

CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice Holmwood.

ROHIMUDDI HOWLADAR

2.

EMPEROR.*

1908

June 3.

Witness—Magistrate—Duty of Magistrate to enforce attendance of witnesses after summonses have once been issued against them—Power of second or third class Magistrate to pass sentence and then to refer the case to a superior Court to bind down the accused—Criminal Procedure Code (Act V of 1898) ss. 257, 349.

Where a Magistrate has once issued summonses for the attendance of witnesses, he is bound to have the processes enforced before disposing of the case.

A Magistrate of the second or third class, if of opinion that the accused should be bound down under s. 106 of the Criminal Procedure Code, must refer the whole case to a superior Magistrate without passing any part of the sentence himself.

THE accused were placed on their trial before Babu Susil Kumar Ganguli, Probationary Deputy Magistrate of Bagirhat, on charges under ss. 147 and 325 of the Penal Code, for having gone in a body, on the 6th November 1907, to the land of the complainant and having dispossessed him and caused serious injuries to his co-sharer, Badan Mistry.

The accused applied for, and obtained, summonses for the attendance of certain witnesses for the defence, but on the date of hearing the witnesses did not appear, whereupon the accused applied for warrants against them, which were refused.

The Magistrate then proceeded with the case and found the accused guilty under ss. 147 and 325 of the Penal Code, and sentenced them, under the former section, to six months' rigorous imprisonment, but passed no sentence under the latter. He then forwarded the proceedings with the accused to the Sub-divisional Magistrate with an opinion that they should be bound down under s. 106 of the Code.

* Criminal Revision, No. 456, of 1908, against the order of A. Ahmad, District Magistrate of Khulna, dated the 16th January 1908.

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Babu Atulya Charan Bose for the petitioner. Once process has been issued against a witness by a Magistrate he is bound in law to compel the attendance of such witness, if he does not attend, and he cannot decide the case, until he has done so. Further under s. 349 of the Code the Magistrate should have referred the whole case to the Sub-divisional Officer without himself having passed any sentence.

No one appeared for the opposite party.

STEPHEN AND HOLMWOOD JJ. This Rule has been issued to show cause why the conviction and sentence in this case should not be set aside on the ground that the petitioners had no opportunity of examining certain witnesses in their defence, although those witnesses had been summoned, and to show cause why the order under section 106 of the Criminal Procedure Code that has been made should not be set aside as having been made illegally, and why we should not order a re-trial of the petitioners before a competent Magistrate, or make such other order as to us may seem fit.

The petitioners were tried before a Probationary Deputy Magistrate on charges under sections 147 and 325 of the Indian Penal Code. Processes were issued on certain witnesses cited by the petitioners, but the Magistrate did not have these processes enforced. In this he was plainly in error. His decision of the case must, therefore, be set aside. He sentenced the petitioners to six months' rigorous imprisonment under section 147, and passed no separate sentence under section 325. He then sent the case to the Sub-divisional Magistrate after expressing an opinion that the accused persons should be bound down under section 106 of the Criminal Procedure Code. In this he was wrong. If he thought the binding down was necessary, he should have transmitted the whole case in order to have the sentence passed.

Under these circumstances the case must be sent back to the Probationary Deputy Magistrate that he may continue the hearing by having the witnesses examined, who have already been summoned. If he should find the accused guilty, and consider that a sentence should be passed, which he is not qualified to pass, he

must then transmit the case to the proper authority for him to pass the sentence, and he must not pass any part of the sentence himself.

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The petitioners will remain on bail pending the trial.

Rule absolute.

E. H. M.