away rupees 4,100 would have been brought forward before the Magistrate on her application for maintenance if it could have been.

The statement as to the insolvency of Mrs. Ord's former husband is vague and uncertain. It is no answer whatever to the finding come to after careful examination of the books by Mr. Justice Phear as to the amount of respondent's income, with which I see every reason to concur. I think there is a good deal in what is said in some of the cases as to a distinction being taken where the income is mainly dependent on the husband's exertions. See the cases in 2 Phillimore, 44. In this case the present income appears to depend principally on the husband's own exertions, and I shall therefore not order that the full moiety be awarded as permanent alimony, to which otherwise I think Mrs. Ord fully entitled. I think I shall do justice between the parties, and treat Mrs. Ord with the liberality to which she is entitled in giving her rupees 250 a month; and looking at the difficulties that have been thrown in her way at every step by Mr. Ord, I think I am justified in directing that this sum be made a first charge on the good-will and stock-in-trade of his business as an undertaker. Under the powers conferred by Section 37 of the Indian Divorce Act, I direct that a deed be executed by the respondent, charging the good-will and stock in-trade of his business as an undertaker with the payment of rupees 250 a month to Mrs. Ord, and I direct that he do so pay rupees 250 a month to her as permanent alimony, and the costs on scale No. 2 as between party and party of and incidental to this application. The order for alimony will be included in the decree for judicial separation, and the alimony itself to run from the date of that decree.

Attorneys for the Petitioner: *Messrs. Sims* and *Mitter.*

Attorney for the Respondent: *Mr. Moses.*

B. L. R. Vol. V, p. 39.

(*Appendix.*)

The 28th May 1870.

Before Mr. Justice Phear and Mr Justice Mitter.

THE QUEEN *v.* MAHENDRANATH CHATTERJEE and another.

Reference No. 59 of 1870, from the Sessions Judge of 24 Pergunnas, dated the 17th May 1870.

Code of Criminal Procedure (Act XXV of 1861), ss. 407, 426.

A. was charged with the offence of voluntarily causing hurt to C., and B. was charged with the same offence, and also with the offence of abetting A. The Magistrate found A. guilty of the offence, and sentenced him to three months' rigorous imprisonment. The Magistrate also found B. guilty of abetment of the offence of voluntarily causing hurt to C., and sentenced him to one month's rigorous imprisonment and a fine.

On appeal, the Sessions Judge held that there was no evidence to convict A., and he accordingly released the prisoner. The appeal of B., however, was rejected, on the ground that the evidence, though it did not prove him guilty of abetment, proved him guilty of voluntarily causing hurt, and, therefore, under Section 426 of the Code of Criminal Procedure, the sentence could not be reversed, No "error or defect either in the charge or in the proceedings on trial" was alleged.

Held (by *Mitter, J.*) that Section 426 of the Code of Criminal Procedure did not apply.

MAHENDRANATH CHATTERJEE was charged before the Cantonment Magistrate of Barrackpore of voluntarily causing hurt to one Gaurmohan Ghose, and abetting one Jan Bax in causing hurt to the said Gaurmohan; and Jan Bax was charged with the offence of voluntarily causing hurt to the said Gaurmohan.

The Magistrate found Mahendranath Chatterjee guilty of abetment of the offence of voluntarily causing hurt to Gaurmohan, under Sections 109 and 323 of the Indian Penal Code, and Mahendranath was sentenced to one month's rigorous imprisonment, and a fine of rupees 200, or, in default, to one month's rigorous imprisonment.

The Magistrate also found Jan Bax guilty of voluntarily causing hurt to Gaurmohan, and thereby punishable under Section 323 of the Indian Penal Code, and Jan Bax was sentenced to three months' rigorous imprisonment.

On appeal by Jan Bax and Mahendranath, the Sessions Judge of the 24-Pergunnas passed the following order :—

The finding and sentence as regards the appellant, Jan Bax, are reversed, and he will be immediately released. The appeal of Mahendranath is rejected, but the conviction will be held to be of the offence of causing hurt.

In passing the order, he said :—

" It has been urged in appeal for Mahendranath that he is entitled to acquittal, as he has been convicted against the evidence ; but in the first place, he was charged with causing hurt, as well as abetting it ; and in the next place, Section 426 of the Procedure Code forbids the reversion of a sentence, on the ground that the evidence proves a different offence. It appears to me impossible to say that Mahendranath has been prejudiced by the conviction of abetment, instead of the substantive offence. Moreover, as it appears on the evidence that both appellants were present at the time, the guilt of both was the same ; the finding must depend on the same evidence, both for the prosecution and for the defence ; and Mahendranath has pleaded to the charge of the substantive offence."

Mahendranath applied to the High Court for revision.

Baboo Amirindar Nath Chatterjee for the Prosecutor.

Mr. Montriou (*Baboo Iswarchandra Chuckerbutty* with him) for the Petitioner.

