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by his testimony, not proved, and at the same time held proved some other hurts to him neither identified by his testimony nor by notifying particulars in the charge. It is obvious also that, unless the legal procedure is properly followed, the end of criminal procedure, *i.e.*, the punishment of crime, will not be attained. The Magistrates should be encouraged to ascertain the fact of a particular offence and to collect evidence thereof before commitment; and not to expect convictions at the Sessions on a vague and multifarious evidence, causing suspicion of several offences, but yielding [505] proof of none. The error to which a wrong procedure might lead the Court is similar to that of a Judge who in a suit for debt does not find any of the items proved, but yet holds the debt to be proved on the same evidence.

I am of opinion that it would be prejudicing the two prisoners who have appealed, if we determined the facts on the record of the trial; and I do not think we ought to acquit them, as the Judge and the assessors found them guilty, and the record does not show that they objected to the misjoinder at the trial, or asked for specification in the charges of hurt: see *The Queen* v. *Stroulger* (1). The proper course, and to which Mr. Phirozshah Mehta assents and the Government Pleader does not object, is to set aside the convictions and sentences of these two appellants and to direct that they be tried anew by the Court of Session. The charges relating to Hanma, to Rakmava and to Yellia should be matter of separate trials. The Sessions Judge should ascertain from the prosecution which of the particular hurts they elect to proceed upon, and the proper heads of charge should be framed. It may be assumed that any charges which cannot be supported by *prima facie* evidence will not be pressed, and especially after the strictures passed by the Judge on some of the evidence before him. The prisoners should be given opportunity to meet the charges, and allowed to give in fresh lists of witnesses.

Convictions and sentences quashed, and re-trial ordered.

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Before Mr. Justice Birdwood and Mr. Justice Jardine.

QUEEN-EMPRESS *v.* SARYA.* [18th February, 1890.]

Jurisdiction—Appeal to the High Court—Scheduled District (Act XIV of 1874)—Act XI of 1846—Rules framed under s. 3 of Act XI of 1846—Rule 44—Appeal.

The accused were convicted under s. 201 of the Indian Penal Code (Act XLV of 1860) of an offence committed in the village of Gulamba, in the Mehwas Estate of Nal, in the Khandesh District, and sentenced by the Agent to the [506] Governor each to suffer rigorous imprisonment for five years. The Agent tried the case under the rules framed under Act XI 1846.

The accused appealed to the High Court under Rule 44 of the rules framed under s. 3 of Act XI of 1846 (2).

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* Criminal Appeal No. 21 of 1890.

(1) L. R. 17 Q. B. D. 327.

(2) *Vide Bombay Government Gazette* for 1855, pp. 1342—1346.

Rule 44 provides as follows:—"The Sadar Faujdari Adalat shall be empowered to call for the Agent's proceedings in any case on petition being made to that Court by any party against whom a sentence may have been passed by the Agent, and the Sadar Court may thereafter proceed according to the provisions of s. 4 of Act XI of 1846."

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Held, that the appeal did not lie to the High Court. Rule 44 was *ultra vires*, as no power was given by Act XI of 1846 to Government to confer appellate powers on the Sadar Faujdari Adalat, as was practically done by the rule. Act XI of 1846 being repealed in the Mehwasi villages by Act XIV of 1874, Rule 44 could not be continued either by the notification published in the *Bombay Government Gazette* for 1879, Part I, p. 115, or by the notification published in the *Bombay Government Gazette*, for 1887, Part I, p. 19.

[Diss., 25 B. 667 (670, 672); R., Rat. Unr. Cr. Cas. 939 (940, 941).]

THIS was an appeal from the conviction and sentence recorded by W. W. Loch, Agent to the Governor of Bombay in Khandesh.

The accused were committed for trial before the Agent to the Governor of Bombay in Khandesh on charges of murder and causing the disappearance of the evidence of the crime, offences punishable under ss. 302 and 201 respectively of the Indian Penal Code.

The offences were alleged to have been committed in the village of Gulamba, in the Mehwas Estate of Nal, in the district of Khandesh.

The Agent to the Governor tried the case under the rules framed under Act XI of 1846, by which the estate of Nal is excluded from the ordinary criminal jurisdiction.

The accused were convicted under s. 201 of the Indian Penal Code and sentenced each to five years' rigorous imprisonment. Against these convictions and sentences the accused appealed to the High Court.

The only point argued at the hearing was whether the appeal lay to the High Court.

