FULL BENCH.

APPELLATE CRIMINAL.

Before Sir L. H. Jenkins, Chief Justice, Mr. Justice Candy, Mr. Justice Fulton and Mr. Justice Chandavarkar.

1901. *June 24.*

KING-EMPEROR *v.* BABYA BHIVA.*

Whipping Act (VI of 1864 as amended by Act III of 1895), section 4—Whipping—Dacoity—Penal Code (Act XLV of 1860), section 395—Previous conviction—Sentence.

Under section 4 of the Whipping Act as amended in 1895, a sentence of whipping in addition to imprisonment is not legal in the case of a conviction of dacoity which was committed prior to the previous conviction of a similar offence.

Reg. v. *Surya* (1) and *Reg.* v. *Kusa* (2) followed.

APPEAL from the conviction and sentence passed by A. Lucas, Sessions Judge of Ahmednagar.

The accused was charged with dacoity and also with the offence of belonging to a gang of persons associated for the purpose of committing dacoity, under sections 395 and 400 of the Indian Penal Code; and was committed to the Court of Session at Ahmednagar.

At the trial the charge under section 400 was withdrawn, as the accused had already been convicted under that section in a previous case.

The accused was then tried for dacoity under section 395, and was found guilty. He was sentenced to undergo rigorous imprisonment for five years, the sentence to run concurrently with another sentence of imprisonment, and to receive thirty stripes.

In passing the sentence of whipping the Sessions Judge said:

I have already convicted him of another offence of dacoity, and according to the letter of the law as found in the Whipping Act III of 1895, he is liable on a second conviction for dacoity to whipping in addition to any other punishment. For that there is a Calcutta High Court ruling: *Queen* v. *Udai Patnaik*,(3) that in a case like this whipping should not be given but

* Criminal Appeal No. 170 of 1901.

(1) (1866) 3 B. H. C. R. Cr. C. 38. (2) (1870) 7 B. H. C. R. Cr. C. 70.

(3) (1869) 4 Ben. L. R. Ap. Cr. 5.

only when an accused person is again convicted after he has completed his sentence for the former offence. I can find no Bombay ruling in support of such a view, nor does the wording of the Act, in my humble opinion, warrant such a view. In a case like this when the accused has been with a gang notorious throughout this district for brutalities in the way of nose-cutting, &c., I think that a sentence of whipping is peculiarly suitable.

The case was heard by a Division Bench (Candy and Fulton, JJ.) who made the following reference to a Full Bench:

Having regard to the decision in *Queen* v. *Udai Patnaik and others*,[1] *Reg.* v. *Surya bin Krishna Mandavkar*[2] and *Reg.* v. *Kusa valad Lakshman*,[3] the Court refers to a Full Bench the question whether under section 4 of the Whipping Act a sentence of whipping in addition to imprisonment is legal in the case of a conviction of dacoity which was committed prior to the previous conviction of a similar offence.

The reference came before a Full Bench (Jenkins, C.J., Candy, Fulton and Chandavarkar, JJ.).

There was no appearance either for the Crown or for the accused.

Per Curiam:—Having regard to the fact that a Full Bench of this Court in 1866 in *Regina* v. *Surya*[4] decided this question in the negative, and that this ruling was followed in 1870 in *Regina* v. *Kusa*[5] by two other Judges, and that the Legislature in their amending Acts of 1895 and 1900 apparently accepted that ruling, which is also that of the Calcutta High Court, we answer the question referred to us in the negative.

(1) (1869) 4 Beng L. R. (Cr.) 5; 12 Cal. W. R. Cr. 68.
(2) (1866) 3 B. H. C. R. Cr. C. 38.
(3) (1870) 7 B. H. C. R. Cr. C. 70.
(4) (1866) 3 B. H. C. R. Cr. C. 38.
(5) (1870) 7 B. H. C. R. Cr. C. 70.