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Sessions Judge may either confirm, modify, or annul such sentence of the Assistant Sessions Judge." We do not consider that the word "modify" includes, or can have been intended to include, the power of enhancing the sentence. An Appellate Court can, when hearing the appeal, enhance a sentence under section 280 of the Code; and the High Court, as a Court of revision, can enhance a sentence under clause 7 of section 297; but no such power of enhancement of sentence is any where given to a Sessions Judge taking up a case referred by an Assistant Sessions Judge under the last clause of section 18.

The Court, therefore, alters the sentence, passed by the Sessions Judge of Surat in this case, to one of four years' rigorous imprisonment.

Order accordingly.

APPELLATE CRIMINAL.

Before Sir Charles Sargent, Kt., Officiating Chief Justice, and Justices M. Melvill, Kemball, Pinhey and F. D. Melvill.

January 8.

IMPERATRIX *v.* ABDULLA.*

The Code of Criminal Procedure (Act X of 1872), Sec. 46—Order—Committal.

The word "order" in section 46 of the Code of Criminal Procedure, associated as it is with the words "judgment and sentence", means a final order, *i.e.*, one disposing of a case so far as the Magistrate, to whom a Subordinate Magistrate submits the proceedings of the case for higher punishment, is concerned. It does not deprive that Magistrate of the exercise of his discretion as to its being a proper case for the Sessions, and of the power of committing it for trial given by section 143 of the Code of Criminal Procedure.

THIS was an appeal from the sentence of transportation for life passed on Abdulla by C. F. H. Shaw, Session Judge of Belgaum, convicted, on his own plea of guilty, of the offences of housebreaking with intent to commit theft and theft in a dwelling-house. The said Abdulla was thrice previously convicted of similar offences.

The convict was at first tried by the Second Class Magistrate of Athni, who found him guilty; but, being of opinion that he deserv-

* Appeal No. 207 of 1879.

ed a more severe punishment than it was competent to him to pass, submitted the proceedings to Mr. G. Waddington, Magistrate of the District of Belgaum, under section 46 of the Code of Criminal Procedure (Act X of 1872). The latter officer was of opinion that the accused should be committed for trial by the Court of Session as an habitual offender, and made an order accordingly. The Session Judge doubted the legality of the committal, but, accepting it, proceeded with the trial.

There was no appearance either for the appellant or the Crown in the High Court. Before the consideration of the merits of the appeal the question for the determination of the High Court was whether the committal and the subsequent trial were legal.

M. MELVILL, J.—On the 30th August 1877 it was held by a Division Bench[1], consisting of Pinhey, J., and myself, that when the proceedings of a case are submitted, under section 46 of the Code of Criminal Procedure (Act X of 1872), to the Magistrate of the District, he has no power to order a new trial by the Court of Sessions or any other Court, unless he considers that an offence has been committed which was not within the jurisdiction of the Magistrate before whom the trial was held.

This ruling was in accordance with the decision of the Calcutta High Court in the case of *Bhickári Mullick*, reported 10 W. R. 50 (Criminal Rulings), but is opposed to the opinion which has been since expressed by a majority (two out of three) of the Madras High Court *in the matter of Chinnimarigadu*[2].

The question is not free from doubt; but, on the whole, I think that our decision of the 30th August 1877 was correct.

By section 46 of the Criminal Procedure Code (Act X of 1872) the Magistrate who tries the case records a conviction, and submits the proceedings to the Magistrate to whom he is subordinate, in order that a more severe punishment may be inflicted than the trying Magistrate is competent to award. The section goes on to direct that the superior Magistrate "shall pass such judgment, sentence, or order in the case as he deems proper, and as is according to law." By the ordinary rule of legal construc-

(1) See *Reg.* v. *Lakshman Satápá*, Cr. Rul. for 1877, Part II, not reported.

(2) I. L. R., 1 Mad. 289.

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tion (see Maxwell on Statutes, p. 297 *et seq.*) the general word "order", following the particular and specific words "judgment and sentence", ought to be presumed to be restricted to the same terms as those words, and to comprehend only such orders as are final in their nature; and this construction seems warranted by other parts of the Code in which the word "order" is used in combination with the words "judgment and sentence", and in which it seems to be a mere expletive equivalent to one word or the other. Thus Chapter XXXIV is headed "of the judgment, order, and sentence"; but in section 464 in that chapter the word "order" is used as identical with the word judgment, and the chapter contains no provision for making any other order.

