

1884
 CHUNDER
 NATH GHOSE
 v.
 NUNDOLLOL
 CHATTERJI.

In dealing with this matter we think we should consider whether we should have granted such an application, if it had been made to us. We have no doubt that it would not have been regarded by us favorably, and that we should certainly not have re-opened the case. We cannot therefore but find that in ordering a further enquiry, or rather a re-trial, the Judge has not exercised a proper discretion. The order is therefore set aside.

Order set aside.

1884
 December 5.

Before Mr. Justice Mitter and Mr. Justice Norris.
 UMA CHURN MUNDLE AND OTHERS (COMPLAINANTS) v. JOSHEIN
 SHEIKH AND OTHERS (DEFENDANTS).*

Criminal Procedure Code, Act X of 1882, ss. 133, 138, 139—Jury illegally constituted—Juror refusing to act.

One out of five jurors appointed under s. 138 of Act X of 1882, declined to act on the jury. Two out of the remainder of the jury were in favor of a temporary order under s. 133 being maintained, whilst the other two were against its being so maintained. The Deputy Magistrate declined to pass any order under s. 139 of the Code of Criminal Procedure, as a majority of the jurors did not find the temporary order to be reasonable and proper, and he therefore struck off the case.

Held, that the course taken by the Deputy Magistrate was irregular, and ordered that a fresh jury be summoned, and the case enquired into anew.

THIS case was referred to the High Court under s. 438 of Act X of 1882.

It appeared that one Joshein Sheikh had closed up a public thoroughfare by placing a fence across it, and on the complaint of one Uma Churn Mundle, the Deputy Magistrate of Howrah issued an order under s. 133 of the Code of Criminal Procedure, calling upon Joshein Sheikh to remove the obstruction, or to appear before him to show cause why the order should not be set aside.

The parties appeared, and eventually a jury consisting of five persons was appointed under s. 138 of the Code of Criminal

* Criminal Reference No. 185 of 1884, made by W. E. Grimley, Esq., Magistrate of Howrah, dated the 28th November 1884, against the order of Baboo Bunkim Chunder Chatterji, Deputy Magistrate of Howrah, dated the 14th of October 1884.

Procedure. One of these five jurors appointed did not act on the jury, and of the remainder two were in favor of the Deputy Magistrate's order being maintained, and two were against it.

The Deputy Magistrate thereupon passed the following order: "Of the five jurors appointed, one has not acted at all. Two report in favor of the order, two against it. As a majority of the jurors do not find the order to be reasonable and proper, no further steps can, under s. 139, be taken. Case struck off." The District Magistrate, at the instance of the complainant, considered that this order was illegal, because (1) the jury were not legally constituted, inasmuch as it consisted of four persons only; and (2), because the proper course for the Deputy Magistrate to have taken was to have appointed another juror in the place of the one who did not act. The Deputy Magistrate, on being called upon for his explanation, did not consider it necessary to offer any explanation in support of the course he had taken, inasmuch as he was of opinion that the case could be revived without any reference to the High Court, and he further considered that ss. 433, 439 of the Code of Criminal Procedure did not apply to a case in which there was no sentence to be revised.

No one appeared for either party on the reference.

The order of the Court (MITTER and NORRIS, JJ.) was as follows:—

We think that the course taken by the Deputy Magistrate was irregular. He must summon a fresh jury and commence the enquiry afresh.

Order set aside.

Before Mr. Justice Mitter and Mr. Justice Norris.

QUEEN EMPRESS v. JACQUIET.

Verdict in accordance with charge—Verdict disagreed with by Judge—

Reference under s. 307, Act X of 1882.

The Court will not interfere with the finding of a jury, unless their verdict is shown to be manifestly erroneous.

A prisoner was charged under ss. 302 and 304 of the Penal Code, and the Judge at the trial added a further charge under s. 325. The Judge in

* Criminal Reference No. 23 of 1884, made by S. H. C. Taylor, Esq., Sessions Judge of Burdwan, dated 20th November 1884.

1884

UMA CHURN
MUNDLE
v.
JOSHEIN
SHEIKH.

1884

December 8.