Dhondu Shamrao Garud (with him *Narayan Vishnu Gokhale*), for appellants.—Under Rule 44 of the rules framed by Government in 1855 under s. 3 of Act XI of 1846 the High [507] Court has the power to entertain this appeal. Rule 44 is continued in force by Government notifications issued in 1879 and 1887.

JUDGMENT.

BIRDWOOD, J.—In arguing this appeal, Mr. Dhondu Shamrao Garud has asked us to admit it under Rule 44 of the rules of the 31st July, 1855, published under s. 3 of Act XI of 1846 at pages 1342—1346 of the *Bombay Government Gazette* for 1855. The appeal is from the judgment of the Agent to the Governor of Bombay in a criminal trial in which the accused persons were convicted of an offence committed in the village of Gulamba, in the Mehwas Estate of Nal, and sentenced each to suffer rigorous imprisonment for five years. The village is one of those belonging to the Parvi of Nal referred to in sch. I, Part II (IV), of the Scheduled Districts Act, 1874. The village is, therefore, in a scheduled district in which the Scheduled Districts Act is only in force if a notification relating to such district has been issued under s. 3 of the Act.

On the 14th February, 1879, the Government of India issued a notification, purporting to be made under s. 3 of the Act, by which the Bombay Government, with the previous sanction of the Government of India, declared the Act to be in force in the villages belonging to the Parvi of Nal and five other Mehwassi Chiefs (see *Gazette of India* for 1879, Part I, p. 106, and *Bombay Government Gazette* for 1879, Part I, p. 115). It is not apparently by a declaration of this kind that the Act was intended to be brought in force in any scheduled district. If any other Acts had been declared to be in force in the Mehwassi villages, any declaration about the Scheduled Districts Act itself would have been

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superfluous. For the purposes of the present appeal, however, it is unnecessary to decide whether the notification of 1879 precisely meets the requirements of the Act, as a later notification was issued by the Bombay Government, (with the requisite sanction), on the 4th January, 1887, in which Bombay Reg. XXX of 1827, Act XXXIV of 1850 and Act III of 1858 were declared to be in force in the villages in question. (See *Gazette of India* for 1887, Part I, p. 33 ; and *Bombay Government Gazette* for 1887, Part I, p. 19.)

[508] The effect of this notification was to extend the Scheduled Districts Act forthwith to the village of Gulamba, if it was not extended to it by the previous notification. The Act being now in force in the Mehwassi villages repeals Act XI of 1846 in those villages. (See s. 2 and sch. II of the Act.) But, under s. 7 of the Act, the rules of the 31st July 1855 "continue to be in force, unless and until the Governor-General in Council or the Local Government, as the case may be, otherwise directs." It does not appear that the discontinuance of the rules has been directed under this section. They are referred to as still in force in recent Resolutions of Government, with copies of which we have been furnished (Resolutions Nos. 638 of the 28th January 1888 and 7457 of 11th November 1889, Political Department). If, therefore, the appellant is really warranted by Rule 44 of the rules in question in preferring the present appeal, we must admit it, though I believe no similar appeal from the Agent's decision has been made to this Court since its establishment in 1862.

Now Rule 44 is in the following terms:—"The Sadar Faujdari Adalat shall be empowered to call for the Agent's proceedings in any case on petition being made to that Court by any party against whom a sentence may have been passed by the Agent, and the Sadar Court may thereafter proceed according to the provisions of s. 4 of Act XI of 1846." Section 4 of the Act provides that upon the receipt of any criminal trials referred by the Agent under the rules which may be hereafter prescribed by the Governor in Council, the Sadar Faujdari Adalat shall proceed to pass a final judgment or such order as may, after mature consideration, seem to the Court requisite and proper, in the same manner as if the trial had been sent up in ordinary course from a Sessions Judge." The reference here is to the procedure prescribed by chap. III of Reg. XIII of 1827, as read with Reg. III of 1830, according to which the Sessions Judges sent up cases to the Sadar Faujdari Adalat for confirmation of certain sentences—a procedure which no longer exists, except as to sentences of death, which are still referred to the High Court for confirmation. **[509]** Section 3 of the Act further empowers the Government, by an order in Council, to define the authority to be exercised by the Agent in criminal trials and what cases he shall submit to the Sadar Faujdari Adalat. There is no provision of the Act which constitutes the Sadar Faujdari Court a Court of appeal from the decisions of the Agent in criminal trials, though the Sadar Divani Adalat is distinctly constituted a Court of Appeal in civil cases. The Sadar Faujdari Adalat is contemplated in the Act only as a Court of Reference for criminal trials. No power is given to the Government to confer appellate powers on it, as is practically done by Rule 44 of the rules of the 31st July, 1855. That rule is, therefore, *ultra vires* of the Government, and cannot be regarded as a valid rule under the Act. It follows that it could not be continued under s. 7 of Act XIV of 1874, after the Act of 1846 was repealed in the Mehwassi villages by the

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extension to those villages of Act XIV of 1874, whether by the notification of 1879 or 1887.

