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make the question of less importance, or change the conditions under which it is to be judged.

We think the facts do not justify the conclusion that any of the inmates of the room admitted the prisoner for the purpose suggested, or at all. We are not entitled either to find or to presume that the prisoner went to the room that night to visit a willing mistress.

The case, therefore, comes to this that, late at night when the women were in bed (in one bed as is stated), the prisoner, a stranger, though a neighbour, went into the room where they were sleeping; that his position and all the facts preclude any motion of his going there to steal or for any purpose save his own pleasure. We think the facts are good evidence of an intent and of an intrusion on privacy within the meaning of section 509 of the Indian Penal Code; and that, therefore, the intent to commit an offence within the meaning of section 441 is made out.

We follow the ruling in *Balmakand Ram* v. *Ghansamram* (1). We may observe that that ruling exactly coincides with the Criminal Revision Case No. 114 of 1881 before Turner, C.J., and Kindersley, J. (2).

We discharge the rule as to the setting aside of the conviction.

But we think 3 (three) months' rigorous imprisonment will be a sufficient sentence; and we reduce the sentence to that amount.

S. C. B. *Conviction upheld, sentence reduced.*

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

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KESHAB CHUNDER ROY (PETITIONER) v. AKHIL METEY (OPPOSITE PARTY.) *

Revision—Criminal Procedure Code (Act X of 1882), section 439—Power of Court on Revision—Revision on facts.

The interference of the High Court in revision is not limited to matters of law; it is fully competent to this Court to enter into matters of fact if it thinks fit. But the mere application of a party to examine the evidence

* Criminal Revision No. 332 of 1895, against the order passed by B. C. Seal, Esq., Sessions Judge of Burdwan, dated the 3rd June 1895, confirming order passed by Babu Promoda Nath Mukerjee, Deputy Magistrate of Burdwan, dated the 16th of May 1895.

(1) I. L. R., 22 Calc., 391. (2) Weir, 327.

in any case would not be a sufficient ground for doing so. There must appear on the face of the judgment or order complained of, or of the record, some ground to induce the High Court to think that the evidence ought to be examined in order to see that there has been no failure of justice. But no hard and fast rule can be laid down ; each case will have to be dealt with according to its own circumstances.

THE story of the prosecution as told by the complainant was that one Rajani Bagdi, who held a decree against the petitioner Keshab Roy, went with a Civil Court peon to the house of the petitioner to attach some moveable property in execution of his decree ; that after the attachment had been made an altercation took place between the peon and one Bhobotaron, whereupon the petitioner chased the peon with a *banti* (fish knife), and on the complainant Akhil's intervening to save the peon he, Akhil, was hurt in the hand by the petitioner Keshab Roy.

The case for the defence was that there was bitter ill-feeling between Sham Chand Roy, to whose party Rajani Bagdi and the complainant Akhil belong, and Loke Nath Roy, to whose party the petitioner's brother Purna belongs ; that Purna having refused to join Sham Chand's party, Sham Chand, with a large band of servants and dependants, among whom was the complainant Akhil, went to *loot* Purna's house ; that while Akhil was attempting to snatch an ornament from the arm of Purna's wife, Purna struck him with a *banti* (fish knife) and that Keshab, the petitioner, had no interest in the house of Purna, nor was he present at the occurrence. The Deputy Magistrate believed the case for the prosecution to be true, and convicted the petitioner under section 326 of the Penal Code, and sentenced him to be rigorously imprisoned for four months. In appeal the Sessions Judge upheld the conviction and confirmed the sentence. From his judgment it appears that there was a counter-case by Purna, complaining of the *loot* which had come up before him in appeal and which he had disbelieved. The petitioner obtained a rule in the High Court.

Mr. *R. Allen* and Babu *Boidya Nath Dutt* appeared for the petitioner in support of the rule.

The *Junior Government Pleader* (Babu *Ram Churn Mitter*) appeared for the Crown.

Mr. *Allen*.—The decision of the Sessions Judge in this case

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was largely influenced by his judgment in appeal in the counter-case brought by Purna. His judgment was not founded upon the evidence adduced in the case before him. Material evidence has been overlooked and no weight given to it. The circumstances of this case are such that this Court as a Court of Revision should permit the facts to be gone into. It is admitted that generally this Court as a Court of Revision declines to go into questions of fact, but there are authorities which establish that this Court has the power to do so, and that this power should be exercised in the interests of justice when the occasion arises, in order to prevent a failure of justice. See *Nobin Krishna Mookerjee* v *Russick Lall Laha* (1), *Reid* v. *Richardson* (2), *Queen-Empress* v. *Shekh Saheb Badrudin* (3), *Bhawoo Jivaji* v. *Mulji Dayal* (4) and *Queen-Empress* v. *Chagan Dayaram* (5).

