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this Court to a Division Bench rather than under section 558. We do not therefore consider ourselves in any way embarrassed by the expression of that opinion, and the more so as on hearing this point fully argued, and after full consideration we have come to the conclusion that this application should be regarded as one under Rule 17 of the Rules of this Court rather than one under section 558. Taking it as such we are of opinion that it is not barred by the law of limitation, which does not apply to such an application.

We are, therefore, of opinion that this rule should be made absolute, and the appeal restored upon condition that the appellant do deposit the costs to-morrow, otherwise the appeal will stand dismissed. We make no order as to costs.

S. C. C. *Rule made absolute.*

CRIMINAL REVISION.

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

MILAN KHAN (PETITIONER) v. SAGAI BEPARI (OPPOSITE PARTY.)*

1895
December 2.

Rule to show cause—Grounds for granting rule—Practice—Discretion of Court hearing a rule—Criminal appeal—Duty of Court trying criminal appeal.

Although rules to show cause are frequently granted on particular grounds, the form of any rule granted would ordinarily be such as to leave the action which the Court should take in case the conviction is set aside to the discretion of the Court which hears the rule.

Where a rule was granted "to show cause why the conviction should not be set aside and the case sent back for retrial," and it came on for hearing before a Bench other than that which had granted it: *Held*, that the terms of the rule did not prevent the Bench hearing it from discharging the accused.

If the Judge of the Appellate Court has any doubt that the conviction is a right one, whatever the original Court has done, the Judge of the Appellate Court should discharge the accused. In this respect the duty of an Appellate Court in criminal cases is not similar to that of an Appellate Court in civil cases. In the latter case the Court must be satisfied, before setting aside an order of

* Criminal Revision No. 650 of 1895, against the order passed by B. Bell, Esq., District Magistrate of Dacca, dated the 23rd of October 1895, affirming the order passed by D. Weston, Esq., Assistant Magistrate of Dacca, dated the 6th of September 1895.

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the lower Court, that the order is wrong. *Protap Chunder Mukerjee* v. *Empress* (1) followed.

THE accused were convicted under section 379 of the Penal Code, and sentenced to three months' rigorous imprisonment for taking away some crops grown on a plot of land which the Assistant Magistrate who tried the case found to be in possession of the complainant. The District Magistrate, before whom the matter came on appeal, in his judgment, said: "I am not quite sure whether I should have arrived at the same conclusion, but nothing has been urged before me which justifies me in upsetting the finding on the question of fact," and he upheld the conviction and confirmed the sentence. On revision a rule was granted by the High Court in the following terms: "To show cause why the conviction should not be set aside and the case sent back for re-trial . . . . . or why the sentence should not be reduced." The rule came on for hearing before a Division Bench of the High Court other than the one which granted it.

Mr. *Jackson* and Babu *Harendro Narain Mitter* for the petitioners.

Mr. *W. C. Bonnerjee* and Babu *Saroda Churn Mitter* for the complainant.

The judgment of the High Court (TREVELYAN and BEVERLEY, JJ.) was as follows:—

In this case a rule was granted by another Division Bench of this Court calling upon the Magistrate to "show case why the conviction of the petitioner should not be set aside." The rule goes on to say, "and the case sent back for re-trial" upon such and such grounds. It is contended that the words of the rule prevent us from directing the discharge of the accused in case we set aside the conviction. There would be no doubt that if the words "if necessary" came after the word "and," we could set aside the conviction and discharge the accused. Although rules are frequently granted on particular grounds, it is very unusual to tie the hands of the Court which is to hear a rule as to the action it should take in case the conviction is set aside. That is a matter which should be left to the discretion of the Court which hears

(1) 11 C. L. R., 25.

the rule. Giving a reasonable construction to the words of the rule, we do not think that the learned Judges who granted the rule ever intended to say that the Court hearing the rule should have no power to discharge the accused person.

In our opinion the conviction must be set aside.

The learned Magistrate, whose duty as an Appellate Court was to come to a conclusion for himself upon the evidence on the record, assisted so far as it might be by such reasons or arguments as he might elicit from the conclusion and reasons contained in the judgment of the original Court, has not, we consider, dealt with this case on that footing. He has apparently considered that his duty as an Appellate Court was similar to that of an Appellate Court in civil cases, and that he could not set aside the order of the original Court, unless the appellant satisfied him that *that* order was wrong. The view that we take of the duty of a Criminal Appellate Court is that which has been taken by this Court, at any rate since the decision to which we have been referred in *Protap Chunder Mukerjee* v. *Empress* (1). The learned Magistrate, after saying that the question is purely one of possession, and that the Assistant Magistrate came to the conclusion that the prosecution had proved their possession, goes on to say: "I am not quite sure whether I should have arrived at the same conclusion, but nothing has been urged before me which justifies me in upsetting the finding on the question of fact." We think that this must be read as meaning this: "I have now heard the evidence before me. I should not have convicted on that evidence if I had heard the case as an original Court. The Assistant Magistrate has convicted, but I am not satisfied that he is wrong." Having regard to the view that we take, if the Judge of the Appellate Court had any doubt that the conviction was a right one, and had any doubt as to whether the offence charged had been committed, whatever the original Court did, he should have discharged the accused. We think that no possible gain can be derived by sending the case back. The Magistrate has expressed his own doubt as to whether the evidence is sufficient for a conviction. Moreover, it is clear in this case that this is merely a dispute between rival zemindars. It is not a theft

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case in the ordinary sense of the term. It is merely a charge of taking away crops the title to which is disputed. There is evidence of possession apparently, which has been accepted by one Court. That this is not really a case where public justice requires any further proceedings, adds to our reasons for not directing a re-trial.

We set aside the conviction and direct the discharge of the accused.

S. C. B. *Rule made absolute.*

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

1895 December 16.

MISRI LAL (PETITIONER) v. LACHMI NARAIN BAJPIE (OPPOSITE PARTY.) *

Criminal Procedure Code (Act X of 1882), section 423— ower of Appellate Court—Commitment to the Court of Sessions—Offences triable exclusively by the Court of Sessions.

Section 423 of the Criminal Procedure Code is not limited to cases triable exclusively by the Court of Sessions. An Appellate Court has under that section the power to order an accused person to be committed for trial by the Court of Sessions in cases which are not exclusively triable by the Court of Sessions.

Queen-Empress v. *Sukha* (1), dissented from ; *Queen-Empress* v. *Abdul Rahiman* (2), followed.

THE petitioner was convicted by the Deputy Magistrate of Chupra of the offences of cheating under section 417, and criminal misappropriation under section 403, of the Penal Code, and sentenced to pay a fine of Rs. 200 for each offence. The petitioner appealed to the District Magistrate of Sarun, who reversed the finding and sentence of the Deputy Magistrate, and directed him to commit the accused for trial before the Sessions Court under section 417 of the Penal Code. The petitioner moved the High Court, and obtained a rule on the ground that an Appellate Court, acting under section 423 of the Criminal Procedure Code, can only direct a committal in cases exclusively triable by the Court of Sessions, and the offence of cheating under section 417 of the Penal Code not being triable exclusively by the Court of Sessions,

* Criminal Revision No. 700 of 1895, against the order passed by F. A. Slack, Esq., District Magistrate of Sarun, dated 24th of August 1895.

(1) I. L. R., 8 All., 14. (2) I. L. R., 16 Bom., 580.