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made against the petitioner, no doubt, must have been very annoying to him, and the subsequent proceedings have shown that there was no foundation for the scandalous allegations the opponent had made against the petitioner. But that would not by itself justify the petitioner in denying his wife's right to a continuance of her maintenance or to insist that those allegations should be unconditionally withdrawn in a Court of law before he would agree to maintain her. The learned Magistrate is right in holding that the attitude taken up by the petitioner is tantamount to a denial of the opponent's right of maintenance. The learned Magistrate gave a reasonable opportunity to the petitioner to make up his quarrel with the opponent, but the petitioner did not avail himself of the Magistrate's suggestion. In revision, primarily we are not concerned with the findings of facts. The application, in my opinion, fails on the grounds of law which were urged by Mr. O'Gorman.

Application dismissed.

CRIMINAL REFERENCE

Before Mr. Justice Fawcett and Mr. Justice Mirza.

EMPEROR *v.* PANDU AVACHIT BHIL.*

1927

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Criminal Procedure Code (Act V of 1898), section 35—Distinct offences—Separate sentences—Bombay Abkari Act (Bom. V of 1878), section 43 (1) (a) *and* (h).†

Offences under clauses (*a*) and (*h*) of section 43 (1) of the Bombay Abkari Act, 1878, viz., possession of illicit liquor and possession of apparatus for manufacturing illicit liquor, are distinct offences, for which separate sentences can be passed.

Queen-Empress v. *Shivdia*,[1] followed.

[1] (1890) Ratanlal's Crim. Cas. 523.

*Criminal Reference No. 100 of 1927.

†The material portions of the section run as follows :—

43 (1). Whoever in contravention of this Act or of any rule or order made under this Act or of any license, permit or pass obtained under this Act—

(*a*) imports, exports, transports or possesses any excisable article or hemp, or

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[*Continued on next page.*

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THIS was a reference made by R. G. Gordon, District Magistrate of Nasik.

The accused was convicted (*a*) of having in his possession 1½ drams of illicit liquor (section 43 (1) (*a*) of the Bombay Abkari Act) and (*b*) of having in his possession apparatus for manufacturing illicit liquor (section 43 (1) (*h*) of the Act), and sentenced to pay a fine of Rs. 25 for the first offence and to suffer rigorous imprisonment for two months for the second.

The District Magistrate of Nasik was of opinion that the two separate sentences for what were not distinct offences were illegal under section 35 of the Criminal Procedure Code, and referred the case to the High Court.

P. B. Shingne, Government Pleader, for the Crown.

There was no appearance for the accused.

FAWCETT, J.:—In this case the accused was convicted of two offences: (1) of having in his possession 1½ drams of illicit liquor—an offence under clause (*a*) of sub-section (1) of section 43 of the Bombay Abkari Act of 1878, and (2) of having in his possession apparatus for manufacturing illicit liquor—an offence under clause (*h*) of the same sub-section. He was awarded a distinct sentence for each offence. The District Magistrate has referred the case to us, being of opinion that the two sentences are illegal, as the second offence was included in the former, and under the Explanation to section 35 of the Criminal Procedure Code, they were not distinct. It should be

(*h*) uses, keeps or has in his possession any materials, still, utensil, implement or apparatus whatsoever for the purpose of manufacturing any excisable article other than toddy,

* * * * * * *

shall, on conviction, be punished for each such offence with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both:

* * * * * * *

noted that this particular Explanation has been repealed by Act XVIII of 1923, and therefore does not affect the case. But the District Magistrate has also given a reference to some rulings which are mentioned at pages 36 and 37 of the Bombay Excise Manual, Volume I. These presumably are the cases mentioned in paragraphs 7, 8 and 9 on those pages, and all these were cases where the accused was convicted of the offence of manufacturing liquor and being in possession of apparatus for manufacturing liquor. In the third case, the accused was also convicted of being in possession of some Mhowra flowers, as well as having an apparatus for manufacturing country liquor from those flowers; and the view which was taken in these rulings that the offence of manufacturing illicit liquor necessarily covered the offence of possessing the apparatus for manufacturing the liquor, because the manufacture cannot be made without such apparatus, was one that was supported by the Explanation to section 35 of the Criminal Procedure Code. That Explanation has, however, now been repealed, and it is open to question whether the same view can now be supported. But, however that may be, there is, in my opinion, no proper basis for saying that the offence of possessing illicit liquor is necessarily covered by the offence of possessing the apparatus for manufacturing such liquor. The two offences are, in my opinion, quite distinct. Similarly, it was held in *Queen-Empress* v. *Shivdia*,[1] that the possession of materials for manufacturing liquor and the act of manufacturing liquor are quite distinct offences, respectively punishable under different clauses of section 43 of the Bombay Abkari Act. This is a ruling which conflicts with those that are mentioned in the Excise Manual and which, I have

[1] (1890) Ratanlal's Crim. Cas. 523.

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already said, are open to question under the present law. The accused has presumably already suffered the imprisonment to which he was sentenced for the second offence. We see no reason to interfere in revision and direct the papers to be returned to the District Magistrate.

MIRZA, J. :—I agree.

Answer accordingly.

R. R.

CRIMINAL APPELLATE

Before Mr. Justice Fawcett and Mr. Justice Mirza.

EMPEROR *v.* BYRAMJI JAMSETJI CHAEWALLA.*

1927

December 12

Indian Penal Code (Act XLV of 1860), section 408—Criminal breach of trust—Exact amount misappropriated need not be proved.

On a charge of criminal misappropriation, it is sufficient if the prosecution establishes that some of the money mentioned in the charge has been misappropriated by the accused, even though it may be uncertain what is the exact amount so misappropriated.

Queen-Empress v. *Waman*,[1] followed.

THIS was an appeal by the Government of Bombay from an order of acquittal passed by H. P. Dastur, acting Chief Presidency Magistrate of Bombay.

The accused, who was a cashier in a firm, was charged with the offences of criminal breach of trust as a servant in respect of an aggregate sum of Rs. 39,942-3-7 and destruction of accounts, punishable under sections 408 and 477A of the Indian Penal Code, 1860.

The trying Magistrate acquitted the accused on the grounds that a general charge of Rs. 39,942-3-7 could not stand and that when such a general charge was made, it was not legal to convict the accused even if the evidence showed that he had committed a defalcation of some indefinite amount.

*Criminal Appeal No. 350 of 1927.

[1] (1893) Ratanlal's Crim. Cas. 659.