

We are, therefore, of opinion that where a Muham-
 madan widow lawfully and peaceably takes possession
 of her husband's estate without any force or fraud
 where her dower debt remains unpaid in whole
 or in part, she is entitled to retain possession against
 the other heirs of the husband, so long as the debt has
 not been paid by them or has been satisfied out of
 the usufruct of the property, and in order to entitle
 her right to retain possession of the property, it is not
 necessary that her possession should have originated
 with the consent express or implied of her husband or
 of her husband's heirs.

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 IMTIAZ
 BEGAM
 v.
 ABDUL KARIM
 KHAN.

The result is that we allow the appeal, set aside
 the decree of the lower appellate court and restore that
 of the court of first instance with costs.

 REVISIONAL CRIMINAL.

Before Mr. Justice Boys.

EMPEROR v. NAZIR HUSAIN.*

*Criminal Procedure Code, section 258(1)—Failure of complain-
 ant and witnesses to attend for cross-examination after
 charge has been framed—Acquittal.*

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 June, 17.

Where, after a charge had been framed against the ac-
 cused person at a trial for causing simple hurt, the com-
 plainant and his witnesses failed to attend on the date fixed
 for their cross-examination, and the Magistrate was of opinion
 that there were no good grounds for adjourning the case :
Held that the Magistrate could thereupon find the accused
 not guilty and acquit him, acting under section 258(1) of the
 Criminal Procedure Code.

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

The opposite party was not represented.

* Criminal Reference No. 233 of 1930.

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EMPEROR
 v.
 NAZIR
 HUSAIN.

Boys, J. :—This is a reference by the Sessions Judge of Dehra Dun asking this Court to order a re-trial, if it thinks fit, in a case where an accused person has been discharged, the Magistrate purporting to act under section 259, although, a charge having been framed, he could not act under that section. The facts are simple. A complaint was lodged against the accused charging him with having shoe-beaten the complainant. The assault was in itself comparatively trifling but for the well known fact that beating with shoes adds insult to any injury that may be inflicted. A charge was framed against the accused and a date was fixed for the complainant to attend with his witnesses for cross-examination. The complainant and also his witnesses failed to attend, and I may state immediately that I have not been able to find on the record nor is the Assistant Government Advocate able to show me, that the complainant has ever explained his failure and the failure of his witnesses to attend. In this connection the Magistrate in his final order pointed out that even if the complainant had missed his train he could have come by lorry, as the Magistrate waited for him till 2 p.m. It is some indication that the complainant did not miss his train, that the witnesses also failed to appear. There is room, therefore, for holding that there may be some substance in the accused person's petition to this Court that the complainant and his witnesses deliberately stayed away because they did not want the trouble of going out into the camp where the Magistrate was, and were quite willing to harass the accused and his witnesses by letting them go unnecessarily. However that may be, there is no explanation before me and apparently none available as to why the complainant and his witnesses failed to appear. On their failure to appear the Magistrate passed an order discharging the accused, purporting to act under section 259 of the Code of Criminal Procedure. He admits that he could not act under that section as the

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accused had been charged, but he quite properly states his difficulty that he is unaware what course he should have adopted and practically invites assistance on this point. There were two courses open to him: firstly, to adjourn the case. He has given good reasons for not wishing to adopt that course. Secondly, if he felt that there were no good grounds for adjourning the case he should have found the accused "not guilty" and acquitted him, acting under section 258 (1). It is true that he had so far formed an opinion that the accused was guilty, in that he had framed a charge against the accused and there had been no subsequent evidence given to suggest that the charge had been wrongly framed, but the accused was entitled to a final judgment not merely on the preliminary evidence of witnesses on examination-in-chief but on that evidence after it had been submitted to cross-examination, and if the complainant himself, in the particular facts of the case, is adjudged responsible for the witnesses of the prosecution not being available for cross-examination, he is himself responsible for rendering that testimony unsafe to rely upon. The Magistrate should then have held that in the circumstances of the case he had no alternative but to find the accused "not guilty" and have acquitted him. The finding "not guilty" is a technical expression and not necessarily equivalent to a finding that the accused did not commit the acts charged.

I set aside the order of the Magistrate discharging the accused, and for that order, there being no adequate grounds for ordering the case to be taken up afresh, substitute an order of acquittal. To this extent, the reference is accepted.