

Penal Code, and was sentenced to rigorous imprisonment for three years, and to pay a fine of Rs. 1,000, or in default, to suffer rigorous imprisonment for a further period of six months.

1881  
 IN THE MAT-  
 TER OF THE  
 PETITION OF  
 SHUMSHER  
 KHAN.

The accused appealed to the High Court.

Baboo *Rashbehary Ghose* and Baboo *Saroda Prosonno Roy* for the appellant.

The judgment of the Court (CUNNINGHAM and PRINSEP, JJ.) was delivered by

CUNNINGHAM, J.—We think that the appeal must be dismissed, on the ground that there is no sufficient reason shown for calling in question the deliberate conclusion at which the Magistrate has arrived.

With regard to the point that the sentence required the confirmation of the Sessions Judge, we think that the words of s. 36 of the Code of Criminal Procedure must be construed to refer to cases in which the sentence of imprisonment is a sentence of upwards of three years, and to leave aside any sentence the Magistrate may pass as to fine or whipping.

We, therefore, think that it is unnecessary for the sentence in this case to be confirmed by the Sessions Judge.

The appeal is dismissed.

*Appeal dismissed.*

*Before Mr. Justice Mitter and Mr. Justice Maclean.*

IN THE MATTER OF THE PETITION OF JANOKINATH GUPTA.

THE EMPRESS *v.* JANOKINATH GUPTA.\*

1881  
 Jan. 27:

*Police Act (V of 1861), s. 29—Overstaying Leave without permission.*

The failure of a Police constable to resume his duty on the expiration of his leave, does not constitute an offence under s. 29, Act V of 1861.

THE accused, a Police constable, obtained leave of absence from his duties, which had expired on the 15th October 1880. He obtained no extension of leave, but did not return to

\* Motion, No. 9 of 1881, against the order of C. E. Buckland, Esq., Magistrate of Howrah, dated the 17th December 1880.

1881  
 IN THE MAT-  
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 PETITION OF  
 JANOKINATH  
 GUPTA.

resume his duties until the middle of December. He was then charged with having committed an offence under s. 29, Act V of 1861, by having overstayed his leave without permission, and being found guilty, was sentenced to two months' rigorous imprisonment.

He petitioned the High Court against this conviction and sentence.

*Baboo Baikant Nath Doss* for the petitioner.

The judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

MITTER, J.—The petitioner, a constable, obtained a month's leave, but failed to join his post at the expiration of that time. For this omission on his part he has been committed under s. 29, Act V of 1861, and sentenced to two months' rigorous imprisonment.

We think the conviction is bad, because his failure to resume his duty on the expiration of the leave, does not, in our opinion, constitute an offence under the aforesaid section.

The conviction is therefore set aside.

*Conviction set aside.*

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## ORIGINAL CIVIL.

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*Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.*

1881  
 Feb. 7.

KEDARNAUTH DOSS AND ANOTHER (PLAINTIFFS) *v.* PROTAB  
 CHUNDER DOSS AND OTHERS (DEFENDANTS).\*

*Common Ancestor—Claim as Collateral Heir—Evidence—Amendment of Record on Appeal.*

Where the plaintiff claimed as paternal uncle's grandson and only heir of *N*, and the evidence showed that *N*'s father was one of three brothers, but it was not stated in the plaint, nor shown by the evidence, who was the father of the three brothers,—*Held*, that the suit ought to be dismissed, it being incumbent on the plaintiff, claiming as a collateral heir, to show who the common ancestor was from whom he derived title.