1885.

JOTIRÁM MÁNIRÁM v. DEVBÁ ISHWARÁPÁ.

The question referred for decision was:—Whether the rule at page 682, Part I, of the *Bombay Government Gazette* of 1882 is legal, and whether the service of notice, in accordance therewith, is good service?

There was no appearance for the parties.

SARGENT, C. J.—We do not think that the rule at page 682 of the *Government Gazette* of 1882 is *ultra vires*. The effect of it is that the conciliator "delivers the notice" by means of the Subordinate Judge. It could not have been intended that he should necessarily deliver it in person.

APPELLATE CRIMINAL.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

QUEEN-EMPRESS *v.* DA'LA' JIVA'.*

1885. *December* 10.

Criminal Procedure Code (*Act X of* 1882), *Secs.* 195, 337 *and* 339—*Indian Penal Code* (*Act XLV of* 1860), *Secs.* 193, 457—*Sanction*—*Evidence of accused illegally pardoned.*

In cases not of the kind contemplated in section 337 of the Criminal Procedure Code (X of 1882) it is not competent to a Magistrate holding a preliminary inquiry to tender a pardon to the accused, or to examine him as a witness.

Statements made by the accused in the course of such examination are irrelevant; and if subsequently retracted, they cannot be used against him, or subject him to a prosecution for giving false evidence, under section 193 of the Indian Penal Code (XLV of 1860).

Reg. v. *Hanmantá*(1) followed.

When a pardon is legally tendered to the accused under section 337 of the Criminal Procedure Code (X of 1882), and the accused makes a statement on oath which he retracts in a subsequent judicial proceeding, a proper sanction is necessary for a prosecution for giving false evidence on each branch of the alternative charges.

In re Bdlájí Sitárám(2) followed.

Such sanction can only be granted before, and not after, the commencement of the prosecution.

THIS was an appeal by Government from an order of acquittal made by A. Shewan, Assistant Sessions Judge of Ahmedábád.

* No. 130 of 1885.

(1) I. L. R., 1 Bom., 610. (2) 11 Bom. H. C. Rep., 34.

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QUEEN-EMPRESS v. DÁLÁ JIVÁ.

The facts of the case are sufficiently stated in the following judgment of the Assistant Sessions Judge :—

"The accused is charged with having given false evidence, under section 193 of the Indian Penal Code (XLV of 1860), under the following circumstances. Some two years ago a dacoity was committed, and the present accused was one of a number of persons apprehended. At the trial he was tendered a pardon, and gave evidence. In that evidence he stated that one Buptá Lillá was concerned in the offence. Lately, Buptá has been apprehended and tried, and the present accused again examined as a witness. This time he has denied that Buptá had any part in the dacoity. As one of these statements must be false, there is no doubt that he has given false evidence on one occasion or the other. An objection has, however, been taken by the accused's pleader to the effect that as the sanction of the High Court, as required by the last clause of section 339 of the Criminal Procedure Code (X of 1882), has not been obtained, this prosecution must fail. And that appears to be so.

"I have, accordingly, instructed the assessors to give opinions of not guilty; and concurring with them I find that the accused, Dálá Jivá, is not guilty of the offence of giving false evidence, punishable under section 193 of the Indian Penal Code (XLV of 1860), and acquit him, and direct him to be discharged.

Against this acquittal an appeal was preferred by Government to the High Court.

Pándurang Balibhadra, Acting Government Pleader, for the Crown.

There was no appearance for the accused.

Pándurang Balibhadra.—The order of acquittal is wrong. The accused is clearly guilty of giving false evidence, either on the former occasion, when he was examined as an approver, or on the present occasion. One of the two statements is clearly false. If his former statement is false, then, no doubt, the sanction of the High Court is necessary. If it was not obtained before the trial, that does not vitiate the whole proceedings. The defect could have been cured by an adjournment of the trial for a time, and an

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application for a sanction to this Court. The Government Prosecutor in the lower Court applied for adjournment for this purpose, but it was not granted. If the accused's statement on the present occasion is false, the very fact of his committal by the Magistrate, before whom it was made, amounts to a sanction, and no further sanction is necessary—*Ishri Prasád* v. *Shám Lál*[1].

[BIRDWOOD, J.—What was the original complaint against the accused and his accomplices in 1883? Was it one of dacoity, or simply house-trespass by night?]

The record of the case does not show the precise nature of the complaint.

[BIRDWOOD, J.—We cannot assume that the complaint was one of dacoity. If the case was not one triable exclusively by the Court of Session, the Magistrate had no power to tender a pardon and examine the accused on oath in 1883: see section 337 of the Criminal Procedure Code (X of 1882). His former statement, therefore, cannot be used against him.]

BIRDWOOD, J.—The accused persons under trial in 1883 were charged under section 457 of the Indian Penal Code (XLV of 1860), that is, with an offence not triable exclusively by the Court of Session. The Government Pleader is unable to inform us whether the complaint against them was one of dacoity,—that is, of an offence triable exclusively by a Court of Session, or not. If the case was not of the kind contemplated in section 337 of the Code of Criminal Procedure (Act X of 1882), then it was not competent to the Magistrate, Mr. Morison, who made the preliminary inquiry in 1883, to tender a pardon to the accused in the present case, who was one of the accused in the former case, or to examine him as a witness; and the deposition of the present accused, recorded in the former case, could not be used against him in the manner in which it is sought to be used: see *Reg.* v. *Hanmanta*[2]. He could only, in that event, be charged with giving false evidence in the recent case before Mr. Maconochie. And there being nothing to show that his evidence in this case is false, the prosecution would necessarily fail.

(1) I. L. R., 7 All., 871. (2) I. L. R., 1 Bom., 610.

If, on the other hand, a pardon was legally tendered to the accused in 1883, the proper sanction would be necessary for the present prosecution on each branch of the alternative charges—*In re Bálāji Sitárám*[1]. And, in respect of the statement made in 1883, the sanction of the High Court would be necessary under section 339 of the Criminal Procedure Code (X of 1882). That sanction has never been given, and could not now be given; (see section 195 of the Code of Criminal Procedure (X of 1882), clause (*b*)). We do not, under the circumstances, consider the question whether there was sufficient sanction as regards the branch of the charge having reference to the evidence given before Mr. Maconochie.

Appeal dismissed.

(1) 11 Bom. H. C. Rep., 34.

REVISIONAL CRIMINAL.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

QUEEN-EMPRESS *v.* SHAIK ADAM VALAD SHAIK FARID AND SHAIK IBRA'HIM VALAD SHAIK UMAR.*

1886. *January* 8.

Theft—Possession—Fish in an enclosed tank—Penal Code (Act XLV of 1860), Section 379.

Where the accused were found fishing without permission in an enclosed tank belonging to the municipality of the town of Sirsi, it was held that they could be convicted of theft, as the tank, from which the fish were taken, was apparently an enclosed tank, and the fish were, therefore, restrained of their natural liberty, and liable to be taken at any time according to the pleasure of the owner, and were, therefore, subjects of theft.

Bhusun Parui v. *Denonáth Banerjee*[1] and the *Queen* v. *Revu Pothadu*[2] distinguished.

THIS was a reference by the District Magistrate of Kánara under section 438 of the Criminal Procedure Code (X of 1882).

The reference, so far as it is material for the purposes of this report, was as follows :—

"On the 26th April, 1885, the accused were seen fishing with a rod in the "Kotekere" tank within the Sirsi municipal limits.

* Criminal Reference, No. 159 of 1885.

(1) 20 Calc. W. R. Cr. Rul., 15. (2) I. L. R., 5 Mad., 390.