ries were, therefore, made as to the powers (magisterial or police) of the Station Staff Officer.

From the papers within it will be seen that he has no such powers.

The appellant appeared before Captain Simpson, Adjutant, 11th M. N. I., and Station Staff Officer, and charged a non-commissioned officer with rape. There was an enquiry, and the charge being found to be false by the military authorities, the Commanding Officer caused the appellant to be prosecuted before the criminal authorities under s. 211. She was committed for trial, and convicted by the Judicial Commissioner under that section.

We are of opinion that the appellant neither instituted, nor caused to be instituted, a criminal proceeding. She, no doubt, charged the non-commissioned officer with an offence; but the Station Staff Officer having neither magisterial nor police powers, as we are informed, it seems to us that s. 211 will not apply. We do not think it is unduly refining the words of the section to say that the false charge must be made to a Court or to an officer who has powers to investigate and send up for trial.

We, therefore, set aside the conviction, and direct the appellant's discharge.

Conviction set aside.

CRIMINAL REFERENCE.

Before Mr. Justice Mitter and Mr. Justice Maclean.

THE EMPRESS *v.* NOBOCOOMAR PAL.*

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Jan. 28.

Bengal Excise Act (Beng. Act VII of 1878), *s.* 53—*Sale by Licensed Vendor contrary to Terms of his License.*

Section 53 of the Bengal Excise Act does not apply to sales by a licensed vendor contrary to the terms of his license. That section provides for a breach of the condition of a license not covered by the second clause of s. 59 of the Act.

NOBOCOOMAR PAL was summarily tried before the Magistrate of Howrah, on a charge of having sold imported liquor

* Criminal Reference, Nos. 3 and 6 of 1881, from the order of J. P. Grant, Esq., Sessions Judge of Hooghly, dated the 6th January 1881.

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by the bottle, without a license empowering him to do so, and having, therefore, committed an offence under s. 53 of the Bengal Excise Act (Beng. Act VII of 1878). At the time of the alleged offence, the accused held a license (under Form 4A of those prescribed under the Act by the Board of Revenue) empowering him to sell only imported liquor, and that only by the glass, to be drunk only on the premises licensed, and not to be removed from them before consumption. The offence imputed to him was, that he sold imported liquor on several occasions by the bottle, delivering it to his customers at their own residences.

He was found guilty under s. 53 of the above Act, and sentenced by the Magistrate to pay a fine of Rs. 200, and to rigorous imprisonment in default of payment. An application was made to the Sessions Judge, who considered the conviction illegal, and referred the case to the High Court under s. 296 of the Criminal Procedure Code.

The judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

MITTER, J.—The Magistrate of Howrah having convicted the petitioner, Nobocoomar Pal, of an offence under s. 53, Beng. Act VII of 1878 (The Bengal Excise Act), and sentenced him to a fine of Rs. 200, and rigorous imprisonment in default of payment, an application was made to the Judge of Hooghly, in order that the proceedings might be referred to this Court under s. 296, Criminal Procedure Code.

In his application Nobocoomar Pal raised two objections to his conviction and sentence: first, that he held a retail license for sale of spirits, and could not, therefore, be convicted under s. 53 of the Act; second, that he was not liable to rigorous imprisonment in default of payment of the fine.

The Judge has referred the case to this Court, and his opinion is, that s. 59, and not s. 53, of the Act applies. He brings to notice certain informalities in the proceedings of the Magistrate, and recommends that the proceedings may be set aside, or the fine reduced to Rs. 50.

We have carefully considered the papers sent up to us, and

have come to the conclusion, that s. 53 of the Act does not apply to this case. It is not disputed, that Nobocoomar Pal held a license for retail sale of imported spirituous and fermented liquors, which is one of the two classes of licenses to which the Act refers. The license, however (No. 49—4 A) restricts him to sale *by the glass*, and art. vi of the license confines the sale to his shop, and directs that the spirits, &c., shall be drunk on the premises. The Magistrate thinks, that because Nobocoomar had not a simple Retail Vend License (Form 4 B), and because he sold liquor by the bottle for consumption off the premises, he was justified in convicting him under s. 53.

We concur with the Judge in his view, that s. 53 does not apply to sales by a licensed vendor contrary to the terms of his license. This seems to follow from a consideration of s. 60 with s. 53. If s. 53 were to be applied to wholesale sales by a retail licensed vendor, a fine of Rs. 500 might be imposed, whereas by s. 60, the maximum fine is Rs. 200 for that offence. Section 60 would be redundant if the construction put by the Magistrate upon s. 53 is correct, whereas it is, upon the construction we put upon it, quite consistent with the previous section and provides for a breach of the conditions of a license not covered by the second clause of s. 59.

As has been said already, Nobocoomar held a license for retail sale. An ordinary retail licensee might sell up to twelve quart bottles; but under its powers under s. 28, the Board of Revenue has regulated the conditions of Nobocoomar's license, and limited him to selling by the glass, with a condition that the liquor shall be drunk in his shop. The information laid against him was, that he had, on seven dates in April, May, and July 1880, sold liquor by the bottle without a bottle license. This seems to be another modification of the ordinary retail license.

The proceedings before the Magistrate were held under chap. xviii of the Criminal Procedure Code. It is therefore difficult to say, whether there was legal evidence for any conviction. In his summary and reasons the Magistrate alludes to account-books, orders, and bills, as satisfying him that the offence was committed. It would have been better if the

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Magistrate had summed up the evidence by which the orders and bills were *proved*, for their mere production is no evidence. Two of the orders refer to lemonade, and we are not aware that this is an excisable article.

We are unable to say for what offence the prisoner really was tried. The complainant was not examined as required by s. 144 of the Procedure Code, and it is certain, that the seven offences mentioned in the information could not be dealt with in one trial, *vide* s. 453, Procedure Code. The omission to record the date of the commission of the offence in the register as required by s. 229, Procedure Code, is, therefore, a material error, and the whole case shows the necessity of recording the few particulars required by law in trials under chap. xviii.

As we are unable, on the record as it stands, to say, that any offence has been made out for which the petitioner ought to have been convicted, we must set aside the conviction under s. 53, Beng. Act VII, 1878.

Conviction set aside.

APPELLATE CRIMINAL.

Before Mr. Justice Cunningham and Mr. Justice Prinsep.

IN THE MATTER OF THE PETITION OF SHUMSHER KHAN.

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Feby. 7.

THE EMPRESS *v.* SHUMSHER KHAN.*

Criminal Procedure Code (X of 1872), s. 36—Confirmation of Sentence by Sessions Judge.

Section 36 of the Criminal Procedure Code, as regards the necessity for confirmation of the sentence by the Sessions Judge, refers to cases in which the sentence of imprisonment is a sentence of upwards of three years, without including any additional sentence as to fine or whipping.

THE accused, who was a head constable, was charged with having received a bribe. The trial was held under the special powers conferred by s. 36 of the Criminal Procedure Code; and he was found guilty of an offence under s. 161 of the

* Criminal Appeal, No. 759 of 1880, against the order of A. C. Campbell, Esq., Deputy Commissioner of Goalpara, dated the 30th September 1880.