circumstances of this case, too severe. He acted evidently upon grave provocation: he was in possession of the property, and he was attacked by a large number of armed people who tried to dispossess him and to carry away his crops. Under these circumstances, we reduce his sentence to two years' rigorous imprisonment. We acquit the other appellants and direct their release.

E. H. M.

CRIMINAL REVISION.

Before Mr. Justice Caspersz and Mr. Justice Ryves.

DASARATH RAI

v

EMPEROR.*

1909
May 25.

Jurisdiction—Appeal—Trial of Summons Case—Conviction of Assault and Mischief on summons for Criminal Trespass—Competence of Magistrate who issued process, but did not take cognizance or direct a local investigation, to hear appeal on conviction—Transfer—Irregularity—Criminal Procedure Code (Act V of 1898) ss. 192, 243, 244, 246, 529 (f), 556.

Where an accused has been summoned for criminal trespass, it is open to the trying Magistrate, under s. 246 of the Criminal Procedure Code, to convict him of assault and mischief without re-opening the trial and following the procedure laid down in ss. 243 and 244.

Mudoosoodun Sha v. *Hari Dass Dass* (1) referred to.

A Magistrate who did not take cognizance of a complaint or order a local investigation but, acting as the officer in charge of the *sudder* sub-division, directed the issue of summonses, holding that the investigating Magistrate had not given satisfactory reasons for recommending the dismissal of the complaint without, however, expressing any clear opinion hostile to the accused, is not incompetent, under s. 556 of the Criminal Procedure Code, to hear the appeal on conviction of the accused.

The irregularity of transferring a case, when the Magistrate is not empowered under s. 192 to do so, is cured by s. 529 (*f*).

ON the 13th December 1908 the petitioners, Dasarath Rai and another, who were servants of one Surja Prosad, the

* Criminal Revision No. 367 of 1909, against the order of J. T. Whitty, Joint Magistrate of Darbhanga, dated March 22, 1909.

(1) (1874) 22 W. R., Cr., 40.

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malik of mouza Dhanauli, went with others upon two plots of land belonging to the complainant, Pathu Sahu, and looted the crops grown by him. Two days afterwards Pathu filed a complaint before Babu Durga Prosad, a Deputy Magistrate of Darbhanga, alleging that the accused with others went to his *khet* and began looting his paddy, that he remonstrated, whereupon two of them struck him with *lathis*, at the orders of the petitioner Dasarath, while some others held him and slapped and fisted him. The Magistrate, considering the story doubtful, made the case over to Babu Rameswar Prosad, a Sub-Deputy Magistrate, for local investigation and report. The latter, after holding an inquiry, submitted a report, on the 24th December, recommending the dismissal of the complaint. The report came before Mr. J. T. Whitty, Joint Magistrate of Darbhanga, who was then in charge of criminal business of the *sudder* sub-division, and he passed the following order :—

"The inquiring Magistrate was of opinion that the complainant was actually in possession of the land in question, but that he was dispossessed before sowing paddy. I can find no sufficient grounds for this belief. If he was at one time in possession, it is doubtful if he would allow himself to be dispossessed and subsequently, after many months, bring a false case. There has been previous litigation and the case is a doubtful one, but the inquiring Magistrate has not given satisfactory reasons for dismissing it. Summon Dasarath, Hari Jha—s. 447, Indian Penal Code."

Mr. Whitty subsequently, on the 3rd February 1909, transferred the case to Mr. A. M. Rashad for trial. This Magistrate, after hearing the evidence but without drawing up any charge, convicted the accused under sections 352, 426 and 447 of the Penal Code, and sentenced them only under section 426 to one month's rigorous imprisonment each.

The accused appealed from the conviction and sentences, and the appeal was heard and dismissed by Mr. Whitty on the 22nd March.

Babu Dasharathi Sanyal, *Babu Akhoy Kumar Banerjee* and *Babu Buldeo Singh*, for the petitioners.

Babu Srish Chandra Chowdhry, for the Crown.

