

Their Lordships therefore humbly advise His Majesty that the judgment and decree of the Judicial Commissioners dated the 1st March 1920, should be set aside and the judgment of the District Judge restored. The plaintiff-respondent must pay the costs of the appeal in the Judicial Commissioner's Court, as also of this appeal.

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitor for the respondent: *H. S. L. Polak.*

A. M. T.

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 MARTAND
 RAO
 v.
 MALHAR
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CRIMINAL REVISION.

Before C. C. Ghose and Cammiade J.

RAMESH PADA MONDAL

v.

KADAMBINI DASSI.*

1927
 June 7

High Court—Power of the Court to vacate an order of enhancement of sentence passed without notice to the accused—Criminal Procedure Code (Act V of 1898), ss. 369, 439.

Where the accused was convicted by a Magistrate under section 323 of the Penal Code, and was let off with an admonition under section 562 (1d) of the Criminal Procedure Code, and the High Court, on a Reference by the District Magistrate, altered the conviction from one under section 323 to one under section 324 of the Penal Code, and sentenced the accused to rigorous imprisonment for one year, without notice and opportunity of being heard, as required by section 439 (2) of the Criminal Procedure Code:—

Held, that the order of the High Court passed without notice was a nullity, and that it had power to vacate the same and re-hear the Reference after notice.

* Criminal Revision No. 520 of 1927, against the order of A. S. Larkin, Additional District Magistrate of Midnapore, dated March 9, 1927.

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On the 17th November 1925 one Kadambini Dassi lodged a complaint, before the Subdivisional Magistrate of Midnapore, charging the petitioner with various acts of violence. The complainant having been absent, on one of the days fixed for the hearing, the petitioner was discharged. The case was subsequently restored, and the trial proceeded. A charge under section 324 of the Penal Code was framed. On the 28th July the petitioner was acquitted under section 324 but convicted under section 323 of the Penal Code, and released after admonition under section 562 (1A) of the Criminal Procedure Code.

On the 7th September 1926 the complainant moved the Additional District Magistrate of Midnapore for a reference of the case to the High Court for enhancement of sentence. On the 9th March 1927 the case was referred to the High Court without notice to the petitioner or his pleader.

The Reference was heard by the High Court on the 5th May 1927, when the Court altered the conviction from one under section 323 to one under section 324 of the Penal Code, and sentenced the petitioner to one year's rigorous imprisonment. It appeared that no notice of enhancement, under section 439 (2) of the Code, was issued to the petitioner in the circumstances set forth in the judgment of the High Court. The petitioner thereafter brought the fact to the notice of the Court and a Rule was issued, on the 23rd May, on the District Magistrate and the complainant to show cause why the order of the 5th May should not be vacated and the Reference re-heard. The rule now came on for hearing before C. C. Ghose and Cammiade JJ.

Mr. S. C. Bose, Advocate (with *Babu Santosh Kumar Pal*), for the petitioner. Under section 439 (2) the

petitioner was entitled to notice and hearing before enhancement of the sentence. No notice was issued. The Court has jurisdiction to vacate the order of the 5th May and re-hear the reference. Cites *King-Emperor v. Romesh Chandra Gupta* (1); *Rajjab Ali v. Emperor* (2). The petitioner was acquitted under section 324 of the Penal Code, and the Court cannot, under section 439, alter the order of acquittal into one of conviction. There is an appeal against such order, and the Court cannot, therefore, under section 439 (5), exercise its revisional powers in this case. The order of the Magistrate should not be set aside.

Mr. N. K. Bose, Advocate (with *Babu Promolha Nath Mitter*), for the complainant. The Court cannot vacate its previous order. Section 369 of the Code prevents alteration of the judgment after it is signed. It has been held in a series of cases that the High Court has no power of reviewing its own orders in criminal cases. Refers to *Queen v. Godai Raout* (3), *Re Gibbons* (4), *Queen-Empress v. Durga Charan* (5), *Queen-Empress v. Fox* (6), *Re Kunhammad Haji* (7), *Achambit Mondal v. Mohatab Singh* (8). Section 562 (1A) is not applicable to the facts of this case.

GHOSE AND CAMMIADÉ JJ. In this case the learned Additional District Magistrate of Midnapore made a Reference to this Court on the 11th March 1927 recommending that a certain order passed by Babu Sukesh Chandra Deb Roy, Deputy Magistrate of Midnapore, convicting the accused under section 323 of the Indian Penal Code and letting him off with a warning under section 562 (1A) of the Criminal Procedure Code,

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(1) (1917) 22 C. W. N. 168.

(5) (1885) I. L. R. 7 All. 672.

(2) (1918) I. L. R. 46 Calc. 60.

(6) (1885) I. L. R. 10 Bom. 176.

(3) (1866) 5 W. R. Cr. 61.

(7) (1922) I. L. R. 46 Mad. 382.

(4) (1886) I. L. R. 14 Calc. 42.

(8) (1914) 18 C. W. N. 1180.

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might be set aside, and the accused convicted either under section 323 or section 324 of the Indian Penal Code and given a suitable sentence. The order of the Magistrate is dated the 28th July 1926.

