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fasli, 1279 fasli, and 1280 fasli, remaining in his hands undivided. There is nothing in the revenue law which restricts a lambardár or other co-sharer, who may make collections, to discharge arrears of Government revenue out of the collections of the particular year in which the arrear may accrue. It would be at least inconvenient to hold that, having in his hands profits to meet the Government demand, the respondent, instead of applying these profits to the discharge of the demand, should be driven to have resort to a suit against each co-sharer.

SPANKIE, J.—I adhere to the opinion expressed in my judgment of the 8th June, 1875. Nothing that I have heard leads me to think that my view is incorrect.

BEFORE A FULL BENCH.

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February 19.

(*Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.*)

IN THE MATTER OF HARDEO.

Act X of 1872, s. 297—High Court—Powers of Revision—Judgment of Acquittal.

The High Court is not precluded by a judgment of acquittal from exercising its powers of revision under s. 297, Act X of 1872. *Queen* v. *Bisheshar Pandey* (1) observed upon.

Per TURNER and SPANKIE, JJ.—Such powers can only be exercised where the judgment of acquittal has proceeded on an error of law and not where it has proceeded on an error of fact (2).

HARDEO was tried by the Court of Session on a charge under s. 471 (using as genuine a forged document), Indian Penal Code, and was acquitted by that Court, in accordance with the opinion of the assessors, the Court remarking that, as there was "such a serious amount of doubt as to the offence charged and so little prospect of a substituted charge being established, the accused ought not to be convicted." An application was made to the High Court on behalf of the persons who had instituted proceedings against him praying that the record of the case might be called for, and a new trial ordered, on the ground that the facts found by the

(1) H. C. R., N.-W. P., 1874, p. 357.

(2) So held in a case of conviction—*Petition of Belilios*, 12 B. L. R. 249. As to "material error," see 12 B. L. R. 253, foot-note.

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Court of Session were sufficient to convict him of the offence charged against him.

The Court (Stuart, C.J.) made the following reference to the Full Bench :—

The question raised in this petition has already been determined in this Court in the case of *Queen* v. *Bisheshar Pandey* (1) before Mr. Justice Turner, who was of opinion that we had no power to disturb an acquittal save on the appeal of Government, and that therefore, I presume, a private prosecutor could not apply for *revision* of a judgment of acquittal; and there is also a ruling by Mr. Justice Markby of the Calcutta Court (2) to the same effect. I am inclined to think that these learned Judges are right, but the question is not without difficulty and doubt.

On the other hand, the powers of revision by this Court under s. 297 of the Criminal Procedure Code are very large, literally unlimited, and there might be great hardship in preventing a private prosecutor from showing to this Court, in the way of *revision*, that the facts and evidence relied on in defence afforded no answer whatever to the charge; and it might be argued to be impolitic and scarcely intended that, while the Government can not only *appeal*, but, according to the judgments above referred to, can also apply for *revision*—and in all cases—a private prosecutor has no remedy by resort to this Court against the ignorance, and it may be the corruption, of a local Magistrate or Judge exculpating and acquitting an offender against the Penal Code in the face of the clearest evidence and the undoubted facts, even where these facts are found by such Magistrate or Judge himself.

In the present case the private prosecutor pleads that "the facts found by the Sessions Judge were sufficient to convict the defendant under s. 471, if not of direct forgery." This is a question that appears to be covered by the terms of s. 297, and revision is not necessarily the same thing as an appeal. The object of s. 272 of the Criminal Procedure Code, which gives an appeal to Government against a judgment of acquittal, was

(1) H. C. R., N.-W. P., 1874, p. 357.

(2) *Queen* v. *Hatu Khan*, 12 B. L. R. App. 22; S.C., 21 W. R. Cr. 21. See also *Petition of Bagram*, 19 W. R. Cr. 52; *Okhoy Teli* v. *Modhoo Sheikh*, 19 W. R. Cr. 55.

perhaps simply to allow the public prosecutor in such a case a rehearing on the merits, without any desire to limit or curtail the powers of revision, whatever the extent of these may be. I refer the question to a Full Bench of the Court.

Mr. *Howard*, for the petitioners, referred to *Queen* v. *Gora Chand Gopee* (1).

Cur. adv. vult.

The following opinions were delivered by the Full Bench:—

PEARSON, J.—The question on which our opinion is asked I understand to be whether an acquittal precludes revision under s. 297, Act X of 1872; and my answer to the question is in the negative. The terms of that section empower the High Court in any case, either called for by itself or reported for orders, or coming to its knowledge, in which it appears that there has been a material error in any judicial proceeding of any Court subordinate to it, to pass such judgment, sentence or order thereon as it thinks fit. There is nothing in these terms restricting the High Court's action in the exercise of the powers conferred upon it to cases in which persons have been convicted of an offence. On the contrary, it seems to me that the High Court is fully warranted by these terms in ordering a new trial of a person who has been acquitted by reason of some material error in a judicial proceeding of a subordinate Court. The provisions of s. 272 of the Code are quite distinct from those of s. 297 and do not militate with them. Whether, in the particular case out of which this reference to the Full Bench has arisen, there has been any such material error in the proceedings of the lower Court as to call for revision is another question, which we are not asked to decide.

TURNER, J.—In *Regina* v. *Bisheshar Pandey* (2) an application was made to me to admit for revision the proceedings in a Sessions trial, in which the Sessions Judge had acquitted a person accused of adultery on the ground that he was not satisfied with the evidence of his guilt and inclined to accept the evidence adduced by the accused in support of a plea of *alibi*, and the petitioner contended that the application ought to be admitted because the guilt of the accused

(1) 1 Ind. Jur., N. S. 177; S.C., 5 W. R. Cr. 45.

