

Before Sir Barnes Peacock, Kt., Chief Justice, Mr. Justice Bayley, Mr. Justice L. S. Jackson, Mr. Justice Macpherson, and Mr. Justice Glover.

THE QUEEN v. KAZIM THAKOOR.*

1868
Sept. 2.

*Letters Patent, 1865, s. 36—Criminal Procedure Code (Act XXV. of 1861).
s. 420—Criminal Appeals.*

When a criminal appeal is heard by two Judges, sitting as a Division Court, and they differ in opinion, the opinion of the senior Judge must prevail under section 36 of the Letters Patent of the High Court, notwithstanding section 420 of the Criminal Procedure Code.

ONE Phili was charged with having married one Bishay, during the life-time of her husband Dhunulai. Kazim Thakoor and Magu Thakoor, the brother and the uncle of Phili, were charged with having abetted the said marriage of Phili.

The prisoners pleaded not guilty, and alleged that Dhunulai, the former husband of Phili, had divorced the girl.

The Sessions Judge, concurring with the assessors, found all the prisoners guilty of having committed an offence punishable under section 494 of the Penal Code. But he discharged the prisoner, Phili, considering her youth and the influence which her brother and uncle might have exercised over her; and sentenced Kazim and Magu to one year's rigorous imprisonment.

Kazim and Magu Thakoor appealed; and the appeal came on for hearing before E. JACKSON and GLOVER, JJ., who were divided in opinion. JACKSON, J., considered that the Prisoners ought to be acquitted, on the ground that it was not on them to prove their innocence, but the prosecutor ought to have proved their guilt. GLOVER, J., considered that the case ought to be remanded for a new trial. The question then arose whether, having regard to section 420 of the Criminal Procedure Code (1),

* Criminal Appeal from Dacca.

(1) Act XXV. of 1861, s. 420.— the sentence or order of a lower Court on appeal or revision, shall be signed by at least two Judges of such Court.

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the opinion of the senior Judge ought to prevail under section 36 of the Letters Patent (1).

The opinion of the Full Bench was delivered by

PEACOCK, C. J.—The question is, “when two Judges, sitting as a Division Bench of the High Court, in appeal, in a criminal case, are divided in opinion, is it necessary, with advertence to section 420 of the Code of Criminal Procedure, that reference should be made to a third Judge; or is it sufficient, with advertence to section 36 of the Letters Patent, that an order should issue according to the opinion of the senior Judge?”

We are of opinion that, notwithstanding section 420 of the Code of Criminal Procedure, the opinion of the senior Judge must prevail according to section 36 of the Letters Patent; and that it is sufficient, if the sentence or order in accordance with that opinion be signed by the senior Judge. In such case it ought to appear, on the face of the order, why it is signed only by one Judge.

Section 420 of the Code of Criminal Procedure speaks merely of the Sudder Court and of Judges of such Sudder Court. The Act itself was passed on the 5th of September 1861. The High Court was established under the 24 and 25 Vic., c. 104, which received the royal assent on the 6th of August 1861. The Letters Patent, under which the High Court now sits, was passed on the 28th of December 1865.

Section 11 of the 24 and 25 Vic. enacted that all Acts of the Legislature of India, which at the time of the establishment of the High Court were applicable to the Supreme Court at Fort William in Bengal, or to the Judges of that Court, shall be taken

(1) *Letters Patent of 1865, s. 36.*—twenty-fifth years of our reign; and if “And we do hereby declare, that any such Division Court is composed of function which is hereby directed to be performed by the said High Court of Judicature at Fort William in Bengal, in the exercise of its original or its appellate jurisdiction, may be performed by any Judge, or by any Division Bench thereof appointed or constituted for such purpose, under the provisions of the thirteenth section of the aforesaid Act of the twenty-fourth and more than two Judges, and the Judges are divided in opinion as to the decision to be given on any such point, shall be decided according to the opinion of the majority of the Judges, if there shall be a majority, but if the Judges should be equally divided, then the opinion of the senior Judge shall prevail.”

to be applicable to the said High Court and to the Judges thereof, respectively, so far as they might be consistent with the provisions of the said Act and the Letters Patent to be issued in pursuance thereof and subject to the legislative powers, in relation to the matters aforesaid, of the Governor General of India in Council. This section, however, did not extend to the High Court; the provisions of section 420 of the Code of Criminal Procedure applied only to the Judges of the Sudder Court.

Section 13 of the said Act enacted, that subject to any laws or regulations which might be made by the Governor General in Council the High Court might, by its own rules, provide for the exercise by one or more Judges, or by Division Courts constituted by two or more Judges of the High Court, of the original and appellate jurisdiction vested in such Court, in such manner as might appear to the Court to be convenient for the due administration of justice.

By section 15 of the Rules of the High Court, it was declared that all powers and functions which were vested in the Court by the Letters Patent constituting the Court, and which were not otherwise expressly provided for by the rules of the Court, might be exercised by a single Judge or by a Division Court consisting of two or more Judges; and by Rule 26, it was provided that a Division Bench for the hearing of criminal appeals may consist of two or more Judges.

These rules, coupled with section 13, provide that a Division Court may consist of two Judges, and a Court so constituted is subject to the provisions of section 36 of the Letters Patent.

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