

[CRIMINAL JURISDICTION.]

1875.
July 6.

REG. v. TUKA'RA'M RA'GHO.

Offence not triable by Subordinate Magistrate—Power of District Magistrate to annul conviction—Criminal Procedure Code, Sections 284 and 297.

Where, on appeal from a conviction, by a Subordinate Magistrate, of an offence triable by him, the Magistrate of the district is of opinion that the evidence in the case establishes a graver offence against the accused not triable by the Subordinate Magistrate,

Held that the Magistrate of the district has no power to annul the conviction and sentence under Section 284 of the Code of Criminal Procedure, but should report the matter for the orders of the High Court.

THE following case was stated by W. M. P. Coghlan, Session Judge of Tháná, for the opinion of the High Court:—

“Tukárám Rágho was convicted by Mr. Shripat Pándurung, 2nd Class Magistrate, of intentionally outraging the modesty of a woman under Section 354 of the Penal Code. The prisoner appealed to the District Magistrate, who annulled the conviction and sentence in the following order:—

“The evidence recorded by the Subordinate Court in this case clearly goes to prove that appellant committed the offence with which he was charged. In the place of completing the evidence and passing sentence as he has done, the Magistrate should have submitted the proceedings in a case of this nature, in order to a more severe sentence being passed on the accused than that passed by the Magistrate, as the offence, if the evidence recorded is to be relied on, is one of attempting to commit rape (Sections 376 and 511 of the Indian Penal Code), and, as such, one calling for a severe sentence, and which the Subordinate Court is not empowered to try as beyond its competency.

2. “The Court accordingly annuls the conviction and sentence passed by the Subordinate Court, and directs a retrial of the case by the 1st Class Magistrate in charge of the Karjat Táluka, with which view the records, &c., are transmitted to that Court (Section 284 of the Code of Criminal Procedure).

3. "I am of opinion that this order was illegal, in that the 2nd Class Magistrate had convicted Tukárám Rágho of an offence triable by him, and that Section 284 of the Code of Criminal Procedure has no application to the case. *Reg. v. Chanveráyá* (5 Bom. H. C. Rep. 65 Cr. Ca.) appears to be in point, and shows that the District Magistrate's order was *ultra vires* as to Section 284 (corresponding to Section 427 of the former Code).

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4. "It seems from *Reg. v. Hiramón* (8 Calc. W. R. Cr. Rul. 30) that the Bengal High Court was of opinion that a Session Judge sitting in appeal may quash an illegal conviction and direct proceeding according to law; but however this may be, it does not bear on the present case, in which the conviction by the 2nd Class Magistrate was legal.

5. "It appears that the District Magistrate, on entertaining the opinion (as I gather from this order) that Tukárám Rágho ought to have been tried for attempt to commit rape, an offence not triable by the 2nd Class Magistrate, ought to have reported the matter to the High Court in order that the erroneous conviction might be quashed and a new trial ordered.

Quære—"Would it have been competent to the District Magistrate to confirm the 2nd Class Magistrate's conviction under Section 354, and then to have received a complaint of attempt to rape, and have committed for trial at the Sessions?"

6. "The alleged illegal action of the District Magistrate was argued to be a bar to the trial of the case, in that it invalidated the committal. I, however, held that, the committal being by a competent Magistrate, the Court was (Criminal Procedure Code, Section 197) bound to accept it."

The case was reviewed by KEMBALL and NA'NA'BHA'I, JJ.

KEMBALL, J., being of opinion that the District Magistrate had, and NA'NA'BHA'I HARIDA'S, J., that he had not power to annul the conviction by the Subordinate Magistrate, referred the point to WESTROPP, C.J., under Section 271 B of the Code of Criminal Procedure.

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July 1.—WESTROPP, C. J. :—The accused Tukárám Rágho was convicted by a Magistrate of the 2nd Class, under Section 354 of the Penal Code, of intentionally outraging the modesty of a woman, which is an offence within the jurisdiction of a 1st or 2nd Class Magistrate. The District Magistrate, on appeal by the accused, being of opinion that the facts in evidence before the 2nd Class Magistrate constituted the graver offence of an attempt to commit rape, annulled the conviction and sentence, the offence of an attempt to commit rape not being within the jurisdiction of the 2nd Class Magistrate. My brothers Kemball and Nánábhái Haridás, JJ.—having differed on the question whether it was within the authority of the District Magistrate to annul the conviction and sentence, or whether he, being of opinion that the offence actually committed was of a graver character than that of which the accused was convicted and beyond the jurisdiction of the 2nd Class Magistrate, ought to have referred the case to the High Court in order that it might be dealt with there—have referred the point to me under Section 271 B of the amended Criminal Procedure Code.

