PRIVY COUNCIL.

FAKIRA AND OTHERS, APPELLANT *v.* THE KING EMPEROR, RESPONDENT.

J. C.*
1937
February 23

[On Appeal from the Court of the Resident at Hyderabad]

Code of Criminal Procedure (Act V of 1898 as modified and made applicable in the Administered Areas in Hyderabad State), sections 268 and 377—Trial by Additional Sessions Judge without jury or assessors—Validity of trial—Confirmation of sentence of death by Additional Judge sitting alone—Validity of confirmation.

An Additional Sessions Judge appointed by the Resident to exercise jurisdiction in a Court of Session is entitled to exercise the discretion conferred by section 268 of the Code of Criminal Procedure as modified and applied in the Administered Areas in Hyderabad and try a case without a jury or assessors.

The provisions of section 377 of the Code are peremptory and an order of confirmation of a sentence of death made, passed and signed by a single Judge is not made in compliance with the section and is invalid as the Court of the Resident consists of two Judges.

Appeal of appellants, other than Fakira, dismissed. Judgment and order of the Court of the Resident, so far as it was applicable to the appellant Fakira, set aside and case remitted to that Court for disposal in accordance with the provisions of sections 375 to 379 of the Code of the sentence of death submitted for confirmation.

APPEAL (No. 99 of 1936) from a judgment of the Court of the Resident in Hyderabad (January 17, 1936) which confirmed a judgment of the Additional Sessions Judge of Secunderabad (November 28, 1935).

The material facts are stated in the judgment of the Judicial Committee.

Subba Row and *Ralph Parikh* for the appellants. Under section 268 of the Code as modified and applied to Hyderabad it is the Sessions Judge alone who is empowered in his discretion to dispense with a jury and assessors. An Additional Sessions Judge is not so empowered and a trial by him without a jury or assessors is without jurisdiction. The Code makes a distinction between

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* *Present:* Lord Thankerton, Lord Normand and Sir Shadi Lal.

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Additional and Assistant Sessions Judges and Sessions Judges. Their powers are not equal; see sections 9, 17 (*3*), 31 (*2*), 193 (*2*), 408 and 409 and *Emperor* v. *Abdul Razzak*,[1] *Emperor* v. *Birju Marwari*.[2]

The Court of the Resident consists of the Resident and an Additional Judge. Under section 377 of the Code a confirmation of a sentence of death must, therefore, be made, passed and signed by the two judges. The order of confirmation of the sentence of death on Fakira having been made, passed and signed by only one judge, has not been made in compliance with the provisions of the section which are peremptory and is therefore invalid. [The further arguments were directed to the facts.]

Dunne, K. C., and *Wallach*, for the respondent. The trial is by the Court of Session. An Additional Sessions Judge or an Assistant Sessions Judge in trying cases exercises the jurisdiction of a Sessions Judge except in so far as it may be specially limited.

There is a limitation of the power of an Assistant Sessions Judge in the matter of the sentence which he may pass, but his jurisdiction is not otherwise limited. Jurisdiction is not affected by provisions as to appeals.

The provisions of section 377 appear to be clear and it is not possible to support the order confirming the sentence of death on Fakira. It is submitted that, if the order is set aside, the case should be remitted to be dealt with in accordance with the provisions of the section.

The judgment of the Judicial Committee was delivered by

LORD THANKERTON. This is an appeal by special leave from a judgment and order of the Court of the Resident

[1] (1915) 37 All. 286. [2] (1921) 44 All. 157.

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at Hyderabad, dated January 17, 1936, which affirmed the convictions and sentences passed upon the appellants by the Additional Sessions Judge of Secunderabad by his judgment dated November 28, 1935.

The appellants and another were tried by the Additional Sessions Judge, sitting without jury or aid of assessors. The learned Judge convicted the appellant Fakira of offences punishable under sections 148 and 302 of the Indian Penal Code, and sentenced him to two years' rigorous imprisonment under section 148 and to death under section 302. The appellant Shankar was convicted under section 148, and was sentenced to two and a half years' rigorous imprisonment and to pay a fine of Rs. 200 and in default to suffer four months' rigorous imprisonment. The appellant Kunnay Lingayya was convicted under section 147, and was sentenced to eighteen months' rigorous imprisonment and to pay a fine of Rs. 200 and in default to suffer four months' rigorous imprisonment. The appellant Narahari was convicted under section 148, and was sentenced to two years' rigorous imprisonment and to pay a fine of Rs. 100 and in default to suffer rigorous imprisonment for two months.