It may, no doubt, be considered undesirable to hold that, when a Subordinate Magistrate convicts an old offender, when he ought, in the exercise of a wise discretion, to have sent the case to the Court of Sessions, the superior Magistrate, to whom the proceedings are submitted, should be forced to adopt the conviction, and pass thereupon a very inadequate sentence. But the same objection applies still more strongly in cases of the same description, in which the Subordinate Magistrate not only records a conviction, but takes upon himself the responsibility of passing sentence. In such cases there is no authority, (not even, I think, the High Court), which could set aside the conviction and sentence, and order a committal to the Court of Session. The fact seems to be that the Legislature, while indicating generally how the discretion should be exercised, has left to the trying Magistrate the power of determining by what tribunal the final sentence shall be passed. If the offence is within the Subordinate Magistrate's jurisdiction, he may, in his discretion, either convict and pass sentence himself, or convict and refer the proceedings to the superior Magistrate, if he thinks that a sentence of two years' imprisonment will be adequate; or refrain from convicting, and commit, or cause the committal of, the case to the Court of Session, if he thinks that a sentence of two years' imprisonment will be inadequate. If he adopts either of the two first courses, the conviction is perfectly legal, and cannot be set aside on the ground that the sentence which the Subordinate Magistrate has passed, or the sentence which the superior Magistrate is competent to

pass, is inadequate. The remedy lies in a reference, after sentence passed, to the High Court, which has the power in all cases to pass a proper sentence.

F. D. MELVILL, J.—The question for decision is whether a Magistrate, to whom a case has been referred under section 46 of the Criminal Procedure Code, can set aside the finding of the Subordinate Magistrate, and commit the prisoner to the Court of Session, and it turns chiefly on the effect to be given to the word "order" in that section.

The District Magistrate may, under section 46, pass judgment or sentence, that is, he may sentence on the finding already recorded, or he may pass judgment of acquittal; *or* he may pass some other order, which is, I hold, an order not in addition to the sentence, but opposed to, and distinct from, it. If it had been intended that the order should be in addition to the sentence, the wording would have been "and may also pass such other order, &c." I do not think it is possible to give full effect to the whole section, unless it is held that the word "order" refers to something quite opposed to, and distinct from, the judgment or sentence. And I cannot understand to what order reference can be made, unless it refers to an order for commitment. The procedure laid down for the District Magistrate seems to show that he is not to be bound by the result of the trial, so far as it was conducted before the Subordinate Magistrate. He virtually has power to re-investigate the case from the commencement, and it would be inconsistent with such power if he is to be tied down within the limits which the Subordinate Magistrate has chosen to draw by finding the prisoner guilty of a specified offence.

The question, however, remains, whether the District Magistrate is prohibited by the Code from setting aside the finding of the Subordinate Magistrate. Now it is laid down that a judgment or final order cannot be altered by the Court making it; and it is also laid down that no Court, other than the High Court, shall alter any sentence or order of a Subordinate Court except on an appeal. But a mere finding that a prisoner is guilty of an offence, does not amount to a judgment, sentence, or order; and I am not aware of any provision of the Code which declares such finding

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(as distinct from a judgment or sentence) to be final. It is only in regard to section 46 that the question of a finding, as distinct from a judgment or sentence, could arise; and the wording of that section, giving, as it does, such wide powers to the District Magistrate, seems to me to give by inference to that Magistrate the power to deal with the case as if he had tried the case in the first instance.

I am, therefore, of opinion that that officer has power to commit a case referred under that section to the Court of Session.

PINHEY, J.—I agree with the opinion of F. D. Melvill, J.

