THE KING *v.* FERNANDO *et al.*

1905.
August 4.

D. C. (Criminal), Negombo, 2,354.

Robbery—Voluntarily causing hurt whilst committing robbery—Jurisdiction of the District Court—Powers of the Attorney-General—Plea to jurisdiction, when to be taken—Ceylon Penal Code, ss. 380 and 382—Courts Ordinance, No. 1 of 1889, s. 73—Criminal Procedure Code, s. 387.

Under section 387 of the Criminal Procedure Code the Attorney-General has large powers of commitment; and the Supreme Court will not interfere with his discretion unless such discretion has been manifestly abused.

The accused were committed for trial before the District Court on an indictment containing a charge of robbery under section 380 of the Penal Code. The evidence disclosed that the accused had also committed hurt in the course of the robbery, an offence punishable under section 382 of the Penal Code and triable only by the Supreme Court. The accused were convicted by the District Court under section 380 without any objection to the jurisdiction of the Court being raised. In appeal it was objected on their behalf that the District Court had no jurisdiction to try the case, as the evidence disclosed an offence punishable under section 382 and triable only by the Supreme Court.

Held, that it was open to the Attorney-General in the circumstances to commit the accused to the District Court, and that the District Court had properly tried the case.

Held, that it was open to the Attorney-General in the circum- Ordinance, No. 1 of 1889, such objection should have been taken in the Court below immediately upon arraignment and before plea.

APPEAL from a conviction by the District Court under section 380 of the Penal Code.

The facts sufficiently appear in the judgments

Dornhorst, K.C., for accused—appellants.

Van Langenberg, A. S.-G., for the Crown.

Cur. adv. vult.

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After hearing the appellants' counsel in this case I intimated that as the District Judge after carefully considering the case had believed the story for the prosecution I could not, sitting in appeal reverse his finding on facts, as I had not the advantage the District Judge had of hearing the evidence and seeing the witnesses in the box. The appellants' counsel then applied to me to set aside the verdict of the District Judge and quash the proceedings at the trial and send the case for trial before this Court and a jury. I informed him that I was not prepared to do so.

Later on in the day appellants' counsel suggested to me that the facts proved at the trial disclosed an offence under section 382 of the Penal Code, which involved a very severe punishment, and pointed out an offence under that section could only be tried by the Supreme Court. It is quite true that the appellants ought to have been indicted under that section by the Attorney-General, and if they had been indicted under that section, the commitment could have only been to the Supreme Court.

The Attorney-General has elected under the powers vested in him under section 387 of the Criminal Procedure Code to commit the appellants for trial before the District Court. In respect of offences triable by that Court, it is admitted by the appellants' counsel that the Attorney-General had that power, and that the District Court had jurisdiction to try the indictment presented by the Attorney-General and could not refuse to try the case.

It is, however, argued that this Court sitting in appeal is not bound by the Attorney-General's election. If the Attorney-General had manifestly abused the discretion left him under section 387 I have no doubt this Court could interfere in appeal, as suggested by the appellants' counsel. I think, however, in this case there is no reason to think that the Attorney-General has not exercised a wise discretion. It appears to me the punishment that the District Court could inflict is complete and sufficient, and I do not think that it is desirable in every case to interfere with the discretion vested in the Attorney-General. The only cases in which this Court should interfere is when the Attorney-General has abused the discretion left to him, and these cases are very rarely likely to arise.

After I delivered this judgment in open Court, the appellants' counsel brought to my notice a judgment of Bonser, C.J., which conflicted with my view of the law. I thought it desirable therefore that the question should be brought before a Bench consisting of two Judges. I have now had the advantage of hearing further

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arguments on the point raised by the appellants' counsel, and I do not see my way to alter my former opinion. I am much indebted to the Solicitor-General for kindly re-arguing the case on behalf of the Crown.

WENDT, J.—

The two appellants in this case were indicted before the District Court for having robbed one Paulu Peeris of a purse containing Rs. 81.90 and some articles of clothing, an offence punishable under section 380 of the Penal Code. The prosecutor in his evidence at the trial deposed that the accused and several others set upon him as he was travelling along the high road in a cart at night, and beat and robbed him of the articles specified in the indictment.

