REG. v. GENU bin A'KU.

1868. Sept. 16.

Housebreaking in order to commit Theft—Theft—Separate Sentences—Whipping Act (VI. of 1864).

Where a prisoner convicted of "housebreaking in order to commit theft," and of "theft," both offences being portions of one continuous criminal act, was sentenced, on the first head of charge, to one year's rigorous imprisonment, under Sec. 457 of the Indian Penal Code, and on the second head of charge to receive twenty stripes, under Sec. 2 of the Whipping Act (VI. of 1864); the separate sentences (though not illegal) were disapproved of, as contrary to the spirit and intention of the Whipping Act.

IN this case the accused was charged (1) with having broken into the house of the complainant in order to commit theft, and (2) with having committed theft in the house of the said complainant; and, being convicted, was sentenced by Dr. Alexander Garden Fraser, Magistrate F.P. in the Puná District, on the first count to one year's rigorous imprisonment under Sec. 457 of the Indian Penal Code, and on the second to receive twenty stripes across his bare shoulders with the cat-o'-nine-tails, under Act VI. of 1864, Secs. 10 and 11 (*sic*), and it was directed that the whipping be inflicted at the beginning of the imprisonment awarded on the first head of the charge.

On an examination of the Magistrate's Criminal Return, the Session Judge, F. Lloyd, sent for the proceedings, and forwarded them, under Sec. 434 of the Code of Criminal Procedure, to the High Court, with the following remarks :—

"This sentence appears to be an illegal one. In the first place the Magistrate should have passed only one sentence, and that should have been under Sec. 380 of the Indian Penal Code, and as, under Sec. 2 of the Whipping Act, the punishment of whipping is only awardable under Sec. 380 in lieu of other punishment, the sentence is in this instance illegal, because it is combined with imprisonment.

"The sections of Act VI. of 1864 under which the punishment of whipping was awarded have been misquoted."

The case having come on for hearing this day, before COUCH, C.J., and NEWTON, J., the Court, after referring to the

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decisions in *Reg.* v. *Vináyak Trimbak* (*a*), *Reg.* v. *Murár Trikam* (*b*), and *Reg.* v. *Rámá valad Shivápá* (*c*), made the following order :—

PER CURIAM :—Though the passing of the separate sentences in this case was not illegal, yet it was, in the opinion of the High Court, contrary to the spirit and intention of the Whipping Act, and ought not to be repeated.

(*a*) 2 Bom. H. C. Rep. 414. (*b*) 5 Bom. H. C. Rep., Cr. Ca. 3

(*c*) NOTE.—In this case the accused, Rámá, was charged (1) with housebreaking, under Sec. 445 of the Indian Penal Code, in having broken into the house of the complainant, and (2) with theft in a dwelling house, under Secs. 378 and 380 of the same Code, in having stolen from the said complainant's house property of the value of Rs. 421-12-0; and was sentenced by J. F. Armstrong, Magistrate of the District of Kalladghi, on the first count to one year's rigorous imprisonment, under Sec. 453, and on the second count to eight months' rigorous imprisonment, under Sec. 380 of the Indian Penal Code.

On the examination of the Magistrate's Return for the month of March 1867, A. Bosanquet, Acting Session Judge, remarked: "The act committed by the prisoner formed a single offence, and he should have been convicted of theft under Sec. 454 of the Indian Penal Code."

He cited in support of his remarks 2 Calc. W. Rep., Cr. R. 63, and 6 Calc. W. Rep., Cr. R. 39, and contended that in a case of housebreaking by night accompanied with theft the lesser crime was merged in the greater; that the accused should be punished only for the greater crime; that, therefore, he should be charged only with the greater crime, and that the act of theft committed by him was simply a matter of evidence to prove the greater crime.

In reply, the following letter was addressed by the Registrar of the High Court to the Session Judge (No. 930 of 1867, dated the 24th of June 1867):—

"There would appear to have been conflicting decisions by the Calcutta High Court on the point to which your question refers (*vide* note to Prinsep's edition of the Code of Criminal Procedure, Sec. 46), and there is a difference in the conclusions which have been arrived at in Calcutta and Bombay on this subject.

"It is a peculiarity of the Indian Penal Code, that it has in several places declared portions of one continuous criminal act to be distinct and separate offences. For instance, a single criminal transaction may combine two offences under the Indian Penal Code, namely, housebreaking with intent to commit theft, and theft. The Bombay High Court has held that a person guilty of a complex criminal act of this character may be charged and convicted of the distinct offences which he has committed, but that, under such circumstances, the punishment to be inflicted for these offences in the aggregate must not exceed the maximum punishment awardable for the offence which is the most grave in the estimation of the law, or the limit of imprisonment which the trying authority is competent to impose for a single offence. No objection would be taken to the conviction and punishment of the offender for one offence only, that is, for the most serious of the several offences committed, which is the practice directed to be observed by the Calcutta High Court; but the Bombay High Court has not declared it to be illegal to convict and punish for each of the several offences, and consequently your instructions to the Magistrate were not approved of."