Before Mr. Justice Kemp and Mr. Justice Glover.

IN THE MATTER OF THE PETITION OF UDAI CHAND MUKHOPADHYA.* 1872 *July 22.*

Criminal Procedure Code (Act XXV of 1861), s. 422—Penal Code (Act XLV of 1860), s. 202.

Where a person had been found guilty by a Magistrate of the offence of intentionally omitting to give information of an offence which he was bound to give, and on appeal the Judge found that there had been no evidence given of the omission, *held, per* KEMP, J. (GLOVER, J., *contra*), the Judge could not remand the case for additional enquiry under 422 of the Criminal Procedure Code (1).

THE accused in this case was charged under s. 202 of the Penal Code with having committed the offence of neglecting to give information to the Police or Magistrate of a dacoity said to have taken place on the 7th March 1872, in Mauza Ghugni, Thanna Kristomanagoree, he being the gomasta of the zemindar of the village, and as such bound, by s. 4 of Regulation III of 1812, to give early information of certain offences committed in the village. The Magistrate convicted him of the offence charged, and sentenced him to suffer six months' rigorous imprisonment and to pay a fine of Rs. 200, and in default of payment to a further rigorous imprisonment of one month.

The accused appealed against the Magistrate's conviction and sentence to the Sessions Judge of Hooghly.

The Sessions Judge said :—"There is no evidence as to the main point in the charge—the omission to give information. The case must accordingly be sent to the Magistrate to have evidence taken on this point under s. 422 of the Code of Criminal Procedure." The accused was undergoing rigorous imprisonment under the Magistrate's sentence pending this enquiry.

On application to the High Cpurt, Kemp and Glover, JJ., called for the record of the case under s. 404 of the Criminal Procedure Code, and admitted the accused to bail pending the decision of the High Court.

Baboos *Hemchandra Banerjee* and *Durgamohan Das* for the petitioner.

The gist of the offence is the omission to give information ; and when there is no evidence of this ommission, as admitted by the Judge, the conviction and sentence are illegal. The Judge was bound on this state of the evidence, under s. 426 of the Criminal Procedure Code, to reverse the Magistrate's finding and sentence. The Judge is in error in remanding this case to the Lower Court for additional enquiry under s. 422 of the Criminal Procedure Code. This section contemplates a further enquiry by taking additional evidence to be directed by an Appellate Court when the conviction by the lower Court has

* Miscellaneous Criminal Case, No. 141 of 1872, against an order of the Sessions Judge of Hooghly, dated the 2nd July 1872, reversing that of the Magistrate of that district, dated the 18th June 1872.

(1) See Act X of 1872, s. 282.

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been based upon some evidence which might legally support it, but which, in the opinion of the Appellate Court, is not quite satisfactory. This section does not empower an Appellate Court so to act in a case where there is no evidence legally capable of sustaining the charge. There is no finding as to whether the alleged dacoity ever took place. The accused, as soon as he himself heard of the alleged offence, did give information to the Police; and the prosecution is bound to show that there was not simply an omission, but an intentional omission to give the information at the earliest opportunity.

GLOVER, J.—The Magistrate convicted the accused under s. 202, Penal Code, holding that he knew of the commission of the dacoity in Mussamat Arjila's house, and, so knowing, intentionally omitted to give information to the authorities. The Sessions Judge on appeal found that a dacoity had taken place, and that the accused was well aware of the fact, but that there was no evidence on the record to prove the "omission." He, therefore, ordered the Magistrate, under s. 422, Code of Criminal Procedure, to supply the necessary evidence, and to return the case to his Court for final disposal.

It is not quite clear to me, from the wording of the Sessions Judge's order, whether the evidence required was on the point of simple "omission" or of "intentional omission;" and if I were trying the case as a regular appeal, I am not sure that I should agree with the Sessions Judge as to there being no evidence as to the fact of "omission." I think that there is some evidence as to the "intention" also; but however that may be, I do not, after much consideration, find anything illegal in the Sessions Judge's order. S. 422, Code of Criminal Procedure, gives the Appellate Court power to direct further enquiry to be made, and additional evidence to be taken, whenever it thinks such enquiry and evidence necessary "upon any point bearing upon the guilt or innocence of the appellant." The words are exceedingly large, and give an almost unlimited discretion. In the present case, the Sessions Judge considered it proved that a person, who was bound by law to give certain information, was possessed of that information, but that there was not on the record evidence of his "omission" to supply the information in question to the Police. No doubt, proof of the omission was absolutely necessary, and without it there was no case against the accused. But s. 422 gave the Sessions Judge the power, as it seems to me, of ordering the deficiency to be supplied. If an Appellate Court is bound under all circumstances to decide on the guilt or innocence of an accused person on the evidence taken in the Court of first instance, and has no power to supplement it in any way, then I cannot understand the object of s. 422, Code of Criminal Procedure. That object I take to be the prevention of a guilty person's escape through some careless or ignorant proceedings of a Magistrate, or the vindication of a wrongfully accused person's innocence, where the same carelessness or ignorance has omitted to record circumstances essential to the elucidation of truth. The words of the section are, as I said

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before, " any point bearing upon the guilt or innocence of the appellant," and the Judge's action appears to me to have been perfectly justified.

KEMP, J.—I regret that I am unable to concur with Glover, J. Apart from the fact that the Magistrate omitted in the case to record any finding, I am of opinion that, before a person can be convicted of an offence under s. 202 of the Indian Penal Code, there must be legal evidence, first, that he has knowledge or reason to believe that some offence has been committed; second, an " intentional " omission to give " any " information respecting that offence; and, third, that he is legally bound to give that information.

The petitioner Udai Chand Mukhopadhya, as the village gomasta, was legally bound to report crimes. An offence, in this case of dacoity, was committed of this there appears to be evidence, which, though discredited in the first instance by the Deputy Magistrate, was believed by the Magistrate and, on appeal, by the Sessions Judge. It may also, I think, be conceded that the petitioner had knowledge, though not immediate, of the offence; but the Sessions Judge finds, and I quote his own words, " there is no evidence as to the main point in the charge—the omission to give information. The case," says the Judge, " must accordingly be sent to the Magistrate to have evidence taken on this point under s. 422 of the Code of Criminal Procedure." The accused, be it remembered, remained in jail, and there he would have remained, but for the action of this Court which released him on bail, while the Police were hunting up evidence to convict him.

It appears to me that the " main " point under s. 202 is whether the omission was intentional. There may be knowledge or a reason to believe that an offence has been committed; there may be an omission to give any information; but it is clear, at least to me, that the gist of the offence is the intention. Now the Sessions Judge finds, not that the evidence is insufficient, though there may be some evidence, but that there is no evidence at all. S. 422, in my opinion, does not apply to such a state of things. Where there is some *prima facie* evidence bearing upon the guilt or innocence of the accused, the Appellate Court may, under s. 422 of the Code of Criminal Procedure, direct additional evidence to be taken; but in the case before us, the Sessions Judge finds that there is no evidence at all. What, then, was there to add to, and how does the necessity for additional evidence arise? I am of opinion that the accused ought to have been acquitted, as there is no evidence of an intentional omission, or, according to the Judge's finding, of any omission at all.

I therefore quash the conviction and sentence, and direct the immediate release of the petitioner.