CRIMINAL REFERENCE.

Before Mukerji and Graham JJ.

DABIRADDI NASKAR

v.

SAKAT MOLLA.*

1928.

Dec. 19.

Reference—Acquittal, revision of—Reference on merits—Criminal Procedure Code (Act V of 1898), s. 438.

A Reference under section 438 of the Code of Criminal Procedure, recommending revision of orders of acquittal, stands on no higher footing than an application of a private prosecutor for such revision.

When the Local Government has not preferred an appeal under section 417 of the Code of Criminal Procedure, the High Court ought not to interfere in revision, on a Reference under section 438, where it cannot do so without practically hearing the case on the evidence.

Hrishikesh Mandal v. *Abadhaut Mandal* (1) followed.

In the Matter of Sheikh Aminuddin (2), *Emperor* v. *Madar Bakhsh* (3), *Re Sinnu Goundan* (4) and *Crown* v. *Acchar Singh* (5) referred to.

As a general rule, it is expedient not to interfere, on revision, at the instance of a private person, with an acquittal, after trial by a proper tribunal.

Faujdar Thakur v. *Kasi Chowdhury* (6) cited.

Pramatha Nath Barat v. *P. C. Lahiri* (7), *In re Faredoon Cawasji Parbhu* (8), *Sankaralinga Mudaliar* v. *Narayana Mudaliar* (9) and *Siban Rai* v. *Bhagwat Dass* (10) referred to.

REFERENCE under section 438 of the Code of Criminal Procedure.

The case for the prosecution was that the complainant, Dabiruddin Naskar, and one Dudali had cut down and were carrying away a branch of a tree which was claimed by both the complainant and the accused. The accused met them and gave Dudali a push, causing the branch to fall on a small boy, who

*Criminal Reference, No. 193 of 1928, made by M. H. B. Lethbridge, Sessions Judge of the 24-Parganas, dated Aug. 31, 1928.

(1) (1916) I. L. R. 44 Calc. 703.
(2) (1902) I. L. R. 24 All. 346.
(3) (1902) I. L. R. 25 All. 128.
(4) (1914) I. L. R. 38 Mad. 1028.
(5) (1923) I. L. R. 5 Lah. 16.
(6) (1914) I. L. R. 42 Calc. 612.
(7) (1920) I. L. R. 47 Calc. 818.
(8) (1917) I. L. R. 41 Bom. 560.
(9) (1922) I. L. R. 45 Mad. 913.
(10) (1925) I. L. R. 5 Pat. 25.

1928.

DABIRADDI NASKAR v. SAKAT MOLLA.

was rendered unconscious. The complainant protested. Whereupon the accused beat him. The accused was convicted by the trial court, which was set aside, on appeal, by the Additional District Magistrate of 24-Parganas. The complainant moved the Additional Sessions Judge, who referred the matter to the High Court, recommending that the order of acquittal should be set aside and the appeal should be ordered to be reheard. The learned Judge was of opinion that the Additional District Magistrate had not properly applied his mind to the case and that, on the merits, an order for rehearing was justifiable.

Mr. Anilchandra Ray Chaudhuri, for the complainant.

Mr. Asaruzzaman and *Mr. A. Quasim*, for the accused.

MUKERJI J. This is a Reference made by the Additional Sessions Judge of 24-Parganas, under section 438 of the Code of Criminal Procedure, recommending that an appellate order of acquittal, passed by the Additional District Magistrate of that district, should be set aside and the appeal ordered to be reheard.

It has been laid down in a long series of cases what should be the guiding principle to be acted upon by the High Courts in dealing with applications for revision of orders of acquittal. The principle has been very clearly laid down by Jenkins C. J., upon a review of the practice in almost all the High Courts in India, in the case of *Faujdar Thakur* v. *Kasi Chowdhury* (1). He observed,—"The pronouncements of the High Courts of Madras, Bombay "and Allahabad, consistently support the view that, "as a general rule, it is expedient not to interfere, "on revision, at the instance of a private person, "with an acquittal after trial by the proper tribunal, "and that applications for that purpose should be "discouraged on public grounds". He further observed,—"I am not prepared to say the Court has

(1) (1914) I. L. R. 42 Calc. 612.

1928.

DABIRADDI NASKAR v. SAKAT MOLLA.

MUKERJI J.

