FULL BENCH.

Before Mr. Justice Parsons, Acting Chief Justice, Mr. Justice Candy, Mr. Justice Ranade, Mr. Justice Tyabji, Mr. Justice Fulton, Mr. Justice Russell and Mr. Justice Starling.

1899.
March 14.

QUEEN-EMPRESS *v.* MALU AND QUEEN-EMPRESS *v.* NAGU.*

Criminal Procedure Code (Act V of 1898), *Sec.* 35—*Conviction of several offences at one trial—One sentence only to be passed in such cases—Sentence—Indian Penal Code (Act XLV of* 1860), *Sec.* 71.

Where a person commits house-breaking in order to commit theft, and theft, he may be charged with, and convicted of, each of these offences. In awarding punishment under the provisions of section 71 of the Indian Penal Code (Act XLV of 1860) the Court should pass one sentence for either of the offences in question and not a separate one for each offence.

If in such a case two sentences are passed, and the aggregate of these does not exceed the punishment provided by law for any one of the offences, or the jurisdiction of the Court, that would be an irregularity, and not an illegality, calling for the interference of a Court of Appeal or Revision.

REFERENCE to a Full Bench.

The reference was made in two cases which came up before the High Court under section 438 of the Code of Criminal Procedure (Act V of 1898).

(1) In *Queen-Empress* v. *Malu Arjun and another* the accused were convicted at one trial by the Second Class Magistrate at Máhim of theft in a dwelling-house, and house-breaking by night in order to commit theft, under sections 380 and 457 of the Indian Penal Code, and sentenced to rigorous imprisonment for fifteen days and for one month separately for each offence.

The District Magistrate of Thána, holding that the separate sentences were illegal, referred the case to the High Court.

(2) In the case of *Queen-Empress* v. *Nagu Babaji* the accused was convicted by the Second Class Magistrate at Sátára upon separate charges, at one trial, of theft in a dwelling-house under section 380 and of house-breaking by night under section 457 of the Indian Penal Code, and was sentenced to one month's rigorous imprisonment for each offence, the sentences to take effect one after the other.

* Criminal References, Nos. 26 and 34 of 1899.

1899.

QUEEN-EMPRESS
v.
MALU.

On appeal the District Magistrate passed the following order:—

"The Second Class Magistrate's finding is wrong. He should have treated the two offences as forming one (section 35, Criminal Procedure Code, and Criminal Ruling No. 36 of 1898), and have inflicted one sentence, and not two. I, therefore, alter his finding and sentence, and find Nagu Babaji guilty of an offence under section 457, Indian Penal Code, and sentence him to two months' rigorous imprisonment."

The Sessions Judge, being of opinion that the District Magistrate's order was illegal, referred the case to the High Court under section 438 of the Criminal Procedure Code (Act V of 1898).

Both these references came on for hearing at first before a Division Bench (Parsons, Acting C. J., and Ranade, J., who referred the following questions to a Full Bench:—

(1) Whether a person who has committed house-breaking in order to commit theft and theft, can be charged with, and convicted of, each of these offences?

(2) If so, can a separate sentence be passed on each conviction, provided that the Court does not exceed its ordinary power of inflicting punishment, and that the aggregate sentence passed does not exceed the punishment provided by law for either of the offences?

Ráo Bahádur *Vasudev J. Kirtikar*, Government Pleader, for the Crown:—Before section 35 of the Criminal Procedure Code was amended by Act V of 1898, there was a conflict of opinion between the different High Courts in India as to whether in a case like the present it was competent to a Court to record a separate conviction and pass a separate sentence for each of the offences charged. The High Court of Calcutta was against two separate convictions and sentences. But this Court took a different view—*Reg.* v. *Anwarkhan*[1]; *Reg.* v. *Tukaya*[2]. The Allahabad High Court agreed with this Court—*In the matter of Daulatya*[3]; *Queen-Empress* v. *Zorsing*[4]. The Madras High Court was of the same opinion: see (1869) 4 Mad. H. C. R. Appx.

(1) (1872) 9 B. H. C. R., 172.
(2) (1876) 1 Bom., 214.
(3) (1880) 3 All., 305.
(4) (1888) 10 All., 146.

1899.

QUEEN-EMPRESS v. MALU.

xxxvii. The High Courts of Bombay, Allahabad and Madras agreed in holding that a separate conviction and a separate sentence should be passed for each of the offences charged. The question is whether the new Code of 1898 has made any change in the existing law. An explanation is added to section 35 of the Code of 1882.

The illustration to the section has created the difficulty. But section 235 of the Code of 1882 is not amended or altered. Nor is section 71 of the Penal Code amended. That being the case, section 35 of the Criminal Procedure Code of 1898 should be read with section 235 of the same Code, and with section 71 of the Penal Code. Section 235 of the Criminal Procedure Code provides that a person may be charged at one trial with more than one offence. And illustration B to the section shows that he may not only be separately charged with, but also separately convicted of, each of the offences. Section 258 of the Code provides that when a charge is framed, the accused must be either convicted or acquitted. If he is convicted, a sentence must be passed according to law. It follows, therefore, that, if an accused person is charged with and convicted of several distinct offences, there must be a separate sentence for each offence. Then section 71 of the Indian Penal Code remains intact. It does not deal with sentences but with the quantum of punishment. In the Full Bench case of *Queen-Empress* v. *Bana Punja*[1] it is expressly laid down by this Court that where a person is convicted of rioting and of hurt, it is not illegal to pass two sentences, one for rioting and one for hurt, provided the total punishment does not exceed the maximum which the Court might pass for any one of the offences. To the same effect is the ruling in *Queen-Empress* v. *Sakharam*[2].

