under such circumstances, be justified, or even consider themselves bound to let the judgment and sentence stand.

"These are startling consequences, which strongly tend in their Lordships' opinion to show that the language used in the proviso was not intended to apply to circumstances such as those under consideration.

"Their Lordships do not think it can properly be said that there has been no substantial wrong or miscarriage of justice, where on a point material to the guilt or innocence of the accused the Jury have, notwithstanding objection, been invited by the Judge to consider, in arriving at their verdict, matters which ought not to have been submitted to them.

"In their Lordships' opinion substantial wrong would be done to the accused, if he were deprived of the verdict of a Jury on the facts proved by legal evidence, and there were substituted for it the verdict of the Court founded merely upon a perusal of the evidence."

For these reasons we are of opinion that, having come to the conclusion that the verdict of the Jury in this case has been vitiated by the misdirection of the Sessions Judge, we have no option but to set aside that verdict and to direct that the accused be retried.

Appeal allowed and new trial ordered.

H. T. H.

CRIMINAL REFERENCE.

Before Mr. Justice Beverley and Mr. Justice Banerjee.

RAMJEEVAN KOORMI (COMPLAINANT) *v.* DURGA CHARAN SADHU KHAN (ACCUSED.)*

1894 *July* 4.

Criminal Procedure Code (Act X of 1882), section 560—Compensation—Imprisonment in default of payment of compensation—Distress.

The operation of section 560 of the Code of Criminal Procedure is restricted to cases instituted by "complaint" as defined in the Code or upon information given to a police officer or a Magistrate, and consequently that section has

* Criminal Reference No. 170 of 1894, made by F. W. Duke, Esq., Officiating District Magistrate of Hooghly, dated the 20th June 1894, against the order passed by Moulvie A. K. M. Abdus Sobhan, Deputy Magistrate of Hooghly, dated the 29th May 1894.

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no application to a case instituted on a police report or on information given *by* a police officer.

Quære—Whether under the section a Magistrate has power to make an order for imprisonment in default of payment of the compensation awarded?

A police constable arrested a carter and charged him before a Magistrate with an offence under section 34 of Act V of 1861. The Magistrate acquitted the accused and directed, under section 560 of the Code, that the police constable should pay him Rs. 20 as compensation or undergo simple imprisonment for a fortnight.

Held, that as the section had no application to the case, the order was illegal, being made without jurisdiction.

Held, further, that even if the Magistrate had power under the Code to pass an order for imprisonment in default of payment of compensation awarded under section 560, it was illegal to pass such an order until some attempt had been made to levy the amount in the manner provided by section 386 for the levying of a fine.

THIS was a reference by the District Magistrate of Hooghly, under section 437 of the Code of Criminal Procedure, questioning the legality of an order passed by a Deputy Magistrate under the provisions of section 560 of that Code, directing a police constable, who had arrested and charged a carter with an offence under clause 3, section 34 of Act V of 1861, and who had failed to prove such charge, to pay the carter Rs. 20 as compensation or undergo simple imprisonment for a fortnight.

The reference was in the following terms :—

"I have the honor, under section 437 of the Criminal Procedure Code, to forward, for the orders of the Hon'ble Court, the proceedings in a case under section 560 of the Criminal Procedure Code against Ramjeevan constable tried by Moulvie A. K. M. Abdus Sobhan, Deputy Magistrate with first class powers.

"The proceedings form part of the record (*Empress* v. *Durga Churan Sadhukhan*) under section 34 of Act V of 1861, in which the said Ramjeevan had arrested and given evidence against the accused.

"The facts are as follows : The constable found a cart untended in the Khurna Bazar of Chinsurah, and when the driver appeared, arrested him and caused his prosecution under clause 3 of section 34 of Act V of 1861.

"The Deputy Magistrate found that the accused's absence from his cart was brief and did not constitute an offence under the sec-

tion quoted, and accordingly acquitted him. I think that his finding that the admitted fact of the carter leaving his cart untended, in the circumstances of time and place, did not amount to an offence was wrong, but I do not propose to trouble the Court with this trivial matter save in so far as it affects the question of compensation.

"The Deputy Magistrate, however, also drew up a proceeding under section 560 of the Criminal Procedure Code, and ordered the arresting constable to pay Rs. 20 compensation to the accused, or to undergo simple imprisonment for a fortnight in default.

"The points I would submit for the consideration of the Court are:—

"(1.) Whether section 560 of the Criminal Procedure Code is applicable at all to a police officer arresting an accused person for a cognizable offence?

"(2) Whether the order imposing 15 days' imprisonment in default of payment is legal?

"(3) That the Deputy Magistrate's proceeding is bad inasmuch as no objection has been recorded as required by section 560, clause (1) *a*, although one was made as appears from the proceeding.

"(4) That in any case the compensation is excessive and totally out of proportion to the circumstances of the parties, to any inconvenience suffered by the accused, or to any wrong-doing committed by the constable.

