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notwithstanding the use of the words "or which has been reported for orders," as in section 439, it could never have been intended that such report might be made by an inferior criminal authority with respect to a proceeding by a superior authority.

We, therefore, decline to interfere in this matter.

S. C. B.

APPELLATE CRIMINAL.

Before Mr. Justice Banerjee and Mr. Justice Hill.

QUEEN-EMPRESS *v.* IMAM ALI KHAN *alias* NATHU KHAN.*

1895 October 10.

Criminal Proceedings, Irregularity in—Criminal Procedure Code (Act X of 1882), section 289 and section 297—Calling upon the accused to enter on his defence—Charge to the jury—Criminal Procedure Code (Act X of 1882), section 423, clause (d), and section 537—Misdirection to jury—Interference with verdict—Failure of justice.

The formality of calling upon an accused person to enter on his defence under the provisions of section 289 of the Criminal Procedure Code is not a mere formality, but is an essential part of a criminal trial. Omission to do so occasions a failure of justice, and is not cured by section 537 of the Code.

To allow the jury to pronounce their verdict before the accused is called upon to enter on his defence is a misdirection, though the Judge omits to charge the jury at all. In such a case, clause (*d*) of section 423 of the Criminal Procedure Code does not stand in the way of the Appellate Court's interfering with the verdict of the jury.

In this case, when the examination of the witnesses for the prosecution and the examination of the accused were concluded, the accused was not called upon to enter on his defence after the Public Prosecutor had summed up his case, as required by the last paragraph of section 289 of the Criminal Procedure Code, nor did the Sessions Judge charge the jury as required by section 297 of the Code. The jury, without hearing the charge, found the prisoner guilty, and the Sessions Judge convicted and sentenced him. The prisoner appealed to the High Court.

No one appeared at the hearing of the appeal.

The following judgments (BANERJEE and HILL, JJ.) were delivered by the High Court:—

* Criminal Appeal No. 675 of 1895 against the order passed by the Sessions Judge of Hooghly, dated the 4th September 1895.

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BANERJEE, J.—I have gone through the record, and I think the proceedings in this case were clearly in contravention of the provisions of sections 289 and 297 of the Code of Criminal Procedure, the accused not having been called upon, as provided by the last paragraph of the first mentioned section, to enter on his defence after the Public Prosecutor's address, and the learned Sessions Judge not having charged the jury as provided by the last mentioned section. The question now is, whether the error or omission is cured by section 537, Criminal Procedure Code, and whether section 423, clause (*d*), stands in the way of our reversing the verdict of the jury.

The former of these two questions I should hesitate to answer in the affirmative. Though having regard to the evidence, the verdict is most probably correct, still it would, I think, be going too far to say that the accused could not possibly have said anything to exculpate himself, even if he had been formally called upon to enter on his defence. It is true that, in his examination before the Sessions Court, he was asked what he wished to say, and he did say something to the effect that he was in enmity with the complainant and his witness, Hari Churn; but that may not be all that he might have said if he had been called upon to make his defence. The witnesses for the prosecution, with one exception, were not cross-examined, and this, no doubt, makes it improbable that the accused could have said much in his defence; but it should be remembered that he was undefended. The formality of calling upon an accused person to enter on his defence is not a mere formality, but is an essential part of a criminal trial, and when that has been wanting, it is difficult to say that the omission has not occasioned a failure of justice.

Nor do I think that clause (*d*) of section 423 of the Criminal Procedure Code stands in the way of our interfering with the verdict of the jury. In one sense, no doubt, there could not have been any misdirection by the Judge, nor any misunderstanding on the part of the jury of the law laid down by him, he having given them no direction as to law or fact. But in effect it was a misdirection for the learned Judge to have allowed the jury to pronounce their verdict before the accused was called upon to enter on his defence.

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I would, therefore, set aside the conviction and sentence and order a retrial.

HILL, J.—I agree in the view of the case taken by my learned colleague. The conviction and sentence will, therefore, be set aside and there will be a new trial.

S. C. B. *Conviction set aside.*

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Gordon.

1895 *July* 5.

CHUNDRA SAKAI AND ANOTHER (DEFENDANTS) *v.* KALLI PROSANNO CHUCKERBUTTY (PLAINTIFF). *

Bengal Tenancy Act (VIII of 1885), section 161—Exchange of land—Incumbrance—Suit for recovery of possession of land.

Exchange of land is an incumbrance within the meaning of section 161 of the Bengal Tenancy Act.

THIS appeal arose out of an action brought by the plaintiff to recover possession of three plots of land, on the allegation that he had purchased the said lands at a sale in execution of a decree for arrears of rent obtained by the *putnidar* against Moni Ram and Ram Chandra Mundul, the registered tenants. The defence was that the lands in dispute did not appertain to the *jama* of Moni Ram and Ram Chandra Mundul; that the defendant, about thirty or thirty-two years ago, obtained under exchange plots Nos. 2 and 3 from Moni Ram and Ram Chandra; and he held possession of the said land by excavating a tank and raising an embankment thereon since then. The Court of first instance dismissed the suit, but on appeal the Subordinate Judge reversed the judgment of the first Court, holding that, though the lands of plots Nos. 2 and 3 were obtained by exchange more than thirty years ago, yet, as the landlord did not ratify it, the plaintiff was entitled to a decree, as the sale passed the entire right, not only of the

* Appeal from Appellate Decree No. 2245 of 1893, against the decree of Babu Abinash Chunder Mitter, Subordinate Judge of 24-Pergunnahs, dated the 24th of August 1893, reversing the decree of Babu Gopal Chundra Banerjee, Munsif of Diamond Harbour, dated the 6th of August 1892.