

CRIMINAL REVISION.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

EMPEROR v. DAVID SASSOON *.

1925.

January 14.

Criminal Procedure Code (Act V of 1938), section 488—Children—Neglect to maintain—Order by Magistrate for maintenance—Offer by father to maintain children in future.

Once it is satisfactorily proved that a father has refused or neglected to maintain his children an offer by him to maintain them in the future is not sufficient of itself to debar a Magistrate from making an order for their maintenance under section 488 of the Criminal Procedure Code. Such an offer may be considered on its merits and in the light of the circumstances in which it is made.

THIS was a criminal application for revision against an order passed by P. L. Thacker, Additional Presidency Magistrate of Bombay.

Proceedings under section 488 of the Criminal Procedure Code.

The applicant resided with his wife and four children at Agripada in Bombay. He was a taxi-driver and had a monthly income of about Rs. 300. Owing to dissensions between him and his wife he left his home, deserting his wife and children, in June 1921. Some time after the separation, he allowed Rs. 100 monthly to his wife and children, by way of maintenance, up to June 1924.

In October 1924, the wife applied under section 488, Criminal Procedure Code, to a Presidency Magistrate in Bombay for an order for maintenance for herself and her four sons. In reply, the husband accused his wife of unchastity, but offered to keep and maintain the children.

The learned Magistrate held on the facts that the imputed unchastity of the wife was not proved, and, being of opinion that the offer by the husband to maintain

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the children did not debar him from making an order for their maintenance under section 488, Criminal Procedure Code, made an order directing the payment of Rs. 50 to his wife and Rs. 40 to the children as maintenance, every month.

David Sassoon applied to the High Court against the order, and obtained a rule on November 26, 1924.

Thereafter, he made an application to the High Court under section 491, Criminal Procedure Code, to obtain custody of the children. The application was heard by Mirza J. who came to the conclusion that the interests of the children would be materially prejudiced if he ordered them to reside with their father, and accordingly rejected the application on December 4, 1924.

The rule was heard.

G. N. Thakor, with *I. J. Sopher* and *S. G. Shertukde*, for the applicant, David Sassoon.

Daphtary, instructed by *Dixit and Maneklal*, for the wife.

S. S. Patkar, Government Pleader, for the Crown.

MACLEOD, C. J. :—The complainant in this case was one Mrs. David Sassoon who presented an application under section 488, Criminal Procedure Code, for maintenance for herself and her four sons against the respondent, David Sassoon, her husband and the father of the children. The defence to the application, as set out in the respondent's statement, was that the complainant was misbehaving herself with a certain person, and had gone to Calcutta without his permission. With regard to the maintenance of the four sons, the respondent said that he was willing to have the children with him.

On the facts the Magistrate came to the conclusion without any hesitation that the defence was not proved in any of its material particulars. Consequently the

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charge of misconduct was proved to be false. The Magistrate further considered that the complainant had satisfied him that the respondent having sufficient means was neglecting to maintain his wife and his four sons, who were unable to maintain themselves. The ages of the children varied from seven to eleven. The Magistrate then considered the contention of the respondent that he was willing to keep the children himself, and that, therefore, no order under section 488 could be made against him. He said :—

“ The point is not free from difficulty. It is not covered by any Bombay authority, so far as I know. There are conflicting rulings of the Punjab Court, supporting respondent's contention, on the one hand (viz., P. R. No. 18 of 1894 and P. R. No. 22 of 1917) and the decisions of the Burma Court, supporting the complainant on the other hand (16 Crim., L. J. 656) ... Considering the object underlying section 488, Criminal Procedure Code, I prefer to follow Burma rulings rather than Punjab ones. Otherwise in those cases where children are very young, as in this case, a man knowing full well that no mother would part with such children, has simply to make an ostensible offer to keep the children with him and he can thus defeat the object of section 488, which is to secure provision for helpless children.”

The Magistrate then made an order that the respondent should pay in the aggregate Rs. 90 a month to the complainant for the maintenance of herself and the children.

On November 26, a rule was granted on the application of the respondent in order that this question might be decided by this Court. Thereafter an application was made on the Crown side by the respondent under section 491, Criminal Procedure Code, asking that the custody of the sons should be given to him. The application was heard by Mr. Justice Mirza who came to the conclusion that the petitioner's allegation that for some time past his wife had led an unchaste life and that he was afraid that if his children were to continue to reside with her they would be contaminated, was absolutely without foundation. The learned

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Judge was satisfied on the evidence that Mrs. Sassoon had looked after the children very well. She had sent the elder boys to school and had educated them at her own expense. He was also satisfied that the children would be much better looked after by the mother than they would be if they were thrown to the tender mercies of their father.

We can now consider the proper construction of section 488 of the Criminal Procedure Code in the light of the respondent's contentions.

We think that with regard to the maintenance of children, it is sufficient under sub-section (1) of section 488 if the neglect or refusal to maintain them is proved. On such proof the Magistrate can make an order for the payment of a monthly allowance for the maintenance of each child to such person as the Magistrate from time to time directs. An offer to maintain the children in the future is not sufficient of itself to debar the Magistrate from making the order. The Magistrate will be entitled to consider the circumstances in which the offer was made, and whether it was right and proper that the children, if not in the custody of the father, should be handed over to him.

With regard to the maintenance which can be directed to be paid to a wife in case her husband neglects or refuses to maintain her, there is a special proviso to the section that if the husband offers to maintain his wife on condition of her living with him, and she refuses to live with him, the Magistrate may consider any grounds of refusal stated by her, and may make an order under the section notwithstanding such offer, if he is satisfied that there is just ground for so doing. There was a very good reason in our opinion why the Legislature did not include children in that proviso, namely, so that the onus should not be thrown

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on them of stating grounds of refusal which would have to be considered by the Magistrate before making an order for their maintenance. It could not have been intended that the father by stating his willingness to maintain the children could deprive the Magistrate of his jurisdiction to make an order under the section. It seems to us that once the Magistrate is satisfied that a father has neglected or refused to maintain his children, he is entitled to make an order for their maintenance, though he may consider any offer by the father to maintain them in the future on its merits. In this case, agreeing entirely with the remarks of the learned Judge who heard the application under section 491, Criminal Procedure Code, we are satisfied that the children ought to remain with the mother. The rule will, therefore, be discharged.

COYAJEE, J. :—I agree.

Rule discharged.

R. R.