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tious diseases to hospitals; but no such power seems to have been conferred in this Presidency.

Upon the whole, we think, that the conviction in this case cannot be supported, and we accordingly direct that the rule be made absolute.

C. E. G. *Rule absolute.*

APPELLATE CRIMINAL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

QUEEN-EMPRESS *v.* FATTAH CHAND (PETITIONER).*

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Magistrate, Jurisdiction of—Disqualification of Magistrate to try case—Witness—Omission to record statement of accused under Code of Criminal Procedure (Act X of 1882), section 364—Order as to disposal of property as to which no offence has been committed—Criminal Procedure Code, section 517—Property found by Police in possession of accused.

Where a Magistrate before whom an accused person is brought omits to record (as provided by section 364 of the Criminal Procedure Code) statements made by the accused, he does not thereby make himself a witness, and so become disqualified from trying the case.

The accused was convicted of criminal breach of trust in respect of certain money belonging to the complainant, and on his conviction the Magistrate made an order under section 517 of the Code of Criminal Procedure, directing that an amount equal to the monies embezzled should be repaid to the complainant out of certain sums of money found by the police on the person of the accused.

Held, that the Magistrate had no power to make the order under section 517 of the Criminal Procedure Code, there being nothing to show that any offence had been committed with regard to the property, or that it had been used for the commission of any offence.

THE accused, who was a cashier in the employ of the complainant, a dealer in kerosine oil, was convicted by the Presidency Magistrate of Calcutta, Syud Ameer Hossein, under section 408 of the Indian Penal Code of criminal breach of trust in respect of certain monies belonging to the complainant. Upon the complaint being lodged the Magistrate issued a warrant for the arrest of the accused, who was brought up before the Magistrate under

* Criminal Appeal No. 918 of 1896 against the order passed by Nawab Amir Hossein, Presidency Magistrate of Calcutta, dated the 26th of October 1896.

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that warrant. The accused thereupon made certain statements, which were not reduced to writing, but which were made before any evidence for the prosecution had been recorded. Subsequently the trial of the accused took place, and he was convicted and sentenced to two years rigorous imprisonment. The Magistrate in the concluding portion of his judgment made the following order :—

"I direct that out of the money and ornaments recovered by the police a sum equal to the amount embezzled by the defendant in this case should be made over to the complainant, and the balance should remain with the police until further orders, pending the disposal of the other case ; *vide* section 517 of the Code of Criminal Procedure."

When the accused was arrested by the police Rs. 6,000 worth of gold ornaments and Rs. 3,500 in notes and silver and *hundis* were found in his possession.

Mr. *P. L. Roy* (Babu *Atul Krishna Ghose* with him) for the appellant.—The Magistrate ought not to have tried this case, having made himself a witness in the case, by allowing the accused to make this unrecorded statement to him. *Queen-Empress* v. *Manikam* (1), *Empress* v. *Donnelly* (2). The statement of the accused should have been recorded under section 364 of the Code of Criminal Procedure. As regards the order of the Magistrate making over to the complainant a sum equal to the amount embezzled out of the gold ornaments found in the possession of the accused, I submit it should be set aside by this Court. [GHOSE, J.—We can set aside the order, but we have no jurisdiction over the complainant.] In *Empress* v. *Joggessur Mochi* (3) it was held that this Court could do so. The Magistrate by doing what he ought not cannot place himself beyond the jurisdiction of this Court. Weir, p. 1120. The case of *Basudeb Surma Gossain* v. *Naziruddin* (4) is no doubt against me, but I do not know that that is correctly based on the section. If the complainant does not obey the order, he will be punished for contempt of Court. [GHOSE, J.—Then he must be prosecuted as an offender.]

The *Advocate General* (Sir *C. Paul*) (Mr. *C. Gregory* with him) for the opposite party.—The confession as made to the

(1) I. L. R., 19 Mad., 263.
(2) I. L. R., 2 Calc., 405.
(3) I. L. R., 3 Calc., 379.
(4) I. L. R., 14 Calc., 834.

Magistrate is no doubt bad. It ought to have been recorded. As regards the second objection I rely on the case of *Basudeb Surma Gossain* v. *Naziruddin* (1). This Court has no power to order restitution, if the property has been handed over. *In re Annapurnabai* (2). The Magistrate went beyond the provisions of section 517 in making the order.