The District Judge found that the prosecutor was assaulted, knocked down, and robbed of the purse and of the clothes he was wearing at the time. He accordingly convicted the appellants of robbery (section 380, Penal Code) and sentenced each of them to one year's rigorous imprisonment.

The accused appealed, and when their appeal was before the Chief Justice their counsel desired to object to the jurisdiction of the District Court, notwithstanding the fact of the committal before the Court at the instance of the Attorney-General, on the ground that the voluntary causing of hurt to the prosecutor during the robbery rendered the accused guilty of the offence defined by section 382 of the Penal Code, an offence triable by the Supreme Court alone. My lord reserved this question for the consideration of two Judges, and we have accordingly heard it argued.

The following cases were cited to us:—*The Queen v. Hinnia* (1896) 2 *N. L. R.* 241 (where the attention of the Court was not called to the provisions of Ordinance No. 3 of 1892, section 3); *The Queen v. Perera* (1897) 3 *N. L. R.* 43; P. C. Tangalla, 13,644 (1899) *Koch*, 43; *Sirineris v. James* (1901) 5 *N. L. R.* 93; *The King v. Raphiel* (1901) 2 *Br.* 253; *The King v. Kolonda* (1901) 5 *N. L. R.* 236; *The Queen v. Kolendavail* (1891) 1 *S. C. R.* 198; *The Queen v. Mendis* (1892) 1 *S. C. R.* 249.

Yielding to the force of these decisions, especially of that in *The King v. Kolonda*, Mr. Dornhorst conceded that the District Court could not have refused to try the indictment, but he submitted that this Court had the power, and in this instance ought, to hold that the offence committed by accused could only properly be tried in the Supreme Court. The Attorney-General does not take this view; he committed the accused before the District Court, and he presumably thinks that the sentence of one year's

imprisonment, though only half of what the Court might have imposed, is adequate to the offence.

Section 387 of the Criminal Procedure Code enacts that when the proceedings in a case reach the Attorney-General under section 157 he may, "if he considers commitment desirable, name the Court to which such commitment shall be made." These words vest a very large discretion in the Attorney-General; they seem to imply that even where an offence has been committed he may consider it not "desirable" to commit at all, that is, of course, not desirable in the interests of justice and of the public. If then he may altogether refuse to commit, why may he not do what is far less, viz., in the present case, direct commitment for the robbery alone, ignoring the voluntary causing of hurt which is alleged in addition to the robbery. I do not say that in a grave case this Court would not interfere by ordering, in terms of section 347 (*b*), that the accused be retried by a Court of competent jurisdiction, but there must first be something in the nature of proof that the discretion vested in the Attorney-General has been abused.

As to the argument that the graver offence committed would thus escape punishment altogether, it may be pointed out that under section 330 (4) of the Procedure Code the accused would be liable to be tried again for the offence under section 382 of the Penal Code.

The question was raised at the argument whether the appellants were not debarred by section 73 of The Courts Ordinance from objecting to the jurisdiction, they not having specially pleaded to it before pleading to the indictment in the District Court. The terms of that section are certainly large enough to cover this case, but appellants' counsel suggested that its scope should be limited to objections to the territorial jurisdiction of the Court. There is nothing in the wording of the section to support this suggestion, and the point does not appear to have been judicially determined. In *Regina v.* —— (2 *S. C. C.* 50) the section was held to apply to an objection based on the absence of a warrant of commitment under the hand of the committing justice, and in *The Secretary of the District Court v. Nikajutiya* (3 *S. C. C.* 96) to the case of an irregular committal. *Regina v. Appuhamy* (1 *S. C. C.* 23) was a case of territorial jurisdiction. All these were instances of charges triable by a District Court, though not properly brought before the particular District Courts in which the trials respectively took place. The present is a case in which, if appellants' contention is correct, no District Court could try the offence. That would appear rather to emphasize the necessity for the objection being

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taken in the Court below and before plea—immediately upon arraignment, in fact; and I am inclined to the opinion that the objection now comes too late.

The Chief Justice had, before this question was raised, expressed the opinion that the appeal failed on the merits; and it will therefore now be dismissed.