We have, therefore, no jurisdiction to admit this appeal, which must be returned to the appellants' pleader for presentation to the proper authority.

JARDINE, J.—I am of the same opinion, and will give my reasons, which, so far as they relate to the procedure of the Courts under the Elphinstone Code, deal with matters not touched in the argument. The appellants were convicted under s. 201 of the Indian Penal Code and sentenced to five years' rigorous imprisonment by Mr. Loch, sitting as Agent to the Governor of Bombay. The offence is found to have been committed in the village of Gulamba, in the Parvi of Nal, which Parvi is one of the seven Mehwas Chieftains' estates specified in the schedule to Act XI of 1846. The territory was by Reg. XXIX of 1827 brought under the first 26 regulations of that year, except as specifically enacted to the contrary. Thus Reg. XIII of 1827 applied thereto. This application of the ordinary criminal procedure was, however, repealed by Act XI of 1846, which empowered the Governor in Council to appoint an Agent, and by s. 3 to define the authority to be exercised by the Agent in criminal trials and what cases he shall submit to the decision of the [510] Sadar Faujdari Adalat. Then s. 4 goes on :—" Upon the receipt of any criminal trials referred by the Agent under the rules which may be hereafter prescribed by the Governor in Council, the Sadar Faujdari Adalat shall proceed to pass a final judgment, or such other order as may, after mature consideration, seem to the Court requisite and proper, in the same manner as if the trial had been sent up in ordinary course from a Sessions Judge." In interpreting these words we have to see what the intention was and what was meant by these words when the Act was passed—*Munigniram Marwari* v. *Gursahai* (1). The meanings of the words " submit " and " refer " are, I think, technical and to be gathered by reference to Reg. XIII of 1827 and its supplements, Regs. XXX of 1827, III of 1830, VIII of 1831. The Judge on circuit and his successor the Sessions Judge had only a limited power of passing absolute sentences : above a certain limit the sentence had to be referred to the Sadar Faujdari Adalat for confirmation, as sentences of death are referred to this Court. He had also powers, like those of our present Sessions Judges, to call for cases and refer them for revision. In chap. 3 of Reg. XIII of 1827 the procedure will be found. The Sadar Faujdari Adalat was endowed with considerable powers by chap. 5. But s. 30 precluded that Court's interference with the Judge on circuit as regards " sentences passed without reference to the Sadar Faujdari Adalat." The reports of the Sadar Faujdari Adalat contain many instances of the procedure : and I may refer, as examples, to the cases found at 6 S. F. A. R., 864 and 909, and 7 S. F. A. R., 487. The higher Court was, however, empowered to report any such sentence to the Governor in Council if it considered that it required to be altered or annulled, whether as an act of mercy or justice. These are the words of s. 31. A change was made by Reg. VIII of 1831, s. 7, whereby the revisional powers of the Sadar Faujdari Adalat were extended to cases not " referable " to it.

Since the passing of Act XI of 1846, these provisions have ceased to be in force in these Mehwas estates, as also s. 27 of [511] Reg. XIII of 1827, which required the Sadar Faujdari Adalat to superintend the

(1) 17 C. 347=16 I.A. 195 (200).