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

The appellant before us, Fattah Chand, has been convicted by the Officiating Chief Magistrate of Calcutta of the offence under section 408 of the Penal Code, namely, of criminal breach of trust as a clerk or servant of the complainant, in respect of certain monies belonging to him. It appears that upon the complaint being lodged, the Magistrate issued a warrant for the arrest of the accused; and the latter was brought up before the Magistrate under that warrant. He then made certain statements which, however, were not reduced to writing. At the trial which subsequently took place, the Magistrate took evidence upon the charge preferred against the accused; and finding that the offence attributed to him had been proved, convicted him under section 408, and sentenced him to two years' rigorous imprisonment.

The Magistrate in his judgment refers to the statement that the accused made before him when he was brought up before him under the warrant; and says that, as no evidence for the prosecution had, at the time when the statements were made before him, been recorded in the presence of the accused, he did not like to record his confession. Mr. Roy, on behalf of the appellant, has contended that the Magistrate, by reason of his having heard the statements thus made by the accused, made himself a witness in the case, and thereby disqualified himself from trying the case; and, therefore, the whole of the proceedings should be quashed, and a new trial ordered before another Magistrate. We are unable to accept this contention as correct. No doubt, the Magistrate did not carry out the provisions of the Criminal Procedure Code in this respect; he was bound to follow the directions of section 364 of the Code of Criminal Procedure, and to have

(1) I. L. R., 14 Calc., 834. (2) I. L. R., 1 Bom., 630.

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recorded the statement of the accused in the manner therein indicated. And it may well be said, as, indeed, it has been said before us, that the Magistrate ought not to have allowed his mind to be in any way influenced in the consideration of the question before him by the statement made to him by the accused, which was not recorded as the law required. Notwithstanding this, we are not prepared to hold that the Magistrate, by reason of his having heard the statements made before him in open Court, made himself a witness in the cause, and thereby disqualified himself from trying the case. In fact, there is hardly any matter upon which the Magistrate could possibly give his evidence in this case. If there were any, we should have been prepared to set aside the conviction, and send the case back for re-trial. Mr. Roy has quoted before us certain cases, which have held that, when a Magistrate becomes cognizant of facts otherwise than in the course of a judicial investigation of the case, or directs the arrest of the accused, or is otherwise interested in the result of the case, he is disqualified from holding the trial; but that is not the case here.

If, however, we were satisfied that by reason of what took place the accused was in any manner prejudiced, we should have been prepared to order a re-trial. There is plenty of evidence on the record, upon which it is clear that the offence under section 408 was committed by the accused; and we have no doubt that the conviction is right. We accordingly refuse to set aside the conviction and sentence.

The Magistrate, however, in the concluding portion of his judgment, said as follows :—

"I direct that out of the money and ornaments recovered by the police, *a sum equal to the amount embezzled* by the defendant in this case should be made over to the complainant, and the balance should remain with the police until further orders, pending the disposal of the other case, *vide* section 517 of the Civil Procedure Code."

It appears that when the prisoner was arrested by the police, Rs. 6,000 worth of gold ornaments, and Rs. 3,500 in notes and silver and *hundis*, were found in his possession.

The accused made over the same to the police; and the Magistrate upon the conclusion of the trial made the order which we have

just noticed, in accordance with, as he says, the provisions of section 517 of the Code of Criminal Procedure. Now, that section provides that "when an inquiry or a trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal of any document or other property produced before it regarding which any offence appears to have been committed, or which has been used for the commission of any offence." The question which naturally presents itself to one's mind, when he is called upon to make an order under section 517 is, whether in regard to the property produced before the Court, any offence was committed, or whether the said property was used for the commission of any offence. Now, there is nothing to shew upon the record that any offence was committed in regard to the property which the police found in the possession of the accused, or that it was used for the commission of any offence; and, therefore, the Magistrate had no authority whatsoever to make the order he did make. It is not necessary for us to refer to any authority upon this matter. The language of the law is clear enough, and if the Magistrate had only considered the provisions of section 517, he would not perhaps have made the order in question. We accordingly set aside that order.

We have been informed that the Magistrate has already given effect to his order under section 517, by delivering over the property to the complainant. That matter, however, is not at present before us, and we do not think it necessary to express any opinion upon the question as to how restitution could be made to the accused, now that we have set aside the said order of the Magistrate. We do not understand how, on the face of the third paragraph of section 517, the Magistrate could have passed an order for the delivery of the property to the complainant before the time for preferring an appeal to this Court had expired, or before this Court had disposed of the appeal.

C. E. G.