From these convictions the appellants appealed to the Court of the Resident at Hyderabad, and the case was also referred by the Additional Sessions Judge under section 374 of the Code of Criminal Procedure for the confirmation of the death sentence passed on Fakira. The appeal was heard by the Additional Judge of the Court of the Resident, who, on January 17, 1936, dismissed the appeals and affirmed the sentences, and passed a separate order affirming the sentence of death on the appellant Fakira.

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On February 1, 1936, on an appeal for mercy by the appellant Fakira, the Resident at Hyderabad, under section 401 of the Criminal Procedure Code, commuted the sentence of death to one of 10 years' rigorous imprisonment.

Three contentions were submitted by counsel for the appellants, one of which applied only to the case of the appellant Fakira.

The occurrence which gave rise to the prosecution out of which this appeal arises took place in Secunderabad within the Administered Areas in the Hyderabad State. By Notification No. 260-I, dated April 24, 1929, in exercise of powers conferred by the Indian (Foreign Jurisdiction) Order in Council, 1902, the Governor-General applied *inter alia* the Indian Penal Code and the Indian Code of Criminal Procedure to these Administered Areas, with certain modifications, which included a provision that references to the Local Government should be read as referring to the Resident at Hyderabad, and references to the High Court should be read as referring to the Court of the Resident at Hyderabad. Further, section 268 of the Criminal Procedure Code, which provides that all trials before a Court of Session shall be either by jury or with the aid of assessors, was applied subject to the modification that "trials before a Court of Session may, in the discretion of the Sessions Judge, be without jury or aid of assessors".

The Court of the Resident at Hyderabad consists of the Resident and an Additional Judge. The Cantonment of Secunderabad is a Sessions Division, the Court of Session consisting of a Sessions Judge and an Additional Sessions Judge.

In the first place, the appellants maintain that the discretionary power of dispensing with a jury and aid of assessors is conferred only upon the Sessions Judge and not

upon an Additional Sessions Judge, and sought to support the contention by reference to a number of sections of the Criminal Procedure Code. The Resident has the power under section 9 (*3*) to appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in one or more Courts of Session. This clearly means the exercise of jurisdiction as a Sessions Judge, and the later provisions as to the arrangement of business and as to the cases to be tried by them [sections 17 (*3*) and (*4*), and 31 (*2*)] do not affect their jurisdiction as a Sessions Judge in any case allotted or made over to them. Section 31 (*3*) does contain an express limitation of the power of an Assistant Sessions Judge in the matter of sentences. The provisions as to appeal in sections 408, 409 and 410 do not affect the question of jurisdiction at the trial, and section 438 as to powers in cases of reference or revision of decisions of a lower Court is equally irrelevant. Their Lordships are of opinion that the Additional Sessions Judge was entitled to exercise his discretion under section 268 of the Criminal Procedure Code.

In the second place, the appellants submitted that the Additional Judge of the Court of the Resident, on the appeal, had erred in founding his conclusions on the view that the evidence of an eye-witness, Vasanta Rao, was corroborated in certain particulars by the evidence of a witness, Srinivasa Rao, and that this error vitiated his judgment.

During the night of August 24, 1935, a Hindu-Muhammadan riot took place at Secunderabad, during which a Muhammadan, Muhammad Ismail, was killed. The case for the prosecution was that when the deceased was proceeding on his bicycle towards his home on that evening and was passing the house of the appellant Kunnay Lingayya he was attacked by the appellant Shankar with a lathi, whereupon he fell off his bicycle and getting up ran

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towards the east, whereupon he was surrounded by about fifteen persons, including the appellants and struck twice on the head by the appellant Fakira with a lathi. The result was that he fell back unconscious and never regained consciousness, but died about twelve hours after the attack.

