[APPELLATE CRIMINAL JURISDICTION.]

REG. *v.* RAHIMAT.

1876
February 16.

Compounding of offences—Voluntarily causing grievous hurt—The Indian Penal Code (Act XLV. of 1860), Section 214—The Criminal Procedure Code (Act X. of 1872), Section 210.

Whenever the words "voluntarily", "intentionally", "fraudulently", "dishonestly", or others, whose definition involves a particular intention, enter along with a specified act into the description of an offence, the offence not being one irrespective of the intention, is not one which the exception to Section 214 of the Indian Penal Code by itself allows to be compounded. The offence, to admit of compromise, must be one in this sense irrespective of the intention; and it must be one for which a civil action may be brought at the option of the person injured, instead of criminal proceedings.*

The offence of voluntarily causing grievous hurt cannot accordingly be compounded.

Reg. v. *Jethá Bhalá* (10 Bom. H. C. Rep. 68) disapproved.

THE accused was charged before Keshavlál Hirálál, Magistrate, 1st Class, of Khándesh, at Dhuliá, with the offence of voluntarily causing grievous hurt to one Mánbi. The latter on the 1st of June following appeared before the Magistrate, and prayed to be permitted to withdraw her complaint; the Magistrate made the order sought for.

On an examination of the case in the Khándesh Magistrate's criminal return, KEMBALL, J., directed the record and proceedings to be sent for.

On a review of the proceedings, WEST and NA'NA'BHA'I HARIDA'S, JJ., referred the question to the Full Bench, whether the Magistrate was right in allowing the offence to be compounded.

The case was heard by WESTROPP, C.J., KEMBALL, WEST, and NA'NA'BHA'I HARIDA'S, JJ.

Shámráv Vithal, as *amicus curiæ*, urged the offence cannot be compounded. The Legislature has not thought fit to declare expressly what offences shall and what shall not be compounded; and we are thus left to gather their intention from various scatter-

* In *Shama Churn Bose* v. *Bhola Nath Dutt* (6 Calc. W. R. Civ. Ref. 9) it was held by Peacock, C.J., and Jackson, J., that there is no law in the Mofussil which requires an injured person in any case to institute criminal proceedings before bringing his action. Semble that there is in the Presidency towns *Coonamul* v. *Samo Ravr.* (2 Ind. Jur. N. S., 187). As to the law in England see *Wells* v. *Abrahams*, L. R. 7 Q. B. 554 and *Osborne* v. *Gillett*, L. R. 8 Ex. 88.

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ed provisions in the Penal and Criminal Procedure Codes, especially Sections 213 and 214 of the former and Sections 188 and 210 of the latter. Section 188 of the Criminal Procedure Code presupposes the offences which may lawfully be compounded, and provides that the compounding may be effected out of Court, or in Court with the permission of the Court. It also provides that the effect of such compounding shall be the acquittal of the accused person. In Section 210 the Legislature invests Magistrates with a discretion to permit on sufficient grounds the withdrawal of complaints in "summons cases". In the Penal Code, Sections 213 and 214 enact a general rule on the subject, declaring all offences non-compoundable, except those mentioned in the exception to Section 214, which runs thus:—

"The provisions of Sections 213 and 214 do not extend to any case in which the offence consists only of an act irrespective of the intention of the offender, and for which act the person injured may bring a civil action."

It is clear, therefore, that, in order that the exception may operate, two conditions must combine. The first is the immateriality of the offender's intention accompanying the act constituting the offence; and the second is the possibility of a civil action by the person injured. We are thus led to the consideration of the question "what is the precise meaning to be attached to these conditions?" Seeking the help of the English Law we find it laid down in *Keir* v. *Leeman* (1) that "the law will permit a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might recover damages in an action." And, again, in the same case, in error (2) that this proposition should be limited to the "cases where the private rights of the injured party are made the subject of agreement, and where by the previous conviction of the defendant the rights of the public are also preserved inviolate".

In order to be able properly to understand the first condition we must assume the Legislature to have made two classes of offences: one involving the commission of an act, which becomes criminal only by the intention of the offender being superadded; the other

(1) 6 Q. B. 308; S. C. 13 L. J. Q. B. 359.
(2) 9 Q. B. 371; S. C. 15 L. J. Q. B. 360.

in which such intention is not essential to constitute the criminality of the act. To establish the former class of offences only the prosecution would have to prove the intention. The use of the words "voluntarily", "intentionally", &c., would point to such a distinction. See Sections 39 and 322 of the Penal Code. Amongst the class of offences in which, the act being proved, the intention is implied, are generally offences under Chapters 6 and 7 of the Penal Code, viz., offences against the State and those relating to the Army and Navy; while offences under Chapters 8 and 13, viz., offences against public tranquillity and offences relating to weights and measures, fall in the other class.

