in refusing to issue process for the witnesses named by the accused did not base his refusal in regard to any particular witness, on any of the grounds which, under the provisions of section 257 of the Code, are sufficient to justify it.

The order was therefore illegal (vide *Emperor* v. *Purshottam* (1) and we do not think the illegality can be cured by section 537, Criminal Procedure Code.

We set aside the conviction: as the accused have served their sentences we do not order any further proceedings.

APPELLATE CRIMINAL.

Before Mr. Justice Sankaran Nair.

1907. December 6, 18.

LAKSHMINARASAPPA AND ANOTHER

v.

MEKALA VENKATAPPA.*

Criminal Procedure Code, Act V of 1898, ss. 435, 437, 439—District Magistrate cannot under s. 437 set aside an order of discharge on the ground that the lower Court had not appreciated the evidence properly.

Where a District Magistrate taking action under section 437 of the Code of Criminal Procedure comes to the conclusion that the evidence for the prosecution is reliable, and that the lower Court has erred in disbelieving such evidence and discharging the accused, the proper course for him is to refer the matter for orders to the High Court, which can deal with it under section 439. It is not open to him to set aside the order of discharge himself on the ground that the lower Court had misappreciated the evidence.

Queen-Empress v. *Amir Khan*, (I.L.R., 8 Mad., 337), followed.

Haredass Sanyal v. *Saritulla*, (I.L.R., 15 Calc, 621), followed.

When a Court competent to decide whether the accused is guilty or not holds that he is not guilty on a consideration of the evidence adduced by the prosecution, that finding should, if at all, be set aside only by a Court competent to set aside such finding of fact that is by the High Court under section 439 of the Code of Criminal Procedure read with section 423.

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(1) I.L.R., 26 Bom., 418.

* Criminal Revision Case No. 349 of 1907, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court, to revise the order of J. J. Cotton, Esq., District Magistrate of Cuddapah in Revision Petition No. 11 of 1907, setting aside the order of discharge passed by M.R. Ry. M. Bapu Row, Second-class Magistrate of Kadiri, in Calendar Case No. 112 of 1907, and directing further enquiry into the case by First-class Divisional Magistrate of Cuddapah.

LAKSHMI-NARASAPPA v. MEKALA VENKATAPPA.

THE accused were tried by the Stationary Second-class Magistrate of Kadiri for offences of thefts under section 380 and abetment of same under sections 380 and 109, Indian Penal Code, and discharged under section 253 of the Code of Criminal Procedure on the ground that the offences were not proved.

The District Magistrate, to whom a revision petition was presented, passed the following order under section 437 of the Code of Criminal Procedure :—

From the evidence on record, I have no doubt that the document existed. There are of course discrepancies in the depositions of the first four witnesses: but I do not consider any of them to be so serious as to come to the conclusion that these witnesses have been giving false evidence. The lower Court has attached undue importance to them. There appears to be no motive why the complainant should concoct a serious charge of this description. The subsequent denial of the petitioner's title by the karnam lends support to the prosecution story. The complaint was promptly lodged and there was no one else interested in making away with the document than the karnam: and the persons whom the complainant cited as his witnesses, were promptly examined by the Magistrate and they supported him in the main story.

Under section 431, Criminal Procedure Code, I set aside the order of discharge and restore the case to file. I direct that it be tried by the First-class Divisional Magistrate of Cuddapah.

Against this order revision petition was presented to the High Court under sections 435 and 439 of the Code of Criminal Procedure.

Dr. S. *Swaminadhan* for petitioner.

The Public Prosecutor, *contra* and *R. V. Seshagiri Rau* for complainant.

ORDER.—This is an application to reverse the order of the District Magistrate of Cuddapah setting aside an order of discharge passed by the Second class Magistrate of Kadiri and directing a further inquiry by the first-class Divisional Magistrate of Cuddapah on the sole ground that the Sub-Magistrate has misappreciated the evidence and arrived at a wrong conclusion on the facts. The complaint was one of theft of a document punishable under section 380, Indian Penal Code. The Second-class Magistrate

