APPELLATE CRIMINAL.

Before Sir Murray Coutts Trotter, Kt., *Chief Justice*,
Mr. Justice Waller and Mr. Justice Anantakrishna Ayyar.

1927, December 14.

PUBLIC PROSECUTOR (APPELLANT),

v.

PONNUSWAMI NAYAK AND FOUR OTHERS (ACCUSED), RESPONDENTS,*

AND

In re RAKKAPPA PILLAI AND TWO OTHERS (ACCUSED 3, 7 AND 8).†

Criminal Procedure Code, ss. 439 and 423—Improper discharge —Jurisdiction of High Court to set aside the discharge in revision and order retrial.

The High Court has under sections 423 and 439 of the Criminal Procedure Code (V of 1898) jurisdiction to set aside an improper order of discharge and direct that the person so discharged be committed for trial.

APPEAL by the Public Prosecutor against acquittal in Sessions Case No. 11 of 1927 in Sessions Court, Madura, and Case taken up in Revision by the High Court calling upon the accused Nos. 3, 7 and 8 in P.R.C. No. 10 of 1926 on the file of the Court of Sub-Magistrate of Nilakkottai (Madura District) to show cause why the order of discharge passed in their favour in the above case should not be set aside and why they should not be committed to take their trial before the Sessions Court.

The following paragraph is taken from the Judgment of the High Court:—"Eight persons were charged with the murder of one Venkatarama Reddi. The committing Magistrate discharged three of them and committed the rest for trial. At the trial one of the assessors

* Criminal Appeal No. 449 of 1927.
† Criminal Revision Case No. 884 of 1927.

thought that all the five accused were guilty. Two thought that one of them, the fifth, was innocent and the fourth, that two, the third and the fifth, were. The Sessions Judge, however, acquitted all of them. Against this acquittal, the Public Prosecutor has appealed and we have called upon the three accused who were discharged by the committing Magistrate to show cause why they should not be committed for trial."

Further facts appear from the judgment.

Public Prosecutor (*J. C. Adam*) for the Crown argued on the evidence that the acquittal was wrong, and that the accused who were acquitted and those who were discharged were equally guilty of murder.

Nugent Grant (with *K. P. Gopal Menon* and *K. Kuttikrishna Menon*) for all the accused, after arguing on the merits, contended that the High Court under section 439 had no jurisdiction in revision to set aside an order of discharge made by a Magistrate and to direct a retrial. Some portions of the evidence such as those relating to *alibi* have not been well considered by the Sessions Court and it is better that the whole case be sent back to the lower Court.

Public Prosecutor.—The High Court has jurisdiction. As a Court of revision, it has all the powers of an appellate Court; and as such it can order a retrial of a person improperly discharged; see sections 435, 439 and 423, *Empress* v. *Ram Lall Singh*(1), *Hari Dass Sanyal* v. *Saritulla*(2), *Emperor* v. *Varjivandas*(3).

JUDGMENT.

After stating the facts extracted above, the Judgment continued :—As we are ordering a retrial, we propose to say as little as possible about the evidence in the case. A great deal of it relates to the parts said to have been played by two of the discharged accused. It is alleged that, while the acquitted accused were parleying with the murdered man, these two drove slowly past in a

(1) (1883) I.L.R., 6 All., 40. (2) 1888) I.L.R., 15 Calc., 668.
(3) (1902) I.L.R., 27 Bom., 84.

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motor car and instigated them to shoot. The committing Magistrate, on the strength of certain *alibi* evidence, which the Sessions Judge considered to be patently false, came to the conclusion that this part of the story could not be true. The man who is said to have addressed the deceased just before he was shot is the son of one of these persons. If the *alibi* evidence were true, he was as much entitled as his father to be discharged and yet he was committed for trial.

It is obvious that, if this part of the story is an invention, the rest of it is entitled to no credit. The committing Magistrate acted on evidence that the Sessions Judge rejected as false. At the trial, this particular issue, the two accused who were specially affected by it having been discharged, attracted less attention than it deserved. It was, however, a most material issue and we are of opinion that it could not be properly tried in the absence of the persons whom it most concerned. *Ex hypothesi* they were the instigators of the murder and they should certainly have been committed for trial along with their supposed instruments.

In Criminal Appeal No. 449 we set aside the acquittal of the respondents and direct that they be retried on the same charges. As regards the discharged men, Mr. Grant has expressed a doubt as to our jurisdiction to set aside the discharge and direct their committal for trial. A similar objection was taken before STRAIGHT, J., in *Empress* v. *Ram Lall Singh*(1), and he negatived it, holding that he had power to set aside an order of discharge and direct a committal. With respect, we think that his decision was right. Section 439 of the Criminal Procedure Code confers on us the powers granted to a Court of Appeal by section 423 and one of

(1) (1883) I.L.R., 6 All., 40.

the powers so granted is that of directing an accused to be committed for trial. The same view was expressed by WILSON, J., in *Hari Dass Sanyal* v. *Sarifulla*(1):

"The High Court under section 423, embodied in section 439, can set aside the order of discharge, and direct a charge to be framed and tried by the proper Court. It can, under section 437 and probably also under section 439, order a further enquiry instead of a committal."

This decision was followed in *Emperor* v. *Varjivandas* (2), where it was held that the High Court had jurisdiction under sections 423 and 439, Criminal Procedure Code, to set aside an order of discharge and to direct that a person improperly discharged be committed for trial. We set aside the order discharging the three respondents and direct that they be committed for trial on the same charges as the other five accused.

N.R.

(1) (1888) I.L.R., 15 Calc., 608, at 619. (2) (1902) I.L.R., 27 Bom., 84.