plaintiff. We have already decided today, agreeing with Mr. Justice DANIELS and dismissing an appeal from him, that where the plaint discloses no allegation of a crime, this article did not apply. We think this is the correct view. We propose to maintain it in this case, and as these cases appear to be of somewhat frequent occurrence, we have thought it necessary to give our reasons at some length.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Sir Cecil Walsh, Acting Chief Justice, and Mr. Justice Banerji.

EMPEROR *v.* ALLAH MAHR AND ANOTHER.*

1927 *January* 6.

Criminal Procedure Code, section 437—Revision—Order of discharge set aside by Sessions Judge—Reference to High Court by District Magistrate against order of the Sessions Judge.

On a case sent up by the police under section 304 and other sections of the Indian Penal Code, the magistrate concerned, without deciding judicially that the charge was groundless, and that the evidence did not establish any case, altered the charge under section 304 to one under section 304A and then proceeded to dismiss the case.

The complainant applied in revision to the Sessions Judge, who entertained the application under section 437 of the Code of Criminal Procedure and decided that the Magistrate had not acted according to law and that the case ought to be committed to the sessions under section 304 of the Indian Penal Code.

The District Magistrate thereupon passed an order purporting to be a reference of the case to the High Court and asked the Sessions Judge to forward it. On the Sessions Judge refusing to do so, the District Magistrate sent up a reference to the High Court directly.

* Criminal Reference No. 626 of 1926.

1927

EMPEROR v. ALLAH MAHR.

Held, that the District Magistrate had in the circumstances no authority to refer the case to the High Court.

Fattu v. *Fattu* (1) and *Dharam Singh* v. *Joti Prasad* (2), referred to.

THE facts of this case are fully set forth in the judgement of the Court.

The Assistant Government Advocate, Dr. M. *Wali-ullah*, for the Crown.

Munshi *Shiva Prasad Sinha*, for the applicant.

Mr. *Hamid Hasan*, for the opposite parties.

WALSH, A. C. J., and BANERJI, J. :—This is a reference to this Court by the District Magistrate of Bulandshahr, the object of which apparently is to complain against, and to invoke the reversionary powers of the High Court with regard to, an order of the Sessions Judge. For reasons which will appear in a moment, we can do no more than express an academic opinion about the decision of the Sessions Judge against which complaint is made.

We have no jurisdiction to entertain this reference at all. It is not made to us under any section of the law, or under any known procedure. It stands no higher as a matter which we can entertain in due course of law, than a letter or complaint sent to the High Court informally by any citizen. As a matter of strict procedure, it should never have been put up before a Judge in Court at all, although one can understand that the officials in the office entertained some doubt as to whether they ought to disregard it altogether or whether they ought to lay it before a Judge in Court to be dealt with. In future the trial clerk and his department must disregard all such petitions, references or complaints, not made according to recognized procedure, and should submit them through the

(1) (1904) I.L.R., 26 All., 564. (2) (1915) I.L.R., 37 All., 355.

Registrar to the Chief Justice, for him to make such order as he, in his discretion, thinks desirable under the circumstances. We wish to make this clear beyond question or possibility of misunderstanding. Otherwise if other Magistrates, or other persons concerned to question an order made by a competent court of superior jurisdiction, like the Sessions Judge in criminal matters, chose to follow the unprecedented course adopted by the Acting District Magistrate in this case, the office of the High Court would be inundated with petitions and documents by way of complaint, without any legal foundation, and which would cause a serious amount of embarrassment and superfluous labour.

What happened in this case was as follows:— Various charges and complaints were made with reference to a cattle trespass and a *marpit*, which ended in the death of a woman. The police sent up the case under section 304, in addition to other sections. and other complaints were made by private complainants before the Sub-Divisional Officer. The Sub-Divisional Officer (we will omit for the moment other proceedings which were dealt with by him) dealt with the charge under section 304 in this way. He does not appear to have decided judicially that the charge was groundless, and that the evidence did not establish any case, but he altered the charge to one under section 304A, thereby dropping altogether the charge under section 304, and then proceeded to dismiss the case, which he could not have done if the charge under section 304 had remained. We pass by for a moment the consideration of the question how far this order was in fact, or could be in law, interfered with by the Sessions Judge. What happened then was that the complainant applied in revision, which he had a perfect right to do, to the Sessions Judge, to reverse

1927

EMPEROR v. ALLAH MAHR.

the order of the Magistrate; and the Sessions Judge entertaining the matter under section 437, as he had a perfect right to do, decided, for reasons which he expressed judicially in an order, that the Magistrate had not acted according to law, and that the case ought to be committed to the sessions under the original charge, section 304. Passing by, for a moment again, the question whether, in the particular circumstances of this case, that order was justified, it is clear that it was an order of the character which was within the competence of the Sessions Judge. It seriously affected the accused persons, because it was tantamount to an order that he, or they, should be put upon their trial under section 304. If that order had been made without any foundation in fact, or upon palpably inadequate materials, or in breach of the legal sanctions limiting the powers of the Sessions Judge, there was a remedy open to anybody prejudiced by that order. The person prejudicially affected by such an order has the right to apply to the High Court in revision to review an order of that kind, and if he can show that it was an order which never ought to have been made, and which the circumstances could not justify any Sessions Judge in making, this High Court has jurisdiction to reverse or modify such an order. No other form of procedure is known to us by which that order could be judicially reviewed.