"no jurisdiction to interfere in revision with an "acquittal, but I hold it should ordinarily exercise "that jurisdiction sparingly, and only where it is "urgently demanded in the interests of public "justice." Since this proposition was laid down by that learned Chief Justice it has, I find, been followed by all the High Courts, e.g., *Pramatha Nath Barat* v. *P. C. Lahiri* (1), *In re Faredoon Cawasji Parbhu* (2), *Sankaralinga Mudaliar* v. *Narayana Mudaliar* (3), *Siban Rai* v. *Bhagwat Dass* (4). A Reference under section 438 of the Code of Criminal Procedure, recommending revision of orders of acquittal, in my opinion, stands on no higher footing than applications of private prosecutors for such revision. In the case of *Hrishikesh Mandal* v. *Abadhaut Mandal* (5), it was said by this Court that, in the case of an acquittal, when the Local Government has not preferred an appeal under section 417, the High Court ought not to interfere in revision on a Reference under section 438, where it cannot do so without practically hearing the case on the evidence as an appeal, in order to satisfy itself that the opinion of the referring court is correct, though it has jurisdiction to intervene in such cases. It is true that, in a few instances, there has recently been some departure from the practice intended to be laid down in the aforesaid decisions of this Court, but on an examination of the papers of such of the cases as are available, it appears that either the Reference was not opposed, or that the acquittal was not on the merits or was based on a palpable error of law. The present Reference is entirely on the merits, the Additional Sessions Judge having been inclined to take a view of the evidence different from that of the Additional District Magistrate. That this is a very reasonable and convenient practice is clear from the fact that other High Courts have also set their face against References of this character: *In the Matter of Sheikh Aminuddin* (6),

(1) (1920) I. L. R. 47 Calc. 818.
(2) (1917) I. L. R. 41 Bom. 560.
(3) (1922) I. L. R. 45 Mad. 913.
(4) (1925) I. L. R. 5 Pat. 25.
(5) (1916) I. L. R. 44 Calc. 703.
(6) (1902) I. L. R. 24 All. 346.

Emperor v. *Madar Bakhsh* (1), *Re Sinnu Goundan* (2), *Crown* v. *Acchar Singh* (3).

In my opinion, this Reference should not be entertained and I would accordingly discharge it.

GRAHAM J. I agree.

A. C. R. C. *Reference rejected.*

(1) (1902) I. L. R. 25 All. 128. (2) (1914) I. L. R. 38 Mad. 1028.
(3) (1923) I. L. R. 5 Lah. 16.

1928.

DABIRADDI NASKAR v. SAKAT MOLLA.

MUKERJI J.

APPELLATE CIVIL.

Before Cuming and Mallik JJ.

SITI KANTA PAL,

v.

RADHA GOBINDA SEN.*

1928.

Dec. 21.

Easement—Inchoate right—Prescription, period of, computation of—User—Uninterrupted—Peaceable—Enjoyment as of right—Grant, lost—Limitation Act (IX of 1908), s. 26, sub-sec. (1), *paras. 1 and 2.*

Paragraph 1 of sub-section (1) of section 26 of the Limitation Act, where the absolute and indefeasible character of a right of easement is mentioned, seems to be clearly controlled by the provisions of paragraph 2 of the sub-section, because the latter does nothing but explain how the period of 20 years necessary under the first paragraph is to be computed.

A title to easement is not complete merely upon the effluxion of the period mentioned in the statute, *viz.*, 20 years: however long the period of actual enjoyment may be, no absolute or indefeasible right can be acquired until the right is brought in question in some suit; and, until it is so brought in question, the right is inchoate only; and in order to establish it, when brought in question, the enjoyment relied on, must be an enjoyment for 20 years up to within 2 years of the institution of the suit. Whether the user had been peaceable or not is a pure question of fact.

For the creation of a right of easement by prescription there must not only be a peaceable and open enjoyment without interruption for 20 years, but that enjoyment must be an enjoyment as of right.

Long user is not sufficient for a finding of an enjoyment as of right. Whether an enjoyment is as of right or not is a pure question of fact, and enjoyment as of right cannot be inferred as a matter of course from a finding of user only.

The question whether there was a lost grant or not is a question of fact.

*Appeals from Appellate Decrees, Nos. 2587 of 1926 and 229 of 1927, against the decrees of R. C. Sen, District Judge of Bankura, dated Sep. 17, 1926, modifying the decrees of Amulya Gopal Roy, Munsif of Bankura, dated Aug. 18, 1925.