CRIMINAL REVISION.

Before Pearson and Patterson JJ.

MASADDAR ALI

v.

ISAMULLA.*

1929

June 14, 21.

Enquiry—Enquiry as to public right, if can be delegated to a subordinate magistrate—Such procedure, if curable—Code of Criminal Procedure (Act V of 1898), ss.139A, 537.

A magistrate initiating a proceeding under section 133 of the Code of Criminal Procedure has no jurisdiction to make over the enquiry as to the existence of a public right under section 139A to his subordinate. Such a procedure cannot be cured by section 537 of the Code, even if he subsequently considers and acts upon the report submitted by the subordinate magistrate.

CRIMINAL RULE obtained by the second party.

On the petition of Isamulla, first party, to the Additional District Magistrate of Sylhet, alleging that the second party had ploughed up a public *gopath* adjoining their land and had thereby obstructed the villagers in the use of the same, proceedings under 133 of the Code of Criminal Procedure were initiated against the second party and a conditional order made. The second party appeared and denied the existence of the public path, whereupon the learned Magistrate directed a subordinate magistrate with third class powers, to enquire and report as to the existence of the public path. The latter, after enquiry, submitted a report, with a sketch map to the effect that *gopath* in question was a public path. The learned Additional District Magistrate, after going through the report, declared it to be a public path. No objection to this procedure was taken by the second party at the time. A jury was appointed, who by a majority, returned the verdict that there was obstruction. The learned Magistrate accepting the said verdict made the conditional order absolute.

*Criminal Revision, No. 106 of 1929, against the order of J. N. Das, District Magistrate of Sylhet, dated Oct. 10, 1928.

The second party moved the Additional Sessions Judge of Sylhet, before whom they raised the objection for the first time that the learned Additional District Magistrate should have conducted the enquiry himself. The application was rejected, the learned Sessions Judge holding that neither party suffered any prejudice. The second party then obtained this Rule.

Mr. Priyanath Datta, for the petitioners.

Mr. Binayendranath Palit, for the opposite party.

PEARSON AND PATTERSON JJ. This Rule is directed against an order passed in proceedings under section 133 of the Code of Criminal Procedure, relating to alleged obstruction of a public *gopath*. The conditional order was passed by the Additional District Magistrate on the 5th June, 1928. On the 20th June, the opposite party No. 3 appeared and denied the existence of the right, and the 6th July was fixed for taking evidence. On the 6th July, all the opposite parties appeared and gave a denial of the right, whereupon the Magistrate passed an order making the case over to Babu A. M. Dam, Extra Assistant Commissioner, for enquiry and report as to the existence of a public path. His report was submitted after enquiry, and the report was in favour of the existence of the right. On the 17th August, the Additional District Magistrate took the report into consideration and acted upon it by passing an order declaring it to be a public path. Matters then proceeded before a jury, the majority of whom found that the obstruction should be removed. This Rule was issued on the ground that the provisions of section 139A had not been complied with, and that the Magistrate had no jurisdiction to direct an enquiry by another magistrate as to the existence of the right. There was also a question as regards the constitution of the jury, to which it is not necessary to refer further in view of our decision.

It is conceded that the terms of the section 139A contemplate an enquiry by the magistrate himself;

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there is no such provision in proceedings under chapter X for deputing a subordinate magistrate to make the enquiry as is to be found under chapter XII, expressly laid down by the terms of section 148. It is, however, said that in effect the magistrate did hold the enquiry himself by reading and acting on the report of the subordinate magistrate: that there has been no prejudice: that the accused participated in all the proceedings in the subsequent stages: and that the omission of the magistrate to enquire is a mere irregularity which is cured under section 537. We are of opinion that the matter cannot be disposed of in this manner. Upon the result of the enquiry depends the subsequent procedure—either a stay of proceedings, or a further step under section 137 or 138. The test is whether there is or is not reliable evidence in support of the denial of the existence of the alleged public right. The value of the evidence is a matter better determined by the magistrate, if he has heard it himself than if, as appears from the order sheet in the present case, he merely "read the report" of his subordinate. Moreover, the magistrate to whom the enquiry was deputed, in the present case, was, we are told, a 3rd class magistrate, whereas the opening words of section 133 show that the intention is that this class of proceeding should be in the hands either of a District Magistrate, a Subdivisional Magistrate or a magistrate of the first class. We, accordingly, are of opinion that the magistrate had no jurisdiction in the present case to make over the enquiry as he did, and for these reasons the Rule must be made absolute. Fresh proceedings may be instituted if necessary.

Rule absolute.

A. C. R. C.