This Reference came on before us for hearing on the 5th May 1927. The case appeared in the daily printed defended list, and the record in this Court was marked with the word "defended". Mr. Narendra Kumar Basu, advocate, appeared for the complainant, but at the time of the hearing of the Reference there was no appearance by any learned counsel or advocate or vakil on behalf of the accused. Having regard to the fact that the record of the Reference before us showed on the face of it that it was "defended", we assumed that notice of the Reference had been served on the accused, and after hearing Mr. Basu for the complainant, we accepted the Reference and altered the conviction from one under section 323 of the Indian Penal Code to one under section 324 of the Indian Penal Code and sentenced the accused to suffer rigorous imprisonment for a period of one year. This order, as stated above, was made by us on the 5th May 1927. Subsequently, *i.e.*, on the 23rd May 1927, Mr. S. C. Basu, advocate, appeared before us on behalf of the accused, and drew our attention to the fact that our order of the 5th May 1927 had been made without hearing the accused and without the accused having been given any notice of the hearing of the Reference before this Court. We thereupon made enquiries, and we discovered, on examination of the record, that, although the accused appeared before the Additional District Magistrate on the 21st September 1926 when orders were reserved by the Additional District Magistrate, it did not appear that the accused appeared before the Additional District Magistrate on any subsequent

date, or on the 23rd December 1926, when the Additional District Magistrate of Midnapore finally made up his mind to refer the matter to this Court; or that the accused had any knowledge of the fact of the Reference to this Court having been made by the said Additional District Magistrate. So far as the proceedings in this Court are concerned, it did not appear, as it should have appeared, on the record in this Court, that no notice of this Reference had been served upon the accused. As stated above, our attention was never called to that fact. Under these circumstances we came to the conclusion that it was our obvious duty to issue a Rule at once on the application of the accused calling upon the complainant to show cause why the Reference should not be re-heard in the presence of both parties, *i.e.*, the complainant and the accused. A rule was accordingly issued. It was heard in part yesterday, and the hearing has been concluded to-day.

The first point taken by Mr. Narendra Kumar Basu, on behalf of the complainant, is that having regard to our orders of the 5th May 1927, we have no jurisdiction whatsoever to re-hear the matter. He has called our attention to various cases beginning with *Queen v. Godai Raout* (1) and ending with the case of *Pigot v. Ali Mahammad Mandal* (2). We have examined the cases, and except the case of *King-Emperor v. Romesh Chandra Gupta* (3) and the case of *Achambit Mondal v. Mohatab Singh* (4), we do not think that the other cases have any real bearing having regard to the facts of this particular case. But be that as it may, we are concerned really, on the question of jurisdiction, with the provisions such as they are contained in the Code of Criminal Procedure

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(1) (1866) 5 W. R. Cr. 61.

(2) (1920) I. L. R. 48 Calc. 522.

(3) (1917) 22 C. W. N. 168.

(4) (1914) 18 C. W. N. 1180.

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as at present amended. We think under the present Code we have ample powers in a case of this description, and having regard to the facts involved, to vacate our order of the 5th May 1927 and to re-hear the Reference. It will serve no useful purpose to go through the long catena of cases cited by Mr. Narendra Kumar Basu as in none of the cases referred to by him were the facts similar to the facts in the present case. Under section 439 of the Criminal Procedure Code we could not make an order of the description which we made on the 5th May 1927 without giving the accused an opportunity of being heard before us. In the circumstances it may well be contended that the order that was made on the 5th May 1927 was an order *per in curiam*, and one which bordered on nullity. If our attention had been called that no notice had been given to the accused we would have directed, in the ordinary course of things, the issue of a Rule on the accused. That we did not do so is because of the circumstances to which reference has already been made. There can, therefore, be no bar, in our opinion, in vacating the order of the 5th May 1927, and re-hearing the Reference in the presence of both sides. We have accordingly re-heard the Reference, and we have had the satisfaction of hearing an elaborate and exhaustive argument on the merits on behalf of the accused from Mr. S. C. Bose. We are greatly indebted to him. But, in the circumstances of this case, there can be no doubt whatsoever that the action taken by the trying Magistrate under section 562 (7A) of the Criminal Procedure Code was clearly irregular. In our opinion, this is a fit and proper case where this Court should exercise its powers of superintendence. We do not propose, having regard to the facts stated in the judgment of the trying Magistrate and to the facts referred to in

the letter of Reference, to go into details. It is sufficient to observe that this case could not by any stretch of the language of section 562 (1A) be brought within the four corners thereof.

In this view of the matter we vacate our order of the 5th May 1927, and after re-hearing the Reference, in the presence of both parties, we accept the Reference; we set aside the order made by the trying Magistrate under section 562 (1A) of the Criminal Procedure Code and maintain the conviction under section 323 of the Indian Penal Code, and sentence the accused to suffer rigorous imprisonment for the period of one year.

The accused who is on bail will surrender to his bail, and undergo the sentence passed on him.

E. H. M.

CRIMINAL REVISION.

Before C. C. Ghose and Cammiarle J.J.

LAL MOHAN PODDAR

v.

EMPEROR*

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1927

June 15.

Income-tax—False return—Production of false account books before an Income-tax Officer—“Judicial proceeding”—Using evidence known to be false—Income-tax Act (XI of 1922) ss. 23 (2), 37—Penal Code (Act XLV of 1860), s. 196.

A proceeding before an Additional Income-Tax Officer, on the production of account books, pursuant to a notice under section 23 (2) of the Income-Tax Act, is a “judicial proceeding” only for the purposes of sections 193 and 228, but not of section 196, of the Penal Code. Where the petitioner, who was a member of a firm, produced certain false account books of the firm, before such officer, on requisition, it was held that his conviction under section 196 of the Penal Code was bad in law.

* Criminal Revision No. 324 of 1927, against the order of J. M. Pringle Sessions Judge of Dacca, dated March 4, 1927.