

Before Mr. Justice Boys.

EMPEROR *v.* BASHIR.*

1930
June, 17.

Criminal Procedure Code, sections 438 and 439(5)—District Magistrate taking action under section 438 against an order of acquittal—Not barred by fact that Local Government has not appealed from the acquittal. —

In a case of acquittal, the powers of the District Magistrate to take action under section 438 of the Criminal Procedure Code are not shut out by sub-section (5) of section 439 because the Local Government could have appealed and has not done so. The District Magistrate, not being the Local Government, is not the party who could have appealed, and therefore sub-section (5) of section 439 does not operate.

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

Mr. Mahmud-ullah, for the opposite party.

Boys, J. :—This is a case of a reference by the District Magistrate asking that an acquittal should be set aside and the case sent back for retrial. The ground of the reference is that the accused was acquitted by the Magistrate of a charge of harbouring, only because that person had not yet been convicted, though proceedings were pending against him whom the present accused was charged with harbouring. The person alleged to have been harboured has been since convicted. The accused was not acquitted on the merits. If the Magistrate thought it necessary, I do not say it was necessary but if he thought it necessary to know the result of the trial of the person who was alleged to have been harboured for the offence which he was alleged to have committed, he should have adjourned the trial and awaited the result of the other trial. The only contention which could be raised here against the reference is that the powers vested in the District Magistrate under section 438 of the Code of Criminal Procedure are shut out by sub-section (5) of section 439, because the Local Government could

* Criminal Reference No. 256 of 1930.

have appealed and has not done so. This is to confound the Local Government with the District Magistrate as if the two terms were interchangeable. It is manifest that the Local Government could appeal, but it could so appeal even if the District Magistrate thought that it should not appeal. The two terms not being interchangeable I can see no reason whatever why sub-section (5) of section 439 should be held to constitute any bar to the District Magistrate taking action under section 438. For the accused my attention is drawn to the case "*In the matter of Sheikh Amin-ud-din* (1). There two Judges of this Court refused to hold themselves barred from entertaining a reference under section 438 by section 439(5). They did, however, go on to hold that as a matter of their discretion they declined to exercise their powers under section 439 where the Local Government might have appealed, and where the Magistrate could have moved the Local Government if he so chose. It is possible that in that case the acquittal had been on what the Magistrate considered to be the merits of the case. In the present case the acquittal has been based on a mistaken view of the course which the Magistrate ought to adopt. That may not be a material distinction, but the decision quoted is one where their Lordships acted in the exercise of a discretion, and I am certainly not bound by it. The District Magistrate not being the Local Government is not the person entitled to appeal, whether or no he may be able in his executive capacity to move the Local Government to appeal. I see no reason, therefore, why his judicial powers should be restricted.

Accepting the reference, I set aside the acquittal and direct the trial court to take up the case again from the stage at which it had reached immediately before the order of acquittal was passed.

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