrate he expressed the opinion that the evidence was insufficient to justify the conviction of two of the accused, and he remitted the unexpired portion of their sentence. But in regard to the third prisoner, one Kamta, he upheld the conviction and ordered him to undergo the remainder of his sentence, adding, "and at its close he will be brought up to enter into his own recognizance of Rs. 100, and to give two sureties of Rs. 50 each, to keep the peace for a year, and in default be simply imprisoned for one year." This is the order the legality or illegality of which has to be considered and determined.

I incline to the opinion that in making this order the Magistrate acted within his powers under ss. 489 and 490, Criminal Procedure Code, but as the question is attended with some doubt and difficulty, I would refer the case to the Full Bench of the Court. It will be observed that in making this order the Magistrate acted as an appellate Court, and there is no express provision to be found in these sections relating to appeals or to the powers or

jurisdiction of an appellate Court as such. It may, however, I think, be very reasonably inferred from the terms of ss. 489 and 490 that they were intended to apply to orders in appeal as well as to other proceedings after trial and conviction. The 2nd clause of s. 489 provides not only for personal recognizance being ordered by a Court or Magistrate before whom an accused person is *convicted*, but also by the Court or Magistrate by which or by whom "the final sentence or order in the case is passed;" and the allusion to the High Court in the 3rd clause of the section seems to show that it is the High Court exercising a jurisdiction other than its original jurisdiction which is there intended, for the procedure of the High Court on its original side in criminal cases is separately provided for by Act X. of 1875: and there is a Full Bench ruling of this Court—*Empress* v. *Muhammad Jafar* (1)—decided on the 9th March, 1881, by which it was held that the Court could make orders under s. 489 in revision. But, although the terms of s. 489 appear to be wide enough for including any proceeding by way of appeal or revision in any Court having appellate jurisdiction, the word "appeal" or the words "order in appeal" are not expressly mentioned in any part of the section.

S. 46 of the Criminal Procedure Code should also not be left out of consideration in such a case. By that section subordinate Magistrates who cannot pass a sufficiently severe sentence may submit the case to the Magistrate above them, who, after considering the case, may pass a proper sentence or order; and it may, I think, be fairly argued that Magistrates so acting may also make orders under ss. 489 and 490, although the procedure under s. 46 is very special and even exceptional, for it is neither by way of appeal nor by revision, but rather by way of re-trial on the merits. Allusion was made at the hearing to s. 280 of the Criminal Procedure Code, but that section only applies where the punishment awarded is such as can be "enhanced;" and it appears to me that the order for recognizance made by the Magistrate in the appeal to him cannot be so described, and that, therefore, s. 280 has no application. The case in all its aspects appears to me a fit one for determination by a Full Bench ruling.

(1) I. L. R., 3 All., 545.

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The Full Bench delivered the following judgment:—

STRAIGHT, J. (STUART, C. J., OLDFIELD, J., BRODHURST, J., and TYRRELL, J., concurring).—We are of opinion that the views expressed by the Division Bench referring the case were correct, and that the order of the Magistrate of the District, passed under s. 489 of the Criminal Procedure Code, was a legal and proper one. The Sessions Judge may be informed accordingly.

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January 17.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Oldfield, Mr. Justice Brodhurst, and Mr. Justice Tyrrell.

EMPRESS OF INDIA *v.* JALLU.

Court-fee stamps—Sale by unlicensed person—Act XVIII of 1869 *(General Stamp Act), s.* 48*—Act VII of* 1870 *(Court-Fees Act), s.* 34*—Act I of* 1879 *(General Stamp Act), s.* 68.

The sale of Court-fee stamps without a license is not an offence.

ONE Jallu was convicted by Mr. C. Rustomjee, Magistrate of the first class, Ghâzipur, by an order dated the 20th June, 1881, "under s. 48 of Act XVIII of 1869, as amended by s. 34 of the Court-Fees Act, 1870," for selling court-fee stamps without authority. The Sessions Judge of Ghâzipur, Mr. J. W. Power, being of opinion that the conviction was illegal, the unlicensed sale of court-fee stamps not being an offence, referred the case to the High Court for orders. The case was laid before Oldfield, J., and was referred by that learned Judge to the Full Bench.

The following judgment was delivered by the Full Bench:—

OLDFIELD, J., (STUART C. J., STRAIGHT, J., BRODHURST, J., and TYRRELL, J., concurring).—Jallu, who is a person not appointed to sell court-fee stamps, has been convicted under s. 48 of Act XVIII of 1869 (General Stamp Act) for selling court-fee stamps; and apart from the circumstance that Act XVIII of 1869 has been repealed and the conviction is technically wrong, we are of opinion that he has not committed a penal offence.

S. 48 of the Act of 1869 enabled the Local Government, with the approval of the Governor-General-in-Council, to frame rules for regulating the sale of stamps and stamped papers required by the Act or by Act XXVI of 1867, and for determining the persons by whom such sales were to be conducted, and for fixing their remuneration,

and the rules so made had the force of law; and the section provided a penalty for wilful disobedience of any rule on the part of any person appointed to sell such stamps or stamped papers; and it was enacted by s. 34, Court-Fees Act (VII of 1870), that in the General Stamp Act, 1869, s. 48 shall be read as if for the words and figures "Act XXVI of 1867" (to amend the law relating to stamp duties), the words and figures "the Court-Fees Act, 1870," were substituted. S. 27, Court-Fees Act, also empowered the Government to make rules for the supply of stamps.

The rules made under the provisions of s. 48 of the General Stamp Act, and ss. 34 and 27, Court-Fees Act, were published in the Gazette dated the 27th April, 1878.

The General Stamp Act, 1869, was repealed by Act I of 1879, which is now in force; but by s. 2 of this Act all rules made under the Act of 1869 are, so far as consistent with the Act, to be deemed to have been made under it; and by s. 68 a penalty has been provided, not only for wilful disobedience of any rule relating to sale of stamps on the part of a person appointed to sell stamps, but also for the sale of stamps by a person not so appointed.

No doubt, with reference to s. 2 of the Act, the rules published in the Gazette dated the 27th April, 1878, for the sale of court-fee stamps are still in force, but those rules do not and cannot of themselves make the sale of court-fee stamps penal, and assuming that the effect of s. 34 of the Court-Fees Act was to extend the penalty provided by s. 48 of the Act of 1869 to wilful disobedience of rules by a person appointed to sell court-fee stamps, that Act has now been repealed, and s. 34, Court-Fees Act, had not nor could it have the effect of rendering penal the sale of stamps by a person not so appointed, which is the case before us, since that is an act which for the first time was made an offence by s. 68, Act I of 1879, with reference to the sale of stamps under that Act only, and was not punishable under s. 48 of the Act of 1869, to which s. 34 of the Court-Fees Act had application. The conviction and sentence are set aside.

Conviction quashed.