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BHUGGOBUTTY DOSSEE v. SHAMACHURN BOSE.

Under the circumstances we think the appellant must pay Anundlall's costs of this appeal, and must add her own costs of this suit and appeal to her security, and Phear, J.'s decree will be modified accordingly.

Decree varied.

Attorney for the appellant: Mr. *Remfry.*

Attorney for the respondents: Baboo *G. C. Chunder.*

ORIGINAL CRIMINAL.

Before Mr. Justice Pontifex.

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April 13.

THE QUEEN ON THE PROSECUTION OF MORAD ALI *v.* HADJEE JEEBUN BUX.

Act X of 1875 *(High Courts' Criminal Procedure Act), s.* 147—*Case transferred to High Court—Refund of Fine on Quashing Conviction—Notes of Evidence taken by Magistrate.*

The High Court has no power, under s. 147, Act X of 1875, to order a fine to be refunded on quashing a conviction (1).

The Court in this instance decided whether the case should be transferred under s. 147 on the notes of the evidence taken by the Magistrate at the trial.

IN this case a rule had been granted by Phear, J., on the 30th March, calling on Mr. Dickens, Police Magistrate for the Northern Division of Calcutta, and Morad Ali, the complainant in the case, to show cause why the case should not be transferred to the High Court under s. 147, Act X of 1875. The facts were, that the complainant and defendant lived in adjoining houses between which there was a party wall. A hole was found to have been made in the wall, apparently from the defendant's side, and Morad Ali instituted a charge against Hadjee Jeebun of having committed criminal mischief. On that charge Hadjee Jeebun was convicted by the Magistrate Mr. Dickens and fined Rs. 50, which was ordered to be paid to the complainant. The ground of the application for transfer to the High

(1) In *In re Louis*, 15 B. L. R., Ap., 14, the Court ordered the fine to be refunded.

Court was that there was no evidence adduced at the trial of any intention on the part of the defendant to commit mischief.

Mr. *Branson* and Mr. *Evans* now appeared to show cause against the order.

Mr. *Jackson* and Mr. *Bonnerjee* contra.

On the part of Morad Ali an affidavit of Mr. Pittar, and on behalf of Hadjee Jeebun Bux, a joint and several affidavit of Mr. Leslie and Hadjee Jeebun Bux, were filed. To the latter affidavit was annexed an attested copy of the notes of the evidence taken by the Magistrate at the hearing of the charge.

Mr. *Branson* went into the merits of the case, and contended that the defendant had been rightly convicted. [Mr. *Jackson.*—The notes of the evidence taken before the Magistrate must be taken to be the materials on which the Court is now to decide. See *In re Louis* (1). Affidavits cannot be used to supplement that evidence.] There the case had been brought up under s. 147; this is an order calling on us to show cause why it should not be sent up. The notes do not comprise all the evidence taken before the Magistrate. He is not bound to take notes at all. [PONTIFEX, J.—Is it a case of mischief at all? The wall appears to be a party wall. But even if it had been the complainant's, the defendant's conduct seems to have been trespass, not criminal mischief.]

Mr. *Evans* on the same side.—Mr. Leslie's affidavit mentions evidence which does not appear in the notes of evidence taken by the Magistrate. Where it appears that all the evidence is not before the Court, the Court ought to call for the whole of the evidence, or it might rehear the case.

Mr. *Jackson* submitted that all the materials necessary for decision were before the Court, and that on those materials the conviction ought to be quashed.

The Court was of opinion that on the evidence which had come up from the Police Court there was no case for convicting

(1) 15 B. L. R., Ap., 14.

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the defendant of mischief: inasmuch as there was no evidence to show that the hole was made in the wall maliciously or for the purpose of annoying the prosecutor. The conviction was therefore ordered to be quashed.

Mr. *Jackson* applied for an order for refund of the fine: but the Court was of opinion it had no power under the section to order repayment of the fine.

An application by Mr. *Jackson* for costs was refused, the Court being of opinion that the defendant was not wholly free from blame in the matter, and that the prosecution did not appear to have been a malicious prosecution.

Conviction quashed.

Attorney for the complainant: Mr. *Pittar.*

Attorney for the defendant: Mr. *Leslie.*

Before Mr. Justice Phear and Mr. Justice Markby.

THE QUEEN *v.* UPENDRONATH DOSS AND ANOTHER.

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March 9, 16 & 20.

Act X of 1875 (*High Courts' Criminal Procedure Act*), *s.* 147—*Case transferred to High Court—Notice to Prosecutor—Penal Code, ss.* 292 *and* 294—*Specific Charge—Procedure on Transfer to High Court.*

In an application for the transfer of a case under s. 147, Act X of 1875, in which the prisoner has been convicted and is undergoing imprisonment, it is in the discretion of the Court to order, for sufficient *primâ facie* cause shown, that the case be removed, without notice to the Crown.

Semble.—A charge under ss. 292 and 294 of the Penal Code should be made specific in regard to the representations and words alleged to have been exhibited and uttered, and to be obscene; and the Magistrate, in convicting, should in his decision state distinctly what were the particular representations and words which he found on the evidence had been exhibited and uttered, and which he adjudged to be obscene within the meaning of those sections. Where no such specific decision has been given, the High Court, when the case has been transferred under s. 147, Act X of 1875, may either try the case *de novo*, or dismiss it on the ground that the Magistrate has come to no finding on which the conviction can be sustained.

THE prisoners had been charged with offences under ss. 292 and 294 of the Penal Code, and had been on conviction sentenced