It is clear that the learned Magistrate in passing the order of 5th November 1925 has acted in excess of the powers conferred upon him by the statute, and the order is therefore void. I must accordingly accept the petition, set aside the order of the 5th November 1925 and direct that the land be released from attachment.

C. H. O.

Revision accepted.

MISCELLANEOUS CIVIL.

Before Mr. Justice LeRossignol and Mr. Justice Martineau.

1926

Jan. 19.

KESRI DAS AND SONS, Petitioners

versus

THE INCOME-TAX COMMISSIONER, PUNJAB AND N.-W. F. PROVINCE, LAHORE } Respondent.

Civil Miscellaneous No. 408 of 1924.

Indian Income-tax Act, XI of 1922, sections 22 (4), 23 (2)—Necessity of serving notice on an assessee who has made a return of his income and submitted his accounts, if the latter are not considered correct.

Held, that where an assessee has furnished a return of his income and has produced his accounts, in compliance with a notice under section 22 (4) of the Indian Income-tax Act, and the Income-tax Officer is not satisfied that the accounts are correct, he should serve on the assessee a notice under section 23 (2) requiring him on a date therein specified either to attend at the Income-tax Officer's office or to produce or cause to be produced any evidence on which the assessee may rely in support of the return. An arbitrary assessment by the Income-tax Officer made without serving such a notice on the assessee is illegal.

Application under section 66 (3) of the Indian Income-tax Act, praying that this Hon'ble Court may

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be pleased to require the Commissioner of Income-tax, to state the petitioner's case and to refer it to the High Court for decision according to law.

OERTEL, for Petitioners.

D. R. SAWHNY, Public Prosecutor, for Respondent.

The order of the Court was delivered by—

MARTINEAU J.—The petitioners manufacture and sell ærated waters and carry on a grocery business. They furnished a return of their income for the year 1922-23 and produced their accounts. The Income-tax Officer in an order of the 20th October 1923, said that no regular accounts were produced and that it was doubtful whether those seen by the Inspector were genuine, and remarking that the business was prosperous and profitable he proceeded to give an estimate, not based on any evidence, of the sales and profits, as well as of the income derived from the rent of the petitioners' house property, considerably in excess of the figures stated in the petitioners' return; he assessed the total income at Rs. 22,000. On appeal the Assistant Commissioner allowed an additional Rs. 2,000 for the costs of the petitioners' establishment, but otherwise upheld the order of the Income-tax Officer. The petitioners then applied to the Commissioner to refer certain questions of law to this Court. The application was rejected, but this Court on being moved by the assessees under section 66 (3) of the Income-tax Act, directed the Commissioner to state the case, and a reference has now been made by him in accordance with that direction.

The learned Commissioner has dealt at considerable length with the various points—eight in number—

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mentioned by the petitioners in their application to him. We think it is unnecessary to enumerate them or to discuss them in detail. The only real question for decision is whether after the petitioners had furnished a return of their income and had produced their accounts in compliance with a notice under section 22 (4) of the Act, the Income-tax Officer, when not satisfied that the accounts were correct, was justified in computing the income in such a manner as he thought fit. In support of the Income-tax Officer's order the learned Commissioner relies upon the proviso to section 13, but that proviso applies only when no method of accounting has been regularly employed or when the method employed is such that, in the opinion of the Income-tax Officer, the income, profits, and gains cannot properly be deduced therefrom. The Income-tax Officer in his order assessing the petitioners said nothing about the method of accounting employed by them, but expressed a doubt, for which he gave no reasons, as to the genuineness of their accounts. Section 13 therefore has no application at all, but the section applicable is section 23 (2), which requires the Income-tax Officer, if he has reason to believe that the return made is incorrect or incomplete, to serve on the person who made the return a notice requiring him, on a date to be therein specified, either to attend at the Income-tax Officer's office or to produce or to cause to be produced any evidence on which such person may rely in support of the return. In this case the Income-tax Officer did not serve such a notice on the petitioners, nor does he appear to have pointed out to them any defects or irregularities in the accounts, so that they might be able to explain them, but he made a purely arbitrary assessment without having given them an opportunity of supporting the return which they had furnished.

Such an assessment was, in our opinion, illegal and we answer the question of law above stated in the negative and direct that the petitioners be paid their costs by the Crown.

C. H. O.

Application accepted.

APPELLATE CRIMINAL.

Before Mr. Justice Harrison and Mr. Justice Fforde.

WARYAM SINGH, Appellant

versus

THE CROWN, Respondent.

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Jan. 20.

Criminal Appeal No. 852 of 1925.

Indian Penal Code, 1860, section 302—Murder—Punishment—where accused was in a state of intoxication—Discretion of Sessions Judge to inflict the lesser punishment—Criminal Procedure Code, Act V of 1898, section 367 (5).

The appellant was found guilty of an offence punishable under section 302 of the Indian Penal Code, but sentenced by the Sessions Judge to the lesser punishment permitted by that section, *viz.* transportation for life, on the ground that he was in a state of intoxication at the time he committed the offence. It was found as a fact that the accused's state of intoxication was not such as to render him incapable of forming the intent of killing the deceased.

Held, that the Sessions Judge had failed to act in accordance with established principles in the exercise of his discretion in imposing the lesser sentence allowed by law, and that the application of the Crown for enhancement to a capital sentence must be accepted.

Unless drunkenness amounts to unsoundness of mind so as to enable insanity to be pleaded by way of defence, or the degree of drunkenness is such as to establish incapacity in the accused to form the intent necessary to constitute the crime, drunkenness is neither a defence nor a palliation.