Babu *Ram Churn Mitter* for the Crown.—This Court as a Court of Revision ought not to go into the questions of fact The Court has the power to do so, but it is a discretionary power, and should not be exercised except under exceptional circumstances. There is nothing peculiar in this case to call for the exercise of this discretionary power.

Mr. *Allen* was permitted to read and comment on the evidence in the case.

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

The petitioner Keshab Chunder Roy has been convicted by the Deputy Magistrate of Burdwan of the offence of causing grievous hurt to one Akhil Metey by a dangerous weapon and sentenced to rigorous imprisonment for four months, and the learned Sessions Judge having dismissed his appeal, he now asks us, under section 439 of the Code of Criminal Procedure, to set aside the conviction and sentence on two grounds:

First, that the learned Sessions Judge, in dismissing the petitioner's appeal, was greatly influenced by his judgment in the counter-case which was no evidence in this case; and that this error has caused a failure of justice.

(1) I. L. R., 10 Calc., 1047. (2) I. L. R., 14 Calc., 361.
(3) I. L. R., 8 Bom., 197. (4) I. L. R., 12 Bom., 377.
(5) I. L. R., 14 Bom., 331.

Second, that the finding of the Courts below is so completely against the weight of evidence that it ought to be set aside.

As both these two grounds depend for their success upon its being shewn that the conviction is not warranted by the evidence, and as there was some discussion during the argument as to the propriety of our examining the evidence in revision, we deem it desirable at the outset shortly to state our view of the law on the subject.

Section 439 of the Criminal Procedure Code provides that the High Court in revision may (subject to certain limitations not necessary now to be dwelt upon) in its discretion exercise any of the powers conferred on a Court of Appeal. The interference of the High Court in revision is not therefore limited to matters of law; but it is fully competent to this Court to enter into matters of fact if it thinks fit. On the other hand, it is not bound to go into evidence if it does not think fit, and the question is where should it exercise this discretionary power and where not. Clearly the mere application of a party to examine the evidence in any case would not be a sufficient ground for doing so. Section 440, which makes it optional with the Court in revision to hear parties or their pleaders, renders this quite clear. Indeed, were it otherwise, there would virtually be a second appeal on facts in every case in which the parties came up to this Court. This we do not think the Legislature could have intended. There must appear upon the face of the judgment or order complained of or of the record some ground (which need not always be a ground of law) to induce this Court to think that the evidence ought to be examined in order to see that there has been no failure of justice. Where there is no such ground, the practice has been to limit the interference in revision to matters of law. See *Nobin Krishna Mookerjee* v. *Russick Lall Laha* (1), *Reid* v. *Richardson* (2), *Queen-Empress* v. *Shekh Saheb Badrudin* (3), *Bhawoo Jivaji* v. *Mulji Dayal* (4), *Queen-Empress* v. *Chagan Dayaram* (5). In making these observations, which are only intended to indicate generally the circumstances under which this Court in revision will enter into ques-

(1) I. L. R., 10 Calc., 1047. (2) I. L. R., 14 Calc., 361.
(3) I. L. R., 8 Bom., 197. (4) I. L. R., 12 Bom., 377.
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tions of fact, we must not be understood as laying down any hard and fast rule for regulating its discretionary power in this respect. It is neither easy nor desirable to lay down any such rule, and each case will have to be dealt with according to its own circumstances.

This being premised, let us examine the grounds urged in this case. In support of the first ground, the learned Counsel for the petitioner referred to the following portions of the judgment of the learned Sessions Judge as shewing that he was influenced in his decision by his judgment in the counter-case.

