explanation, which accompanies this reference, has not suggested any justification for the order referred to.

1902

EMPEROR v. MATHURA PRASAD.

Babu Luchmi Narayan Singh for the accused.

PRINSEP AND STEPHEN JJ. The object of the reference seems doubtful. The Subdivisional Magistrate, who is also Chairman of the Municipality, has in one order convicted the accused under s. 273 (1) of the Bengal Municipal Act, 1884, and, in addition to sentence, has, as Chairman, in the same order directed the demolition of the addition made to his house. The act condemned is the commencement of a second storey without permission. We can find no necessity for such permission. The Building Regulations, s. 236 *et seq*, relate to building or rebuilding a house. The previous sections relating to alteration of a house contemplate obstruction or encroachments on roads. This is not the ground of objection. We do not therefore see how the case comes within s. 273 (1). Consequently we set aside the whole order. The fine, if paid, will be refunded.

D. S.

Before Mr. Justice Prinsep and Mr. Justice Stephen.

EMPEROR
v.
BHELEKA AHAM.*

1902
Jan. 28.

Murder—Unsoundness of mind—Disease brought on by voluntary drunkenness—Criminal liability—Penal Code (Act XLV of 1860) ss. 84, 85, and 302.

Under s. 84 of the Penal Code unsoundness of mind producing incapacity to know the nature of the act committed or that it is wrong or contrary to law is a defence to a criminal charge, but by s. 85 of that Code such incapacity is no defence, if produced by voluntary drunkenness. If, however, voluntary drunkenness causes a disease which produces such incapacity, then s. 84 applies, though the disease may be of a temporary nature.

IN this case the accused Bheleka Aham, while proceeding towards his field met a boy named Ratneshwar who was returning home. The accused without speaking a word killed the boy with a single stroke of his *dao* as he passed. The accused then made off

* Criminal Reference No. 31 of 1901, made by A. Porteous, Esq., Officiating Sessions Judge of Assam Valley District, dated 6th December 1901.

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EMPEROR v. BHELEKA ADAM.

across the field pursued by his father. The blow dealt was apparently unpremeditated, there being no quarrel or dispute of any kind. The accused was tried on a charge of murder under s. 302 of the Penal Code by the Sessions Judge of the Assam Valley District with the aid of a jury.

The evidence showed that the accused was addicted to intemperate habits by excessive use of opium, and that for some days before and after killing the boy the accused was irresponsible for his actions.

On the 30th November 1901 the jury returned a verdict by a majority of four to one of guilty under s. 302 of the Penal Code against the accused. The Sessions Judge being unable to accept the verdict referred the case under s. 307 of the Criminal Procedure Code to the High Court.

The letter of reference was as follows:—

I find myself unable to accept the verdict of guilty under s. 302 of the Indian Penal Code arrived at by the majority of the jury in this case for the following reasons:—

So far as the evidence on the record shows there was practically no motive on Bheleka's part for killing the boy Ratneshwar. The boy's father distinctly stated when first questioned on the subject—*vide* evidence of the investigating police officer, Birendra Kumar Gupta—that accused had no cause of quarrel with him. The subsequent mention of a dispute about land, even if it be believed, goes for little, inasmuch as Godhola, the father, expressly states that for six months he had been on good terms with Bheleka's family, and it is not alleged that either at the time of the murder or within that six months the matter of the land had been ever again referred to.

The blow dealt by Bheleka to the boy Ratneshwar was apparently unpremeditated, and there was no accompanying quarrel or dispute of any sort or kind. The accused was proceeding towards his field and the boy Ratneshwar was returning home when the two met, and Bheleka, without a word spoken, inflicted the fatal blow with a *dao* which he had in his hand, immediately afterwards making off across the field pursued by his father, Dhanbar. An aimless unpremeditated act of this sort is *primâ facie* the act of a madman. There is, however, positive evidence to show that accused was then in a state of insanity. In the first place, the murdered boy's father reported at the thana within a few hours of the occurrence that his son had been killed by Bheleka, who had been out of his senses for six or seven days. The investigating police officer, who saw the accused at the time the deceased's father was still at the thana laying the first information, states that Bheleka when brought to the thana "spoke violently and without meaning" and that "he seemed to be a madman." The Jail Hospital Assistant, whose opinion, formed from the prisoner's subsequent conduct, when he behaved rationally, is that

he was feigning madness, admits that when he first saw him his eyes were red and that he looked threateningly at the people; also that he looked flushed and angry. He further admits that for two or three days accused "displayed symptoms of rage and was of threatening disposition." He, moreover, deposes to accused being noisy at night in his cell and to his weeping for a considerable period on the 29th August four days after his arrest. These are all symptoms pointing to mental disturbance, and taken in conjunction with the absolutely unprovoked character of the murder, its suddenness, and its aimlessness raise a strong presumption that Bheleka when he killed the boy Ratneshwar was not in a sound state of mind, and was incapable of distinguishing right from wrong.

