

1924
 HOE MOE
 v.
 I. M.
 SREDAT.
 LENTAIGNE,
 J.

decision of the question as to the admissibility of the set-off; and that the onus of proof should be placed on the defendant to prove the alleged payment of Rs. 1,200 and that for such purpose he should not be allowed to treat Exhibit 1 (c) as other than a receipt, unless he applies to amend his written statement. Of course if he applies to amend his written statement, the question of the admissibility of the set-off will then arise on the different allegations.

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CARR, J.—I concur.

(Suit remanded.)

APPELLATE CRIMINAL.

Before Mr. Justice Carr.

NASU MEAH

v.

KING-EMPEROR.*

1924
 May 2.

Criminal Procedure Code, section 562—Failure to furnish security by an accused person ordered to be released—Correct procedure—Before passing order Magistrate should satisfy himself that security can be given.

Held, that before passing an order under section 562 of the Code of Criminal Procedure directing an accused to be released on his entering into a bond with sureties, the Magistrate must satisfy himself that the accused is in a position to furnish security.

CARR, J.—On the merits of this case I see no sufficient reason to interfere with the conviction.

But the Magistrate has gone wrong in his procedure. He ordered that the appellant be released on security

* Criminal Appeal No. 373 of 1924 against the order of the Third Additional Magistrate of Rangoon, dated the 10th day of March 1924 passed in Criminal Regular Trial No. 200 of 1924.

for three months under section 562, Criminal Procedure Code. It appears that appellant could not furnish security, though the only record of this fact is in the warrant. The Magistrate passed no further order but a warrant was issued in Form Criminal 99 which is a warrant under section 106, Criminal Procedure Code. This warrant is incorrectly written up and entirely inappropriate.

The question arises what is the correct procedure when a person ordered to be released under section 562 fails to furnish security. The first answer is that this situation should not be allowed to arise. Having regard to section 564 it seems clear that the Magistrate should satisfy himself that security can be given before passing the order.

But clearly if the situation does arise, then the proper course is for the Magistrate to pass sentence according to law.

The Magistrate seems to think that section 123, Criminal Procedure Code, applies, and that the accused should be imprisoned accordingly as provided in that section. But that section specifically applies only to sections 106 and 118 and not to section 562.

I confirm the conviction of Nasu Meah but set aside the Magistrate's order directing him to furnish security and instead sentence him to rigorous imprisonment for the term already undergone. He will forthwith be released.

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 NASU MEAH
 v.
 KING-
 EMPEROR.
 CARR, J.