examined eight witnesses, and filed six exhibits for the prosecution, and also filed nine exhibits on behalf of the defence, and discharged the accused as in his own words "the very existence of a document of the kind said to have been lost is doubtful and the case bears distinct marks of having been trumped up as the witnesses are all untrustworthy." The District Magistrate on the other hand, has "no doubt that the document existed" and he also saw no reason to consider that the witnesses have been giving false evidence and accordingly directed further inquiry by another Magistrate. The petitioner's counsel refers to Criminal Revision Case No. 501 of 1900 where this Court reversed an order of the District Magistrate directing a further inquiry on the ground of misappreciation of evidence. He also relies upon *Joy Gopaul Banerjee* v. *The Emperor*(1) and *Queen-Empress* v. *Erram Reddi*(2) and *Rash Behari Lal Mandal and others* v. *The Emperor*(3). Under the Codes of 1861 and 1872 it has been held that this Court will not exercise its power of revision on the ground that the lower Court has not rightly appreciated the evidence the reason being that it is for the Court called upon to determine whether the person charged is guilty or not, to consider and weigh the evidence and any error as to the probative force and effect is not open to correction on revision but only on appeal [5 M.H.C., Appx. X and *In the matter of Aurokiam*(4)]. The same view has been accepted under the Codes of 1882 and 1898 in the case of *Queen-Empress* v. *Lakshmi Nayakan*(5) and Criminal Revision Case No. 343 of 1900, Weir, p. 255. The practice, so far as I am aware, has been in accordance with this view. While it is quite clear to me that the High Court is entitled to deal with any case on facts, it has been held that only in case of defective investigation, of failure to consider important evidence, of consideration of the evidence from a wrong point of view, of contravention of any provision of law, and of conviction upon facts which will not support the same, will the revisionary powers of this Court be exercised. It is clear, therefore, assuming the District Magistrate is right in his estimate of the evidence,

(1) 11 C.W.N., 173. (2) I.L.R., 8 Mad., 299.
(3) 12 C.W.N., 117. (4) I.L.R., 2 Mad., 38.
(5) I.L.R., 19 Mad., 238.

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that this Court would not have interfered with the order of discharge on the grounds stated by him. If the Second-class Magistrate had proceeded to frame a charge against the accused and tried and acquitted him, the High Court alone could have interfered with the order of acquittal or convicted him on appeal by the Local Government. The District Magistrate's powers in this respect are defined by sections 435 and 437 of the Code of Criminal Procedure. Under section 435, he is entitled to call for the records to satisfy himself "as to the correctness" of any finding or order and may order "further enquiry" under section 437 into the case of any discharged person or refer the case to the High Court under section 438 for orders. Reading sections 439 and 423 together there is no doubt the High Court can set aside a finding of fact and direct a retrial or further inquiry. It was decided by the High Court in *Queen-Empress* v. *Amir Khan*(1) that the "further enquiry" referred to in section 437 is not the same as "fresh enquiry" in section 436 and does not include the power to direct a Subordinate Magistrate to reconsider the same evidence on the sole ground that he has misappreciated the evidence and it was pointed out that "The High Court itself which has a power that the Magistrate does not possess, namely, to order a retrial is not warranted in so doing merely because the Magistrate who has discharged an accused person in a case he was competent to try and finally determine, arrived at a conclusion different from that at which the High Court would have arrived as to the credit due to the witnesses" and that "if in cases not falling under section 436 a District Magistrate sees reason to think that the Subordinate Magistrate has improperly discharged an accused person by reason of his having mishpprehended the law or committed a material error in procedure the District Magistrate should, under section 438, report the case for opinion and orders of the High Court." The majority of the Judges of the Calcutta High Court took a different view as to the effect of the words "further enquiry" and held that it was open to the District Magistrate for sufficient reasons acting under section 437 to direct a reconsideration of the case on the same evidence, and further Wilson, J, expressing the opinion of the majority of the Judges said: "In a case not triable

(1) I.L.R., 8 Mad., 337.

only by the Court of Sessions, if the Sessions Judge or the District Magistrate is satisfied that on the evidence taken there is a clear case for charging and trying the accused, and there is no reason or desiring further magisterial examination, I think it is ordinarily his duty to refer the case to this Court, which can make a suitable order, and not to direct a further enquiry by a Magistrate." This Court in *Queen-Empress* v. *Balasinnatambi* and others(1) agreed with the decision of the Calcutta High Court but did not indicate in their judgment the nature of the order to be passed under section 437 that would be appropriate to the grounds on which the revisional powers of the District Magistrate are to be exercised.

