

1871
 PANCHUDAS
v.
 SRIMATI
 SHUDHAMAYI.

The Sessions Judge being of opinion that the Deputy Magistrate's award of maintenance for the children was illegal, sent up the proceedings of the Deputy Magistrate to the High Court under section 434 of Act XXV of 1861, for the purpose of having the order quashed.

The judgment of the High Court was delivered by
 KEMP, J.—We think that the proceedings of the Deputy Magistrate are illegal. He finds that the wife is not entitled to receive maintenance, as she has not been able to prove that her husband illtreated her, or was living in adultery with another woman. There is no evidence that the husband is unwilling to support his infant children; on the contrary he states that he is willing to do so provided they reside under his roof and not in his father-in-law's house. The order of the Deputy Magistrate is quashed.

Before Mr. Justice E. Jackson and Mr. Justice Glover.

GOPAL MAZUMDAR (PLAINTIFF) *v.* HARO SUNDARI BAISTAMI
 (DEFENDANT.)*

1871

Nov. 23.

Criminal Procedure Code (Act XXV of 1861), ss. 169 and 435—Sanction for Prosecution of Certain Offences.—Jurisdiction of Court of Session.

A Court of Session has no power to interfere under section 435 of Act XXV of 1861 with an order of a Magistrate permitting a prosecution under section 169 of Act XXV of 1861.

IN this case one Gopal Chandra Mazumdar was prosecuted before the Magistrate for an offence and discharged. Subsequently the Magistrate permitted the accused, Gopal Chandra Mazumdar, to prosecute one Haro Sundari Baistami, who had deposed against him, for having given false evidence. The Sessions Judge, under section 435 of Act XXV of 1861, sent for the record of the preliminary enquiry by the Magistrate into the charge of giving false evidence, and held that the sanction given by the Magistrate for the prosecution was illegal. The Magistrate having expressed to the Judge that he doubted the jurisdiction of the latter officer to interfere with the sanction given by him for the prosecution for giving false evidence, the Judge referred the matter for the opinion of the High Court, under section 434 of Act XXV of 1861. The point referred was whether under section 435 the Court of Session has no jurisdiction to interfere in any other arising in a preliminary enquiry by a Magistrate to an offence triable exclusively by the Court of Session, and consequently in the matter of the sanction given by the Magistrate in this case for the prosecution for giving false evidence.

The opinion of the High Court was delivered by

JACKSON, J.—We think that the Sessions Judge had no authority under the law to interfere with the order of the Magistrate allowing the prosecution

*Reference under Section 434 of the Code of Criminal Procedure by the Officiating Sessions Judge of Rajshahye.

of Haro Sundari Baistami by Gopal Chandra Mazumdar, and that such order of the Magistrate was in no way illegal. The Sessions Judge's order of the 26th July is set aside, and if Gopal Chandra Mazumdar desires he can proceed with his complaint, and the Deputy Magistrate will hear and pass orders upon it.

The Deputy Magistrate's decision of the 14th August dismissing Gopal Chandra Mazumdar's complaint is set aside.

1871

 GOPAL
 MAZUMDAR
 v.
 HAROSUNDARI
 BAISTAMI.

Before Mr. Justice Macpherson and Mr. Justice Ainslie.

THE QUEEN v. ZULFUKAR KHAN AND OTHERS.*

1871
 July 31.

Evidence—Intoxication—Recording Evidence.

Evidence taken on the trial of one prisoner wrongly admitted as evidence on the trial of another. Intoxication wrongly treated as an aggravation of offence.

THE facts sufficiently appear in the judgment of the Court, which was delivered by

MACPHERSON, J.—The case against Zulfukar Khan has been so carelessly and badly tried that the conviction and sentence must be set aside and a new trial had.

It appears that Kamru Khan, Guldad Khan, Dyanath, and others, on the one side, had a regular fight with Kulfukar Khan and others, on the other side; both parties using swords and *latties* freely. Dyanath received a sword wound, of which he subsequently died; and Zulfukar Khan also received very serious injuries.

The matter having been taken up by the Magistrate, Kamru and Guldad were committed for trial [in respect of the injuries done to Zulfukar, while Zulfukar was committed for trial charged with causing the death of Dyanath. Their separate commitment in this manner was quite regular and in proper form.

The Sessions Judge first tried Kamru and Guldad; and the whole matter having been fully gone into, the jury found them guilty (under sections 326 and 109 of the Penal Code) of abetting the causing of grievous hurt to Zulfukar, being armed with weapons of offence, &c.

As soon as their trial was over, Zulfukar was put on his trial charged with causing the death of Dyanath, causing grievous hurt to him, &c.

The jury was composed of the same persons who had just tried the case of Kamru and Guldad: and the Judge seems to have considered that all the evidence taken in the first trial was to be deemed as imported bodily into the second, and might be fairly used as evidence against Zulfukar. The result is, that the record of the case against Zulfukar, taken by itself, contains absolutely no evidence of the death of Dyanath or of grievous hurt to Dyanath caused or abetted by the prisoner. The Judge in his summing up to

* Criminal Appeal, No. 401 of 1871, against the Order of the Sessions Judge of Patna, dated the 9th June 1871.