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police. It may be and probably is the fact that the Chemical Examiner was asked to examine a certain piece of cloth, but it does not appear that the Chemical Examiner ever sent in his report or that such report was available to the prosecution and that such report has been withheld by the prosecution.

I am of opinion that there is no substance whatsoever in this appeal and it must be dismissed. The appellants, if on bail, must surrender to their bail bonds and serve out the remainder of the sentences imposed on them.

RANKIN C. J. I agree.

O. U. A. *Appeal dismissed.*

CRIMINAL REVISION.

Before Suhrawardy and Graham JJ.

RAJANIKANTA RAY

v.

IBRAHIM SARKAR.*

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Irregularity—Omission to put question as to the public right to the way or river obstructed, if curable by section 537, Cr. P. C.—Section 139 A of the Code of Criminal Procedure, scope of—Code of Criminal Procedure (Act V of 1898), ss. 139A, 537.

Where a party files a written statement and admits thereby that the river, which he is said to have obstructed, is a public river, but he claims that he has not put an obstruction in it but has built upon his own land,

held, section 139A of the Code of Criminal Procedure does not apply.

Even if section 139A applies to such a case, the omission to put a formal question to him under that section does not vitiate the entire proceedings but is curable by section 537 of the Code of Criminal Procedure.

CRIMINAL RULE, obtained by Rajanikanta Ray *alias* Pal, 2nd party.

On the complaint of Ibrahim Sarkar, 1st party, a conditional order, under section 133 of the Code of Criminal Procedure, was issued on the petitioner and others on the 8th March, 1928, by the Subdivisional Officer of Comilla, for the removal of certain obstructions caused to the public in the use of a river known as Marghara river, by filling up a certain portion of the river, raising its

*Criminal Revision, No. 1202 of 1928, against the order of N. L. Hindley, District Judge of Tippera, dated Nov. 5, 1928.

level and building huts on it. The petitioner appeared and filed a written statement admitting *inter alia* that the river was a public river, but that he had not obstructed it, but had built upon the *khas* land of his *zemindar*, from whom he took settlement thereof. After the filing of the written statement, no question was put to him as to whether he denied the existence of any public right in respect of the river in question. The enquiry proceeded and the magistrate found that the petitioner and others of the 2nd party had really obstructed a portion of the Marghara river, which was covered by C. S. *dag* No. 2573, which had been used by the public for more than twenty years. He, thereupon, made the conditional order absolute. The petitioner moved the Sessions Judge of Tippera, who, by his order dated the 5th November, 1928, dismissed the application. The learned Sessions Judge, in his order, suggested that an *amin* should relay C. S. *dag* No. 2573 and anything that fell within that *dag* should be cleared away, but he also observed as follows :—" This is not any elabora-" tion of the order passed. I merely lay down " instructions for the guidance of the court in having " the order carried out." The petitioner, thereupon, moved the High Court and obtained the present Rule.

Mr. B. C. Chatterjee (with him *Mr. Akhilchandra Datta*), for the petitioner. There has been no compliance with the provisions of section 139A of the Criminal Procedure Code. There has been no enquiry under that section. As a matter of fact, no question was put to the petitioner as to whether he denied the existence of a public right to the subject-matter in dispute. The trial court was wrong in supposing that public right was admitted and proceeding at once into an enquiry under section 137 of the Code of Criminal Procedure. Its failure to enquire whether there is any public right under section 139A vitiated the entire proceedings. The second ground is that the order of the trial court is bad, because it is incapable of execution, the land not being properly and specifically identified. The whole

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direction is vague. The learned Judge's order shows that, and he could not amend the order of the trial court, as he attempted to do.

Mr. Mrityunjay Chattopadhyay (with him *Mr. Debabrata Mukherji*), for the opposite party. As the learned Judge pointed out, the petitioner in his written statement admitted that the river in question was a public river and hence there was nothing to be done under section 139A. It is the way or the river, the public right to which is properly a matter under section 139A, and not the alleged encroachment. That is always a matter under section 137. When the public right was admitted, it would be futile to ask any further questions. Such omission is curable under section 537 of the Code of Criminal Procedure. The order is sufficiently specific. The particular *dag* number is mentioned there.

Mr. Anilchandra Ray Chaudhuri, for the Crown. The Crown also opposes this application, because it is an important public channel. In addition to what has been said, it need only be pointed out that the petitioner has now shifted his ground. Before the Judge, his complaint was of a highly technical nature, namely, that the omission to question him under section 139A had vitiated the proceedings. That was redundant after his own written statement. He is now trying to make out a new grievance before this Court that there was no enquiry as to the public right of the alleged encroachment. Under whatever section it might be, the court fully entered into the question and came to the clear finding that the encroachment was actually a part of the public river. With regard to the second ground, it is perfectly clear, from the concluding sentences of the learned Judge's words, that he never amended or in any way elaborated upon the order of the trial court, but merely laid down instructions for the guidance of the court in having the order carried out. Those directions were really and entirely for the benefit of the petitioner himself.