The illustrations to the exception to Section 214 of the Penal Code, though they do not throw much light on the intention of the Legislature, support this view. The word "assaults" in Illustration (*b*) is not used as defined in Section 351. This is clear when it is read with Illustration (*a*). The offence of bigamy, mentioned in Illustration (*c*), is one irrespective of the offender's intention; but, as it cannot become the subject of a civil action, it cannot be compounded. The offence of adultery satisfies both the conditions, and the Legislature, therefore, declares it to be compoundable.

Next, going to decided cases, we find that the Madras High Court would not permit the withdrawal of a case of dishonest misappropriation of property on the ground that the dishonest intent was a necessary ingredient of the offence (1). Again, the High Court of Bengal in *Reg.* v. *Gopee Mohun Mitter* (2) allowed a complaint of kidnapping to be compounded, because "the offence, of which the accused has been convicted, is simply kidnapping as punishable under Section 363, and it has not been found that there was an intention to commit any further offence", and because a civil action could be brought. This High Court has, apparently, taken a different view in *Reg.* v. *Jethá Bhalá* (3), but without assigning any reasons.

The present case is one of grievous hurt, which does not satisfy both the conditions of the exceptions, and cannot, therefore, be compounded.

(1) 9 Mad. Jur. 341.

(2) 22 Calc. W. R. 26 Cr. Rul. (3) 10 Bom. H. C. Rep. 68.

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Shántárám, Náráyan, as *amicus curiæ, contra*:—The exception to Section 214 should be construed by the light of the illustrations. Illustration (*b*) declares the offence of assault to be compoundable. This offence is defined in Section 351, which expressly speaks of the offender's intention. Sections 6 and 7 of the Penal Code make it necessary that the word "assault" should be understood only in the sense given to it by Section 351. The offence of adultery is not aggravated by any particular intent, and could be properly compounded. Rape could not be compounded, because no civil action could be brought in respect to it. Mr. Mayne in a note to Section 214 quotes a case from 3 R. C. C. S. C. 14 and another from 4 R. J. and P. 171, which show that house-trespass was held not compoundable, though wrongful restraint was.

Cur. adv. vult.

The judgment of the Court was delivered by

WEST, J.:—Section 188 of the Code of Criminal Procedure says that "in the case of offences which may lawfully be compounded, injured persons may compound the offence out of Court or in Court with the permission of the Court", and that "such withdrawal from the prosecution shall have the effect of an acquittal of the accused person". The case before us is one in which an accusation of voluntarily causing grievous hurt has been compounded with the permission of the Court; and the question is, whether this is a case of an offence "which may lawfully be compounded".

The remedies provided by the law for wrongs which it recognizes as affording a proper ground for the exercise of the State's coercitive power, may be classed generally as criminal and civil. The latter apply properly to wrongs not regarded as so flagrant and so dangerous to society at large as to call for the spontaneous interference of the State. The general well-being of the community is sufficiently protected by the exercise of power at the desire of the person injured, and on proof of the wrong. The object is in theory not penal, but remedial or compensatory.

Criminal sanctions, on the other hand, are intended to enforce duties regarded as of such importance to the community that

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the option of insisting on them, or of bringing the provided penalty to bear in cases of their infringement, cannot safely be left in the hands of private persons. In such cases the State, through its representatives, steps in either on a denunciation duly made, or of its own accord, to bring the wrong-doer to justice; and it regards this object as one of such paramount importance that it will not allow any purely remedial arrangement between the person injured and his injurer, by which the punishment prescribed for the latter may be avoided.

The views taken, however, at different times and under different influences, of the enormity of particular wrongs vary widely; and there are wrongs which, while they fall within the same general description, may, according to circumstances, be of an extremely pernicious, or of but a slightly pernicious, tendency. They may endanger the welfare of society, or they may affect, except in some inappreciable degree, only the interests of an individual. Hence there comes to be recognized a class of cases which may be the subjects either of criminal or civil cognizance. If the person injured desires to obtain compensation, the law does not forbid him; if he invokes the penal interposition of the Magistrate, that interposition is not refused.

Full competence to accept satisfaction for wrongs done to oneself follows necessarily from the general rule of freedom of transactions. That rule, however, and the deduction from it, are subject to limitations in the interest of the community through which some compromises of offences are made penal, and others are so disapproved that the Courts will not give effect to them. These limitations correspond generally to the classes of wrongs for which, though a personal injury has been sustained, a civil suit is not allowed, or is allowed only after the public interest has been satisfied by a prosecution, the instituting of which is by the British Indian, as by the English, law regarded as a duty resting on the person injured, and one which he is not at liberty to neglect in consideration of any advantage to himself.