Phear, J.—In this case the record has been brought up before us on an application for revision, and we are asked to quash the conviction, substantially on the ground that there was no legal evidence upon which the conviction could properly be made to rest.

The case came before the Sessions Judge on appeal ; and the Judge, was clearly of opinion that the evidence did not support the conviction which the first Court had made. He thought, however, that the evidence did establish the offence laid in the alternative charge ; and inasmuch as the punishment which had been awarded was not an improper punishment for that offence, he allowed the conviction to stand. I must add that this is my interpretation of what the Sessions Judge in effect did, for he states in his judgment that the conviction will be held to be for the offence of causing hurt.

The Judge acted, as he says, under the provisions of Section 426, Criminal Procedure Code.

It appears to me that, under that section, supposing that section to apply, the learned Judge being of opinion that the prisoner ought to have been found guilty of an offence other than that of which he was really found guilty, had no power to alter either the finding or sentence, and ought therefore to have confined himself simply to dismissing the appeal ; I take it therefore that, in law, that is the effect of his judgment.

Mr. Montriou for the prisoner has argued very forcibly that, inasmuch as the prisoner had been substantially, though not in express terms, acquitted by the first Court of the offence of which the Sessions Judge considered the evidence to prove him to be guilty, therefore, even under Section 426, the Lower Appellate Court could not rightly allow the conviction to stand, for obviously the result of doing so would be, at any rate so far as the opinion of the Lower Appellate Court is concerned, that the prisoner would be convicted and punished for an offence of which he had been acquitted by the first Court, and thus the prosecutor would indirectly obtain all the advantage of a successful appeal against an acquittal, notwithstanding that the Criminal Procedure Code expressly forbids an appeal in such case. It appears to me that this argument is very strong ; but having regard to the matter on this record, I do not find it necessary to pass a judicial opinion upon it.

During the discussion of the case, I threw it out, as the inclination of my opinion, that this section is in terms confined in its operation to the cases where error or defect, either in the charge or in the proceedings, is the foundation on which the alteration of the finding or sentence is sought ; and I still feel very great difficulty in coming to the conclusion that the finding a prisoner guilty without evidence upon one charge, and acquitting him of another charge to which the evidence is really directed (that which has happened here) is either an error or defect in the charge or in the proceedings.

It appears to me to be an error, in the exercise of judicial discretion, and I could not bring myself without more consideration than I have been able to give to this case

to say that an error of that kind, when the proceedings are otherwise regular, is covered by the words of this section. I believe, however, there is no doubt that some Division Benches of this Court, and certainly some of the other High Courts in India, have given a larger construction to the words of this section. But, as I have already said, I don't think that, on the facts of this case I am obliged to give a judicial opinion with regard to this point.

The prisoner stands convicted of a charge which there is no evidence, according to the judgment of the Appellate Court, to support; and in that judgment so far I entirely concur.

It is clear, on looking through the depositions, that, if the witnesses are to be believed at all, the offence committed by the prisoner was an assault on the prosecutor with his (the prisoner's) own hand. There is literally no evidence to support the second charge of abetment. Therefore the record being now before us on revision, and it appearing therefrom that the prisoner has been acquitted of the assault, and convicted of the abetment, I think there is such an error in the record as to vitiate the conviction, and such that we ought to reverse that conviction, unless Section 426 intervenes and we are of opinion that the evidence makes out that the accused person ought to have been found guilty of another offence for which the sentence passed is appropriate.

Now, on looking into this evidence (assuming that Section 426 applies), I think that it is entirely unworthy of credit, and it appears to me also not difficult to discover how the first Court came to this, at first sight, extraordinary conclusion, namely, that, notwithstanding the testimony of the eye-witnesses, it was safer to find the prisoner guilty of abetment, than to find him guilty of the actual assault.

* * * * * * * *

Without going further into the details of their depositions, I will at once state that I feel the evidence to be utterly untrustworthy with regard to this point. The first Court certainly disbelieved the evidence of the three women, with respect to the assault being committed by the hand of Mahendranath Chatterjee; and I think the first Court was right.

I therefore agree with the Appellate Court that there was no evidence upon which the prisoner could be found guilty of the offence of which he was, in fact, found guilty, and I also agree with the first Court that the evidence which went to support the other charge ought not to be believed; it follows, therefore, that even if this case falls within the scope of Section 426, there exists no ground upon which the conviction can be upheld; consequently the conviction must be quashed; and as the prisoner is out on bail, the bail-bond or other security must be cancelled.

Mitter, J.—I concur in the order proposed by my learned and honorable colleague; but I would prefer to rest my judgment on the ground that this case is not governed by the provisions of Section 426 of the Criminal Procedure Code.

