

APPELLATE CRIMINAL.

Before Mr. Justice Morris and Mr. Justice White.

THE EMPRESS *v.* CHUNDER NATH DUTT.*

1879
May 14.

Presidency Magistrates' Act (IV of 1877), ss. 82, 86, and 87, expl. 2—"Revival of a Prosecution"—Examination of Witnesses.

A "revival of a prosecution," as mentioned in expl. 2 of s. 87 of Act IV of 1877, is not a continuation of the original prosecution from which the accused has been discharged. On the revival of the prosecution, all the witnesses on whose evidence the prosecution intend to rely must be examined before the Magistrate; and if any of them were examined at the time of the original prosecution, they must be examined *de novo*.

THIS case was referred to the High Court in the following terms:—

"The defendant in this case surrendered, on the 30th of July 1878, to a warrant issued by this Court for his arrest on the 26th July 1878 on a charge of stealing and fraudulently appropriating two unregistered letters containing currency notes and a hoondee. He was arraigned before me on the 30th July 1878. The prosecution cited certain witnesses, whose evidence was recorded, for the commitment of the case to the Sessions; but in spite of a warrant which was obtained under s. 135 of the Presidency Magistrates' Act, they failed to produce the material witness whose testimony, it was stated, would clinch the fact of theft. In the absence, therefore, of any evidence to connect the accused with the offence, and after every possible opportunity had been given to the prosecution to produce the absent witness, he was discharged on the 14th September 1878, under s. 87 of Act IV of 1877. On the 8th April 1879, this witness, Gopal Chunder Ghose, was apprehended. Upon a statement made by him, an application was made by the Officiating Government Prosecutor to revive the charge against the defendant Chunder Nath Dutt, and a

* Criminal Reference, No. 113 of 1879, from an order made by Syed Ameer Ali, Esq., Officiating Chief Magistrate of Calcutta, Northern Division, dated the 6th May 1879.

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fresh warrant was applied for and obtained. The defendant was accordingly placed before this Court on the 29th April 1879, when the evidence of Gopal Chunder Ghose was recorded in his presence. The Government Prosecutor does not propose now to examine any further witnesses, and applies that the case may be committed to the Sessions, upon the evidence taken on the previous occasion, before the defendant was discharged, plus the evidence taken after his re-arrest. He contends that the word "revival" in expl. 2, s. 87 of Act IV of 1877, implies that the proceeding against an accused discharged under this section may be revived at any time, and the point where it was left off should form the starting point for the proceeding which might be instituted in the second instance. I do not, however, agree with this view. I think when a prisoner is discharged for want of evidence, the former proceeding is at an end; and when a prosecution is revived, it is a fresh proceeding, requiring the evidence to be gone into *de novo*.

I hardly think the Legislature could have meant that a discharge under s. 87 should be a remand *sine die*. Arguments have been drawn from the use of the word "revival," but these arguments appear to me to be fallacious. If the words had been revival of the prosecution, instead of revival of a prosecution, there might have been some force in the contention. I take it that the explanation to s. 87 simply debar the defendant in certain cases from taking the plea of *autre fois acquit*; but creates no special procedure such as is contended for. For the reasons above stated, I am inclined to hold that no commitment can be made; and that as the Government Prosecutor does not propose to call witnesses to prove the material facts of the case, and to enable the defendant to cross-examine them with reference to the new evidence, the prosecution must fail."

The question referred was—

"Whether a prosecution revived under expl. 2 to s. 87 of Act IV of 1877 is a continuation of the old proceeding; and whether evidence of the "revival" should or should not be taken *de novo*." Pending the opinion of the High Court, the defendant was enlarged on bail, to appear on the 20th instant.

The opinion of the High Court was delivered by

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WHITE, J. (MORRIS, J., concurring).—The question raised by the reference of the Officiating Chief Magistrate is as to the procedure to be adopted in cases under chap. 8 of the Presidency Magistrates' Act, when an accused person who has been discharged by the Magistrate under s. 87 of that Act, because there are no sufficient grounds for committing the prisoner to take his trial, is at some subsequent time again prosecuted before a Magistrate for the same offence. The Act, in s. 82, states specifically the procedure to be applied when an accused person is brought before the Magistrate under chap. 8, and no distinction is made between the cases of a first and that of a second prosecution for the same offence. The argument that on a second prosecution the witnesses who were examined on the first prosecution need not be examined again, but may be considered as giving evidence in support of the second prosecution, is based solely and entirely upon the circumstance that the Legislature, in expl. 2 of s. 87, has described the second prosecution as the "revival of a prosecution." I think the argument is not sound, and has no sufficient foundation. The argument is in fact an inference from the use of the word "revival." The object of expl. 2 of s. 87 is to negative the supposition that a discharge would be a bar to a second prosecution for the same offence. The explanation does not deal with the procedure which is to be adopted, if such second prosecution should take place. The fact that the Legislature has described the second prosecution as the "revival of a prosecution," does not in my opinion warrant the inference either that the evidence upon which the first prosecution is based is also revived, or that the procedure upon the second prosecution is to be different from that pointed out in s. 82. A further reason for this view is to be found in the provision for adjournment, which is contained in the same chapter of the Act. Under s. 86 a Magistrate has large powers of adjourning an enquiry for reasonable cause, but no adjournment can be for longer than fifteen days at a time. If upon a second prosecution after a discharge, the Magistrate is to treat the evidence that was given in the first

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prosecution as evidence upon the second prosecution, or as it is called in the reference before us—"take up the case for the prosecution where it was left when the prisoner was discharged"—the Magistrate would in effect be acting as if he had adjourned the enquiry *sine die*, which he has no power to do. It cannot be supposed that the Legislature intended by the mere use of the word "revival of a prosecution" in expl. 2, s. 87, to give the Magistrate such a power, after it had carefully made provision by s. 82 against unlimited adjournments. In my opinion the proper reply to the question of the Officiating Chief Magistrate is, that a "revival of a prosecution" as mentioned in expl. 2 of s. 87 is not a continuation of the original prosecution from which the accused has been discharged; and that upon the revival of the prosecution, all the witnesses on whose evidence the prosecutor intends to rely as justifying the committal of the accused must be examined before the Magistrate; and if any of them were examined at the time of the original prosecution, they must be examined *de novo*.

Before Mr. Justice Morris and Mr. Justice White.

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THE EMPRESS v. MAGUIRE.*

*Mutiny Act, s. 101—Jurisdiction of Civil (as opposed to Military) Courts—
 Offence committed by British Soldier.*

Section 101 of the Mutiny Act does not deprive the Civil (as opposed to Military) Courts of jurisdiction over British soldiers committing offenses within the territorial limits of those Courts, nor render the exercise of their jurisdiction dependent upon the sanction of the Commander-in-Chief. The section is merely permissive of a military trial being held.

IN this case the prisoner, who was a European British subject, and a private in the army, was charged with the offence of theft, and was committed by the First Assistant Superintendent for trial to the Sessions Judge and Judicial Commissioner of the

* Criminal Reference, No. G $\frac{1}{4}$ of 1879, from an order made by Lieutenant-General C. A. Barwell, C. B., Sessions Judge and Chief Commissioner of Andaman and Nicobar Islands, dated the 24th April 1879.