It is clear from *Queen-Empress* v. *Amir Khan*(2) and *Hare Dass Sanyal* v. *Saritulla*(3), therefore, that the balance of authority is in favour of the view that the District Magistrate, when he has come to the conclusion, as in this case that, *primâ facie*, the prosecution evidence is reliable, ought to have referred the case to this Court for orders instead of setting it aside himself on the grounds formulated by him in his order. It may be different when he exercises his powers for other reasons than mere misappreciation of evidence. I am inclined to take this view. My reasons are these. Where a Court competent to decide whether the accused is guilty or not, holds that he is not guilty on a consideration of the evidence adduced by the prosecution, that finding should, if at all, be set aside only by a Court competent to set aside such finding of fact, that is, by the High Court under section 439 of the Code of Criminal Procedure read with section 423. The District Magistrate, it is clear, is not entitled to come to a final conclusion on the evidence and hold that a *primâ facie* case has been made out because in that case the proper order would be one to direct a charge to be framed and try the accused on that charge. Prinsep, J., no doubt in the case of *Haridass Sanyal* v. *Saritulla*(3) was of opinion that he had such power but I agree with Wilson, J., who delivered the judgment of the majority of the Judges that that view is not correct for the reasons given by him in p. 620. In addition to those reasons I would add that section 436 which

(1) I.L.R., 14 Mad., 334. (2) I.L.R., 8 Mad , 337.
(3) 15 I.L.R., Calc., 621.

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empowers the District Magistrate to direct a committal which involves the framing of a charge and for which a finding that a *primâ facie* case has been made out is a preliminary condition supports the same view. The case in *Queen Empress* v. *Munisami* and others(1) apparently accepts that principle. The proper function of the District Magistrate is therefore criticism He ought to point out to the Subordinate Magistrate the reasons which may have led to an incorrect conclusion, reasons which have been held to justify the High Court in interferring with the findings of fact, to enable that Magistrate to come to a right conclusion and not dictate to him, the decision to be pronounced. In case of a difference of opinion upon the evidence he ought to refer the matter to the High Court which has also the powers of that Appellate Court to deal with that reference. The procedure above indicated keeps in view the ordinary distinction between the revisional and appellate jurisdiction of a Court. A power to order what is practically a retrial, to give a complainant another opportunity of re-examining his witnesses and adducing fresh evidence ought not to be presumed as it is unjust to the accused and opens a wide door to perjury and corruption. That the case is only one of discharge, which is not ordinarily at any rate a bar to a fresh prosecution, supports the same view as the injustice, if any, to the complainant may be thereby remedied. That it will be generally inquired into by the same Magistrate and good reasons will have to be adduced by the complainant for coming to a different conclusion is a sufficient guarantee that this privilege is not likely to be abused.

Assuming the District Magistrate has the power he ought to exercise it subject to the limitations placed by the High Court upon their own larger powers. It has been suggested that the High Court refuse to interfere for the reason that the evidence has already been considered by two Courts. I have already pointed out that this is not the ground of decision. This was not so in the case reported in Weir, p. 257, nor in the cases in 5 Madras High Court Appeal and II Madras series, p. 38. The right of appeal given to the Local Government against a judgment of acquittal by an Appellate Court does not support that argument.

(1) I.L.R., 15 Mad., 39.

For the above reasons I am of opinion that the order of the District Magistrates should be set aside and it is ordered accordingly. But as the records have been called up and the District Magistrate considers the view of the Second-class Magistrate unsustainable, I have heard counsel on the evidence to see whether this Court ought to interfere in revision.

The prosecution case is that an unregistered sale deed executed by the father of the first accused in favour of the complainant's uncle more than 35 years ago was taken by him to the first accused for preparing an application for transfer of patta; that the latter gave it to a petition writer Subban Singh to prepare the transfer application in one Somayya's house, and when after preparing the application, the petition writer went to the Sub-Registrar to show him this and a lease deed which he had prepared, leaving the sale deed in Somayya's house, the second accused took it and rushed into the house of the first accused with it. The prosecution second and fourth witnesses are admittedly interested in the complainant, no independent witnesses of Kadiri are produced. No explanation is given for the necessity of this application after a lapse of 30 years. There is no explanation whatever why it was necessary to take the documents to the Sub-Registrar. No motive on the part of the second accused is alleged much less proved. He is a Muhammadan while the first accused is a Hindu. For these reasons I see no reason to interfere with the order of discharge.