Sections 213 and 214 of the Indian Penal Code are intended to prevent the suppression of prosecutions in cases in which the public is thought to be deeply interested in the punishment of the offender. They impose penalties on transactions entered into

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with this view. But after the rules have been laid down in terms extending to all compromises of offences, an exception is made that "the provisions of Sections 213 and 214 do not extend to any case in which the offence consists only of an act irrespective of the intention of the offender, and for which act the person injured may bring a civil action". The words "may bring a civil action" seem to mean "may bring an action without, or instead of, instituting criminal proceedings". On the principle of "*ubi jus ibi remedium*" there are but few, if any, violations of right recognized by the law as occasioning personal injury, for which, when the demands of criminal justice have been satisfied, a civil action may not be brought by the person injured; and the condition of a civil action being competent to the party injured after a prosecution could not have been intended where the design is to define and circumscribe the bounds within which private compromises of offences are permissible. The graver the injury in such cases, so long as the injured person survives, the better founded the claim for civil reparation. Where the law allows a choice between the criminal and the civil remedy, the exception says that a compromise shall not be penal by which the person injured obtains what civil proceedings would give him. The taking and giving of a compensation which the law forbids, instead of a criminal prosecution, is the gist of the offences in Sections 213 and 214; but where the law would itself award a compensation, the exception allows the compromise.

The condition thus construed at once cuts down the cases in which compounding is not penal to a limited class. Unless a "suit of a civil nature", according to Section 1 of the Code of Civil Procedure, can be maintained in the first instance by the person injured against the injurer, they are not at liberty to enter into a transaction by way of compromise. They are subject to the penalties of Sections 213 and 214 of the Indian Penal Code should they attempt thus to defeat its purpose. In all the more serious cases of wrong-doing by which personal injury is sustained, no such action could, according to the recognized principles of the English law, be maintained. The criminal law, wherever those principles are accepted, must first be put in motion, before civil redress for the private wrong can be effectually sought. That these principles were accepted, at least generally, by the Legislature when it passed

the Penal Code, is, we think, sufficiently apparent from the test it has provided; and according to these it is only in cases comparatively trivial—at least, of trivial importance to the community at large—that an action can be brought without a prior prosecution. In no others is a compromise free from the penalties prescribed by Sections 213 and 214 of the Indian Penal Code.

The other condition, that the "offence consists only of an act irrespective of the intention", seems to have the same general purpose of confining compromises to the cases of almost venial offences. The words "irrespective of the intention" seem to mean that the definition of the offence extends only to acts, not to a particular intention prompting or accompanying the acts. Thus the several instances of negligence constituting an offence without a positively mischievous purpose, are cases in which the "offence consists only of an act". No intention is, or needs be, imputed as an element of the offence. In other cases the act—as, for instance, waging war against the Queen, or committing adultery—though it may be essentially voluntary, is still conceived, for the purpose of the definition or of the imposition of punishment, simply as an act. If the act, as thus viewed by the Legislature, is done, the offence is committed, and the penalty is incurred "irrespective of the intention of the offender". In all cases of this kind for which the Indian Penal Code provides, the act is either one, as negligently allowing a prisoner charged with, or convicted of, an offence to escape, for which no civil action could be brought, and on that ground excluded from the operation of the exception: or else, as in the case of adultery, of a kind regarded as of a specially personal character, so that the public peace and welfare will be rather furthered than impaired by allowing a private settlement of the wrong.

In contrast to these cases stand the great mass of offences which arise in the ordinary course of affairs. In the definitions or descriptions of these in the Penal Code the intention is an essential element. The mere act, not perhaps in itself, but as viewed by the Legislature, is regarded as possibly ambiguous, and is not an "offence irrespective of the intention of the offender" according to a distinction well expressed by Lord Mansfield, C.J., in the case of *R.* v. *Shipley* (1). Thus, in cases of theft, personal

(1) 4 Dong. p. 165.

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violence, threats, and defamation, the physical act must spring from a dishonest or malicious intent in order to constitute an offence. This was the class of cases which probably was most conspicuous to the Legislature when the exception to Section 214 was made law. The offences are of a kind regarded as highly dangerous to society, and not, therefore, proper subjects of compromise. As their definitions involve intention, they were excluded from the exception by limiting it to cases of offences constituted by "acts irrespective of the intention of the offender."