The District Magistrate, for reasons into which we need not enter, and so far as they involve questions of law, are contained in a letter sent to the High Court on the 2nd of September, had decided to invoke the jurisdiction of the High Court to interfere with the order of the Sessions Judge. It appears from a letter of his, addressed to the Assistant Registrar of the High Court, dated the 27th of September, that the Sessions Judge, to whom the District Magistrate

had submitted the reference for the purpose of its being forwarded to the High Court, had refused to forward it. That refusal appears to us to have been right, inasmuch as the District Magistrate has no power under any statutory provision, as we have already pointed out, to refer an order of the Sessions Judge to the High Court for the purpose of having it quashed, or modified; *a fortiori* he had not power to call upon the Sessions Judge to forward it to the High Court. It would perhaps have been better if the District Magistrate, on receiving the refusal of the Sessions Judge, had taken advice, or taken some trouble to look into his own powers in the matter before taking the next step which he took, which we have already described as quite unprecedented, and one which, we trust, will not be repeated by any Magistrate under similar circumstances. But what he did was in defiance of the rules on the subject. He sent the reference to the High Court. The Assistant Trial Clerk noted at once the informality of the proceeding, and wrote a note pointing out that a reference could only come through the Sessions Judge. This view was properly communicated to the District Magistrate. In spite of that the District Magistrate persisted in the course which he had chosen, and resubmitted the record with the remark, to which we have already referred, that the Sessions Judge had refused to submit it himself. The result of that was that the office of the High Court found itself embarrassed by a reference for which there was no precedent so far as they knew, but which was persistently made under cloak of legal justification by a gentleman occupying the high and responsible position of a District Magistrate, and in the result the matter was put up in Court before my brother Mr. Justice BANERJI, and he realizing that the questions raised were out of the

1927

EMPEROR v. ALLAH MAHR.

common, decided to issue notice to the parties, so that the matter might be discussed and settled once for all, and to refer it to a Bench of two Judges, which is the Bench now dealing with the matter.

We can only repeat, what we have said, that the reference has no existence in law, and is not recognized by any legal procedure. If it is not to be treated as mere waste paper, it has at any rate no higher status than that of a private letter, addressed by some private individual to the High Court, and our duty is strictly confined to deciding that we have no jurisdiction to entertain the reference, and to direct the record to be returned.

Inasmuch, however, as the whole proceeding appears to have arisen out of a difference of opinion upon a very important question, which, however, is elementary, and has been clearly settled for many years, and ought to be known to everybody connected with the administration of the criminal law namely the duty of a committing Magistrate in dealing with a *primâ facie* case triable by sessions, we think it desirable to add a word or two by way of re-statement of the law in regard to that matter. In what we are saying we are only re-stating the settled principles by way of *obiter*, and the decision which this Court would be compelled to give, if, as we have pointed out was open to him, the accused person had applied to this Court in revision to set aside the order of the Sessions Judge. But the necessity of making this re-statement is created by the somewhat surprising *dicta* of a gentleman occupying the position of a District Magistrate, in the letter which he has written to the Registrar of the High Court, and which has come to be dignified by the name of a reference. The District Magistrate suggests that the action of the

1927

EMPEROR v. ALLAH MAHR.

Sessions Judge amounted to an unwarranted interference with the lawful exercise by the Magistrate of the discretion vested in him by section 209, and went on to state that the order was *ultra vires*. The Sessions Judge appears to us to have approached the matter strictly in accordance with the settled principles. He differed from the view taken by the Magistrate in reducing the charge from section 304 to section 304A for the following reason:—"If the prosecution evidence were true that the two accused intentionally assaulted the woman with *lathis*, of which she died, it is difficult to understand how the act would amount to no more than rashness or negligence." The view he took was that the Magistrate, while not rejecting the evidence, had disregarded the inference of criminal liability, legally and necessarily to be drawn from the *primâ facie* facts established by the prosecution evidence and had himself usurped the function of the trial court and reduced the quality of the acts testified to by the evidence to a totally different legal complexion, thereby shutting the door to the possibility of the alternative of a graver charge being established. Now it is easy to state in a question of a serious *marpit*, where serious bodily injuries, or death, have occurred, circumstances which raise a serious argumentative question of fact as to whether the acts complained of were committed with such intention as to amount to either section 302 or section 304, or were committed under such circumstances as although criminal, would amount to no more than rashness or negligence. It is quite a simple matter for a committing Magistrate to deal with a case of that kind. He is not the trial court. His duty, if the evidence is *primâ facie* adequate, is to commit and leave the ultimate judicial decision to the trial court, but if he has reason to think and is prepared to state for

