[APPELLATE CRIMINAL JURISDICTION.]

Before Mr. Justice Melvill and Mr. Justice Kemball.

1877.

April 26.

REG. *v.* BALA'PA' BIN DUNDAPA' AND OTHERS.*

Murder—Culpable homicide not amounting to murder—Reference—Appeal—Power of High Court to alter finding—Code of Criminal Procedure (Act X. of 1872), Section 288.

Under Section 288 of the Code of Criminal Procedure, the High Court, to which a reference is made by a Court of Session for confirmation of a sentence of death on conviction of murder, cannot, in the absence of an appeal, alter the conviction to one of culpable homicide not amounting to murder, if it be of opinion that the evidence does not establish the former but the latter offence. It must order a new trial for that purpose.

Where the prisoners were tried on two charges of murder and culpable homicide not amounting to murder, and the opinion of the assessors was taken on both charges, but the Session Judge, being of opinion that the evidence established the former charge, recorded a conviction and sentence for murder only, the High Court being of opinion, on a reference under Section 287 of Act X. of 1872, that the offence proved was culpable homicide not amounting to murder, did not order a new trial *ab initio*, but directed the Session Judge to complete the trial by recording a finding on the second charge of culpable homicide not amounting to murder.

THE three accused were tried by W. Sandwith, Session Judge at Dharwad, and two assessors on charges of murder and culpable homicide not amounting to murder. The assessors expressed their opinions on both the charges, and the Session Judge being of opinion that the evidence established the graver offence, convicted the accused of murder, and sentenced them to death, but did not consider it necessary to proceed further on the minor charge. Under Section 287 of the Code of Criminal Procedure the proceedings were referred to the High Court for confirmation; but the convicts preferred no appeal.

Prisoners Nos. 2 and 3, Máhádevápá and Apana, in company with their relative, prisoner No. 1, Bálápa, went, according to the finding of the Court of Session, to the house of a prostitute with whom their step-brother Dundapá was sleeping, and attacked him with sticks, causing injuries, which resulted in his death within eight hours. The evidence showed that there existed a bitter hatred between the prisoners and the deceased; and pointed to a quarrel which had taken place in the morning of the day on which the deceased was attacked.

* Confirmation Case No. 10 of 1877.

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Inverarity, instructed by Mánekshâh Jehangirshâh, was heard on behalf of the convicts. He urged that the evidence was discrepant and untrustworthy, especially as regarded the share of Apana, No. 3, in the transaction.

Honourable V. N. Mandlik, Acting Government Pleader, for the Crown, urged that the evidence was sufficient for the conviction of all the three on the charge of murder.

MELVILL, J., delivered the judgment of the Court. After commenting at length on the evidence, and observing that there was not sufficient evidence of the commission of any offence by prisoner No. 3, Apana, he proceeded thus :—

It seems impossible, therefore, to bring the acts of the prisoners within the definition of murder. What we consider to be proved is this, viz., that prisoners, Nos. 1 and 2, went to the prostitute's house, armed with sticks, intending to beat the deceased; and that prisoner No 1 caused the death of the deceased, by striking a blow which was likely to cause death, but was not sufficient in the ordinary course of nature to cause death. Under these circumstances, prisoner No. 1 was guilty of the offence of culpable homicide not amounting to murder, and having regard to the provisions of Section 111 of the Indian Penal Code, we consider that prisoner No. 2 was equally guilty of that offence.

Unfortunately, this Court, as a Court of reference, does not appear to have power, under Section 288 of the Code of Criminal Procedure, to alter a conviction of murder into one of culpable homicide not amounting to murder, but only to order a new trial. In referred cases there is generally a petition of appeal, and then this Court, being a Court of Appeal as well as of reference, can alter the finding of the Sessions Court (Section 280); but in the present case there is no petition of appeal. We think that it is to be regretted that the Legislature should have taken no notice of the objections which were raised to Section 399 of the old Code, and should have enacted Section 288 in the same form. It seems quite useless to order a new trial merely because this Court considers that the facts established by the evidence constitute the offence of culpable homicide, or of hurt, and not of murder. Nor, if this Court is authorized to act upon its own view of the

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law, when there is an appeal as well as a reference, is there any apparent reason why it should not have the same power when there is a reference only. However, we have no choice but to obey the provisions of the law, which require us to annul the conviction, and order a new trial. Fortunately, however, in the present case, the prisoners were arraigned on the charge of culpable homicide, as well as on that of murder, and the trial on both charges was so far completed that the opinion of the assessors was taken on both charges, though the Session Judge only recorded a finding on the charge of murder. We think that we shall be sufficiently fulfilling the requirements of the law if, instead of ordering a new trial *ab initio*, we direct the Session Judge to complete the trial of accused Nos. 1 and 2 by recording a finding on the second charge, viz., that under Section 304 of the Indian Penal Code, and in the event of his convicting the accused, (as it may be presumed that he will do, though this Court has no authority to direct him to do so), we would suggest to him that he might appropriately sentence the accused No. 1 Bálápa to rigorous imprisonment for five years, and accused No. 2 Máhádevápá to rigorous imprisonment for three years.

Proceedings returned.

[APPELLATE CIVIL JURISDICTION.]

Before Sir M. R. Westropp, Knt., Chief Justice, and Mr. Justice Nánábhái Haridás.

BHAGVAN DULLABH (ORIGINAL PLAINTIFF, SPECIAL APPELLANT) *v.* KALA' SHANKAR (ORIGINAL DEFENDANT, SPECIAL RESPONDENT.)* April 26.

Hindu Law—Will—Nuncupative will.

A nuncupative will, or a verbal bequest, of his separate property, made by a separated Hindu, beyond the limits of the ordinary original jurisdiction of the High Court of Bombay, and not relating to any immoveable property to which the Hindu Wills Act (XXI. of 1870) applies, is valid.

* Special Appeal No. 20 of 1875.