

5 B. 140.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, Mr. Justice M. Melvill and Mr. Justice Kemball.

EMPRESS v. NANA RAHIM.* [28th October, 1880.]

Indian Penal Code (XLV of 1860), s. 75—Offence—Attempt—Sentence—Conviction of an attempt to commit theft—Previous Conviction of theft.

[MELVILL, J., dissentiente].—If a person, who has been convicted of an offence punishable under chap. 12 or chap. 17 of the Indian Penal Code with imprisonment for a term of three years or upwards, is convicted of an attempt to commit any such offence, he does not thereby become liable to the enhanced punishment allowed by s. 75 of the Code.

[R., 17 A. 120 (123)=15 A.W.N. 22; 10 Bom. L.R. 26=3 M.L.T. 122.]

[141] THE accused in this case was convicted by S. H. Phillpotts, Sessions Judge of Ahmedabad, of an attempt to commit theft, under ss. 379 and 511 of the Indian Penal Code. He had previously been seven times convicted of theft; and the Sessions Judge, on the authority of s. 75 of the Indian Penal Code, sentenced him to transportation for ten years.

The prisoner appealed to the High Court.

There was no appearance on either side.

KEMBALL and F. D. MELVILL, JJ., sent for the record and proceedings in order to determine whether the sentence passed was legal.

The appeal was heard by M. MELVILL and KEMBALL, JJ.

M. MELVILL, J.—I think that the sentence passed in this case is legal. Section 511 of the Penal Code provides that "whoever attempts to commit an offence punishable with transportation or imprisonment ... shall ... be punished with transportation or imprisonment of any description provided for the offence for a term ... which may extend to one-half of the longest term provided for that offence." The longest term provided for the offence of theft is transportation for life, which may be awarded under the circumstances mentioned in s. 75: and under the same circumstances it appears to me that s. 511 authorizes the award of one-half of the same punishment, or transportation for ten years (s. 57). This conclusion seems to me to be not only strictly in accordance with the words of s. 511, but also with what may be presumed to have been the intention of the Legislature in fixing an arithmetical proportion between the punishment to be awarded for an offence and the punishment to be awarded for an attempt to commit such offence. Degrees of punishment are regulated according to degrees of criminality; and it is manifest that an unsuccessful attempt to commit theft, in spite of the deterrent effect of a previous conviction, is as much a sign of a confirmed criminal propensity as if the offence had been actually committed.

KEMBALL, J.—I am unable to concur in thinking the sentence legal, and would, therefore, reduce it to 18 months' rigorous imprisonment [142]. It is only where a person has been convicted a second time of an offence punishable under chap. 12 or chap. 17 of the Indian Penal Code that he can be made to undergo extra punishment under s. 75. I do not, therefore, see what application that section has to an attempt to commit one

* Criminal Appeal, No. 1 of 1880.

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5 B. 140.

1880
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5 B. 140.

of those offences. Section 511 of the Code is perfectly clear, and however desirable it may be to award enhanced punishment in the case, I am of opinion that we cannot take into consideration the penalty the prisoner might have been subjected to had he been convicted under s. 379.

[In consequence of the difference of opinion the case was laid before the Honourable the Chief Justice, under s. 271-B of the Code of Criminal Procedure, for his opinion.]

OPINION.

WESTROPP, C. J.—The accused, Nana Rahim, comes within the first of the two conditions required by s. 75 of the Penal Code to warrant the enhanced punishment allowed by that section,—that is to say, he has previously been convicted of offences punishable under chap. 17 of the same Code. But his case does not satisfy the second condition required by s. 75. He has not on the present occasion been guilty of any offence punishable under chap. 12 or chap. 17 of the Code, but has been guilty of an offence, *viz.*, an attempt to commit theft punishable under chap. 23 (s. 511). Hence I think the sentence of ten years' transportation, passed by the Sessions Judge, cannot be sustained. The view, which Mr. Justice Kemball and I have adopted of the inapplicability of s. 75 of the Penal Code to such a case as the present, seems to have been taken by Bittlestone in *Reg v. Mooneswamy*, mentioned by Mr. Mayne in his note on s. 511 at p. 420 of the ninth edition of his commentaries on the Indian Penal Code.

In accordance with this opinion the Division Bench reduced the sentence to eighteen months' rigorous imprisonment.

5 B. 143.

[143] ORIGINAL CIVIL.

Before Mr. Justice West.

BURJORJI CURSETJI PANTHAKI (*Plaintiff*) v. MUNCHERJI KUVERJI, (*Defendant*).* [10th, 13th, 14th, 15th, 17th and 24th, January 1880].

Registration Act III of 1877, cls. (b) and (h) of s. 17—Document creating a right to obtain another document—Pleading—Admission—Effect of admission in pleading of execution of contract—Evidence to prove an admitted document not necessary—Evidence.

By an agreement, dated 2nd August 1880 the defendant agreed to sell to the plaintiff a certain piece of land with a dwelling-house for Rs. 1,900. At the time of the execution of this agreement the plaintiff paid the defendant Rs. 100 earnest-money, and the agreement provided that the remaining Rs. 1,800 should be paid within a month from the date of the agreement when the deed of conveyance of the property should be executed. The material part of the agreement was as follows:—

“I have received from you Rs. 100, namely, rupees one hundred, as earnest (*i. e.*, at the time of the execution of this bargain-paper. And as to the remaining Rs. 1,800, namely, one thousand and eight hundred, the same are duly to be paid to me within one month from this day, when you will get the deed (or) document made in your favour. And all the expenditure in respect of the deed (or) documents and transferring (the property) to your name you are duly to make on your account. On these terms this informal bargain-paper having been written, is agreed to and delivered.”

The plaintiff sued for specific performance, and tendered the agreement in evidence, although unregistered.

* Suit No. 450 of 1880.