The question turns upon the construction of Section 284 of that Code, which provides that “when any Court has *convicted* a person of an offence not triable by such Court, the Appellate Court shall annul the conviction and sentence of such Court, and direct the trial of the case by a Court of competent jurisdiction.” The Appellate Court in this case was the District Magistrate; the offence of which the accused was convicted, was “intentionally outraging the modesty of a woman” which, it is not denied, is an offence within the jurisdiction of a 2nd Class Magistrate and, therefore, was triable by him. It may be that the facts alleged, if true, constituted an attempt to commit rape, which is not an offence triable by a 2nd Class Magistrate. But the 2nd Class Magistrate did not try the accused for, or convict him of that offence. Therefore I think that the District Magistrate had not any jurisdiction, under Section 284, to annul the conviction and sentence on the ground that the evidence, on which the accused was convicted, warranted a graver

charge than the 2nd Class Magistrate had authority to try. The decision in *Reg. v. Chanveráyá* (5 Bom. H. C. Rep. 65 Cr. Ca.) of Newton and Tucker, JJ., on Section 427 of the former Criminal Procedure Code, which is similar in all respects to Section 284 of the present amended Code, agrees with my opinion. A *dictum* at the conclusion of the Court's remarks in the case of *Reg. v. Heeramun Singh (a)* is of an opposite character. But, on looking at the language of Section 427 of Act XXV. of 1861 and Section 284 of the present amended Criminal Procedure Code, I think it is explicit and cannot be extended so as to comprise such a case as the present.

The difference in language between Clause 5 of Section 297 of the present amended Code and Section 284 of the same Code fortifies this conclusion. Clause 5 of Section 297 is that, "if the High Court considers that any person convicted by a Magistrate *has committed* an offence not triable by such Magistrate, it may annul the trial and order a new trial before a competent Court." Here we find the Legislature using much more comprehensive language when it clearly intended to give the power of annulling the previous proceedings, although the charge and conviction may have been within the jurisdiction of the trying Court. That power is here given irrespectively of the nature of the charge and conviction where the evidence leads the High Court to believe that the offence committed was graver than that charged, and for which the accused was convicted in the Court below.

The reply to the Session Judge of Tháná should, I think, be that the District Magistrate had not power to annul the conviction and sentence passed by the 2nd Class Magistrate, but should have referred the matter to the High Court.

July 6.—*Coram* KEMBALL and NA'NA'BHAI HARIDA'S, JJ. :—The District Magistrate had not power to annul the conviction and sentence passed by the 2nd Class Magistrate, but should have referred the matter to the High Court.

(a) 8 Calc. W. R. 30 Cr. R.

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1875. It should be pointed out to the Session Judge that he
 REG. . was wrong in holding that the committal, being by a com-
 v. petent Magistrate, he was, under Section 197 of the Code of
 TUKA'RA'M Criminal Procedure; bound to accept it. When the Session
 RAG'HO. Judge found the order of committal to be contrary to law,
 he should have reported the proceedings to the High Court,
 under Section 296 of the Code, with a view to getting it
 annulled.

Order accordingly.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 400 of 1874.

July 6. SHA'PURJI JAHA'NGIRJI.....(*Defendant*) *Appellant.*
 THE SUPERINTENDENT OF } ... (*Plaintiff*) *Respondent.*
 THE POONA CITY JAIL. }

*Limitation Act IX. of 1871, Schedule II., Clauses 63, 84, and 95—Suit on an
 indemnity bond—Fraud—Cause of action.*

On the 27th July 1868 plaintiff received from defendant an indemnity bond, promising to indemnify plaintiff against the misbehaviour of a third person. On the 4th June 1870 the third person committed an act of embezzlement. In an action brought by plaintiff on the 28th June 1873 on the indemnity bond, the first Court held the claim barred under Clauses 63 and 84 of Schedule II., Act IX. of 1871. In appeal that decree was reversed, and the claim allowed under Clause 95 of the same schedule.

The High Court, on special appeal, *held* that Clauses 63 and 84, and not Clause 95, applied to the case; as the suit was one, not for relief on the ground of fraud, but for breach of a contract to indemnify against fraud.

THIS was a special appeal from the decision of H. Crowe, Assistant Judge of Poona, reversing the decree of Mahádev Govind Bânade, 1st Class Subordinate Judge at the same place.

The special appeal was argued before WESTROPP, C.J., and LARPENT, J., on the 6th July 1875.

Gándhibái Jhángirji Modi for the appellant.

Dhirájlál Mathurádás (Government Pleader) for the respondent.

The facts of the case fully appear from the judgment of the Court delivered by