Mr. Akhilchandra Datta, in reply. The provision of the Code is that on the appearance of the

petitioner, it was the duty of the Magistrate to question him. That provision is mandatory. The filing of a written statement at a subsequent stage did not cure the breach. The courts below were in error in thinking that the petitioner admitted the right of the public. All that he admitted was the right of boat passage on the river itself. He claimed the land in dispute as his private land and denied any right of the public over the same. Moreover, the order sheet shows that on the first day, instead of asking him any question, the trial court at once proceeded on an enquiry under section 137. This he could not do. The written statement was therefore really one in that enquiry.

SUHRAWARDY J. This Rule was issued on two grounds. The first is that the procedure laid down in section 139A of the Code of Criminal Procedure was not followed in this case. What happened was that the petitioner was charged with obstructing a river called the Marghara river by throwing earth into it and raising the land over which the water used to pass. The Magistrate issued a notice under section 133 of the Code on the petitioner to show cause why he should not remove this obstruction. He appeared on the date fixed for showing cause and asked for time. On the following day, he filed a written statement, in which he admitted that the river said to have been obstructed was a public river, but that he had not obstructed it, but had built his shop on the land which belonged to his *zemindar*. He claimed that the land over which he was charged with throwing earth and building was a part of his *zemindar's khas* land. The trying magistrate, thereafter, proceeded under section 137 of the Code of Criminal Procedure, and being of opinion that the obstruction caused by the petitioner was on the bed of a river, he made the Rule absolute under that section and passed an order for removal of that obstruction. No doubt section 139A requires the magistrate to ask the party against whom a Rule has been issued under section 133, as soon as he appears, whether he

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denies the existence of any public right in respect of the way, river, etc., etc., and if he does so, the magistrate shall proceed under section 137, if he finds that there is no ground for such denial. But in this particular case, the omission by the magistrate to comply with the section does not, to my mind, vitiate the entire proceeding. On the day the petitioner filed his written statement he admitted therein that the river, which is said to have been obstructed, was a public river; but he contended that the obstruction, which was said to have been put up, was not in the river and was upon the land which was his *khas* land and not a portion of the river. In such cases, strictly speaking, section 139A ought not to apply. But the language of the section is so general that I am not prepared to hold that, even in such a case as this, the magistrate should not exercise a good discretion in following the direction of the law, but the omission to do it does not necessarily vitiate the entire proceeding. It would be an act of superfluity when a party comes before the magistrate and admits the public character of the river, which he is said to have obstructed, to ask him whether he denies or admits its public character. This section applies only in a case where a party wants a determination of the public character of the river or way obstructed. It has been conceded on behalf of the petitioner that if, on a notice under section 133, a party appears before the magistrate and admits that the way or river which he is said to have obstructed is a public way or river and does not deny the existence of a public right over it, but says that he has not put up an obstruction in the public way or river, but has built upon his own land, section 139A does not apply. The present case does not seem to be in any way different from the case I have just put. The question, therefore, left to the magistrate for decision is not the existence or non-existence of a public right in the river obstructed, but to determine if the obstruction was made in the river. The object with which section 139A was enacted seems to be that, where the

existence of the public right is denied, the magistrate has to make an enquiry. If it is not denied, then the section hardly seems to apply. But it may be said that the dispute between parties is whether the land, over which the obstruction is made, is part of a public river and thus attracts the application of section 139A. Even if it be so, when the petitioner appeared before the magistrate and denied that it was part of the public river, there was no necessity for putting a formal question to him and the subsequent procedure followed by the magistrate was as is indicated in the second clause of that section, and the final order passed was under section 137, since the obstruction was admitted. The omission at the most is an irregularity which is covered by section 537, Criminal Procedure Code.

The second ground relied upon by the petitioner is that the order of the magistrate is vague and incapable of being carried out. The magistrate passed an order for removal of the obstruction from a particular settlement *dag*, namely, *dag* No. 2573, which is well defined in the settlement record; and when notice was served upon the petitioner to show cause, under section 133 of the Criminal Procedure Code, he did not object on the ground of vagueness of the notice. This ground is suggested by certain remarks made by the learned Sessions Judge, to whom an application was made by the petitioner under section 435 of the Code of Criminal Procedure. The learned Judge suggested that in cases like the present the best procedure was to appoint an *ameen* to relay the site which would give clear indication to the opposite party as to the extent and nature of the obstruction. This was merely a piece of advice given to the trial court which might help it in enforcing its order, if necessary. There does not seem to be any vagueness in the order passed in this case and both the grounds having failed, in my opinion, this Rule shall be discharged.

GRAHAM J. I agree.

A. C. R. C. *Rule discharged.*