The petitoner, Mahendranath Chatterjee, and one Jan Bax, a Cabuli, were tried before the Cantonment Magistrate of Barrackpore on the following charges: namely, first, that they had voluntarily caused hurt to one Gaurmohan Ghose; and secondly, that he, Mahendranath, had abetted the commission of that offence.

The evidence for the prosecution went to show that the blow which caused the hurt had been struck by the prisoner, Mahendranath, himself. The Cantonment Magistrate was of opinion that this evidence was not worthy of credit. But, instead of releasing the prisoners then and there, as he ought to have done upon this view of the evidence, the Cantonment Magistrate went upon some conjectural grounds set forth in his judgment to find the Cabuli guilty of the offence of voluntarily causing hurt to Gaurmohan Ghose, and the prisoner, Mahendranath, of having abetted the commission of that offence. Against this decision, both the prisoners appealed to the Sessions Judge of the 24 Pergunnas; the ground of appeal in both cases being that there was no evidence to support the conviction of the prisoners on the charges of which they had been respectively convicted.

The Sessions Judge has acquitted the Cabuli, on the ground that there is no evidence to prove that the Cabuli had caused the hurt complained of. With reference to Mahendranath Chatterjee, the Sessions Judge was of opinion that the evidence on the record was sufficient to prove that he had struck the blow by which the hurt was caused; and being of that opinion, the Sessions Judge has refused to interfere with the sentence passed on Mahendranath under Section 426.

I am not quite prepared to say whether this Court, sitting as a Court of revision under Section 404, has any right to enter into the question whether the view of the evidence taken by the Lower Appellate Court is correct or not. But I express no opinion on this point, because I think that the application of Section 426 to this case by the Sessions Judge was not legal.

It has been contended before us that, although the Cantonment Magistrate of Barrackpore disbelieved the evidence of the witnesses for the prosecution, no formal verdict of acquittal has been recorded by him in favor of Mahendranath on the first charge, namely that he, Mahendranath, had voluntarily caused hurt to Gaurmohan Chose.

This circumstance does not in my opinion affect this case one way or the other. If the Magistrate was of opinion that the evidence against the prisoners was not sufficient to support the charge, he was legally bound to record a verdict of acquittal. But his omission to do so cannot affect the interests of the prisoner in any manner whatever. This point has been ruled by a Full Bench of this Court in the case of *Queen* v. *Toyab Sheikh* (1). In that case the prisoner was tried by the Sessions Judge for two distinct offences, namely, for the offence of murder, as well as for culpable homicide not amounting to murder. The Sessions Judge convicted the prisoner of the last offence; and it was held by this Court that, although a formal verdict of acquittal had not been recorded to the offence of murder, the Sessions Judge had substantially acquitted the prisoner of that offence. It being clear, therefore, that the Magistrate had substantially acquitted the prisoner of the offence of causing hurt to Gaurmohan, we will now proceed to see whether Section 426 applies to this case. The words of that section have already been quoted by my learned and honorable colleague; and so far as I can understand them, I am bound to say that they have no bearing upon this case.

The prisoner did not appeal to the Sessions Judge, on the ground that there was "any error or defect in the charge," or on that of any irregularity in the proceedings held at the trial. If he had done so, the Sessions Judge might have, under Section 426, declined to interfere if he found from the record that the punishment awarded by the Magistrate was not an improper punishment for the offence of which the accused person ought to have been convicted. But if he found that there was no evidence to support the charge of abetment, which was the only charge of which the prisoner had been convicted by the Magistrate, the Sessions Judge should have set aside the conviction, and acquitted the prisoner. There was no error or defect in the charge, and consequently the prisoner did not complain of any.

The proceedings had been conducted regularly throughout, and consequently the prisoners did not and could not complain of any irregularity in those proceedings. But the prisoner had a substantial ground of complaint, namely, that the offence of which he had been convicted was not supported by any evidence on the record, and the Sessions Judge himself admits that this ground was valid.

To allow the Sessions Judge, in a case of this description, to exercise the discretion vested in him by Section 426 would be to act directly contrary to the provisions of Section 407. That section says that "there shall be no appeal against a judgment of acquittal," and the appeal in the present case being restricted to a judgment of conviction for a particular offence, all that the Sessions Judge had to do was to see whether that conviction was supported by the evidence or not; for he had no power to enquire whether the prisoner had been properly or improperly acquitted of the other charge for which he was tried by the Magistrate.

I do not think that the provisions of Section 426 were ever intended by the Legislature to override that great principle of Criminal Jurisprudence, which says that no man's life or liberty ought to be jeopardized twice for the same offence. In the full Bench case already cited by me, it has been held that this Court has no power, either as a Court of revision or as a Court of appeal, to convict a prisoner of an offence for which he has been already tried and acquitted by a Court of competent jurisdiction; and I do not think that the Sessions Judge had any power to do that indirectly which he is not competent to do directly according to the principle laid down in that case.

(1) 5 W. R., Cr. Rul., 2.