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 QUEEN-
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 v.
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the Criminal Procedure Code. The Sessions Judge refused to confirm my order and discharged Jahandi.

"I therefore request the High Court to be good enough to look into the case and pass what orders it thinks fit.

"This is a case of a discharge and not of an acquittal, and therefore the Public Prosecutor cannot present an appeal on behalf of the local Government under section 417 of the Criminal Procedure Code. I have, therefore, on the advice of the Legal Remembrancer, referred this case directly to the High Court."

No one appeared on either side.

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

We do not think that section 438 of the Criminal Procedure Code authorizes the District Magistrate to refer to this Court a case in which the Sessions Court has, under section 123, refused to confirm his order under section 118, and has discharged the person called upon to furnish security. Section 123 makes the order of the Magistrate, in a case like this, subject to confirmation or reversal by the Sessions Court, and it would be contrary to every principle to allow the District Magistrate to report against an order of the Sessions Court to which he is subordinate.

If the Magistrate, as the officer responsible for the peace of his District, is dissatisfied with any such order, his proper course, we need hardly point out, is to ask the Public Prosecutor to move this Court for the revision of the same.

We decline to take any action upon this reference, and direct that the case be returned to the Magistrate with a copy of this order.

S. C. B.

Before Mr. Justice Ghose and Mr. Justice Hill.

QUEEN-EMPRESS v. KARAMDI. ^o

1895
 October 29.

Criminal Procedure Code (Act X of 1882), section 438—Power of the District Magistrate to question the propriety of a finding and sentence by the Sessions Judge.

^o Criminal Miscellaneous No. 54 of 1895, containing a letter No. 2566J., dated the 8th of October 1895, from the District Magistrate of Mymensingh, referring for orders the judgment of the Sessions Judge, dated the 7th of June 1895.

The power conferred by section 438 read with section 435 of the Criminal Procedure Code upon a District Magistrate to make a reference to the High Court refers clearly to a "proceeding before any inferior Criminal Court." By the words "or otherwise" in section 438 the Legislature never intended to give to a Magistrate the power to question the propriety of a judgment or sentence by a superior criminal authority; nor by the use of the words "or which has been reported for orders" in section 439, could it have been intended that such report might be made by an inferior criminal authority with respect to a proceeding by a superior authority.

THIS was a reference under section 438 of the Criminal Procedure Code by the District Magistrate of Mymensingh questioning the propriety of a finding and sentence by the Sessions Judge. The accused Karamdi Sheik was committed to the Court of Sessions on a charge of murder under section 302 of the Penal Code. The Sessions Judge found the accused guilty of culpable homicide under section 304, and sentenced him to undergo rigorous imprisonment for seven years.

No one appeared on either side.

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

This is a reference by the District Magistrate of Mymensingh, at the instance of the Commissioner of the Dacca Division, questioning the propriety of a finding and sentence by the Sessions Judge.

We are not aware under what authority the reference has been made. Such references have always been condemned by this Court as irregular. The power given to a District Magistrate to make a reference to the High Court is conferred by section 438 read with section 435 of the Criminal Procedure Code. But this clearly refers to a "proceeding before any inferior Criminal Court;" and notwithstanding the words "or otherwise," in section 438, we do not think that the Legislature ever intended to give to a Magistrate the power to question the propriety of a judgment or sentence by a superior criminal authority, as the Sessions Judge is, and to refer the proceeding to the High Court for revision. Section 439 read with section 435 gives to the High Court the authority to examine the record of any proceeding (whether it be of a Sessions or Magistrate's Court, and howsoever it might have been brought up) and interfere with or alter the conviction or sentence or other order, but

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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.