Unfortunately, owing to the change of Civil Surgeons, the evidence of no qualified medical officer was forthcoming as to accused's mental condition soon after the commission of the act. The Committing Magistrate, with a singular want of commonsense, never summoned or recorded the deposition of the then Civil Surgeon and Superintendent of the Jail, Captain MacLeod, although from papers on the record it appears that that officer did report on the prisoner's case.

As regards the evidence of accused's father, Dhanbar, who is a witness for the prosecution, and of the defence witnesses, which shows that Bheleka had been entirely off his head for several days before the murder, it is naturally to be viewed with suspicion, but in the light of complainant's statement at the thana on the very day of the murder that accused had been mad for six or seven days I can see no reason myself for disbelieving it.

I consider there are sufficient grounds for believing that Bheleka was at the time he killed the boy Ratneshwar incapable of knowing the nature of his act, and that he is therefore entitled to an acquittal under s. 84 of the Penal Code.

PRINSEP AND STEPHEN JJ. The jury have convicted the accused of murder, but the Sessions Judge has refused to accept this verdict because he considers that the jury, while finding that the accused killed the boy Ratneshwar should also have found that he was by reason of unsoundness of mind incapable of knowing the nature of his act or that he was doing what is either wrong or contrary to law (s. 84 of the Penal Code), and that on this ground the jury should have acquitted the accused.

The evidence shows that the accused is addicted to intemperate habits by excessive use of opium, and that occasionally or for some days before and after killing the boy he was irresponsible for his actions. The manner in which the boy was killed amply confirms this.

The only doubt in our minds is whether the case falls under s. 84 or s. 85 of the Indian Penal Code. Under s. 84 unsoundness of mind producing incapacity to know the nature of the act committed or that it is wrong or contrary to law is a defence

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to a criminal charge, but by s. 85 such incapacity is no defence, if produced by voluntary drunkenness. If, however, voluntary drunkenness causes a disease which produces such incapacity, then s. 84 applies, though the disease may be of a temporary nature. Without attempting to lay down any rule as to what constitutes such a disease, we are of opinion that there was such a disease in the present case, which consequently falls under s. 84. The accused must therefore be acquitted. We so find in the present case. The accused must be kept in custody pending the orders of the Local Government, to which the case should be reported by the Sessions Judge under s. 471 of the Code of Criminal Procedure. We are further of opinion that, if the case had been more clearly explained to the jury, and they had been made to understand that they should find, not only that the accused had killed the boy under circumstances which would ordinarily amount to murder, but also whether the act comes within s. 84 of the Penal Code, they would probably have returned a proper verdict, so as to have rendered this reference unnecessary.

D. S.

Before Mr. Justice Prinsep and Mr. Justice Stephen.

1902
Feb. 4.

KESHWAR LAL SHAHA
v.
GIRISH CHUNDER DUTT.*

Ganja—Sale of, without license by servant in presence of master—Receipt of money by servant—Servant, liability of—Bengal Excise Act (Bengal Act VII of 1878) s. 53—Penal Code (Act XLV of 1860) ss. 34, 40 and 114.

Where both master and servant were present at the sale of *ganja* in contravention of the terms of his license and the servant received the money paid for the *ganja*:

Held, that, having regard to the provisions of s. 34 of the Penal Code, the servant was guilty of the offence of selling *ganja* without a license, and that under the circumstances of the case s. 114 of the Penal Code had no application.

Queen-Empress v. *Harridas San* (1) distinguished.

IN this case the 1st petitioner Keshwar Lal Shaha was a licensed vendor of opium at Khagra and of *ganja* at Gorabazar

* Criminal Revision No. 1219 of 1901 against the order passed by J. E. Webster, Esq., Officiating District Judge of Murshidabad, dated the 21st of July 1901.

(1) (1890) I. L. R. 17 Calc. 566.