has taken place. We may observe that we have constantly cases before us of the same nature in which proceedings of the Magistrate are set aside for want of jurisdiction, and it has never occurred to us that it was necessary in every such case to declare whether further proceedings should or should not be taken. Occasionally it has happened that the Criminal Bench has expressly declared that under the circumstances of a particular case no further proceedings should be taken. The Rule is therefore discharged.

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Rule discharged.

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[415] CRIMINAL APPEAL.

Before Mr. Justice Prinsep and Mr. Justice Stephen.

CHEMON GARO *v.* EMPEROR.* [5th February, 1902.]

Complaint—Rape—Adultery—Committal of accused on charge of rape—Addition by Sessions Judge of charge of adultery—Criminal Procedure Code. (Act V of 1898) ss. 199, 227 and 238—Penal Code (Act XLV of 1860) ss. 376 and 497.

Before a criminal charge of adultery can be preferred, a formal complaint of that offence must be instituted in the manner provided by s. 199 of the Criminal Procedure Code.

Therefore, where an accused person was committed to the Sessions to stand his trial on a charge preferred by a husband under s. 376 of the Penal Code, and the Sessions Judge at the trial added a charge of adultery under s. 497 and acquitted the accused under s. 376, but convicted him under s. 497 :—

Held, that the Sessions Judge had acted without jurisdiction.

The fact that the husband appeard as a witness in the prosecution of the offence of rape cannot be regarded as amounting to the institution of a complaint for adultery.

Empress v. *Kallu* (1) followed.

THE appellant Chemon Garo was accused by a husband of the rape of his wife ; he was committed to the Sessions Court of Mymensingh to stand his trial on a charge under s. 376 of the Penal Code. In that Court a charge of adultery under s. 497 of the Penal Code was added. The husband and other witnesses were examined. The Jury by a majority found the appellant guilty of adultery and unanimously not guilty of rape. The Sessions Judge accepted the verdict of the Jury, and the appellant was, on the 25th November 1901, acquitted of rape, but convicted of adultery under s. 497 of the Penal Code and sentenced to undergo two years' rigorous imprisonment.

No one appeared for the appellant.

[416] PRINSEP and STEPHEN, JJ. The appellant was accused by a husband of rape of his wife, and at the Sessions trial he has been convicted of adultery. The two offences are obviously different. S. 199 of the Code of Criminal Procedure declares that no Court shall take cognizance of an offence under s. 427 of the Indian Penal Code, that is, of adultery, except on the complaint of the husband of the woman, &c. The husband is no doubt a witness, but he has never made such complaint. The conviction is therefore without jurisdiction. The case is on

* Criminal Appeal No. 971 of 1901, made against the order passed by D. N. Mitter, Esq., Additional Sessions Judge of Mymensingh, dated the 25th November 1901.

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all fours with that of *Empress* v. *Kallu* (1), in which Straight, J. expressed himself in the following terms :—

"I do not think that the circumstances of his (the husband's) appearing as a witness in the prosecution of that offence can be regarded as amounting to the institution of a complaint for adultery in the sense of s. 478 (now s. 199 of the Code of 1898). The expression 'complaint' is a perfectly well-understood one, and s. 142 of the Criminal Procedure Code (of 1872) in terms prohibits a Magistrate from taking cognizance of a case *without complaint* when it falls under Chapter XX of the Penal Code within which is included s. 497. It by no means follows, as a necessary consequence, that because a husband may wish to punish a person, who has committed a rape upon his wife, that is, who has had connection with her against her consent, he will desire to continue proceedings when it turns out she has been a willing and consenting party to the Act. At any rate, if a criminal charge of adultery is to be preferred, a formal complaint of that offence must be instituted in the manner provided by law, and if it is not, s. 478 (s. 199 of the Code of 1898) will not have been satisfied. I may mention here that s. 238 of the new Criminal Procedure Code leaves no doubt as to the course the Courts should adopt in cases of the kind now before me."

We entirely agree with and adopt the view of the law thus expressed, and on these grounds we set aside the conviction and sentence as without jurisdiction. The appellant must be released.

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[417] CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Stephen.

BHAI LAL CHOWDHRY *v.* EMPEROR.* [5th and 6th February, 1902.]

Defence—Right of private defence—Public servant—Unlawful assembly—Public servant acting in good faith under colour of his office—Institution of proceedings—Criminal Procedure Code (Act V of 1898) ss. 87, 88 and 190—Penal Code (Act XLV of 1860) ss. 99, 143 and 183.

A Magistrate issued a proclamation under s. 87 of the Criminal Procedure Code, and an order of attachment under s. 88 of the property of certain absconding accused persons. During the attachment an objection was raised that the property being attached did not belong to the absconders. The Police Officer, on being informed by the Patwari that it was their property, continued the attachment. A mob, among whom were the accused, assembled, and by assuming a threatening attitude prevented the police officer from further attaching the property.

Held, the conviction of accused under ss. 143, 183 of the Penal Code was right.

Held, further, that even supposing the property attached was not the property of the absconders, the rightful owner had no right of private defence of his property, inasmuch as the evidence showed that the police officer was acting in good faith under colour of his office ; and even supposing the order of attachment might not have been properly made, that would in itself be no sufficient ground for such a defence.

Held, also, that where the attaching police officer sent a person to inform the Magistrate of what had taken place, and the Magistrate thereupon sent

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* Criminal Revision No. 923 of 1901, made against the order passed by H. Coupland, Esq., District Magistrate of Darbhanga, dated the 28 of August 1901.

(1) (1882) I. L. R. 5 All. 233.