

CRIMINAL REFERENCE.

Before Macpherson, J.

RAMASIS THAKUR

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (Act V of 1898), sections 438 (1) and 439—Sessions Judge or District Magistrate. whether can refer his own order with recommendation that it be altered—section 438(1), scope of—High Court, when should interfere in revision.

Section 438(1), Code of Criminal Procedure, 1898, contemplates action by the Sessions Judge or District Magistrate upon examination of the proceedings of a subordinate court. It does not apparently authorize the Sessions Judge or Magistrate to refer his own order with a recommendation that it be altered.

Where, therefore, the District Magistrate, being of the opinion that his order dismissing the appeal of a convicted person was erroneous, referred the matter to the High Court under section 438(1) of the Code, with a recommendation that the appellant be acquitted.

Held, that the reference was incompetent.

The principle upon which the High Court has acted from the outset is that in revision it is necessary, in order to get a conviction set aside, to show that it is wrong. Ordinarily the court will not go into the facts at all unless the conscience of the court has been touched in regard to them.

Ramkishan Missir v. Emperor(1), followed.

Reference under section 438(1) of the Code of Criminal Procedure.

The facts of the case material to this report are stated in the judgment of Macpherson, J.

* Criminal Reference no. 36 of 1933. Reference made by V. E. Davies, Esq., i.c.s., District Magistrate, Darbhanga, in his letter, dated the 9th December, 1933.

No one in support of the reference.

Assistant Government Advocate, against the reference.

MACPHERSON, J.—Under the provisions of section 438(1) of the Code of Criminal Procedure the District Magistrate has referred to this Court the conviction under section 380 of the Indian Penal Code and sentence of three months' rigorous imprisonment and fine of Rs. 25 passed by a Magistrate of the second class on one Ramasis Thakur, which he himself upheld in appeal.

Ramasis Thakur was convicted along with two other persons named Bengali Tewari and Bhajju Gop. The appeal of Bengali Tewari was sustained on the 26th July last and he was acquitted. Ramasis Thakur appealed from Jail and his appeal was dismissed on the 3rd August in a judgment covering three closely typed pages. The appeal of Bhajju Gop was heard on the 15th August and he was acquitted. Having therein arrived at the opinion that his order dismissing the appeal of Ramasis Thakur was erroneous, the District Magistrate has referred the matter to this court.

Notice has been issued to the Crown and I have had the advantage of hearing the learned Assistant Government Advocate. He is, in my opinion, correct in the view that the reference is itself incompetent. Section 438(1) appears to contemplate action by the Sessions Judge or District Magistrate upon examination of the proceedings of a subordinate court. It does not apparently authorize the Sessions Judge or Magistrate to refer his own order with a recommendation that it be altered. Manifestly if such a reference could be made, the recommendation might just as well be to convict an appellant who had been acquitted as to acquit an appellant whose conviction had been upheld.

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It remains to consider whether this court should take action under the provisions of section 439 since the proceedings have come to the knowledge of this court. Now the principle upon which this Court has acted from the outset is that in revision it is necessary, in order to get a conviction set aside, to show that it is wrong. Ordinarily the court will not go into the facts at all unless the conscience of the court has been touched in regard to them. This was the view taken by Chapman, J. in *Ramkishun Missir v. Emperor*⁽¹⁾ and, so far as I am aware, it has been consistently followed throughout the whole history of the court.

Applying these principles to the present case, I am of opinion that this court ought not to interfere with the judgment on appeal though the Judge who passed it is at present of opinion that it is erroneous. It is by no means clear that it is erroneous. The considerations which contributed to the acquittal of the co-accused are not present in equal degree in respect of Ramasis Thakur. There is substantially no defence and it did not appear that there was any reason for falsely implicating him. In the case of Bengali enmity has been established. In the case of Bhajju Gop there appeared to be good reason to suppose that being ill of small-pox, he would not participate in a burglary by night. In the case of Ramasis, however, two witnesses who might quite well have seen him have deposed that he was carrying away a trunk on his head and, therefore, presumably not proceeding very rapidly so as to be difficult to identify.

All things considered, there is no good ground for preferring the second thoughts of the learned District Magistrate to his earlier view upholding that of the Magistrate who heard the witnesses testify.

Accordingly I would discharge the reference.

Reference discharged.