CASPERSZ AND RYVES JJ. This is a Rule calling upon the District Magistrate to show cause why the conviction and sentence of the petitioners should not be set aside on three grounds: *first*, that the Joint Magistrate had no jurisdiction to try the appeal, inasmuch as he had taken cognizance of the complaint against the petitioners; *secondly*, that the offence for which the petitioners were tried was one within section 447 of the Indian Penal Code, whereas they have been convicted under sections 426 and 352, which is also contrary to the provisions of section 246 of the Criminal Procedure Code; and, *thirdly*, that there is no finding as to the necessary intent under section 447 of the Indian Penal Code. Cause has been shown by the learned Junior Government Pleader.

It appears that the complainant charged the petitioners with certain offences. On the 15th December 1908, Babu Durga Prosad, a Deputy Magistrate, who received the complaint and examined the complainant, recorded an order:—"Story seems doubtful. To Sub-Deputy Magistrate, Babu Rameswar Prosad, for favour of local investigation and report by 21st December 1908." The Sub-Deputy Magistrate having examined witnesses submitted a report recommending the dismissal of the complaint. The matter came before Mr. Whitty, Joint Magistrate (then in charge of the criminal business of the *sudder* sub-division) who, without expressing any clear opinion hostile to the petitioners, thought that they ought to be summoned to stand their trial. In the opinion of Mr. Whitty, the Sub-Deputy Magistrate had not given satisfactory reasons for recommending the complaint to be dismissed. On the date fixed, the matter again came before Babu Durga Prosad, Deputy Magistrate, who took bail from the accused persons present in his Court. On the next date fixed, the 3rd February 1909, Mr. Whitty (as *sudder* Sub-divisional Magistrate) transferred the case for disposal to Mr. A. M. Rashad who convicted the petitioners under sections 426, 352, and 447 of the Indian Penal Code, although they had been summoned to answer a charge under section 447 only.

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In these circumstances, we are of opinion that the Joint Magistrate, Mr. Whitty, had jurisdiction to hear the appeal. It is true that he summoned the petitioners as accused persons, but that was because he was in charge of criminal business as we have already mentioned. The cognizance of the case had already been taken on complaint by the senior Deputy Magistrate, and Mr. Whitty did not take action under section 190, sub-section (1), clause (*c*) of the Criminal Procedure Code, as has been argued that he must have done. If he had no power to transfer the case from the file of Babu Durga Prosad, the irregularity is covered by section 529 (*f*) of the Criminal Procedure Code. The objection is very technical and has no substance. Moreover, the Joint Magistrate (Mr. Whitty), not having expressed any judicial opinion upon the facts stated in the report of the Sub-Deputy Magistrate, was not incompetent to hear an appeal from the judgment ultimately convicting the petitioners. He was not debarred from so doing by the provisions of section 556 of the Criminal Procedure Code. It may be mentioned in this connection that no objection was taken to Mr. Whitty's trying the appeal, either in the Court below or here, on the ground that he should not try the appeal because he had already formed or expressed an opinion on the merits of the case hostile to the petitioners.

In the next place, in our opinion, it was open to the trying Magistrate to convict the petitioners of the offences of assault and mischief, although they had been summoned to answer a charge of criminal trespass only. The learned vakil relies on the note to section 246 in Sir Henry Prinsep's 14th Edition of the Criminal Procedure Code; but it appears to us, on a plain construction of section 246, that the Magistrate is not bound, when he thinks that other offences have been proved, to re-open the trial and follow the procedure of sections 243 and 244. Such a view would necessitate a re-hearing of all the evidence in the same trial, and is clearly opposed to the manifest intention of the Legislature. It was held, under the Code of 1872, in the case of *Mudoosoodun Sha* v. *Hari*

Dass Dass (1), that it is open to the Magistrate to "convict an accused person, who has been summoned before him on the footing of a complaint, of any offence which is the subject of the definition in section 148 (now section 4 (*h*) of the Code), if he thinks that the facts established by the complainant and his evidence only amount to an offence within that section," notwithstanding the terms of the summons in answer to which the accused appears in Court.

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We think, therefore, that this Rule must fail upon the second ground also.

With regard to the third ground of this Rule, we think that the finding of the Deputy Magistrate as to the necessary intention of the petitioners is sufficient to convict them, and the conclusions at which the Joint Magistrate arrived, on appeal, were to the same effect.

The result is that we discharge this Rule, and direct the petitioners to surrender and serve out their punishment.

E. H. M. *Rule discharged.*

(1) (1874) 22 W. R., Cr., 40.