[APPELLATE CRIMINAL JURISDICTION.]

1874.
February 12.

REG. *v.* DOD BASAYA' and another.

Cumulative sentence—Single act and intention—Indian Penal Code, Sections 435 and 436.

Where the act of an accused person, coupled with his intention or knowledge, constitutes a graver offence, the circumstance that the same act also answers to the definition of another less grave offence, does not render him liable to a cumulative punishment.

Case where different statutes provide separate punishments for the same act, distinguished.

THE accused persons were tried by C. F. H. Shaw, Session Judge of Belgaum, for having climbed on to the roof of a warehouse and set fire to it, with the intention of destroying it with the goods therein stored. The Judge found them guilty, first, under Section 436 of the Indian Penal Code, of mischief in destroying a building used for the custody of property, and sentenced them to seven years' rigorous imprisonment; and, secondly, under Section 435, of mischief causing damage to property to the amount of upwards of Rs. 100, and sentenced them to three years' additional rigorous imprisonment.

The appeal was heard by WEST and NA'NA'BHA'I HA'RIDA'S, JJ.

Ghanashám Nilkanth, after commenting on the evidence, argued:—The Legislature in the Indian Penal Code has classified the offences into cognate groups, generally placing the lightest of them at the head, then the more serious ones following it in the order of gravity, and the most heinous of the group at the end, and providing for each offence a suitable penalty. It does not intend that the person who commits the gravest offence should also be subjected to the punishments provided for the minor offences. A double sentence for an offence founded on a single intention should not be sustained. The intention of the accused persons in this case was to destroy the warehouse along with what it contained. There was not one intention to destroy the building, and a second one to destroy the goods.

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Dhirajlál Mathurádás, Government Pleader, *contra* :— The act of the accused met the requirements of two different sections, and the Judge was right in awarding punishment provided under each. There is nothing to make this course illegal.

WEST, J., in delivering the judgment of the Court, said :—

The prisoners have been convicted by the Session Judge of Belgaum of the offence of committing mischief by fire, with intent to destroy a warehouse, under Section 436 of the Indian Penal Code, and of the offence of mischief by fire with intent to cause damage to property of the amount of Rs. 100 and upwards, under Section 435 of the Code. They have been sentenced to seven years' rigorous imprisonment for the former and to three years for the latter offence.

It has been contended by Mr. Ghanashám Nilkanth, on behalf of the appellants, that a double sentence for an offence, founded upon a single act, could not be maintained.

Section 426 of the Indian Penal Code provides punishment for the offence of mischief generally. In the various sections which follow, aggravating circumstances are added and enhanced punishments provided to suit those circumstances. When one set of aggravating circumstances properly attaches to an act making it an offence, another set should not be applied to the same act, unless there be in the mind of the offender a wholly separate intention. In some English cases one act or set of acts of the accused person has been held punishable under two different statutes, and a double conviction and sentence have been sustained. In such cases, the intention of the Legislature is to guard two interests of different species and to prevent a person, who has offended against both, from escaping with a penalty provided for the defence of one only. The present is not such a case. The intention of the accused was solely to do one act, viz., to set fire to a warehouse; and the circumstance that the same act also answers to the definition of another and subordinate offence,

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does not render him liable to an additional punishment for it. Such a case seems to be contemplated by Section 454 of the Criminal Procedure Code, paragraph II. It is a general rule that when, in the same penal statute, there are two clauses applicable to the same act of an accused, the punishments are not to be regarded as cumulative, unless it be so expressly provided. The rule of only a single penalty for a single offence under the same law was distinctly recognised by the Roman Law (Pothier Pand Lib. XLVIII. Tit. XIX. 59, Dig. fr. 41) and has been followed in many cases under the English law (*a*). The observation of LUSH, J., in *Berry* v. *Henderson* (*b*), implies that separate penal provisions in the same enactment are not to be understood as cumulative, unless it be so provided. While, therefore, we sustain the conviction on the graver of the two charges—the one under Section 436—we must reverse the conviction and sentence on the minor one under Section 435.

[APPELLATE CIVIL JURISDICTION.]

Miscellaneous Regular Appeal No. 3 of 1873.

January 9.

KRISHNARA'V VENKATESH .....*Appellant.*

VA'SUDEV ANANT.....*Respondent.*

Act VIII. of 1859, *Section* 256—*Meaning of term "Applicant"—Jurisdiction—Attaching creditor—Appeal to High Court—Amount.*

A puisne attaching judgment-creditor for a sum under Rs. 5,000 applied to a Subordinate Judge, under Sec. 256 of the Civil Procedure Code, to have a sale, made in a suit brought in his Court by a senior attaching judgment-creditor, for a sum above Rs. 5,000, set aside. The application was refused on the ground of want of jurisdiction, as the applicant was not a party to the suit; and the sale was accordingly confirmed.

On regular appeal to the High Court:—

Held that the term "applicant" in Sec. 256 is not confined to the parties to the suit, but also includes any person who has sustained substantial injury by reason of any material irregularity in publishing or conducting the sale.

(*a*) As in *Reg.* v. *Moodie*, 1 M. & R. 128. (*b*) L. R. 5 Q. B. 203.