After stating some of the facts of the case, the learned Sessions Judge observes: "Thus there were the two counter-cases, one by Purna complaining of the *loot* and the other by Akhil Metey complaining of the hurt. The case of Purna came up before me in appeal, and I disbelieved the case set up by him, and found that the occurrence had taken place in connection with the execution of the writ of attachment issued at the instance of the decree-holder, Rajani Bagdi. A copy of that judgment is with the record. The evidence for the prosecution in Purna's case is, generally speaking, the evidence for the defence in this case." He then adds: "When considering the application for bail in this case I made the following observations: "The facts connected with the occurrence relating to this case were considered by me in another case. It is therefore that I have patiently heard the learned pleader to see if there are grounds for changing the view that I then took." And a little further on he says: "Though the judgment in the previous case is no evidence in this, some of the arguments on which that judgment is based apply to the facts of this." And when commenting adversely on the evidence for the defence, he observes: "The best witness to prove such a fact was the woman herself, but she has not been examined. It is not out of the scrupulous regard for the female members that she has been kept back. In the previous case it has been pointed out that her evidence was damaging to the case set up by Keshab, and that the evidence of the mother of Keshab went to a certain extent to support the case of Akhil and both of them have been kept back in this case."

These remarks of the learned Sessions Judge clearly show that, though he says that the judgment in the former case was no

evidence in this, he was influenced in his decision in this case by that judgment. He seems to have heard this case to use his own words) to see if there are grounds for changing the view he took in the counter-case, when he ought to have heard it quite irrespective of that view, and with reference to the evidence adduced in it. He appears to have been under the misapprehension that because "the evidence for the prosecution in Purna's case (that is the counter-case) is generally speaking the evidence for the defence in this case," the failure of the prosecution in the former case must lead, not only to the failure of the defence in this case, but also to the success of the present prosecution when he should have borne in mind that it was quite possible for both the two prosecutions to fail by reasom of the cases set up being both false.

The judgment of the Appellate Court is thus vitiated by a clear error, and the question is, how far that error has affected the decision on the merits. This brings us to the second point raised on behalf of the petitioner and renders it necessary for us to examine the evidence for ourselves.

Upon a careful examination of the evidence, and after attaching all due weight to the opinions of the Court below, the conclusion we arrive at is that the evidence does not warrant the conviction of the petitioner. The Courts below seem to have scrutinized the evidence for the defence more narrowly than that for the prosecution; whereas we need hardly add it is only when the evidence for the prosecution stands examination that it becomes necessary to consider the evidence for the defence.

The story of the prosecution as told by the complainant in his deposition in this case is, that the witness Rajani Bagdi, who held a decree against the accused Keshab Roy, went with a Civil Court peon to the house of the accused to attach some moveable property in execution of his decree; that after the attachment had been made, an altercation took place between the peon and one Bhobotaron, whereupon the accused chased the peon with a *banti* or fish knife, and on the complainant Akhil's intervening to save the peon, he, Akhil, was hurt in the hand by Keshab. The case for the defence is, that there is bitter ill-feeling between

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Sham Chand Roy, the master of Rajani Bagdi, and of Akhil Metey and Loke Nath Roy, to whose party Keshab's brother Purna belongs; that Purna having refused to join Sham Chand's party, Sham Chand with a large band of servants and dependants, among whom was the complainant Akhil, went to *loot* Purna's house; that while Akhil was attempting to snatch an ornament from the arm of Purna's wife, Purna struck him with a *banti* and that Keshab had no interest in the house of Purna, nor was he present at the occurrence. [Their Lordships after dealing with the evidence in the case continued.]

* * * * *

Weighing, therefore, the evidence for the defence against that adduced for the prosecution, and bearing in mind the material discrepancies in the evidence for the prosecution, we must say that the evidence does not warrant the conviction of Keshab Chunder Roy, and that it would be wrong to allow the conviction to stand.

The result is that the conviction and sentence must be set aside and the petitioner acquitted and released.

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

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

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AKHIL CHANDRA DE AND ANOTHER (PETITIONERS) *v.* THE QUEEN-EMPRESS (OPPOSITE PARTY.)*

Commitment—Criminal Procedure Code (Act X of 1882), sections 195, 478—Forged documents filed in Court—Order of commitment for trial—"Any such offence" in section 478, Meaning of.

Certain documents were filed annexed to a petition in a suit pending before a Munsif, but were not given in evidence. The Munsif on suspicion that they had been tampered with held an enquiry and committed the petitioners for trial by the Court of Session. *Held*, that it was a proper commitment under section 478 of the Criminal Procedure Code.

The words "any such offence" in that section means an offence referred to in section 195 of the Code, and not an offence referred to in that section qualified by the circumstances under which it is committed.

* Criminal Revision No. 362 of 1895, against the order passed by Babu Mohendra Lal Das, Additional Munsif of Chittagong, dated the 21st of May 1895.