the *present* code would be *ultra vires*, because, as it now stands, the law limits the power of Government to determining, in each particular case as it arises, the person by whom and the manner in which the prosecution of such public servant is to be conducted, and empowers Government to specify the Court before which the trial of a public servant is to be held ; whereas in the order of 1875 the Government directed that a class, viz., Tahsildars and Magistrates or Deputy Tahsildars and Magistrates, should be tried only by a Court of Session. This may be so and may explain why the Government order was repealed, if repealed it be.

We must decline to interfere on two grounds: (1) it has not been shown that the trial by the Senior Assistant Magistrate was without jurisdiction; (2) the question of jurisdiction was considered by the Sessions Judge and decided adversely to Government and Government has not appealed.

APPELLATE CRIMINAL.

Before Mr. Justice Parker and Mr. Justice Wilkinson.

QUEEN-EMPRESS

v.

MUNISAMI AND OTHERS.*

1891. August 6.

Criminal Procedure Code—Act X of 1882, *ss.* 436, 437—*Further inquiry—Power of District Magistrate to suggest a committal.*

A District Magistrate who refers a case to a Sub-Magistrate for further inquiry has no authority to fetter him in the exercise of his judicial discretion as to the question whether the case should or should not be committed to the Court of Sessions.

CASE referred for the orders of the High Court under section 438 of the Code of Criminal Procedure by E. J. Sewell, Sessions Judge of North Arcot.

The question referred was whether or not a committal was illegal which was made by a Second-class Magistrate, (who had previously discharged the accused and now expressed no opinion that a *primâ facie* case had been made out for the prosecution,) in

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* Criminal Revision Case No. 297 of 1891.

QUEEN-EMPRESS v. MUNISAMI.

pursuance of an order of the District Magistrate, directing him to hold further inquiry and adding "as it might be doing a violence "to the scruples of the Lower Court to come to a different finding "from that already recorded, the Lower Court will do well if a re-"consideration of the evidence leads to the conclusion that it is "possible for two views to be held as to the conduct of the accused, "if it commits the accused to the Court of Sessions."

The *Acting Advocate-General* (Hon. Mr. *Wedderburn*) for the accused.

The *Government Pleader* and *Public Prosecutor* (Mr. *Powell*) *contra*.

JUDGMENT.—Under section 437, Criminal Procedure Code, the District Magistrate had power to make further inquiry himself or to direct the Sub-Magistrate to make further inquiry, but if he chose the latter course he had no legal authority to fetter the Sub-Magistrate in the exercise of his judicial discretion.

A commitment to the sessions (assuming that the case was one which ought to be tried by the Sessions Court) would not be justifiable unless the committing Magistrate considered a *primâ facie* case had been made out which in his judgment ought to be tried at the sessions. The order of the District Magistrate that the case was to be committed if the Sub-Magistrate thought it was possible for two views to be held, (the District Magistrate distinctly stating he held another view,) was therefore *ultra vires*, and practically took away from the Subordinate Magistrate the exercise of his judicial discretion. In making the commitment the Sub-Magistrate does not profess to have exercised any judicial discretion, but commits the case as it is possible two views may be held, though he does not say he himself entertains any doubt as to the correctness of the decision he himself had arrived at.

The commitment must be quashed and the order of the District Magistrate of 10th June must be restricted to a simple direction to hold a further inquiry.