

judgment-debtors against whose property orders of attachment have been made in execution of decrees for money shall be made to the District Court, has not been in any way affected by the said para. 2 of section 360. * * *

"The order which will be passed under section 360 is not appealable. I beg, therefore, to submit the question for an authoritative decision before disposing of the application."

There was no appearance of the parties in the High Court.

Per Curiam—We think that the Subordinate Judge is right in holding that he cannot entertain the application in question.

APPELLATE CRIMINAL.

Before Mr. Justice Kimball and Mr. Justice Pichey

QUEEN EMPRESS v. SHEKH SA'HEB BADRUDIN AND BADRUDIN SHEKH SA'HEB.*

March 1.

Criminal Procedure Code, Act X of 1882, Secs. 439 and 423—High Court—Court of Revision—Court of Appeal—Appellate powers—Discretion—Appeal—Evidence.

In cases in which the law allows no appeal the High Court, as a Court of Revision, will not, except on very exceptional grounds, exercise the powers of an Appellate Court; but where such exceptional grounds exist, as where the conviction is not in any degree supported by the evidence, the High Court will exercise its discretion under section 439 of the Code of Criminal Procedure, and reverse the conviction and sentence.

THE first accused in this case was convicted by W. W. Drew, Magistrate (First Class) at Thána, of cheating under section 417, Indian Penal Code, and the second of abetment of cheating under sections 417 and 109. The complainant alleged that on the 3rd of October, 1881, the two accused, son and father, went to him to buy salt of him, that the complainant refused to let them have it without payment of the price, that the accused thereupon gave him a bill of exchange payable in a month and a half on a firm in Bombay signed by the first accused, and that the complainant consequently delivered the salt to the accused. On the expiration of the term mentioned in the bill the complainant presented it for payment, but the bill was dishonoured both by the drawee and the accused. The accused contended that the

* Criminal Review, No. 289 of 1882.

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complainant, after selling the salt to the second accused, went to the first accused during the absence of the second accused at Bombay, and by making a false statement that the second accused had given him authority to ask for it, induced the first accused to give him the bill in question. They added that money dealings existed between themselves and the complainant, and that the complainant being their debtor it was not at all necessary to pay him in cash or *hundi*. The Magistrate disbelieved the evidence of the accused, and held the allegations made by the complainant to be proved. He found the first accused guilty of cheating, and the second of abetment of cheating, and fined each Rs. 30, or, in default, simple imprisonment for one month.

On an examination of the criminal calendar it appeared to the High Court that if it were true that the complainant delivered the salt in consequence of the bill which the accused never intended to honor, the offence of the accused fell within the scope of section 420 of the Indian Penal Code, for which a sentence of imprisonment was obligatory. The record and proceedings were consequently sent for, and a notice was issued to the accused to show cause why their convictions and sentences should not be altered.

Branson, with him *Ghanashám Nilkanth Nádkarni*.—The Magistrate has entirely failed in his appreciation of the evidence.

[KEMBALL, J.—Our rule is that in cases in which there is no appeal we do not weigh the evidence or disturb the Magistrate's finding. If we did so, we should be giving the appeal forbidden by law. Under the old Code we did not deny that we had the power of going into the evidence, but we invariably refused to exercise it, save upon a question of law, *e.g.*, that there was no evidence whatever to sustain a conviction.]

The provisions of section 439 of the new Code are quite distinct. They empower the High Court to exercise the powers of an Appellate Court. The evidence in the case clearly shows that the account of the transactions given by the complainant cannot be true, and that given by the accountant is the most probable one.

Hon. V. N. Mandlik, Government Pleader, for the Crown.

KEMBALL, J.—The question with which we are now concerned, is whether the circumstances brought to our notice in the present case are such that we ought, in the exercise of our discretion, to reverse the convictions of the two accused on the ground that the evidence does not support them. Hitherto we have refused, and we shall continue to refuse, save on very exceptional grounds, to exercise that discretion, but we are satisfied that those grounds exist here. The complainant has sworn that he refused to deliver the salt to the accused, and that it was only on their delivering to him the *hundi* that he consented to, and did make over the salt; but when we look to the date on the permit and the *hundi*, and the entries in the complainant's books, it seems certain that the complainant's story is absolutely untrue, and it is probable that the account given by the two accused accurately represents the facts, *viz.*, that it was only after the salt was delivered that the *hundi* was executed by the first accused during the absence of the second accused, and that the second accused on receiving information of it repudiated the *hundi*. We reverse convictions and sentences, and direct the fines to be refunded.

We think it necessary to point out to the Magistrate, Mr. Drew, that on the facts found by him the charge should have been framed under section 420, Indian Penal Code, and not under section 417, and that, assuming the facts established, a fine of Rs. 30 was neither an adequate nor an appropriate sentence.

Conviction reversed.

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