The result appears to be that whenever the words "voluntarily", "intentionally", "fraudulently," "dishonestly", or others, whose definition involves a particular intention, enter along with a specified act into the description of an offence, the offence, not being one "irrespective of the intention", is not one which the exception to Section 214 of the Indian Penal Code by itself allows to be compounded without the parties incurring the penalties prescribed by that and the next preceding section. The offence, to admit of compromise, must be one in this sense irrespective of the intention; and it must be one for which a civil action may be brought at the option of the person injured, instead of criminal proceedings.

This construction of the exception does not, indeed, clear away all difficulties. It seems anomalous that, while adultery, through its definition not including any statement of intention as an element of the offence, may be compounded, enticing a woman away with intent to commit adultery with her may not be compounded. The anomaly may, perhaps, be explained by the circumstance that mere adultery may be a wholly private transaction, which the husband may hope to keep secret, while enticing a woman away, necessarily involves a public scandal; but, such as it is, it is in a measure corrected by the provisions of the Code of Criminal Procedure (Sections 478, 479), which make the prosecution of the offender in the one case, as in the other, dependent on the will of the husband. The attempt to compress a principle gathered from a great number of instances within a few words generally, leaves some cases not provided for in a quite satisfactory way; and the existence of such cases is not a sufficient argument against a particular construction, unless some other can be suggested which gets rid of all difficulties.

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The illustrations to the exception, so far from throwing light on its meaning, create the chief difficulties in its construction. Illustrations (*a*) and (*b*) taken together, if we take "assault", as Section 7 bids us do, in the sense defined by Section 351, suggest that the true sense of the exception is to allow compounding in every case that might be the subject of a civil action, except where the act constituting an offence is made a graver offence by some intention accompanying it, which is not involved in the definition of the minor offence; which the act would *primâ facie* amount to. The condition that, for the exception to operate, the act must be one for which a civil action might be brought before taking criminal proceedings, would, on this construction, as on the other, cut down the possible cases of compromise to a small number, where the principles of the English law on this subject prevail; but, allowing this, the difficulty remains that the suggested construction is one that is not by any ingenuity to be gathered from the language of the exception itself. If we take "assault" in its defined sense, it is not an offence constituted by "an act irrespective of the intention". The physical act being the same in both cases, the intention accompanying it might make it an assault under Section 351, or an attempt to commit murder under Sections 511, 299, and 300 of the Indian Penal Code; and there is not, in any of the cases in which intention enters into the definition of an offence in that Code, such an inseparable connexion of a particular intent with a particular act, that such intent is to be conclusively inferred from it; otherwise the intention would not be specified as part of the definition. But if the act thus derives all its criminal character from the particular intent accompanying it, it cannot be said that a minor offence is constituted by the act irrespective of the intention, while a major offence is constituted by a similar act along with some different or additional intention. There is no offence at all until there is a criminal intention; and when this accompanies the act, it at once determines the character of the offence, be it graver or more venial.

The illustrations to the Penal Code rank as cases decided upon its provisions by the highest authority. But as every authority may sometimes err, we are justified in asking whether this may have happened in the present instances. Illustration (*b*) says:—

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"A assaults B. Here, as the offence consists simply of the act irrespective of the intention of the offender, &c." This conception of the meaning of assault is obviously quite at variance with that which governed its definition in Section 351.* The Legislature conceived of assault as consisting, as viewed by the law, in some mere act. In Illustration (*a*) an intention is superadded to this act, so that an attempt to commit murder is constituted an offence consisting by its definition of an act *plus* an intention, and thus not within the exception according to the construction which we have preferred. Illustrations (*c*) and (*d*) are equally reconcileable with either interpretation.

Amongst the cases actually decided on the exception there is one at 9 Madras Jurist 341, in which it was ruled that a charge of dishonest appropriation under Section 404 of the Indian Penal Code could not legally be compounded. In the case cited from 3 Rev. Civ. and Cri. R., 14 S. C. Ct. References, a compromise in a case of wrongful restraint was successfully sued on; but wrongful restraint being punishable with but one month's imprisonment, a withdrawal from the prosecution is expressly allowed by Section 210 of the Code of Criminal Procedure; and as Section 188 of that Code cannot but have been meant to have some operation, an agreement for such withdrawal could not be illegal. The case at 22 Calc. W. R., 26 Cr. Rul., was one of kidnapping, and the Court held that it could be lawfully compounded. Ainslie, J., seems to have inclined to the view that this was allowable, because there was not an intention to commit on offence beyond that of simple kidnapping, and because a civil action might be maintained, but it does not appear that the obvious grammatical construction of the exception had been considered by him. Kidnapping, though a voluntary act, is not, according to its definition in the Penal Code, composed of an act *plus* an intention, but of an act alone. It is, though necessarily involving an intention, conceived of and dealt with by the Legislature as a mere act; and being thus an offence irrespective of the intention would, according to our view, admit of a compromise if the second condition were satisfied, namely, that a civil action might be maintained for the wrong by the injured person. It is not certain from the language of Ainslie, J., that this was not his view also; but, if not, the decision is, we think,

* See the observations of Turner, J., in *Reg.* v. *Mudan Mohun* (6 N. W. P. H. C. R. at p. 305).

to be sustained where a civil suit is admitted, independently of the reasons given for it.