KEMBALL, J.—I am of opinion that the ruling of the Division Bench of the 30th August 1877 was right, and should be upheld. I am not aware of any authority residing in a Magistrate, save in cases falling under either section 280[1] or section 328[2], to set aside a finding passed by a Subordinate Magistrate, and order a new trial; and I cannot but think that, had the Legislature intended to give the Magistrate, to whom proceedings are submitted under section 46, the option of either completing the trial himself or committing the case to the Court of Session, it would have expressed itself to that effect in clear terms, as it has done under the preceding section 45. It does not appear to me that any inference is to be drawn as to the intention of the Legislature from the use of the words "judgment, sentence, or order" in section 46. In the corresponding section 277 of the old Criminal Procedure Code (Act XXV of 1861 and VIII of 1869) the word "judgment" did not appear, and the reason for its introduction into section 46 of the present Code is, at best, but matter for conjecture. It may be that, as the recording of a finding by the submitting Magistrate was no longer rendered obligatory under the new Code, it was considered necessary to insert the word "judgment", as providing an additional duty to be performed by the superior Magistrate; or the addition may have been considered as a necessary and appropriate amendment of the corresponding

(1) *i.e.*, in appeal.

(2) *i.e* without appeal in cases of conviction on evidence partly recorded by one Magistrate and partly by another.

provision in the old, "a judgment" of acquittal being required before making an "order" for discharge. But section 46 is so worded as to render it doubtful, whatever may have been the intention of the Legislature, whether a reference can be made unless a finding is recorded. The use of the words "judgment, sentence, or order" is quite compatible with the proposition that the Magistrate, to whom the reference is made, is bound to dispose finally of the case himself.

Under the circumstances the question must now be referred to a fifth Judge : so let the papers be submitted to Mr. Justice Green.*

Dec. 19, 1879. SARGENT, C.J.—The question, which has been referred to me under section 271 B. of the Criminal Procedure Code, is, whether the Magistrate, to whom proceedings have been submitted by a Subordinate Magistrate under section 46 of the Criminal Procedure Code, may commit the case for trial at the Sessions. The answer to it depends upon the meaning to be assigned to the term "order" in the above section.

I agree with Mr. Justice M. Melvill in his conclusion, from the circumstance of its being associated with the terms "judgment and sentence", that a final order, *i.e.*, one disposing of the case so far as the Magistrate is concerned, was contemplated by the section ; but I think he is mistaken in supposing that it is a mere expletive, or that in chapter 34, which has the heading "judgment, order and sentence" (upon which he relies for that conclusion), the term "order" is necessarily identical with "judgment". It is plain, I think, from the concluding part of section 464, that an "order" submitting the case to the High Court was one within the contemplation of that chapter. By analogy, an order by the Magistrate of the District committing a case for trial at Sessions may well be supposed to be such an order as was contemplated by "judgment", sentence, or order in section 46. If that be so, is there any reason to be gathered from the section itself, or from the general provisions of the Code, for restricting the meaning of the term? It is said that the Legislature has left to the trying Magistrate the power of

* In consequence of the sudden indisposition of Mr. Justice Green, the case was referred to the Chief Justice, under section 271 B., whose judgment, as provided for in that section, became the judgment of the Court.

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determining by what tribunal the final sentence shall be passed. No doubt he can either dispose of the case himself, or by the concluding para. of section 46 send it for trial at the Sessions, and by section 221 ought to do so, if he is of opinion that it is a proper case; but this scarcely disposes of the question, whether, if he is not of that opinion, and thinks it best to send up the proceedings to his superior, the District Magistrate, the latter is to be deprived of the exercise of his discretion as to its being a proper case for the Sessions, and of the power of committing it for trial given by section 143. If that has been the intention, I should have expected it to be clearly expressed, and that such comprehensive terms as "judgment, sentence, or order" would not have been used.

Nor does the existence of a finding of guilty on the record, militate against the exercise of such power by the District Magistrate, as it is plain that the finding is not intended to be binding on him, and that he may direct an acquittal; and, as is pointed out by the High Court of Madras (I. L. R. 1 Mad. 289), an order of committal for trial will have the same effect. It was said that the power is given specially in section 45, and not so in section 46; but this even does not appear to me to be entitled to much weight, as it may well have been thought necessary to give more specific directions when dealing with Subordinate Magistrates whose powers are of such a varying nature. For the above reasons, and also because there appears to be an unanimity of opinion amongst the members of the Court, that the construction which gives the power of committal to the District Magistrate is the more convenient one, I think that the ruling of the Division Court on the 30th August 1877 should not be followed, and that the Sessions Judge should be directed to try the case.

Jan. 8, 1880. This being the opinion of his Lordship the Chief Justice, it was followed, and the appeal was disposed of on the merits by Pinhey and F. D. Melvill, JJ., who reduced the sentence to transportation for ten years.