

is therefore no authority for the position taken up by the learned Advocate for the respondent. The other case relies upon *Jagdish Narain's*(1) case, but in effect lays down a different rule. I do not agree with that decision, but as the case dealt with another clause of the rule no reference to the Full Bench is necessary.

I would allow the applications, set aside the orders of the District Judge and remand the cases for the rehearing of the appeals by him.

Ross, J.—I agree.

*Cases remanded.*

## CRIMINAL REFERENCE.

*Before Adami and Wort, JJ.*

JANAKDHARI SINGH

v.

KING-EMPEROR.\*

1928.

*Dec. 19.*

*Code of Criminal Procedure, 1898 (Act V of 1898), sections 203, 436 and 537—order for further enquiry—issue of summons without enquiry—irregularity—failure of justice, proof of—section 537, Explanation.*

Where a further enquiry into a complaint was ordered under section 436, Code of Criminal Procedure, 1898, and the magistrate thereon summoned the accused persons without holding a further enquiry and convicted them,

*Held*, that the procedure adopted by the magistrate was merely irregular and that the conviction could not be set aside in the absence of proof of failure of justice.

*V. M. Abdul Rahman v. The King-Emperor*(2) and *Subrahmania Ayyar v. The King-Emperor*(3), referred to.

\*Criminal Reference no. 57 of 1928, made by Rai Bahadur Surendra Nath Mukerji, Sessions Judge of Bhagalpur, by his letter no. 2410/X.R., dated the 17th August 1928.

(1) (1917) 2 Pat. L. J. 720.

(2) (1927) I. L. R. 5 Rang. 53, P. C.

(3) (1902) I. L. R. 25 Mad. 61, P. C.

1928.  
 MUFTI  
 REAZUDDIN  
 v.  
 LALA  
 MAHESHA-  
 NAND.  
 CHATTERJI,  
 J.

1928.

JANAKDHARI  
SINGH  
v.  
KING-  
EMPEROR.

*Held*, further, that apart from any order of the revisional court for further enquiry, a magistrate has jurisdiction to issue summons against an accused person in spite of the fact that he has already dismissed the complaint.

*Jyotindra Nath Daw v. Hemchandra Daw*(1), followed.

*Sir Ali Imam* (with him *G. N. Mukherjee* and *S. K. Banerji*), for Janakdhari Singh and others.

*S. Sinha* (with him *B. P. Jamuar*), for Panchi Mandal.

WORT, J.—This is a reference by the learned Sessions Judge under section 438 of the Code of Criminal Procedure. In the letter of reference he recommends the conviction to be set aside under the following circumstances.

On the 13th of September, 1927, the prosecution lodged a first information, and on the 4th of November, 1927, Panchi Mandal, complainant, filed a complaint in Court. The complainant in accordance with section 200 of the Code of Criminal Procedure was examined on oath and a certain order was made by the Subdivisional Officer to the effect,

"I have gone through the final report of the police. The case was supervised by the divisional inspector and I also considered the facts. I did not consider it a proper case to call for a charge sheet and I declined to summon the accused. The complaint is dismissed under section 203, Criminal Procedure Code."

As against this order of dismissal, the complainant moved the Sessions Judge on the 23rd of January, 1928, and the Additional Sessions Judge in considering the matter came to the conclusion that a further enquiry ought to be held. The order under section 203 was accordingly set aside and further enquiry into the complaint was directed. On the 10th of February the Subdivisional Officer in the circumstances recorded this order :

"Read the order of the Additional Sessions Judge, dated 23rd January 1928. Summon Janakdhari Singh, Babu Singh, Hemraj Singh, Bangtoo Singh and Debnarain Singh under sections 147 and 323, Penal Code, for 2nd March 1928,"

and then a trial was directed as a result of which the accused were convicted.

(1) (1909) I. L. R. 36 Cal. 415.

Now, Sir Ali Imam on behalf of the accused argues that having regard to what happened after the order of the Additional Sessions Judge directing a further enquiry the whole proceedings are illegal and consequently the conviction must be set aside. The reason for advancing that argument is that the Sub-divisional Officer, as one sees from the order of reference, instead of holding a further enquiry summoned the accused and a trial proceeded. Now the whole question to be determined is whether the course adopted by the Subdivisional Officer was illegal and contrary to law or whether it amounted merely to an error, omission or irregularity under section 537 which cures such errors, omissions or irregularities, unless it is shown that it has occasioned a failure of justice. In the course of argument two cases, which came before the Judicial Committee of the Privy Council, were referred to. The latter of these cases is *V. M. Abdul Rahman v. The King-Emperor*<sup>(1)</sup> and in that case, and I have referred to it for this purpose only, the earlier case before the Judicial Committee of the Privy Council was discussed. Now in the earlier case which is *Subrahmania Ayyar v. The King-Emperor*<sup>(2)</sup> it was shown that the conviction had to be quashed for the reason that what had taken place there was something which was quite contrary and in fact prohibited by the provisions of the law. The substance of the later decision was that the objection to be taken to the trial of the accused whose case was then before it was nothing more than an irregularity and the only point, therefore, to be determined was whether there had been a failure of justice under the proviso to section 537. So the cases which are referred to as having come before the Privy Council give no assistance to this Court in the determination of the question which is before it, namely, whether this was a mere omission or irregularity, or whether it was an illegality.

