

1881

MARCH 2.

5 B. 403.

## APPELLATE CRIMINAL.

APPEL-

*Before Mr. Justice Melvill and Mr. Justice Nanabai Haridas.*

LATE

EMPRESS *v.* SHANKAR. \* [2nd March, 1881.]

CRIMINAL.

5 B. 403.

*Rape—Attempt to commit rape—Indecent assault—Indian Penal Code, ss. 354, 375 and 511.*

An indecent assault upon a woman does not amount to an attempt to commit rape, unless the Court is satisfied that there was a determination in the accused to gratify his passions at all events, and in spite of all resistance.

*Reg. v. Lloyd* (1) followed.

THIS was an appeal against a sentence passed by W. Wedderburn, Session Judge of Ahmednagar. The accused was tried on the charges of rape and an attempt to commit rape, and, being convicted of the latter, was sentenced to rigorous imprisonment for a term of three years. The prisoner appealed.

[404] *Inverarity* (with him *Shivshankar Govindram*), for the appellant, contended that the evidence could not be relied on as establishing more than an indecent assault. The object of the prisoner was no doubt to have sexual intercourse; but there was no evidence of such a determination to effect that object at all hazards as was held in *Reg. v. Lloyd* (1) to be necessary to support a conviction of an attempt to commit rape.

Hon. V. N. *Mandlik* (Govt. Pleader) for the Crown, supported the conviction.

## JUDGMENT.

The judgment of the Court was delivered by

M. MELVILL, J.—The only point on which we entertain any doubt in this case is whether the prisoner's conduct amounted to an attempt to commit rape. In *Reg. v. Lloyd* (1), *Patterson, J.*, in summing up, said: "In order to find the prisoner guilty of an assault, with intent to commit a rape, you must be satisfied that the prisoner, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part." We believe that in this country indecent assaults are often magnified into attempts at rape, and even more often into rape itself; and we think that a conviction of an attempt at rape ought not to be arrived at, unless the Court be satisfied that the conduct of the accused indicated a determination to gratify his passions at all events and in spite of all resistance. In the present case, having regard to the medical evidence, and to the varying statements made at different times by the complainant, we find it impossible to place entire reliance upon her statement; and, as to the extent of the violence to which she was subjected, there is no evidence except her own statement. The Sessions Court has, not believed her allegation that penetration took place, and has consequently refused to convict the prisoner of rape. We feel a similar hesitation in coming to the conclusion, on the complainant's unsupported statement, that the prisoner's conduct amounted to an attempt to commit rape. He seems to have desisted before he was interrupted; and no evidence has been given to show that the complainant's person showed marks of violence, (while the [405] Civil

\* Criminal Appeal, No. 2 of 1881.

(1) 7 Car. & Pay. 318.

Surgeon's evidence is to the contrary effect), nor that the clothes, either of the complainant or the prisoner, showed any stains which would indicate to what point the prisoner's criminality had proceeded. In saying this it is not necessary that we should impute dishonesty or intentional exaggeration to the complainant. The unsatisfactory nature of the evidence on this point may perhaps be attributed to ignorance, arising from youth or innocence; for she is stated never to have had sexual intercourse, and she may therefore, possibly, be unable to describe, with any intelligence or accuracy, the nature and extent of acts directed to that purpose.

For these reasons we find the prisoner Shankar Gyanu not guilty of attempt to commit rape, but guilty of using criminal force to a woman intending to outrage her modesty—an offence punishable under s. 354 of the Indian Penal Code: and as we consider the assault to have been one of an aggravated character, we sentence the said Shankar Gyanu to rigorous imprisonment for two years.

*Order accordingly.*

5 B. 405=6 Ind. Jur. 37.

APPELLATE CRIMINAL.

*Before Mr. Justice Pinhey and Mr. Justice Nanabhai Haridas.*

THE GOVERNMENT OF BOMBAY v. SHIDAPA.\* [13th April, 1881.]

*The Code of Criminal Procedure, s. 147—Dismissal of complaint—Revival of complaint.*

A person made a complaint to the police that the accused had enticed away his wife (a non-cognizable offence), and committed theft (a cognizable offence). The police inquired into the latter offence only; and finding no *prima facie* case made out, reported to that effect to a Magistrate, who directed that that offence be expunged from the list of reported offences.

*Held* that under the circumstances, there had been no dismissal of the complaint in respect of the former offence; and that there was no bar to the complaint into that offence being taken up and proceeded with.

THIS was an appeal by the Government of Bombay against the order of C. F. H. Shaw, Sessions Judge of Belgaum, reversing the conviction and sentence of one year's rigorous imprisonment [406] recorded by R. B. Balkrishna Devrav, Magistrate (First Class) against the accused, charged with enticing away a married woman, under s. 498 of the Indian Penal Code.

The facts of the case fully appear from the judgment of the Court.

Hon. V. N. Mandlik (Govt. Pleader), for the Government.

Pandurang Balibhadra, for the accused.

JUDGMENT.

PINHEY, J.—This is an appeal by Government from an order of the Court of Sessions at Belgaum reversing, on appeal, a conviction and sentence recorded by Mr. Balkrishna Devrav, First Class Magistrate in the Belgaum District, against Shidapa Basapa.

Shidapa Basapa was convicted by the First Class Magistrate, under s. 498 of the Indian Penal Code, of enticing away with criminal intent a married woman, an offence triable by a Magistrate of the First or Second Class. The Court of Session reversed the conviction, on the

\* Criminal Appeal, No. 18 of 1881.