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August 29.

REG. v. LAKHU valad SAKRU.

*Jurisdiction—Opium Laws, Offences against—Smuggled Opium, Possession of—Reg. XXI. of 1827, Secs. 4, 7, and 10—Crim. Proc. Code, Sec. 21.*

The offence of unlawfully being in possession of smuggled opium is an offence exclusively cognisable by a Magistrate of a District or of a division of a District, as representing the Zillá Magistrate referred to in Reg. XXI. of 1827, Sec. 7. No other Magistrate or Court has now jurisdiction to hold a preliminary inquiry into, or to try a person accused of, such an offence.

*Reg. v. Hirá Jivá (a)* approved, and the Court's reply, No. 1231 of 19th August 1867, to the Khándesh Session Judge's reference No. 702 of 1867, dissented from.

THIS was a reference made by A. C. Watt, Acting Session Judge of Khándesh, to the following effect:—

“With reference to the ruling of the Bombay High Court reported in Vol. VII., p. 59, Crown Cases, I have the honour to submit for the orders of their Lordships the accompanying proceedings of a case committed for trial by this court at the ensuing sessions.

“The accused has been committed for trial by Mr. Anderson, a Magistrate F. P. in this district, charged with an offence punishable under Reg. XXI. of 1827. As Sec. 7 of that Regulation says that the penalty shall be enforced by information before the Zillá Magistrate or Criminal Judge, and as Mr. Anderson holds neither of these offices, it appears to me that he had not jurisdiction to commit the case to the Session Court.”

The reference was heard by GIBBS and WEST, JJ.

Neither side was represented.

WEST, J.:—In this case a Magistrate F. P. has committed, for trial by the Session Court, a man accused of being unlawfully in possession of opium. The Acting Session Judge has referred the case to this court with an expression of his opinion that as in cl. 1, Sec. VII. of Reg. XXI. of 1827, by which the jurisdiction in cases like the present is constituted, it is provided that the penalty shall be enforced by information

before the Zillá Magistrate or Criminal Judge, and as the committing Magistrate does not hold either of these offices, he had not jurisdiction to commit the case for trial before the Sessions Court.

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Reg. XXI. of 1827 forms part of what was intended as a connected and complete system of legislation for this Presidency, and the true intention of any particular enactment can be arrived at only by a consideration of its place in the Code, and of those other provisions the existence and force of which must have been present to the mind of Government in framing it. Now Reg. XII. of 1827 was designed to establish "a system of police, and to define the duties and powers of all police authorities." "The duties of police," it is declared by Sec. 1, "as described in the Regulations, shall be conducted by the Judge and Collector of each Zillá, under the respective designations of Criminal Judge and Zillá Magistrate, in the manner hereinafter enacted." Sec. 2 limits the police jurisdiction of the Criminal Judge generally to the town in which his Court or *Adálat* is situated. This special police jurisdiction of the Criminal Judge was swept away by Reg. IV. of 1830 and Act V. of 1846. Reg. III. of 1830, simultaneously with Reg. IV., provided that "the criminal courts held by the Zillá Judges shall be held by them as Session Judges, and where in the Regulations functions and duties are provided for the Criminal Judges, the same shall be executed by the Session Judges as substituted for them." This is the origin in the Bombay Presidency of the office of Session Judge—an office divested, as we have seen, at the moment of its creation, of the local police jurisdiction that had belonged to the Criminal Judge under Reg. XII. of 1827.

The remaining functions of the Criminal Judge descended to the Session Judge. These were in general "the functions of criminal justice," which, according to the definition given in Reg. XIII. of 1827, Sec. 1., cl. 1, are "to conduct the trials of persons accused of crimes and serious offences, and to maintain adherence to Regulations made for the said purpose, and for the guidance of Magistrates and Police

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Officers in general." Such functions, forming the subject of a separate Regulation, were regarded as quite distinct from the duties of police, for the execution of which an entirely different set of officers is constituted by Reg. XII.—entirely different, that is, from the moment when the anomalous local police jurisdiction of the Criminal Judge had been extinguished by Reg. IV. of 1830.

Amongst the duties assigned to the Collector as Zillá Magistrate was that of receiving informations of offences; as to which it is provided that they "shall, if circumstances permit, be recorded in the form of depositions:" Reg. XII. of 1827, Sec. ix., cl. 1 and 2.

The Criminal Judge discharging the duties of police within the Sadr Station, as prescribed by Sec. 1 of the same Regulation, "in the manner hereinafter enacted," could receive and act on such informations relating to offences and offenders within the limited space assigned to him with magisterial powers, but not beyond it. When, therefore, we find in Sec. 7 of Reg. XXI. of 1827, a contemporaneous enactment, that "the penalty for abetting the smuggling of opium" "shall be enforced by information before the Zillá Magistrate or Criminal Judge according to the general Code," the process intended is obviously that the principal police authority (according to the sense attached to the term "police" in the Regulations) shall take cognisance of the breach of the Revenue Law. For laying an information before the Criminal Judge in his strictly judicial character no provision is made in the Code. It is true that in Reg. III. and also in Reg. IV. of 1830 it is provided that "the functions and duties" of the Criminal Judge shall be executed by the Session Judge, "and that a Session Judge has all the duties and functions of the Criminal Judge." These expressions taken by themselves would be comprehensive enough to include such a function as that imposed by Reg. XXI. of 1827, Sec. vii., cl. 1; but then they must be taken in connection with the express withdrawal by Reg. IV. of 1830 of the police jurisdiction up to that time exercised by the Criminal Judge. To take an information "according to the general

Code" was to exercise police jurisdiction, and became legally impossible when that jurisdiction was withdrawn.

