than they affect the sixth accused, and further considering the fact that the sentence passed on them is a light sentence for the offence of dacoity, and a sentence, which might be increased on a retrial, we think that we are not called on to interfere on their behalf in revision.

APPELLATE CRIMINAL.

Before Mr. Justice Miller and Mr. Justice Munro.

NARAYANA MUDALY AND ANOTHER

v.

EMPEROR.*

1907. November 26.

Criminal Procedure Code, Act V of 1898, ss. 257, 537—Refusal of Magistrate to issue process to witnesses where none of the grounds mentioned in s. 257 exist is illegal.

The refusal of a Magistrate to issue process to witnesses named by the accused, when such refusal, in regard to any particular witness, is not based on any of the grounds mentioned in section 257 of the Code of Criminal Procedure, is an illegality which cannot be cured by section 537 of the Code.

A conviction under such circumstances is illegal and will be set aside. *Emperor* v. *Purushottam*, (I.L.R., 26 Bom., 418), followed.

THE accused were tried by the Second-class Magistrate of Gudiyattam on charge of offences under sections 341, 323 and 327 of the Indian Penal Code.

Charges were framed against the accused, who cited 71 persons as witnesses for the defence. The Magistrate refused to issue process for more than 24 of the witnesses. Some of these were examined and the accused insisted on having all the witnesses named by them summoned and examined. This the Magistrate refused to do and convicted the accused. The material portion of his judgment on this point is as follows :—

"It was only after the accused entered on their defence that the accused headed by No. 3 began to display their true spirit of rowdyism as detailed below. They refused on two hearing dates, 6th

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* Criminal Revision Case No. 393 of 1907 presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the decision of J.C. Stodart, Esq., Joint Magistrate of Vellore, in Criminal Appeal No. 57 of 1907 presented against the sentence passed by M.R.Ry. T. S. Venkatarama Ayyar, Second-class Magistrate of Gudiyattam in C C. No. 142 of 1907.

NARAYANA MUDALY v. EMPEROR

and 15th July 1907, to recross-examine the prosecution witnesses saying that they had not obtained copies of depositions and that they intended to engage a pleader. The accused filed a list containing 71 names to be examined on their defence: the list was ordered to be minimised and reduced to a dozen at the utmost. The accused put in a revised list containing 27 names saying that they could not further reduce the number. The accused were asked to give the reasons for summoning each witness the number being too many, and this also they declined to do. They applied for an adjournment to apply for a transfer elsewhere: and it was rejected on 24th July 1907 on the ground that it was put in to defeat the ends of justice and the 27 defence witnesses were summoned for the 3rd instant. On this date two witnesses were examined and the accused put in an application for time to move the Subdivisional Magistrate for transfer making certain out-of-the-way and clearly vexatious allegations therein. The request could not be complied with, the examination of the defence witnesses having begun and having been adjourned to the 13th instant. The accused in the meanwhile put in an application to the Subdivisional Magistrate for a transfer of the case and it was declined on the ground that the reasons alleged were clearly vexatious. Seven witnesses were examined on the 13th, 9 on the 14th August 1907, 2 on the 15th instant and two more this day, thus making up 25 in number. One witness was dispensed with by the accused and the other's name is not correctly stated. On the 14th instant the accused presented an application for adjournment to enable them to move the District Magistrate. It was rejected as too late, and the accused presented an application just when the last defence witness was being examined this day, that all the 71 persons including those already enquired into, should be enquired into and the seventh prosecution witness's presence secured. This was rejected as too late."

An appeal was presented by the accused to the Joint-Magistrate of Vellore, who dismissed it under section 421 of the Code of Criminal Procedure.

A revision petition was put in in the High Court under sections 435 and 439.

Mr *John Adam* and *C. V. Ananthakrishna Ayyar* for petitioners.

Mr. *P. R. Grant* for the Public Prosecutor *contra*.

ORDER.—The Magistrate's order read to us by Mr Adam but which is not among the papers sent up shows that the Magistrate

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.