

As regards the question whether the act committed in itself amounted to an offence under s. 408, we think that the case is closely analogous to that of the *Empress v. Wilkinson* (1), to which the learned Honorary Magistrate refers, and in accordance with the view expressed in that case we hold that the act of the defendant did not amount to criminal breach of trust.

Let this answer be returned to the Honorary Magistrate.

D. S.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Stephen.

EMPEROR

v.

MATHURA PRASAD.*

1902

Feb. 6.

Building—Commencement of second storey to house—Rebuilding house—Alteration—Encroachment—Whether permission from Municipality necessary—Order for demolition of addition—Bengal Municipal Act (III of 1884) ss. 175, 235, 236, 237, 238, and 273—Criminal Procedure Code (Act V of 1898) ss. 438 and 439.

The accused commenced building a second storey to his house without permission of the Municipality. He was convicted under s. 273 (1) of the Bengal Municipal Act of 1884, and, in addition to a sentence of fine, the Magistrate as Chairman of the Municipality in the same order directed the demolition of the addition made to the house.

Held, that the whole order was illegal. The case did not come under s. 273 (1) of the Act, and there was no necessity for the accused to have obtained permission.

In this case the Municipal Overseer of the Samastipur Municipality reported to the Chairman that the accused Mathura Prasad had made an addition to his house by commencing to build an upper storey. The Chairman sanctioned the prosecution of the accused, and simultaneously in his capacity as Subdivisional Magistrate signed an order summoning the accused. The accused was subsequently tried by another Subdivisional Magistrate and convicted under s. 273 (1) of the Bengal Municipal Act of 1884, and sentenced to a fine. The accused was also in the same order directed to demolish the addition made to his house.

(1) (1898) 2 C. W. N. 215.

* Criminal Reference No. 342 of 1901, made by E. P. Chapman, Esq., Sessions Judge of Tirhoot, dated the 12th December 1901.

1902

EMERSON
P.
MATHURA
PRASAD.

The Sessions Judge of Tirhoot under s. 438 of the Criminal Procedure Code submitted the case for orders to the High Court with the following report:—

(1) A brief analysis of the case—

The Municipal Overseer of the Samastipur Municipality reported to Mr. Ramsay, the Chairman, that three persons, of whom Mathura Prasad was one, had made additions to their houses by commencing to build upper stories. Mr. Ramsay in his capacity as Chairman signed a printed form containing the words "Prosecution sanctioned," and, it appears, simultaneously signed in his capacity of Subdivisional Officer an order to summon the three accused persons. Mathura Prasad was subsequently tried, as required by law, in a separate trial by Mr. Birley, who had succeeded Mr. Ramsay as Chairman and Subdivisional Officer. The only witness examined was the Municipal Overseer who had reported the case. He stated that the accused had begun to build an upper story to his house and that he had not obtained permission. Mr. Birley in his judgment states that he had seen the house, and that "there is no doubt that the work already done to it amounts to an alteration as contemplated by the Act." The accused stated in reply to a question whether anything had been done to the house that the wall had been raised a little. Mr. Birley in his capacity as Subdivisional Officer then proceeded to convict Mathura Prasad of an offence under s. 273 (1) of the Bengal Municipal Act of 1884 and to sentence him to a fine of fifteen rupees, and in default to undergo one week's rigorous imprisonment. He further ordered Mathura Prasad to demolish the addition made to his house within seven days, adding that Mathura Prasad might then file an application for permission, and the question would be considered.

(2) The order recommended for revision is the order directing Mathura Prasad to demolish within seven days the addition to his house.

(3) The whole order is illegal.

(4) It need not be explained that Mr. Birley as Subdivisional Officer had no powers to make such an order. He could only make such an order in his capacity as Chairman of the Municipality. The introduction of such an order into a judgment written by him as Subdivisional Officer was more than a technical irregularity. As Chairman exercising under s. 44 the powers of the Commissioners, he could issue such an order only under s. 238 (1), which requires, as I read the section, that notice of the order be delivered within fifteen days of the commencement of the building. Further, every such notice is required by s. 175 to contain certain particulars which the order to the accused did not contain. What is more important, a person aggrieved by such an order made by the Chairman has under s. 242A the right of appeal to the Commissioners, and the section requires that every such appeal shall be heard and determined by not less than three Commissioners. Mathura Prasad was therefore seriously prejudiced by the introduction of such an order into the judgment. I submit that as the order purports to have been passed by Mr. Birley in his capacity as Subdivisional Officer, the High Court as a Court of Revision has jurisdiction to set it aside. Mr. Birley in his

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

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.*

Murder—Unsoundness of mind—Disease brought on by voluntary drunkenness—Criminal liability—Penal Code (Act XLV of 1860) ss. 84, 85, and 502.

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.

1902

EMPEROR
v.
MATHURA
PRASAD.

1902
Jan. 28.