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It thus appears that since the year 1830 it has been necessary to read cl. 1, Sec. VII. of Reg. XXI. of 1827 as though the words "or Criminal Judge" had been struck out of it: the penalty then must be enforced by information "before the Zillá Magistrate." The sections of Reg. XII. of 1827 defining the Zillá Magistrate are no longer in force, but it has been held on several occasions in this court that when powers are given to the Zillá Magistrate alone they can now be exercised only by the Magistrate of the District (3 Bom. H. C. Rep., Cr. Ca. 39, 50), and there is no room for doubt that "Zillá Magistrate" in the Regulations meant everywhere and always the Collector in the exercise of his magisterial functions. These functions he could, and as to opium cases usually did, devolve on his Assistants under Reg. XII. of 1827, Sec. III., cl. 3; but the repeal of that clause by Act XVII. of 1862 has thenceforward made such delegation illegal. The District Magistrate must himself receive the information.

It was perhaps permissible to the Magistrate under the Regulations, though he had received the information, to commit an offender against an opium law for trial to the Court of the Criminal Judge (now the Court of Session). It is true that the English books lay down that "when a statute creating an offence gives a penalty and directs how it shall be recovered, the offence cannot be punished in any other way" (Cro. Jac. 643), and that a particular mode of proceeding prescribed in the case of a new offence must be strictly pursued: *Reg. v. Wright (b)*. The doctrine, after having been shaken in *Crofton's Case*, was reaffirmed by Lord Mansfield (see the cases collected in 1 Russell on Crimes, 50), and has not since been questioned. But in the classification of acts given in Sec. 1 of Reg. XIV. of 1827 as to be considered "criminal" according to the heading of the chapter, Art. 6 includes "acts which constitute breach of laws made for particular purposes," and Sec. 12 of Reg. XII. of 1827 allows

(b) 1 Burr. 545.

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the Magistrate, in the case of any trial of an offender in which he finds his powers of punishment inadequate, or that the offence is one which ought to be referred for trial to the Criminal Judge, to commit the case for trial accordingly. Such cases arising out of the smuggling of opium could hardly, according to the distinction made by Reg. XIII. of 1827, Sec. 1, be considered as "crimes and serious offences" properly referable for trial to the Criminal Judge. Even if they could sometimes be placed in this category, commitments would necessarily be very infrequent after the Magistrate's power of inflicting imprisonment had been extended to a year by Reg. IV. of 1830. He has now jurisdiction (Act XXV. of 1861, Sec. 22) to inflict the extreme term of imprisonment authorised by Reg. XXI. of 1827, Sec. VII., cl. 1, to be inflicted in commutation of the penalty. It was only under the particular circumstances set forth in Sec. 12 of Reg. XII. of 1827 that he could, after entering on the trial of an opium case under Sec. 7 of Reg. XXI., transfer the trial to the court of the Criminal Judge. Sec. 12 of Reg. XII. of 1827 having now been repealed by Act XVII. of 1862, such a transfer is no longer allowed by the law. He must hear and determine the case himself, since in any other Criminal Court the objection might be raised that a breach of the opium regulation, as the law now stands, ranks amongst "offences which are by such law made punishable by some other authority therein specially mentioned" (Act XXV. of 1861, Sec. 21).

The view just expressed has been taken by this court on several previous occasions. The last of these amongst the published reports is that of *Reg. v. Hirá Jivá (a)*, in which it is distinctly laid down that "no other authority (than the Magistrate of the District) has jurisdiction." The point immediately before the court on that occasion was as to whether a Subordinate Magistrate, 1st Class, had jurisdiction; but the principle extends to the present case. It is before the District Magistrate's alone, of existing courts, that the penalty can be now enforced in the mode prescribed by

(a) 7 Bom. H. C. Rep., Cr. Ca. 59.

the Regulation, and no other mode, as we have seen, can be pursued.

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The proceedings held by Mr. Anderson, the Magistrate F. P., must, therefore, be annulled, and his commitment cancelled, as having been made without authority. On information duly laid before the Magistrate of the District, it will be his duty to dispose of the case in accordance with the law.

GIBBS, J.:—I concur with Mr. Justice West in the conclusion at which he has arrived. The

Session Judge of Khándesh No. 702, of 7th August 1867. Court's reply, No. 1213, dated 19th August 1867.

question has never before been raised in court. A reference was made by the Session Judge of Khándesh as per margin, in which it might be

said to have been partially raised, and the court's reply certainly gives rise to the view taken by the Session Court that it had jurisdiction to try such cases.

I remember the reference being discussed in chambers, and I think Mr. Justice Newton then pointed out that as the functions of the Criminal Judge had been transferred to the Session Judge, the latter officer could dispose of such cases as the present.

I think, however, that had the matter been discussed fully, as it now has been by Mr. Justice West, we should not have agreed on the reply then sent to Mr. Hobart.

It appears to me that Reg. XXI. of 1827 gives permission that the complaint may be made before the Criminal Judge or Zillá Magistrate; if, therefore, the former officer were to be considered as represented by the "Session Judge," it follows that the complaint should be made before him. As a Session Judge cannot now, by the Code of Criminal Procedure, Sec. 359, act on a complaint made before him (save in special cases mentioned in that section, and of which opium-smuggling is not one), it also follows that he cannot try such cases any longer.