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whether the plaintiffs or either of them paid the consideration set forth in the deed or a part of it, has been definitely decided by the lower Appellate Court. We must, therefore, refer these two questions now for its decision, and request the Assistant Judge to certify his findings thereon within two months. These issues should be decided on the evidence already on the record.

Issues sent down accordingly.

The lower Appellate Court found, first, that Khatijá gave her full consent to the insertion of Ardesar's name in the deed; and, secondly, that the plaintiffs did not pay the consideration, as set forth in the deed, or any part of it.

On the return of these findings, the case again came on for hearing before West and Birdwood, JJ., on the 30th June, 1886.

Shántárám Náráyan and *Mánekshá Jehángirshá* for appellants.

Gokuldás Kahándás for respondent.

The Court confirmed the decree with costs.

Decree confirmed.

APPELLATE CRIMINAL.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

QUEEN-EMPRESS *v.* SAKHA'RA'M BHA'U.*

1886. *February* 25.

Criminal Procedure Code (Act X of 1882), Secs. 35, 235—Indian Penal Code (Acts XLV of 1860 and VIII of 1882), Secs. 71, 380, 457—Simultaneous convictions for several offences—Sentence.

The accused was convicted at one trial by a Magistrate of the First Class of the offences of house-breaking by night with intent to commit theft, punishable under section 457, and of theft in a dwelling-house, punishable under section 380 of the Indian Penal Code (XLV of 1860),—the two offences being part of the same transaction, the theft following the house-breaking. The prisoner was sentenced to two years' rigorous imprisonment under section 457, and to six months' rigorous imprisonment and a fine of Rs. 100, or, in default of payment, three months' further rigorous imprisonment, under section 380. The District Magistrate referred the case to the High Court, on the ground that the aggregate of punishment awarded on the two heads of charge exceeded the powers of the First Class Magistrate who tried the case. The Sessions Judge,

* Criminal Reference, No. 177 of 1885.

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to whom an appeal had been preferred, was of the same opinion, and reduced the sentence to two years' rigorous imprisonment.

Held, that as the accused committed two distinct offences which did not "constitute, when combined, a different offence" punishable under any section of the Indian Penal Code (XLV of 1860), section 71 of the Code did not apply, and as the aggregate punishment did not exceed twice the amount of punishment which the trying Magistrate was competent to inflict, the sentences were legal under section 35 of the Criminal Procedure Code (Act X of 1882).

Per JARDINE, J. :—The rules for assessment of punishment, contained in section 454 of the Criminal Procedure Code of 1872, having been omitted in section 235 of the Criminal Procedure Code of 1882, must now be sought for in section 71 of the Indian Penal Code (XLV of 1860) and in section 35 of the Criminal Procedure Code (X of 1882).

Reg. v. *Tukayá* (1) distinguished.

THIS was a reference, under section 438 of the Criminal Procedure Code (Act X of 1882), by W. A. East, District Magistrate of Poona.

The reference was made under the following circumstances :—

The accused Sakhárám Bháu was tried and convicted of house-breaking by night with intent to commit theft, and of theft in a dwelling-house, the two acts being part of one and the same transaction, the theft following the house-breaking. The accused was sentenced on 25th November, 1885, by Ráv Sáheb Vishnu Hari Shikharé, 1st Class Magistrate, Táluka Mával of the Poona District, to rigorous imprisonment for two years under section 457 of the Indian Penal Code (XLV of 1860) and to six months' rigorous imprisonment with a fine of Rs. 100, or, in default, to undergo a further rigorous imprisonment for three months under section 380.

In view of the Bombay High Court rulings in *Reg.* v. *Anvarkhán*(2), *Reg.* v. *Govinda*(3) and *Reg.* v. *Tukayá*(1) the District Magistrate was of opinion that the aggregate punishment awarded on the two charges should not have exceeded the powers of the trying Magistrate, *viz.*, two years.

The District Magistrate, therefore, referred the case to the High Court under section 438 of the Criminal Procedure Code (X of

(1) I. L. R., 1 Bom., 214.

(2) Half-yearly statement of Criminal Rulings, 1st January to 30th June, 1872.

(3) Criminal rulings from 1st July to 31st December, 1873.

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1882). Pending the reference, an appeal was made to the Sessions Judge of Poona, who considered the punishment to be illegal and contrary to the provisions of section 71 of the Penal Code (XLV of 1860). He reduced it to two years' rigorous imprisonment.

BIRDWOOD, J.:—With reference to his finding, in appeal, that the aggregate sentence in excess of two years' rigorous imprisonment, passed by the Magistrate on the accused Sakhárám, is illegal, the Sessions Judge should be informed that his view of the law is not correct, as the offences punishable under sections 457 and 380 of the Indian Penal Code (XLV of 1860) do not "constitute, when combined, a different offence," under any section of the Indian Penal Code. A copy of our judgment in Criminal Reference No. 182 of 1885, decided on the 11th January, 1886, should be forwarded to the Sessions Judge. A notice should now issue to the accused to show cause why the sentence passed by the Magistrate should not be restored. Mr. Candy should be requested to communicate a copy of his judgment to the Inspector-General of Police, if he has not already done so.

