

## CRIMINAL REFERENCE.

*Before Mr. Justice Rampini and Mr. Justice Sharfuddin.*

1908  
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 Feb. 5.

EMPEROR

v.

MOMIN MALITA.\*

*Jurisdiction—Security to keep the peace—District Magistrate—Appellate Court power of, to direct security to keep the peace on conviction by a second or third class Magistrate—Criminal Procedure Code (Act V of 1898) s. 106 (3).*

An Appellate Court cannot exercise the power given by section 106(3) of the Criminal Procedure Code, where the conviction has not been by a Court specified in sub-section (1).

*Muthiah Chetti v. Emperor*(1), *Paramasiva Pillai v. Emperor*(2), and *Mahmudi Sheikh v. Aji Sheikh*(3) referred to.

THE petitioner was convicted by a Sub-Deputy Magistrate of Kushtia, vested with second class powers, under s. 323 of the Penal Code, and sentenced to a fine of Rs. 25. He appealed to the District Magistrate of Nadia, who dismissed the appeal, and directed him, under s. 106(3) of the Criminal Procedure Code, to execute a bond for Rs. 100, with one surety in the same amount, to keep the peace for two years.

The petitioner moved the Sessions Judge of Nadia to report the case to the High Court with a recommendation to quash the order for security as without jurisdiction.

The learned Judge accordingly referred the case to the High Court under s. 438 of the Criminal Procedure Code.

*The Deputy Legal Remembrancer (Mr. Orr)*, for the Crown, stated that he could not support the District Magistrate's view that he, as an Appellate Court, had power under sub-section (3) of s. 106 to make an order for security to keep the peace even when

\*Criminal Reference No. 13 of 1908, by J. N. Ghose, Sessions Judge of Nadia, dated Jan, 21, 1908.

(1) (1905) I. L. R. 29 Mad. 190.

(2) (1906) I. L. R. 30 Mad. 48.

(3) (1894) I. L. R. 21 Calc. 622.

the conviction was by a Magistrate of the second or third class.

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RAMPINI AND SHARFUDDIN JJ. This is a Reference under section 438 of the Criminal Procedure Code by the Sessions Judge of Nadia, who invites us to set aside an order passed by the District Magistrate of Nadia directing, under section 106(3) of the Code of Criminal Procedure, a person named Momin Malita to execute a bond for Rs. 100, with one surety of Rs. 100, to keep the peace for two years. The learned Sessions Judge points out that Momin Malita was convicted by the Sub-Deputy Magistrate of Kushtia, a second class Magistrate, under section 323 of the Indian Penal Code and sentenced to a fine of Rs. 25, that he appealed to the District Magistrate, who dismissed his appeal and passed the above order under section 106 of the Criminal Procedure Code binding him down to keep the peace. He further points out that, as the order convicting the said Momin Malita under section 323 of the Indian Penal Code was passed by a Sub-Deputy Magistrate of second class powers, such a Magistrate had no power to pass any order under section 106 of the Criminal Procedure Code; and, therefore, he contends that a District Magistrate hearing an appeal from an order of such Magistrate cannot pass such an order. In support of this view he cites the cases of *Muthiah Chetti v. Emperor*(1) and *Paramasiva Pillai v. Emperor*(2).

The learned District Magistrate shows cause, and according to his view a District Magistrate has power to pass such an order on appeal from the decision of any Magistrate. In other words, he thinks that any Appellate Court can, under sub-section (3) of section 106 of the Criminal Procedure Code, pass an order without any restriction as to the powers of the Court against whose order the appeal is made. We do not think that this view is right. According to the rulings cited by the Sessions Judge, an Appellate Court cannot exercise the power given by section 106 of the Criminal Procedure Code, when the accused has not been convicted by a Court such as is referred to in sub-section (1). And we may

(1) (1905) I. L. R. 29 Mad. 190.

(2) (1906) I. L. R. 30 Mad. 48.

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also refer to the case of *Mahmudi Sheikh v. Aji Sheikh*(1) in support of this view.

We, therefore, set aside the order of the District Magistrate, dated the 30th November 1907, directing, under section 106(3) of the Criminal Procedure Code, the said Momin Malita to execute a bond for Rs. 100 to keep the peace for two years.

E. H. M.

(1) (1894) I. L. R. 21 Calc. 622.