

at Súrat, and sentenced to forfeit Rs. 151-4-9, or in commutation of the forfeiture to suffer imprisonment for a period of six months. 1866.
Nov. 1.
Crim. Review.

The conviction and sentence were confirmed on appeal by the Session Judge of Súrat.

The record and proceedings were called for, under Sec. 404 of the Code of Criminal Procedure.

PER CURIAM (COUCH, C.J., and WARDEN, J.) :—The Court annuls the conviction and sentence, and orders the fine, if paid, to be restored; the Full Power Magistrate not having had jurisdiction, as the “Zillah Magistrate” (that is, the Magistrate of the District) only is empowered to enforce the penalty.

NOTE.—Sec *Reg. v. Sadu valad Pavade*, *antè*, p. 39.—ED.



REG. V. J. M. DIAZ.

Criminal breach of Trust—Ind. Pen. Code, Sec. 409—Examination of Prisoner—Crim. Proc. Code, Sec. 373—Irregularity.

A conviction and sentence for criminal breach of trust as a public servant, reversed, owing to irregularities in the preliminary inquiries, and irregular procedure as to the examination of the prisoner in the Court of Session.

THE prisoner was convicted, on the 21st of September 1866, of criminal breach of trust as a public servant, under Sec. 409 of the Penal Code, and sentenced to eighteen months' rigorous imprisonment, by A. C. Watt, Acting Assistant Session Judge of Puná. 1866.
Dec. 12.
Crim. Appeal.

The record and proceedings were sent for (10th October), on hearing the petition of the prisoner.

Howard and *Macpherson*, for the prisoner :—The Assistant Session Judge said to the prisoner, on the 19th of September, before he was examined, “It is optional for you to answer the questions or not; but your refusal to do so will be considered as an admission.” This was immediately before putting the questions to the prisoner. The prisoner was examined, in the course of the evidence for the

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prosecution; and not in accordance with Sec. 373 of the Code of Criminal Procedure. No list was taken of the Jail books; and other persons besides the prisoner had access to the "prisoners' property box" in the interval between possession being taken of it by the Superintendent of the Jail, and its contents being examined. The prisoner had by mistake made entries in wrong books; but those books were not produced by the prosecution.

COUCH, C.J.:—The prisoner was convicted of criminal breach of trust, by the Session Court, in respect of two matters. The first was Rs. 20 and some annas, which it was alleged the prisoner, as Jailer, had received from the Nazir, being the property of a convict then in the Puná Jail. There was conclusive documentary evidence that he had received that sum; and he neither entered it in the books, nor was it found in the property box of the Jail convicts. The prisoner alleged that the item, although not entered in the books brought forward by the prosecution, was entered by mistake in a book which is not now forthcoming; and the prisoner's want of experience as Jailer renders such a supposition not improbable. It is just possible that he may have entered the item in another book, as he alleges; and there is some evidence to support his allegation. It looks somewhat suspicious that such a book should not be forthcoming. It appears from the evidence that the Jailer's books were not at first kept in the proper custody; and that access to them was allowed between the time of the Superintendent of the Jail taking charge of them from the Jailer, and his finally placing them under proper custody. It is much to be regretted that the Superintendent did not act with greater caution in the matter; and that he did not keep the books and the box in his own custody, so as to remove all possibility of other persons having access to them. The circumstance raises a doubt; and perhaps the prisoner may have entered the item as he alleges, and placed the money in the box.

2ndly, There was another charge, with regard to a pair of scales, which it was alleged the prisoner either applied to

his own use, or made a fictitious entry regarding. The prisoner, by the line of defence which he took in the Court of Session, rather injured his case, and excluded the supposition that the entry was made by mistake by those who kept the books. The case is altogether one of such a nature that, had we the power, we should send it down to be re-tried more carefully and minutely.

The Acting Assistant Session Judge, in violation of the provision of Sec. 373 of the Criminal Procedure Code, which distinctly lays down that: "The Court, at the close of the evidence on behalf of the accused person, if any evidence is adduced on his behalf, or otherwise at the close of the case for prosecution, may put any question to the accused person which it may think proper," put certain questions in the middle of the case to the prisoner, with a view to supply the evidence for the prosecution. This was a most serious irregularity in the trial of the case.

Looking at all these circumstances, and the doubts created in our minds as already stated, I am of opinion that the conviction and sentence should be reversed.

NEWTON and WARDEN, JJ., concurred.

REG v. BHA'U' bin VITHU and another.

Disobeying order of Public Servant—Ind. Pen. Code, Sec. 188—Bombay Act No. V. of 1864—Mámlatdár—Jurisdiction.

Convictions and sentences for disobeying an order duly promulgated by a public servant, reversed; as the Mámlatdár, who stated that he proceeded under Bombay Act No. V. of 1864, was not thereby empowered to make the order.

THE accused were convicted by G. Wilson, Acting Magistrate F. P., in the Sátará District, under Sec. 188 of the Indian Penal Code, of disobedience to an order duly promulgated by a public servant; and sentenced, respectively, to pay a fine of Rs. 15, or in default to suffer eight days' simple imprisonment.

The case was referred for the orders of the Court, under Sec. 434 of the Code of Criminal Procedure, by R. F. Mac-tier, Session Judge of Sátará, with the following remarks:—