1927

EMPEROR v. ALLAH MAHR.

judicial reasons in the exercise of his discretion in the committal order that there is a possibility of an alternative view to that which is set out in the charge originally made, he can always commit the accused for trial on two or more alternative charges. What he cannot do is what was done in this case, namely, to shut the door finally to the possibility of trial upon evidence which *primâ facie* is capable of interpretation to support a graver charge. The question of the duty of a committing Magistrate, where he has doubts about the real nature of the offence, and the quality of the evidence, is really well settled, and should cause in the vast majority of cases no difficulty whatever. One may place the classes of cases into three categories. There is the case where the evidence is *primâ facie* so clear that nobody can entertain any doubt that the matter ought to be tried. There is, on the other hand, the class of cases where the evidence is so palpably tainted, absurd, incredible and, as it has been described on occasions, groundless, that nobody could doubt that it would be a hardship and unjust to an accused person to allow the matter to go any further. There is the third category, which, of course, provides debatable ground, where the evidence is conflicting, and lays itself open to suspicion—but where, on the other hand, it may be true, and may commend itself to certain tribunals, the Magistrate, even though he may have reason to doubt whether if he were trying the case he would convict, has no right to substitute his judgement for the final judgement of the court indicated by law for the trial, and to arrive at a final decision dismissing the case in the way in which he would do if he were the trial court. If the evidence is balanced, however unevenly in his opinion, then it is a matter which has to be tried, and it is his duty to commit it for trial. In England the

existence of the procedure of trial by jury makes the task of the Magistrate in such debatable cases perhaps easier than it is in India. At any rate in England an experienced Magistrate, although he is bound to acknowledge that there is evidence, which by itself is adequate to support a charge, can, taking a broad view, and not substituting his own judgement for that of the trial court, pronounce that he is perfectly satisfied that no jury would convict. It is easier because it is well known that it is more difficult in a very debatable case to obtain an unanimous verdict from twelve men than from one. Therefore, if there is any difference between the practice in England and the practice in India, it is rather in the direction of reducing the number of cases in which a committing Magistrate in India is justified in throwing out the case as compared with a committing Magistrate in England. We, in expressing our opinion in this matter, desire to endorse what has been laid down for many years in this Court as the correct test. In *Fattu* v. *Fattu* (1) this Court laid down that a Magistrate has a wide discretion in the matter of weighing the evidence produced on one side or the other, the remedy for an erroneous exercise of such discretion being provided in the powers conferred on Sessions Judges and District Magistrates by the revisional sections. But in the exercise of such discretion, if the question of discharge or commitment is one merely of probabilities, the inquiring Magistrate ought rather to leave the decision thereof to the court of session than to make an order of discharge, because in his opinion the accused ought to have the benefit of the doubt. It would be difficult to state the principle more clearly and satisfactorily than it is there stated. That case was followed in more recent days by a most experienced

(1) (1904) I.L.R., 26 All., 564.

1927

EMPEROR v. ALLAH MAHR.

and learned Judge of this Court, who had great experience as a Magistrate himself and as Sessions Judge, and in *Dharam Singh* v. *Joti Prasad* (1) Mr. Justice PIGGOTT, following *Fattu* v. *Fattu*, said: "When a Magistrate has heard the evidence for the prosecution with entire disbelief, when he considers himself in a position to show that the prosecution witnesses are totally unworthy of credit, and *a fortiori* when, after examining certain witnesses named on behalf of the accused, he has come to the conclusion that the evidence given by them is reliable and disproves that given by the prosecution, he is well within his discretion in discharging the accused." There again is an admirable statement of the legal position. If there had been anything in the Sessions Judge's order in this case which appeared to us to offend against those principles, we think it would have been our duty to have expressed our opinion *obiter* upon the matter. As it is, it must be clear to everybody concerned in this case that this question lies at the root of the unfortunate proceedings which we have been compelled to entertain today. But, on the contrary, in accordance with our view the learned Sessions Judge was careful to point out that, without rejecting the evidence as totally untrustworthy and the charge as groundless, the Magistrate had in his view exceeded his jurisdiction, usurped the function of the trial court, interpreted the evidence and given it a legal complexion which to his mind it ought to receive, and as a result had dealt with the matter in a final judgement which he had no right to do.

(1) (1915) I.L.R., 37 All., 355.