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administration of criminal justice. Section 2 of Act XI of 1846 vested the administration of criminal justice in the Agent to the Governor, and Reg. XIII of 1827 and its supplements have also been repealed. By a notification of the 31st July, 1855, published at p. 1342 of the *Bombay Government Gazette* for 1855 the Governor in Council introduced rules purporting to be made under s. 3 of Act XI of 1855. They can only be understood with reference to the ordinary regulation procedure then in force, which was the natural analogy. Rule 35 says:—"The absolute jurisdiction of the Agent in criminal cases shall extend to fine and imprisonment for five (5) years, with or without hard labour, and sentences involving a punishment beyond that period, or of greater severity, must be submitted for the confirmation of the Sadar Faujdari Adalat." The case in which the present appeal is made, falls within the "absolute jurisdiction," and no reference of any kind to this Court has been made by the Agent, and I am, therefore, unable to understand how the appellant's pleader can argue that s. 4 of Act XI of 1846 applies of itself. But he refers us to Rule 44, which is as follows:—"The Sadar Faujdari Adalat shall be empowered to call for the Agent's proceedings in any case, on petition being made to that Court by any party against whom a sentence may have been passed by the Agent, and the Sadar Court may thereafter proceed according to the provisions of s. 4 of Act XI of 1846." No instance has been shown us of this rule having ever been put in force, and the probability is that the questions whether any jurisdiction was really conferred, or whether the Judges would exercise the power at their peril, have never been raised. On careful examination of Act XI of 1846, the only law cited in the notification, I am of opinion that it did not authorize the Government to make such any rule. The Act was passed in order to exempt the territory from the ordinary jurisdictions, including the Sadar Faujdari Adalat, except as therein provided. I know that for many years after the Elphinstone Code of 1827 was enacted, the connection of the Sadar Adalat with the Local Government was somewhat close: the Judges in those halcyon days even [512] assisted the Government as a sort of Privy Council in advising on some of the civil and criminal questions appealed to the Government in a political diplomatic sort of way from the Political Agents in territories outside of British India. But when the High Court was established, it declined to continue to assume any duty or jurisdiction in such cases: and the records were removed from the High Court by the Secretary to the Government at the request of the then Chief Justice Sir M. Sausse. No law has been pointed out to us authorizing the Governor in Council to empower the Sadar Adalat in terms of Rule 44: and I think that, before assuming the jurisdiction, the Court would have required to be satisfied of some statutable warrant. See the *Empress* v. *Burah*(1). If there was any, it was the duty of the appellant's pleader to point it out, and more especially as I know of no statute in existence which requires the High Court to make reports to Government, in order to get sentences annulled or mitigated. But this report was, I think, except where Reg. VIII of 1831, s. 7, applied, the only mode of disposal in cases where in a regulation district the Sessions Judge had passed a sentence not requiring confirmation.

The pleader next referred us to the 27th clause of our amended Letters Patent, which I have considered along with the corresponding cl. 26 of the

(1) 4 C. 172=5 I.A. 178 (195).

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original Letters Patent. But the words of these clauses require us to be satisfied that some law in force at the time Her Majesty issued the original Letters Patent allowed the subject to appeal to the Sadar Faujdari Adalat from the Agent, and that some law allowing the appeal to the High Court was in force when the amended Letters Patent were issued.

It was difficult to gather from the pleader's argument whether he considered Act XIV of 1874 (the Scheduled Districts Act, 1874) was in force in the Parvi of Nal. I have treated the subject hitherto irrespective of that Act.

But under the two notifications of 1879 and 1887 referred to by my brother Birdwood, Act XIV of 1874 is in force in that territory, and one result is that Act XI of 1846 is repealed. [513] Assuming that we would so hold, the appellant's pleader argued that the Rules of 1855 are continued in force by virtue of s. 7 of Act XIV of 1874. But s. 7 only continues rules which were *in force* at the time the Scheduled Districts Act was passed: and it would be difficult to hold that the words *in force* can apply either to rules that were *ultra vires* when made, or that conflict with either the original or amended Letters Patent. Again, the rules continued by s. 7 are rules "for the guidance of officers appointed within any of the scheduled districts." Thus their scope is confined, as regards the officials, to limits very much the same as those defined in s. 3 of Act XI of 1846, and does not extend to the Judges of this Court or of the Sadar Faujdari Adalat. The most harmonious construction of the two Acts is that which confines the power of Government to making rules for its Agent and other officers subordinate to the Government. I am confirmed in this view by the declaration in s. 11 of Act XIV of 1874 that the Act is not to affect any law other than laws contained in Acts or Regulations or in Rules made in exercise of the powers conferred by such Acts or Regulations. This language excludes rules made *ultra vires*:—Rule 44 seems to me such: and I would add that the framers seem to show in their language that they did not suppose that s. 4 of Act XI of 1846 covered it. That Act shows that, except as therein provided, the Legislature conferred the responsibility for the due administration of criminal justice on the Agent to the Governor, and withdrew it from the Sadar Adalat, on whom it had been imposed in 1827, "with a view to maintain correct application of laws and orders." It would seem as if the Government of 1846 had departed from Mr. Mountstuart Elphinstone's policy, and that the Government of 1855 returned to it and contemplated that the Court would exercise functions which the Legislature in 1846 placed on the Government and its Agent, when it repealed in these Mehwas Estates the requirement of s. 27 of Reg. XIII of 1827 that the Sadar Faujdari Adalat should superintend the administration of criminal justice.

Appeal returned for presentation to the proper authority.