1928.

JANAKDHARI  
SINGH  
v.  
KING-  
EMPEROR.

WORT, J.

(1) (1927) I. L. R. 5 Rang. 53, P. C.

(2) (1902) I. L. R. 25 Mad. 61, P. C.

1928.

JANAKDHARI  
SINGH  
v.  
KING-  
EMPEROR.

WORT, J.

Now the matter in my judgment can be disposed of in this way. It may be disposed of by looking at the history of this case. There is no doubt in the first place that up to the time that the Session Court exercised its revisional jurisdiction there had been no irregularity or illegality in the course of these proceedings. We then come to the order of the Additional Sessions Judge in which he directs further enquiry. We know that instead of conducting the further enquiry the accused were summoned. There is no doubt that it is admitted that the Subdivisional Officer in proceeding in that manner disobeyed the order of the Session Court. Now what has he done. He has in fact omitted to carry out the order of the superior Court. On the face of it, therefore, it would appear that what has occurred is a mere omission in the procedure which the Court of the Subdivisional Officer should have adopted in conducting these proceedings. But Sir Ali Imam on behalf of the accused argues that it is not merely an omission, because apart from this further enquiry the Subdivisional Officer had no jurisdiction to proceed in the manner in which he did by summoning the accused. That question is to be determined, in my judgment, by reference to section 203 of the Code of Criminal Procedure. There is no doubt, in the first place, and there is authority for it, that the subordinate Court would have had jurisdiction even apart from the revisional order of the Sessions Judge and that appears from the case of *Jyotindra Nath Daw v. Hemchandra Daw*(1). There a Magistrate had dismissed a complaint under section 203 of the Code of Criminal Procedure; reference was made to the District Magistrate and he declined to make any order in the case. There was then a petition to the Magistrate by the complainant and the Magistrate in the circumstances ordered that, as the application was after the order of the District Magistrate who had

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(1) (1909) I. L. R. 36 Cal. 415.

been asked to exercise revisional powers, the matter should go to him for orders. The District Magistrate, however, in the events which happened declined to make any order stating, "This matter has nothing to do with me. I have already disposed of the petition of motion which was filed before me. The Deputy Magistrate must act on the petition filed before him according to his own discretion." The Magistrate then proceeded to issue summonses and a trial proceeded of the accused party. It was argued that the District Magistrate having declined to exercise his revisional powers the Magistrate had no jurisdiction to proceed with the trial of the accused. But it was there held that the subordinate Magistrate was competent to revive the proceedings notwithstanding the District Magistrate had refused to order further enquiry. There is no suggestion in the case reported that there was any further enquiry by the Magistrate, but Sir Ali Imam in his attempt to distinguish this case from the case which we have before us argues that there was there a petition by the complainant which had the effect of reviving the complaint. But the answer to that question is that the objection to these proceedings does not arise from the fact that no complaint existed but that no enquiry was held and it seems, therefore, that if this argument be followed there is no reason why this Court should not follow the decision of the Calcutta Court in this case. In my judgment, quite apart from any order of the revisional Court, the Magistrate had jurisdiction to proceed in spite of the fact that he had already dismissed the complaint under section 203 of the Code. In my judgment, therefore, the procedure which the Magistrate or the Subdivisional Officer adopted in this case merely disclosed not an illegality but an irregularity consisting of an omission, an omission in fact to proceed according to the direction of the Sessions Judge. There is no doubt that he had jurisdiction apart from the revisional order of the Session Court to proceed if *Jyotindra Nath's case*(<sup>1</sup>) is to be

1928.

JANAKDHARI  
SINGH  
v.  
KING-  
EMPEROR.  
WORT, J.

(1) (1909) I. L. R. 86 Cal. 415.

JANAKDHARI  
SINGH  
v.  
KING-  
EMPEROR.

followed and in those circumstances it cannot be said that the procedure was anything more than an omission on the part of the Subdivisional Officer.

WORT, J.

The question which remains to be determined, therefore, is whether the case can be held to come under the proviso to section 537, which reads " unless such error, omission, irregularity has in fact occasioned a failure of justice ". Two matters are to be taken into consideration in determining this point. First of all, the *Explanation* which is given to section 537, namely,

" In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

Now it is quite clear from the record of this case that this point could have been taken at an earlier stage of the proceedings. It was not taken until after the case came before the District Magistrate and further, when it does come before the Sessions Judge in his letter of reference he states that

" At the same time I should like to notice that there was no prejudice to the accused, because of this illegality in the procedure adopted."

Taking these two matters into consideration, namely, the proviso or *Explanation* to section 537 and the fact as stated by the Sessions Judge, in my judgment, Sir Ali Imam cannot take advantage of that proviso. Therefore, this was nothing more than an omission or irregularity and no failure of justice could be shown.

In those circumstances the reference must be discharged.

ADAMI, J.—I agree.

*Reference discharged.*