JARDINE, J.:—I am of the same opinion. This is a case of house-breaking by night with intent to commit theft, punishable under section 457, and of theft in a dwelling-house, punishable under section 380 of the Indian Penal Code,—the two acts being part of the same transaction, the theft following the house-breaking. The prisoner has been sentenced by a Magistrate of the First Class at the same trial to two years' rigorous imprisonment under section 457 and to six months' rigorous imprisonment and a fine of Rs. 100, or, in default of payment, three months' further rigorous imprisonment, under section 380. The District Magistrate referred the case to this Court on the ground that the aggregate of punishment awarded on the two heads of charge should not have exceeded the powers of the trying Magistrate, *viz.*, two years' rigorous imprisonment. The case of *Reg.* v. *Tukayá*[1] is quoted as authority. In the meantime an appeal was made to the Sessions Judge, who considered the punishment illegal, as contrary to section 71 of the Indian Penal Code (Act XLV of

(1) I. L. R., 1 Bom., 214.

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1860), as amended by Act VIII of 1882, and reduced it to two years' rigorous imprisonment.

Reg. v. *Tukayá*[1] was a case precisely similar as regards the transaction and the heads of charge, but it was decided by this Court under the Code of Criminal Procedure of 1872, sec. 454. As remarked by West, J., "the illustration to paragraph III of section 454 indicates that house-breaking, *plus* an offence for the perpetration of which the house-breaking was committed, are regarded by the Legislature, for the purposes of punishment, as one combined offence." The present case has, however, to be decided with reference to the Code of Criminal Procedure of 1882, sec. 235. It is important to notice that the illustration just mentioned (*viz.*, illustration (*n*) to paragraph III of section 454 of the older Code) has been made an illustration of a different category in the corresponding section of the new Code, where it re-appears, but as illustrative of paragraph I of section 235. It is evident, therefore, that the Legislature now looks upon a case, like the present, not as one combined offence, but as constituting more offences than one; and, therefore, the ruling in *Reg.* v. *Tukayá*[1] does not now apply.

The rules for assessment of punishment, contained in section 454 of the older Code, are omitted in section 235 of the Criminal Procedure Code (X of 1882.) They must now be sought for in section 71 of the Indian Penal Code and in section 35 of the present Criminal Procedure Code. As the present case does not fall under paragraphs II and III of section 235 of the Criminal Procedure Code (Act X of 1882,) it does not fall under the similar classifications in the 2nd and 3rd paragraphs of section 71 of the Penal Code. The first clause of section 71 also has no application. We are able, therefore, to eliminate section 71 from the reasoning; and the provisions of section 35 of the present Code of Criminal Procedure come into uncontrolled operation. The aggregate punishment did not exceed twice the amount of punishment which the Magistrate, who tried this case, is, in the exercise of his ordinary jurisdiction, competent to inflict. The sentences were, therefore, legal under section 35.

Notice issued for restoration of sentences passed by Magistrate.

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The following is the judgment in Criminal Reference No. 182 of 1885, decided by Birdwood and Jardine, JJ., on the 11th January, 1886, and referred to in the above judgment, the facts being precisely similar :—

Per Curiam :—"This case must be considered with reference to the provisions of the present Code of Criminal Procedure. It falls under clause I of section 235 of the Code. The accused could, therefore, be legally tried at one trial for each of the offences committed by him, and the separate convictions were legal. (See illustration (*b*) of section 235.) But nothing contained in that section affects the Indian Penal Code (XLV of 1860), sec. 71; and the question, therefore, is, whether the case falls also under that section. If it does, a single sentence could only be passed for one of the offences committed. As the accused committed distinct offences, which, when combined, are not punishable under any single section of the Indian Penal Code, section 71 does not, in our opinion, apply to the case. The sentences passed by the Magistrate were, therefore, legal under section 35 of the Criminal Procedure Code (X of 1882); and the papers can be returned."

APPELLATE CRIMINAL.

Before Mr. Justice Nánábhái Haridás and Mr. Justice Jardine.

QUEEN-EMPRESS *v.* MA'NIA' DAYA'L.*

1886.
February 24.

Criminal Procedure Code (Act X of 1882), Sec. 307—Trial by jury—Verdict of acquittal—High Court's power of interference with the verdict of a jury.

In a case referred under section 307 of the Criminal Procedure Code (Act X of 1882) the High Court will not, as a rule, interfere with the verdict of a jury, except when it is shown to be clearly and manifestly wrong.

THIS was a reference under section 307 of the Criminal Procedure Code (Act X of 1882) by J. W. Walker, Sessions Judge of Ahmedabad.

The accused was charged with the murder of a child, and also with dishonestly retaining stolen property, offences punishable under sections 302 and 411, respectively, of the Indian Penal Code (Act XLV of 1860). The jury unanimously found him not guilty of the first offence, but found him guilty of the second. The Sessions Judge, disagreeing with the verdict of acquittal on the charge of murder, referred the case to the High Court under section 307 of the Criminal Procedure Code (X of 1882).

The reference was as follows :—

* Criminal Reference, No. 4 of 1886.