The case of *Jethâ Bhalá*, at 10 Bom. H. C. Rep. 68, is more distinctly against what we think the correct construction. But no reasons are given for that decision, and the case does not appear to have been argued. If the offence of voluntarily causing hurt may be compounded, so apparently might causing grievous hurt, or even an attempt to commit murder. For the mere act and the personal injury sustained from it, apart from any special criminal intent, the person injured might, in each case, maintain a civil action; and there would not in either be an aggravating intention placing the offence in a graver category than that to which it would ordinarily belong. If the act was thought to include the intention ordinarily accompanying it, and thus in a manner to be one, in the eye of the law, irrespective of the intention, we do not think that such a construction is admissible in any case in which the Legislature has expressly made a particular intention part of the definition of an offence. It may be easy to infer the motive in any ordinary case from the act and the circumstances but that the inference was not intended to be a necessary and conclusive one, is clear from the specification of the intention in defining the offence. We think, therefore, that that case was not rightly decided, and that an offence, in the definition of which a particular intention is included, cannot be compromised legally, or without incurring a penalty, except in the petty cases provided for by Section 210 of the Code of Criminal Procedure. If the intention does not enter into the definition of the offence, it may be compounded in all cases in which a proceeding by way of civil action, instead of a criminal prosecution, would be competent to the person injured.

The offence of voluntarily causing grievous hurt is, accordingly, one which cannot legally be compounded. The Magistrate's order of dismissal must, therefore, be reversed as contrary to law. Whether he will, under the circumstances, now proceed any further with the case, is a matter which must be left to his discretion. He will probably not feel called on to take any step, by which the expectation naturally raised by his previous disposal of the case would be disappointed.

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The difficulty we have had in dealing with this case, and which seems to be inherent in the law as it now stands, is one that, in our opinion, calls for the action of the Legislature.

Order accordingly.

Note.—In conformity with this ruling, the following offences were held not compoundable :—

(*a*) Criminal Breach of Trust, *Reg.* v. *Lakshman Shenan Gabaji*, 24th February 1876.

(*b*) Cheating. *Reg.* v. *Lakhu Sadashiv*, 24th February 1876.

(*c*) Defamation. *Reg.* v. *Nutty*, 8th March 1876.

(*d*) Enticing away a woman, *Reg.* v. *Jethi Chatru*, 30th March 1876.

In addition to the authorities cited in the present case, *Reg.* v. *Mudan Mohun* (6 N. W. P. H. C. R. 302.) may be referred to, in which it was held that the offence of voluntarily causing grievous hurt was not compoundable. See also the ruling 7 Mad. H. C. Rep. XXXIV. in which it is laid down that dishonest misappropriation of property is not compoundable.

[ORIGINAL CIVIL JURISDICTION.]

Suit No. 1018 *of* 1867.

Appeal No. 290.

March 4.

SUMA'R AHMED AND OTHERS (ORIGINAL DEFENDANTS) APPELLANTS *v.* HA'JI ISMA'IL HA'JI HABIB (ORIGINAL PLAINTIFF) RESPONDENT.

Practice—Account—Commissioner's Report—Motion to discharge or vary—Affidavit—Memorandum of objections—Decree—Construction—Notes of judgment in Deputy Registrar's Book.

In moving to discharge or vary the report of the Commissioner for taking accounts, the right practice is to move on a memorandum of objections filed in the Prothonotary's office, and upon the evidence taken by, and the proceedings before, the Commissioner, and not on affidavits made for the purpose of the motion. In such a motion, affidavits should only be filed (*a*) when ordered by the Court, if it desire fresh evidence; or (*b*) by special leave of the Court for the purpose of advancing a fact which does not appear on the face of the proceedings before the Commissioner.

A note of the judgment of the Court taken by a Deputy Registrar cannot be consulted for the purpose of explaining or aiding in the construction of a decree. Where, therefore, a decree was, on the face of it, an ordinary decree in a partnership suit, for the taking of the accounts between the partners in the usual way, the Court