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June 8.

REG. V. RAGHA NARAJI *et al.*

Case submitted by Subordinate Magistrate for Sentence— Sentence passed in absence of Accused—Crim. Proc. Code, Sec. 277.

When the proceedings in a case tried by a Subordinate Magistrate are submitted, under Sec. 277 of the Code of Criminal procedure, to a District Magistrate to pass sentence upon the accused, the accused is entitled to be present at the passing of such sentence before the District Magistrate.

THIS was an application to the High Court for the exercise of its extraordinary criminal jurisdiction.

The prisoners were convicted of the offence of theft in a dwelling-house by the Second Class Subordinate Magistrate at Pardi. The Subordinate Magistrate, being of opinion that a more severe punishment than he was competent to adjudge should be passed upon the prisoners, referred the proceedings under Sec. 277 of the Code of Criminal Procedure, To T. C. Hope, Magistrate of the Surat district.

Mr. Hope sentenced prisoner No. 1 to six, No. 2 to four and No. 3 to three months' rigorous imprisonment.

An appeal was presented to the Session Judge, on the ground, *inter alia*, that the sentences, having been pronounced by the District Magistrate in the absence of the accused, were illegal. The Session Court called upon the District Magistrate to state whether he had passed sentences in the absence of the accused persons, and he stated that he had done so, and forwarded as his authority a Resolution of the High Court dated 19th June 1869, passed on a reference of the District Magistrate of Surat, to the following effect :--

"The District Magistrate should be informed that the Code of Criminal Procedure does not require the accused person to be present before the Magistrate to whom the case is referred when such Magistrate only passes a sentence or order in the case. But if the Magistrate desires to recall and examine any witness who shall already have given evidence in the case or to call for or take any further evidence, the presence of the accused person before him is necessary."

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He further drew attention to a Circular order of the High Court, No. 1038 of 1866, dated 11th July 1866:—

“A question having arisen with respect to the disposal of the accused in a case referred to the Magistrate by a Subordinate Magistrate, under Sec 277 of the Code of Criminal Procedure, I am directed by the Honorable the Chief Justice and Judges of Her Majesty’s High Court of Judicature to inform you that, in every case referred under Sec 277 of the Code of Criminal Procedure, the accused person should, pending the disposal of this reference, be kept in the custody in which he was at the trial; provided that, when the offence is a bailable one, the Subordinate Magistrate may, if he thinks fit, take fresh bail for his appearance when called upon.”

Upon consideration of all these documents, and the merits of the petitioner’s appeal, the Session Judge saw no reason to interfere.

The case was argued before GIBBS and LLOYD, JJ.

Nanabhai Haridas, for the accused:—It is wrong in principle that a Magistrate who has the power of passing “such order in the case as he may deem proper” should not, before he passes sentence, hear the accused, even though a conviction has been already been recorded. A Subordinate Magistrate who convicts may consider a case to be of so serious a nature as to induce him to recommend the infliction of a heavier punishment than he himself can legally award, and yet the superior authority may think proper to record an acquittal without calling for any more evidence. Where the Code allowed the personal attendance of an accused person to be dispensed with, it does so only to a limited extent. In no case in which a sentence of imprisonment is to be passed does the Code dispense with the appearance of the accused, and even where a sentence of fine alone is to be pronounced it is left to the discretion of the trying authority to require such appearance or not. [LLOYD, J. :—When this court confirms a sentence of death the accused is not present before it.] But the passing of a sentence is different from its confirma-

tion, and even in confirmation cases where the accused chooses to appear by counsel the court cannot prevent it. And the jealousy of the Code in this respect is founded upon a very good reason. After the completion of the case, and the entry of the jury's verdict of guilty, it is the invariable practice of English Courts, and of the High Court when exercising original criminal jurisdiction, to ask the prisoner if he has anything to say why sentence should not be passed upon him; the prisoner may give evidence of good character, and induce the Judge to pass a lenient sentence.

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Dhrajlal Mathuradas (Government Prosecutor), for the Crown:—I do not contend that in some cases it may not be desirable to require the accused to be present when sentence is passed upon him. My argument is that it is not imperative, and that, unless it is so, the present practice, which is very convenient, should not be departed from.

Cur. adv. vult.

GIBBS, J. (after recapitulating the facts of the case, continued):—Upon a reference from the Magistrate of Canará, the question of the necessity for the appearance of the accused was brought before us in chambers. There was no argument, but only a discussion among the Judges, and it was thought that if accused persons were made to follow the migratory camp of the District Magistrate very great inconvenience and hardship would be caused to them, and that it was a kindness to exempt them from such inconvenience. Under this view the High Court ordered, in their Circular No. 1038 of 1866, that the accused person should, pending the disposal of the reference under Sec. 277 of the Criminal Code, be kept in the custody in which he was at the time of the trial. Since hearing the argument of Mr. Nánabhai in this case, my brother Lloyd and I came to the conclusion that the practice laid down by the resolution in chambers was not correct. Had the sections not contained the provision that the District Magistrate might pass "such order as he may deem proper and had it confined his power to the passing of a sentence only it might have been different—the practice might have been

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allowable; but as the District Magistrate can, and does frequently, reverse the conviction of the Subordinate Magistrate and direct the release of the prisoner, it follows that the prisoner should always be present to offer to the District Magistrate such reasons as he may have against the finding of the Subordinate Magistrate, or to state his plea, if he has one, for a lenient punishment. We, therefore, felt it our duty to bring this to the notice of our brother Judges in chambers, and they, after a reconsideration of the matter, have expressed their concurrence with us in the decision we shall now give, namely, that the District Magistrate's sentence having been passed in the absence of the prisoners, is illegal.

We shall not, however, direct a fresh sentence to be passed, as the periods of their sentences have nearly expired; they will, therefore, be discharged.

Order accordingly.

NOTE.—The following Circular has since been issued by the High Court :—

“Sec. 277 of the Code of Criminal Procedure having been recently brought to the notice of the Chief Justice and Judges in chambers, and a case arising under it having also been lately argued in court before a Divisional Bench, it appears to the Chief Justice and Judges that Circular No. 1038 of 11th July 1866 cannot be sustained, and that the accused person is entitled to be present before the District Magistrate when he takes into consideration the finding and proceedings of the Subordinate Magistrate; and that this is so even though the District Magistrate does not examine the parties, or recall and examine any witness who may have already given evidence in the case, or may not call for and take any further evidence; inasmuch as the accused person will be at liberty to contend before the District Magistrate that there is no sufficient case made out against him for a conviction, and the District Magistrate, if he concur in that view, will be at liberty to order an acquittal and discharge. Circular No. 1038 is, therefore, cancelled.”