

In Re: Petition of Khamir

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Court : Kolkata

Decided On : Jul-29-1881

Reported in : (1881)ILR7Cal662

Judge : Morris and ;Tottenham, JJ.

Appellant : In Re: Petition of Khamir;The Empress

Respondent : ;khamir

Judgement :

Morris, J.

1. In this appeal it is contended, first, that the order under which appellant was committed to take his trial in the Court of Sessions, is on two distinct grounds illegal and ultra vires; and next, that, on the merits, the prisoner ought not to have been convicted.

2. The case had been instituted against the prisoner under Section 498 of the Penal Code. The Deputy Magistrate, after hearing the evidence for the prosecution, discharged the accused under Sections 215, Criminal Procedure Code.

3. That complainant then moved the Sessions Judge to take action under Section 296, Criminal Procedure Code.

4. That officer was of opinion that the facts alleged against the accused really amounted to abetment of rape or of adultery; and those offences being triable only in the Sessions Court, he directed the Deputy Magistrate to commit the accused accordingly.

5. He remarked that even if the case properly came under Section 498, the Deputy Magistrate had no power to try it, inasmuch as he was vested with only second class powers. This dictum is opposed to the provision made in schedule iv of the Criminal Procedure Code in regard to Section 498 of the Penal Code.

6. It is quite clear, however, that the case before the Deputy Magistrate was one under Section 498; and that he being duly empowered by law to try such a case, discharged the accused under Section 215. The Sessions Judge had, therefore, no power to order a commitment under Sections 376 and 497. He had, under the proviso added to Section 296, Criminal Procedure Code, by Act XI of 1874, power to direct the subordinate Court to enquire into these offences, but no more. In ordering the commitment the Judge unquestionably transgressed the law.

7. It further appears upon an affidavit made on behalf of the appellant, that the order for his commitment was made by the Judge without giving him any opportunity of showing cause against it, which procedure is not in accordance with what the High Court has laid down on this subject: see *Re Bundhoo* (sic) 22 W. R., Cr., 67), *Nowab Singh v. Kokil Singh* (24 W. R., Cr., 70). It has been submitted that the trial and conviction ought to be set aside for the two reasons above set forth. These are, no doubt, serious irregularities, and more especially the first, which is a direct transgression of the law; and if they had been brought to the notice of this Court before the trial had taken place, the commitment would properly have been quashed; but as the trial has been held, and as we do not consider that any actual failure of justice has been caused by the errors, we are disposed to hold that Section 283, Criminal Procedure Code, is a bar to the reversal of the judgment on these grounds.

8. (His Lordship then proceeded to consider the merits of the case, and set aside the conviction.)

