WHITE, C.J., AND MILLER — MUTHUVERRU MUDALIAR v. VYTHILINGA MUDALIAR.

Vythilinga did not give any consent or receive valuable consideration. These findings were accepted and the second appeal was dismissed with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Munro and Mr. Justice Pinhey.

1908. September 30. October 14.

VENKATA SUBBA REDDI AND ANOTHER (PETITIONERS),

v.

AYYALU REDDI (RESPONDENT).*

Criminal Procedure Code, Act V of 1898, ss. 435, 437—Sessions Judge can order further inquiry on the ground of misappreciation of evidence.

Under sections 435 and 437 of the Code of Criminal Procedure, the Sessions Judge has power to direct further inquiry by a Subordinate Magistrate when, in his opinion, an accused has been discharged by such Magistrate in consequence of an improper appreciation of evidence.

Lakshmi Narasappa v. *Mekala Venkatappa*, [(1908) I.L.R., 31 Mad., 133], dissented from.

Queen-Empress v. *Balasinnatambi*, [(1891) I.L.R., 14 Mad., 334] followed.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of K. C. Manavedan Raja, Sessions Judge of North Arcot, in Criminal Revision Case No. 7 of 1907, setting aside the order of discharge passed by the Sub-Magistrate of Wandiwash in Calendar Case No. 176 of 1907.

The facts are sufficiently stated in the judgment.

P. S. Parthasarathi Aiyangar and *G. S. Ramachandra Ayyar* for petitioners

The Acting Public Prosecutor for the Corwn.

L. A. Govindaraghava Ayyar for respondent.

ORDER (MUNRO, J.).—In this case certain persons were accused of theft and discharged by a Sub Magistrate. The Sessions Judge on revision held that on the evidence the accused persons should not have been discharged. He therefore set aside the order of discharge and directed further inquiry. It is contended before us that the Sessions Judge had no jurisdiction to set aside the

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Crimin al Revision Case No. 271 of 1908.

order of discharge on the ground of misappreciation of evidence, and that on the merits the order of discharge should not have been interfered with.

The powers of a Sessions Judge in such a case are defined in sections 435 and 437 of the Criminal Procedure Code Under section 435 a Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of his jurisdiction for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order. Section 437 provides that, on examining any record under section 435, the Sessions Judge may direct further inquiry into the case of any person who has been discharged. Reading the two sections together it seems to me to be clear that the Sessions Judge may direct further inquiry in such a case if he thinks the order of discharge is incorrect, illegal or improper, and this being so, I am unable to see how it can be argued that he cannot direct further inquiry on the ground of misappreciation of evidence if, in his opinion, misappreciation of the evidence has led to the passing of an incorrect or improper order of discharge. No restriction is placed by the sections upon the grounds on which a Sessions Judge may order further inquiry, and I do not see why we should read into the sections restrictions which are not there and which are not imposed by any other provision of the Criminal Procedure Code. In *Queen-Empress* v. *Balasinnatambi*(1), the Sub-Magistrate had discharged the accused on the ground that the evidence was worthless. The Sessions Judge took a different view of the evidence and referred to the High Court the question whether it was competent to him to order further inquiry, additional evidence not being forthcoming. The Full Bench answered the question in the affirmative. There are sufficient indications in the judgments of the learned Judges that they considered misappreciation of evidence to be a good ground for ordering further inquiry, and indeed misappreciation of evidence was the ground on which the Sessions Judge desired to interfere. I am therefore of opinion that the Sessions Judge had power to set aside the order of discharge in the present case.

The objection on the merits seems to be an after thought, as no reference is made to it in the revision petition. Having,

(1) (1891) I.L.R., 14 Mad., 334.

MUNRO AND PINHEY, JJ.

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however, heard the case on the merits, I think the Sessions Judge has shown sufficient grounds for ordering further inquiry, and would dismiss the revision petition.

PINHEY, J.—The petitioners, the first of whom is the Village Munsif of Alathur, were accused of the offence of theft in a building, punishable under section 380, Indian Penal Code, and discharged by the Sub-Magistrate of Wandiwash.

Being of opinion that a *prima facie* case had been made out against the accused and that it was for them to prove the defence they set up, the Sessions Judge, North Arcot, under section 437, Criminal Procedure Code, directed the District Magistrate to make, either by himself or by any Subordinate Magistrate, further inquiry into the case.

We are asked to revise the order of the Sessions Judge. It is contended that the Sessions Judge had no jurisdiction to set aside an order of discharge on the ground of misappreciation of evidence, as the only Court empowered to set aside a finding of fact is the High Court acting under section 439, Criminal Procedure Code.

