

CRIMINAL REVISION.*Before Sharfuddin and Coxe JJ.*

1912

Nov. 28.

FIDOI HOSSEIN

v.

EMPEROR.*

Practice—Appellate Court, duty of—Defective judgment—Omission to consider the defence evidence in a bad likelihood case—Criminal Procedure Code (Act V of 1898), ss. 110, 118, 367 and 424.

It is the duty of the Appellate Court, on an appeal from an order under ss. 110 and 118 of the Criminal Procedure Code, to look into the evidence for the defence, and after dealing with it to come to a decision thereon, notwithstanding that the counsel for the appellant has practically ignored it during his arguments.

UPON the receipt of a police report from the Sub-Inspector of Islampur thana, the Subdivisional Officer of Kissengunge drew up a proceeding under s. 110 of the Criminal Procedure Code against the petitioner. The case was enquired into by Babu N. K. Tripathi, a Deputy Magistrate at Kissengunge, when 30 witnesses were examined for the prosecution and 95 for the defence. By his order, dated the 29th July 1912, the Magistrate found that the petitioner habitually committed mischief by fire, and was by habit a harbourer of thieves, and so desperate and dangerous a character as to render his being at large without security hazardous to the community, and directed him to execute a bond in the sum of Rs. 2,000, with two sureties in half the amount each, to be of good behaviour for one year. The petitioner appealed

* Criminal Revision No. 1440 of 1912, against the order of R. G. Kilby, District Magistrate of Purnea, dated Sept. 16, 1912.

against the order to the District Magistrate of Purnea, who affirmed the same, but reduced the amounts of the bond and security. In his judgment the Magistrate dealt with the evidence of each of the thirty prosecution witnesses in detail, but did not refer to the evidence for the defence at all. After considering the prosecution evidence, he merely discussed certain arguments of fact and law put forward by the petitioner's counsel, and dismissed the appeal with the modification stated above. The petitioner then moved the High Court and obtained a Rule to show cause why the order of the Appellate Court should not be set aside, and the appeal re-heard on the ground that the District Magistrate had omitted to take into consideration the evidence for the defence. In his explanation the Magistrate stated that the reason why his judgment contained no reference to the defence evidence was, that, when the case was argued before him, it was practically ignored by the counsel for the appellant.

Mr. Gregory and *Maulvi Nooroodeen Ahmed*, for the petitioner.

No one appeared for the Crown.

SHARFUDDIN AND COXE JJ. This is a Rule calling upon the District Magistrate to show cause why the order of the Appellate Court, under section 110 of the Criminal Procedure Code, should not be set aside and the appeal re-heard, on the ground that the District Magistrate had omitted to take into consideration the evidence for the defence.

We have received the explanation sent to us by the learned District Magistrate, wherein he has admitted that in the appeal before him he did not think it necessary to deal with the evidence adduced by the defence in the case. But he says this was

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because no reference to that evidence was made by the counsel who appeared for the appellant before him, and the evidence on the part of the defence was practically ignored in the argument. There is no doubt, however, that it was the duty of the Appellate Court to look into that evidence, and after dealing with it to come to a decision. For that reason we think it necessary that the case should go back for re-hearing. The appeal will be re-heard by the District Magistrate, and at the re-hearing of the appeal he should deal with the evidence on both sides.

E. H. M.

Case remanded.

PRIVY COUNCIL.

AZIMA BIBI

v.

SHAMALANAND.

*P.C.*²

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 Nov. 12, 26.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Mortgage—Mortgage bond executed by male members of Mahomedan family—No proof of custom to exclude females as in Hindu family—Female members added as defendants in mortgage suit, though not executants of bond—Form of decree—Whether females were represented in the mortgage transaction by male members of family—Esoppel by conduct.

The appellants were the female members of a Mahomedan family which had adopted the Hindu religion in matters of worship, and as to which both Courts in India concurrently held that there was no custom proved excluding female members from inheritance, which was the case set up by the respondent. In a suit brought by the latter to enforce a mortgage bond which had been executed only by the male members of the

² *Present* : LORD MACNAGHTEN, LORD MOULTON, SIR JOHN EDGE AND MR. AMEER ALI.