"As regards the first point I would only say that it is of the first importance that it should be decided whether section 560 is applicable to a police officer arresting for an offence for which he has power to arrest. The words of the section are, "in any case instituted by complaint as defined in this Code, or upon information given to a police officer, or to a Magistrate." The case was instituted neither on complaint nor upon information given. The accused was arrested by the police officer, in whose view the offence was committed, and therefore there was neither complaint nor information. The section is evidently framed so as to exclude police officers acting under colour of their duty from its operation.

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"As regards the second point, the words of the section, clause 2, has provided that if it (the fine) cannot be recovered the imprisonment to be awarded shall be simple.

"Imprisonment is intended to be resorted to as a final measure if the compensation *cannot be recovered* by other means. An order for imprisonment made concurrently with the order for compensation, involving as it does immediate imprisonment if the compensation is not paid on the spot, seems to be bad. It is clearly intended that an attempt shall first be made to effect recovery by distraint.

"I have already noted that the Deputy Magistrate has not recorded the objections offered by the constable as he was bound to do. He has contented himself with saying that the constable could not show any good cause.

"Lastly, as regards the amount of compensation, the Deputy Magistrate has found that the accused left his cart for a while in the Khurna Bazar, a narrow and crowded street. This certainly appears to be an offence under the 3rd clause of section 34 of Act V of 1861, but the Deputy Magistrate thinks not. He finds fault because there is not corroborative evidence of actual damage or obstruction, though under the law only the probability of damage or obstruction is required, and these might have been sufficiently inferred from the circumstances of the case; and in any case it is not the arresting constable who is responsible for the production of evidence. However, he considers the constable acted without discretion in making the arrest. Admitting that he did, and that the accused is entitled to compensation, there is no reason for compensation of Rs. 20. The accused was detained from his arrest to his acquittal between 8 A.M. and 4 P.M., 8 hours. The accused was detained in custody, because he could not furnish bail, but the constable is not responsible for that. His loss of time allowing for his carts and bullocks may be estimated at not exceeding Rs. 1. With three times that sum he would have been amply compensated for all the loss and inconvenience he suffered. He had no legal nor any other expenses in the case.

"The amount again is nearly equal to three months' pay of the constable, and is as excessive for him to pay as unnecessary for the

complainant to receive. It is in fact a penal or vindictive fine and not compensation."

Ramjeevan Koormi did not appear at the hearing of the reference.

The *Deputy Legal Remembrancer* (Mr. *Leith*) at the request of the Court on behalf of the Crown :—As regards the question as to whether under section 560 it is competent for a Court to award imprisonment in default of payment of compensation at the time of ordering compensation to be paid, I contend that it is within the Court's power to do so. By section 250 of Act X of 1882, repealed by Act IV of 1891, as well as by section 560, compensation is made recoverable "as if it were a fine." By section 209 of Act X of 1872, and by section 270 of Act XXV of 1861, this was not so. As to recovery of fines see section 33 and section 389 of Act X of 1882. Imprisonment is ordered as "a process for enforcing the payment of a fine" [see *Empress* v. *Asghar Ali* (1), and section 552 and Sch. V, Form XXX of Act X of 1882, and also section 69 of the Penal Code], and must therefore be equally a process for the recovery of compensation awarded under the section.

The judgment of the High Court (BEVERLEY and BANERJEE, JJ.) was as follows :—

One Durga Charan Sadhu Khan was arrested without warrant by constable Ramjeevan for an offence under clause 3 of section 34 of Act V of 1861. The Deputy Magistrate, who tried the case, acquitted Durga Charan, and under the provisions of section 560 of the Code of Criminal Procedure ordered the constable "to pay Rs. 20 as compensation to the accused, or undergo simple imprisonment for a fortnight."

The District Magistrate has asked us to exercise our powers of revision in the case on four grounds : (1) That section 560 of the Code is not applicable to a police officer arresting an accused person for a cognizable offence ; (2) that the order imposing imprisonment in default of payment is illegal ; (3) that sub-section (1) proviso (*a*) has not been complied with ; (4) that the compensation awarded is excessive and out of proportion to the circumstances of the parties, to any inconvenience suffered by the accused, or to any wrong-doing committed by the constable.

(1) I. L. R., 6 All., 61.

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On the first ground, we think it is quite clear that the order complained of is illegal. Section 191 of the Code authorizes certain Magistrates to take cognizance of an offence—(*a*) upon receiving a complaint of facts which constitute such offence; (*b*) upon a police report of such facts; (*c*) upon information received from any person, *other than a police officer*, or upon his own knowledge or suspicion that such offence has been committed.

"Complaint" is defined in section 4, clause (*a*), and that definition in express terms excludes the report of a police officer. The operation of section 560 is restricted to cases instituted "by complaint as defined by this Code or upon information given *to* a police officer or to a Magistrate." It is clear that it will not apply to a case instituted on a police report or on information given *by* a police officer. The Deputy Magistrate therefore had no jurisdiction to make any order under that section in this case, and the order is for that reason illegal.