This revision petition was, no doubt, filed in consequence of the decision of Mr. Justice Sankaran-Nair in *Lakshmi Narasappa* v. *Mekala Venkatappa*(1). Mr. Justice Wallis, sitting as Judge of the Admission Court, doubted the correctness of the above decision and directed this petition with others to be placed before a Division Bench. The decision of Mr. Justice Sankaran-Nair follows that of the Division Bench in *Queen-Empress* v. *Amir Khan*(2) and of the Calcutta Full Bench in *Hari Das Smyal* v. *Saritulla*(3).

A perusal of the Calcutta case shows that, in the opinion of majority of the Judges, the correct procedure for a Sessions Judge or District Magistrate who disapproved of a finding of fact by a Sub-Magistrate was *not* to order further inquiry, but to refer the case to the High Court under section 437, Criminal Procedure Code. Both the decisions quoted were considered by the Full Bench of this Court which decided *Queen-Empress* v. *Balasinnatambi and others*(4), and while the former was expressly dissented from, the latter was only partially followed. Mr. Justice Sankaran-Nair dismisses the Full Bench decision of this Court with the following observation: "This Court in *Queen-Empress*

(1) (1908) I.L.R., 31 Mad., 133. (2) (1885) I.L.R., 8 Mad., 336.
(3) (1888) I.L.R., 15 Calc., 608. (4) (1891) I.L.R., 14 Mad., 334.

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."

In my opinion the learned Judge has misunderstood the Madras Full Bench decision, and what he considers an omission on the part of the Judges was in fact a deliberate refusal to follow the Calcutta ruling in its entirety. Section 437, Criminal Procedure Code, makes no provision for a reference to the High Court at all. Such a reference could only be made under the general section 438. It is section 437, Criminal Procedure Code, however, that lays down the procedure to be adopted by a Sessions Judge or District Magistrate (and the High Court also) in the case of an improper order of discharge in a warrant case triable by a Magistrate, and the only procedure prescribed is an order for further inquiry. It is clear from the answer of the Madras Judges to the question referred to them that they realised the error into which the Calcutta Judges had fallen by reading into section 437, Criminal Procedure Code, matter that it did not contain. The question referred was as follows: "Whether, under section 437, Criminal Procedure Code, it is competent to a District Magistrate, Sessions Court or High Court or any of them to direct further inquiry or a retrial to be held when additional evidence is not forthcoming." All the four Judges answered in the affirmative, and three of them further intimated to the Sessions Judge who had made the reference that it was competent to him to order further inquiry under section 437 in the particular case reported for orders. This latter intimation can only have been added to mark their disapproval of the procedure indicated by the Calcutta Bench. The facts of the case in *Queen-Empress* v. *Balasinnatambi and others*(1), which are set forth in the judgment, show that the sole ground on which the Sessions Judge proposed to interfere was that the Sub-Magistrate had not properly sifted the evidence or, in other words, that he had misappreciated it. If the Madras Judges had been prepared to endorse the views of Wilson, J., in *Hari Dass Sanyal* v. *Saritulla*(2) in their entirety, it is clear that they would have

(1) (1891) I.L.R., 14 Mad., 334. (2) (1888) I.L.R., 15 Calc., 608

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informed the Sessions Judge that the appropriate order in the case was *not* one for further inquiry under section 437, but a reference to themselves, as they alone had power to set aside a finding of fact under section 439, Criminal Procedure Code. In fact they would have proceeded to deal with the case referred on the merits and passed the necessary orders themselves.

I am of opinion that the decision in *Lakshmi Narasappa* v. *Mekala Venka'appa*(1) is directly opposed to that of the Full Bench of this Court in *Queen-Empress* v. *Balasinnatambi* 2) and that it cannot be followed. I hold that the Sessions Judge had jurisdiction to make the order he did in the present case under section 437, and as there is no reason to suppose that he misused the discretion vested in him by law, the petition now before us must be dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Miller and Mr. Justice Sankaran-Nair.

1908. December 8.

PALANIANDY GOUNDAN

v.

EMPEROR.*

Criminal Procedure Code, Act V of 1898, s. 350—Application of section to cases withdrawn from one Magistrate and transferred to another—'Trial' what is within s. 350 (a).

The words of section 350 of the Code of Criminal Procedure are applicable to cases in which the case under enquiry on trial is withdrawn from one Magistrate, who thereupon ceases to exercise jurisdiction *therein* and is transferred to another.

A preliminary enquiry by a Magistrate into a case exclusively triable by the Court of Session is not a 'trial' before framing a charge within section 350 (*a*) and where such an enquiry is transferred, the Magistrate is not bound to rehear the case *de novo*

Mohesh Chandra Saha v. *Emperor*, [(1908) I.L.R., 35 Calc., 457], followed.

PETITION, under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of M. Abdul Hie Sahib, Head-quarters Deputy Magistrate of Salem, in a Criminal Miscellaneous Petition in Petition Revision Case No. 10 of 1908.

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(1) (1908) I.L.R., 31 Mad., 133. (2) (1891) I.L.R., 14 Mad., 334.

* Criminal Revision Case No. 538 of 1908.