

1330 F. to the date of delivery of possession and to interest thereon. They are also entitled to five-sixths of their costs in all the Courts with future interest. Interest will be at six per cent. per annum.

KULWANT SAHAY, J.—I agree.

Appeal allowed in part.

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MITA
DUSADH
v.
ANUP
MAHTON.

CRIMINAL REFERENCE.

Before Wort and Macpherson, JJ.

WAZIR KUNJRA.

v.

KING-EMPEROR.*

1928.

March, 16.

Code of Criminal Procedure, 1898 (Act V of 1898), sections 438 and 439—High Court, jurisdiction of, to interfere with acquittal on reference by Sessions Judge.

Section 438, Code of Criminal Procedure, 1898, covers all cases of irregularity and injustice including erroneous acquittals and certainly all such acquittals as the High Court would interfere with in revision under section 439 at the instance of a private party.

The High Court may well interfere with an acquittal on a reference made by the Sessions Judge even when it would not do so on a reference by a District Magistrate.

Siban Rai v. Bhagwat Dass (1), referred to.

This was a reference by the Sessions Judge of Monghyr under the provisions of section 438 of the Code of Criminal Procedure. His recommendation was that Wazir Kunjra who was acquitted by the Honorary Magistrate of Begusarai of an offence under section 326 of the Indian Penal Code be convicted of that offence.

Wazir was placed on his trial along with seven others including Bashir and Anis on a charge under section 148 of the Indian Penal Code of having rioted

*Criminal Reference no. 119 of 1927, made by S. B. Dhavle, Esq., I.C.S., Sessions Judge of Monghyr, in his letter no. 2828/X-1, dated the 21st/23rd December, 1927.

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armed with deadly weapons, with the common object of assaulting Munshi Kunjra. Separate charges under section 326 of that Code were framed and tried at the same time against Wazir, Bashir and Anis of having voluntarily caused grievous hurt to Zamir and Yusuf and Munshi respectively in the course of the riot. The Magistrate convicted the accused under section 148 and also found that the separate charges of causing injury to Zamir, Yusuf and Munshi were made out but in writing his judgment he inadvertently set out that Wazir, Bashir and Anis were charged with causing injury to Munshi, Zamir and Yusuf respectively. Under this misapprehension that Wazir was the assailant of Munshi he held that as assault on Munshi was the common object of the unlawful assembly, Wazir could not be separately sentenced under section 326 of the Indian Penal Code. Shortly after he had pronounced judgment the Magistrate perceived his mistake as to the facts and reported the matter to the Sessions Judge of Monghyr stating that it was "due to oversight due to similarity of names." Shortly afterwards an appeal was preferred by Bashir, Anis and others against their convictions and sentences. Wazir did not appeal but the Sessions Judge issued notice upon him to show cause why the matter should not be referred to the High Court.

Eventually the Sessions Judge dismissed the appeal of the appellants before him and found that Wazir had actually committed the offence with which he was charged under section 326 of the Indian Penal Code. He therefore made the present reference. A notice was issued by the High Court to Wazir to show cause why his acquittal of the charge under section 326 should not be set aside and why he should not be convicted and sentenced under that section.

No one appeared in support of the reference.

S. A. Asghar, against the reference.

MACPHERSON, J.—(after stating the facts set out above proceeded as follows:) *Mr. Asghar* who has

appeared on behalf of Wazir contends in the first place that this Court will not accept a reference under section 438 of the Code of Criminal Procedure recommending that an acquittal be set aside. He points out that though there is no decision of this Court to that effect several High Courts have, in cases where the District Magistrate has referred an acquittal to a High Court with the recommendation that it be set aside, declined to accept the recommendation indicating that in the opinion of the Court the proper method was an appeal by the local Government under section 417 of the Code of Criminal Procedure. Now, I am not prepared, as at present advised, to accept the view which has found favour in the decisions cited. The existence of section 417 is to my mind not even relevant in the majority of cases. The position in respect of it in this province at least is set out in *Siban Rai v. Bhagwat Dass* (1) where I said: "Again too much stress may easily be laid upon the remedy available under section 417 even in police cases. An appeal against acquittal is a special weapon in its armoury which the local Government judiciously reserves for exceptional occasions, and which is only used after most anxious consideration and in cases which are themselves of great public importance or in which a principle is involved. It cannot be expected that Government will dull the edge of that salutary provision by utilizing it freely in cases which though of importance to individual subjects, are of no or of little general interest. Actually, therefore, a remedy under section 417 is practically non-existent in the less heinous cases whether they are private or public prosecutions. Yet where justice fails in this country, it undeniably does so at least as much by erroneous acquittal as by erroneous conviction."

It is obvious that the local Government can only deal with a very small proportion of erroneous acquittals. It can, therefore, be reasonable to refuse

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to entertain a reference by the District Magistrate only where it is clear that the case is one of that small proportion of cases in which the local Government would be expected to move on account of their special importance to the administration but has failed to do so. Section 438 is intended to cover all cases of irregularity and injustice including acquittals which come to the notice of the local eyes and ears of the High Court. Manifestly it must cover at least cases of erroneous acquittals with which the High Court would interfere under section 439 at the instance of a private party who comes direct to the High Court. The greatest caution must be exercised in whittling down a provision of law which is itself clear.

Then again in many of the cases referred by a District Magistrate the circumstances were special. Here, however, is a case much more suitable for a reference than for an appeal under section 417. Even if the reference had been made by a District Magistrate it is impossible to believe that any Court of justice having jurisdiction, as this Court admittedly has, would permit a manifestly erroneous acquittal induced by inadvertence to stand.

Further assuming that ordinarily the High Court will not interfere with an acquittal on a reference by a District Magistrate who has the means of communicating with the Local Government with a view to an appeal under section 417, it does not follow that the position should be the same in respect of a reference by the Sessions Judge who has no such means, whose outlook on the matter cannot but be purely judicial and who must either act under section 438 or not at all. Mr. Asghar is unable to cite any decisions where a reference by a Sessions Judge was refused for the reasons set out in the decisions relating to a reference by the District Magistrate. It is also clear that section 439 (5) relied on in a Madras case has no application and in numerous cases this Court has interfered with acquittals at the instance of the

private prosecutor. The first plea, therefore, cannot prevail.

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It is next urged by Mr. Asghar that this Court should not direct a retrial of the case against his client in spite of the misapprehension of the learned Honorary Magistrate. He desires this Court to try the charge on the evidence before it and candidly informs the Court that he is unable to say that any case could be made out upon the evidence for the acquittal of Wazir of the charge under section 326. Having read the judgment of the learned Sessions Judge and of the Honorary Magistrate I am of opinion that this view of the matter cannot be gainsaid. In the riot Wazir was not only armed with a farsa, but caused therewith a very serious injury to Zamir cutting off his thumb and causing other injuries to his hand. I would accept the recommendation of the learned Sessions Judge and convict Wazir of the charge under section 326 of the Indian Penal Code.

Finally learned Counsel has referred to the question of sentence. It appears that the sentence passed on Bashir and on Anis under section 326 is six months' rigorous imprisonment and the Sessions Judge sets out that the grievous hurt caused by Wazir to Zamir was by no means less serious than the injuries in respect of which Bashir and Anis have been sentenced. A similar sentence will not be excessive.

I would accordingly accept this reference, convict Wazir under section 326 of the Indian Penal Code and direct that he do undergo rigorous imprisonment for a period of six months. This sentence is in addition to the sentence of fine passed upon him under section 148 of the Indian Penal Code.

WORT, J.—I agree.

Reference accepted.