As regards the order for imprisonment in default of payment of the compensation, it is to be observed that the section itself does not expressly authorize the Magistrate to award such imprisonment. All that the section says on this point is contained in sub-section (2) which runs as follows:—

"Compensation, of which a Magistrate has ordered payment under sub-section (1), shall be recoverable as if it were a fine.

"Provided that, *if it cannot be recovered*, the imprisonment to be awarded shall be simple, and for such term, not exceeding thirty days, as the Magistrate directs."

By section 209 of the Code (Act X) of 1872 authority was expressly given to award imprisonment if the compensation could not be realized. The third clause of that section runs as follows:—

"The sum so awarded shall be recoverable by distress and sale of the moveable property belonging to the complainant which may be found within the jurisdiction of the Magistrate of the District, and such order shall authorize the distress and sale of any moveable property belonging to the complainant without the jurisdiction of the Magistrate of the District, when the order has been endorsed by the Magistrate of the District in which such property is situated, *and if the sum awarded cannot be realized by*

means of such distress by imprisonment of the complainant in the civil jail for any time not exceeding thirty days unless such sum is sooner paid."

In the Code of 1882, the wording of the corresponding section, *viz*, section 250, now repealed, was altered, and the words expressly authorizing the levy of the fine by imprisonment were for some reason omitted, nor have they been reproduced in section 560 of the Code, which now takes the place of section 250. Mr. Leith, whom we have heard on this point, suggests that imprisonment is to be regarded as one of the ordinary modes of recovery of a fine, but we are not aware of any provision of the law under which a fine is recoverable by imprisonment. Section 386 prescribes that a fine, if not paid, may be levied by distress and sale of any moveable property belonging to the offender, but is silent in respect of any other mode of recovering the fine. The power to award imprisonment, in default of payment of a fine, in the case of an offence, is contained in section 64 of the Penal Code, but that section only refers to cases in which a person is sentenced to pay a fine *for an offence* and will not apply to an order to pay compensation. Similarly, section 33 of the Code of Criminal Procedure only relates to cases in which imprisonment, in default of payment of a fine, is *authorized by law* in case of default.

As section 560 of the Code stands, therefore, we think it extremely doubtful whether the Deputy Magistrate had any jurisdiction at all to make an order for imprisonment in default of payment of the compensation. But, however that may be, we think it clear that such an order could not be made in the terms in which it has been made in this case. Under section 209 of the Code of 1872, the order for imprisonment could only be made if the compensation could not be realized by distress, and the words of section 560 of the present Code are to the same effect—"if it cannot be recovered." See also the cases of *Bisheswar Shaha* v. *Bishwambhur Sircar* (1), and *Queen* v. *Gopai* (2).*

Therefore, even if the Deputy Magistrate had jurisdiction

(1) 23 W. R. Cr., 64. (2) 2 N. W. P., (All.) H. C., 430.

* See the case of *Queen-Empress* v. *Kutrapa*, I. L. R., 18 Bom., 440.—*Ed.*

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to make an order for imprisonment, it was illegal to make such an order until some attempt had been made to levy the amount.

For these reasons, we think that the order of the Deputy Magistrate is bad in law, and we set it aside accordingly. We think it unnecessary to consider the other grounds urged by the District Magistrate.

H. T. H. *Order set aside.*

APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Hill.

1894
July 31.

SHITAL MONDAL (DEFENDANT) *v.* PROSSONNAMOYI DEBYA AND OTHERS (PLAINTIFFS.)*

Bengal Tenancy Act (VIII of 1885), section 30, clause (a)—Suit for enhancement of rent—Prevailing rate, Meaning of—Average rate.

The words "prevailing rate" in section 30, clause (*a*) of the Bengal Tenancy Act, mean, not the average rate of rent, but the rate actually paid and current in the village for land of a similar description with similar advantages; they should be construed, therefore, in the same sense as was given to the same words in the earlier cases decided under Act X of 1859.

THE facts of this case and the points material to the report sufficiently appear from the judgment of the Judge which confirmed the Munsif's decision and which was as follows:—

"This is an enhancement suit brought under the provisions of section 30 (*a*) and section 3 of the Bengal Tenancy Act, against an occupancy ryot. The defendant holds 19½ *bighas* at a *jama* of between Rs. 6 and Rs. 7. The plaintiff claimed enhancement to a rate of Rs. 2 per *bigha*. The Munsif decreed an enhanced rate of Rs. 1-8 per *bigha*, and the defendant now appeals. The question of enhancement is the sole question taken in appeal. The first ground of appeal to the effect that the lands are 'protected from enhancement' is admitted by the appellant's pleader to mean merely that defendant has held a long time at the old rate; he admits for his client that there is no legal protection.

"The Munsif's judgment is based mainly, if not entirely, upon the report of a Commissioner, who was appointed under the provisions of section 31 (6)

* Appeal from Appellate Decree No. 167 of 1894, against the decree of C. A. Wilkins, Esq., District Judge of 24-Perganas, dated the 20th of November 1893, affirming the decree of Babu Tarak Chunder Dass, Munsif of Basirhat, dated the 6th of September 1892.