H. C. Coyaji, amicus curiæ:—I submit that separate convictions and separate sentences can only follow distinct offences. Section 35 of the Code of Criminal Procedure of 1898 allow separate sentences to be passed only if the offences are distinct. But the illustration to the section shows that house-breaking with intent to commit theft and theft are not distinct offences.

(1) (1892) 17 Bom., 260. (2) (1886) 10 Bom., 493.

The explanation and illustration to this section must be read together. The object of amending the section was to make the law on this subject clear and consistent. The rulings under the old Code are, no doubt, against my contention. But the ground on which they are based was that theft and housebreaking in order to commit theft were treated as two distinct offences. But the new Code declares that they are not distinct offences. Those rulings, therefore, are no longer any authorities in point. As to the state of the law under the Code of 1872, see *Reg.* v. *Anwarkhan*(1), *Reg.* v. *Govinda*(2) and *Reg.* v. *Noujan*(3).

Section 235 (Illustration (*b*)) of the Code of Criminal Procedure is not against my contention. If the Legislature has now expressly excluded the offences in question from the category of "distinct" offences, it is not open to contend that they are distinct offences by analogy of the cases. Moreover, clause 4 of section 235 provides that nothing contained in that section affects section 71 of the Indian Penal Code. The former deals with the procedure at a trial, the latter with punishment only. Because more charges than one can be framed at one trial, it does not necessarily follow that there should be separate sentences also. The section is not imperative but enabling only: see Weir's Criminal Rulings, p. 895; see also *Queen-Empress* v. *Ugra Virchand*(4).

Upon the second question, I submit that a separate punishment upon each charge would be illegal. The offences form parts of one and the same transaction: see *Queen-Empress* v. *Muse Bagas*(5).

PER CURIAM:—We are of opinion that the first question should be answered in the affirmative.

We are also of opinion that looking at the illustration and explanation added to section 35 of the Criminal Procedure Code, 1898, it is the intention of the Legislature that a Court in awarding punishment under the provisions of section 71, Indian Penal Code, should pass one sentence for either of the offences in question, and not a separate one for each offence; but if two sentences

(1) Cr. Rul., 23rd May, 1872.
(2) Cr. Rul., 11th Dec., 1873.
(3) (1872) 7 Mad. H. C. Rep., 375.
(4) Cr. Rul. for 1886, No. 59.
(5) Cr. Rul. for 1889, No. 63.

1899.

QUEEN-EMPRESS v. MALU.

are passed, and the aggregate of these does not exceed the punishment provided by law for any one of the offences, or the jurisdiction of the Court, we are of opinion that that would be an irregularity only, and not an illegality requiring interference by a Court of appeal or revision.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

1899. *March* 20.

MAHAMAD DASU (ORIGINAL DEFENDANT), APPELLANT, v. AMANJI DASU (ORIGINAL PLAINTIFF), RESPONDENT.*

Bhágdár—Bhágdári estate—Alienation by a bhágdár of his share—Bombay Act V of 1862, *Sec.* 3*—Collector setting aside sale of share—Subsequent suit to recover share—Limitation.*

In the year 1871 the plaintiff, a co-sharer in a bhág, alienated his share to a stranger. In the year 1882 the Collector declared the alienation to be illegal, and in the year 1883 ordered that the plaintiff should be reinstated in the possession of his share. At plaintiff's request his share was given into the possession of the defendant, who was the plaintiff's brother and khátedár of the entire bhág. In the year 1892 the plaintiff brought this suit against the defendant to recover possession of his share. The defendant contended that the suit was time-barred, the plaintiff not having been in possession since the year 1871.

Held, that the suit was not barred, the possession of plaintiff's alienee being the possession of the plaintiff himself, and the defendant not being entitled to tack to the period of his own possession that of the plaintiff's alienee.

SECOND appeal from the decision of R. J. C. Lord, Assistant Judge of Broach with full powers, confirming the decree of Chunilal D. Kavishvar, Second Class Subordinate Judge.

In 1871 plaintiff, a co-sharer in a certain bhág, sold his share to one Valli Adam, who was a stranger to the bhágdár family. Valli Adam continued in possession till the year 1883, when the Collector, who had in the meanwhile declared the sale to be illegal by an order dated the 12th January, 1882, directed that the plaintiff's share be restored to him. The plaintiff thereupon requested that, as he was not living in the village in which the bhág was situate, possession of his share should be given to the defendant, who was his elder brother and the khátedár of the entire bhág. The defendant was accordingly put into possession.

* Second Appeal, No. 575 of 1898.