The witness Vasanta gave evidence which, if believed, justified the conviction of all the appellants. His credibility was attacked and was discussed by the Trial Judge, who, nevertheless, accepted his story as true in essential particulars. The Trial Judge also took into account the evidence of the witness Srinivasa; the learned Judge says:—

"The principal feature of the evidence of Srinivasa in this Court is that whereas he has to a considerable extent given the same evidence as in the committing Magistrate's Court until the stage when accused 2 (Shankar) struck the Muhammadan coming on the cycle, he has declined to depose that accused 2 struck the Muhammadan with a lathi on his back, as a result of which the Muhammadan fell off the cycle, whereupon the Muhammadan left his cycle and ran in the direction from which he had come and the Hindus ran after him and surrounded him and that while accused 2 stood where he was and struck the cycle with a lathi he saw the Muhammadan surrounded near the toddy shop and being beaten after which he was frightened and went away; and on the other hand he has deposed as follows: 'A Muhammadan boy was coming on a cycle. The 50 persons that were there all of them surrounded him. I got afraid and I went away. I do not know anything more, it was dark and as there were about 50 people I was not able to make out any.' The principal result of his evidence is that he does not implicate accused 2 at all which he had previously done and that he does not say that the Muhammadan was beaten after being surrounded."

The Trial Judge had taken the view that this witness had obviously been tampered with, and, in exercise of the discretion conferred upon him by section 288 of the Criminal Procedure Code, had admitted his deposition before the committing Magistrate as evidence.

The appellants did not suggest that the Trial Judge had made any such error as to the evidence of this witness as they impute to the Additional Judge of the Court

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of the Resident. The only objection taken by them was to maintain that the deposition, when admitted under section 288, could only be used for the purpose of cross-examination within the provisions of section 155 of the Indian Evidence Act. But this contention is clearly untenable in view of the express provision of section 288 of the Code that it is to be treated as evidence in the case for all purposes; the words "subject to the provisions of the Indian Evidence Act, 1872" cannot be read so as to limit the purposes for which it may be used.

This Board, as has been so often said, does not act as a Court of review of the decisions of a Court of Criminal Appeal, unless it can be shown that the error has led to injustice of a grave character. In the present case their Lordships find no room for suggestion of any such injustice. As aleady stated, the appellants, apart from the untenable contention as to the use of the deposition of Srinivasa, made no suggestion of error on the part of the Trial Judge, and their Lordships are satisfied that the Trial Judge, in the view that he took of the credibility of Vasanta, whom he heard and saw, along with the evidence and deposition of Srinivasa, was entitled to find the case proved against the appellants. Their Lordships therefore declined to examine the suggestion of error on the part of the Additional Judge of the Court of the Resident. Accordingly this ground of appeal fails.

There remains the third ground of appeal, which affects only the appellant Fakira. Sections 374 and 377 of the Criminal Procedure Code as modified provide as follows :—

"374. When the Court of Session passes sentence of death, the proceedings shall be submitted to the Court of the Resident at Hyderabad and the sentence shall not be executed unless it is confirmed by the Court of the Resident at Hyderabad.

"377. In every case so submitted, the confirmation of the sentence or order passed by the Court of the Resident at Hyderabad shall, when such Court consists of two or more Judges, be made, passed and signed by at least two of them."

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The new sentence or order referred to in section 377 refers to the powers of variation of the sentence, etc., conferred by section 376.

It is plain, as the Court of the Resident consists of two Judges, and the order of confirmation was only made, passed and signed by one of them, that the peremptory provisions of section 377 have not been complied with, and counsel for the respondent felt unable to resist this conclusion. It follows that the sentence of death passed by the Court of Session on the appellant Fakira has not been validly confirmed, and that it remains submitted to the Court of the Resident, who will require to dispose of the same under sections 375 to 379 of the Criminal Procedure Code, and who should take into account, when considering their action under the alternative powers of section 376, their Lordships' views on the other contentions in this appeal and the commutation of sentence made by the Resident in February, 1936.

Their Lordships will accordingly humbly advise His Majesty that the appeals of the appellant Shankar, Kunnay Lingayya and Narahari should be dismissed and that the judgment and order of the Court of the Resident, so far as applicable to these appellants, should be affirmed; that the appeal of the appellant Fakira should be allowed, and the judgment and order of the Court of the Resident, so far as applicable to this appellant, should be set aside, and the case should be sent back to the Court of the Resident in order that the sentence of death on the said appellant submitted to them for confirmation by the Sessions Court of Secunderabad may be disposed of by them in terms of sections 375 to 379 of the Criminal Procedure Code.

Solicitor for the appellants: Mr. *G. K. Kannapalli.*

Solicitor for the respondent: *The Solicitor, India Office.*

C. S. S.