(2) H. C. R., N.-W. P., 1874, p. 357.

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was proved by the admission of the woman who was at the same time on trial for abetment of the offence.

In refusing that application I inadvertently used language which warrants the conclusion that in no case of acquittal can this Court interfere as a Court of Revision. I am not prepared to maintain that view. Where there has been an acquittal on the merits, where an accused person has been acquitted because the Court by which he has been tried holds the evidence insufficient to prove his guilt beyond reasonable doubt, I am still of opinion that this Court cannot interfere as a Court of Revision. But where the acquittal has been brought about by a material error in the proceeding, and by material error I understand such an error as makes the proceeding bad in law, then I hold it is competent for this Court to interfere. Now it is not only not an error on the part of the Court, but it is the duty of the Court to determine whether evidence offered is in its judgment reliable or not. Consequently, although this Court might be disposed to give credit to evidence distrusted by a subordinate Court, it could not interfere on this ground as constituting a material error in a judicial proceeding. On the other hand, if the facts found by the subordinate Court constituted the offence charged, and through error of law the subordinate Court held that they did not constitute the offence, and therefore acquitted the accused, or if the subordinate Court improperly excluded relevant evidence, and consequently acquitted the accused, in both these cases I should hold that this Court had power to intervene as a Court of Revision.

It has been suggested that the first clause of s. 297 is controlled by the succeeding clauses. Although some of the cases mentioned in these clauses might be held to constitute material error in a judicial proceeding and so to fall within the purview of the first clause, I have already in other cases expressed my opinion that the first clause is not controlled by the succeeding clauses.

There remains the question whether, in the case referred, a private complainant may set the Court in motion. In my judgment, in this as in other cases in which the Court has a discretionary power to call for cases for revision it is competent to the Court to allow a private person to move it to exercise its powers.

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SPANKIE, J.—The prayer of the petition which gave rise to the reference is that the records of the case may be called for, and an order for a new trial be given—and the reason assigned for the prayer is that the facts found by the Sessions Judge were sufficient to convict the defendant under s. 471, if not of direct forgery.

I do not quite gather from the order of reference what we are asked to determine. If we are asked whether the Court could entertain the petition under s. 297 so far as to send for the record, I would say that it could be sent for if the petition discloses any material error in the proceedings of the Court below. But it seems to me that nothing of the kind is disclosed by the petition in the case brought to our notice. The petitioner expresses his opinion that the facts found on the evidence by the Sessions Judge were sufficient to convict the defendant—but no error or defect either in the charge or in the proceedings on or before trial, on account of the improper admission or rejection of any evidence, has been shown, whereby there has been a failure of justice affecting the due conduct of the prosecution. The proceedings of the Court have been regular, but the Judge on the evidence finds that the charge has not been established. He therefore acquits the prisoner. There is no appeal allowed by law to a private prosecutor from an order of acquittal—and in my opinion there is no power given to this Court to revise an order of acquittal on the facts found on the evidence. Any revision must proceed on the ground of a material error in some judicial proceeding. When no such errors such as those referred to above are pointed out, unless there is something that could be considered to be a material error in law, all interference under the first paragraph of s. 297 seems to be barred. It will further be observed that though where the material error is such that the Court is empowered to pass such judgment, sentence or order as it thinks fit, and though these words seem to be almost unlimited in their range, still there does appear to be some limit put to these cases in which a new trial may be ordered. When an accused person has been improperly discharged there is power to order commitment, there is power to alter a finding and sentence and power to annul conviction, power to annul improper and to pass a proper sentence, and power in certain cases, of which this

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before us is not one, to annul the trial and order a new trial before a competent Court. But there is no express power given to order a new trial in the case of an acquittal on the ground that the facts found might warrant conviction. From these considerations I come to the conclusion that, as there is no appeal to a private prosecutor in the case of an acquittal, so there can be no revision by the Court merely of the finding on the evidence, and if there is a revision at all, it must be on some purely material error (in law) in the proceedings.

OLDFIELD, J.—In my opinion it was not the intention of the legislature that the power of revision given to this Court by the first paragraph in s. 297, Criminal Procedure Code, to pass such judgment, or sentence or order as it thinks fit, when a material error in any judicial proceeding of a Court in any case has come to its knowledge, should only be exercised in the particular instances of error and in the particular manner given in the succeeding paragraphs of s. 297. I apprehend that those paragraphs are merely illustrative of the operation of the law in particular instances, and that this Court can and should revise any material error in a judicial proceeding coming to its knowledge, by passing such judgment, sentence or order as it thinks fit.

In this view of the law the fact that an accused person has been acquitted on trial will not operate to take away the general power of revision, when there has been a material error in any judicial proceeding in the case. The law, by s. 272, Criminal Procedure Code, allows the High Court to entertain an appeal from judgments of acquittal, at the instance of the Local Government, and since it can interfere in cases of acquittal on appeal, I conclude it can *a fortiori* under its power of revision; and without such a power in this Court there would be danger of miscarriage of justice. Such too was the view of the law under the old Criminal Procedure Code taken in *Queen* v. *Gora Chand Gopee* (1) by the Calcutta Court, Peacock, C. J., Trevor and Norman, JJ.

I am not called upon to express an opinion whether there has been a material error in the case within the meaning of s. 297.

(1) 1 Ind. Jur., N.S., 177; S.C., 5 W. R. Cr. 45.

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STUART, C.J.—This case has come back from the Full Bench with the opinions of the Judges, and it is now to be disposed of by me as the referring Judge.

The majority of the Court, including myself, hold generally that we have and may exercise in such a case as the present the revisional power conferred by the first general substantive enactment of s. 297 of the Criminal Procedure Code. Mr. Justice Spankie is of a different opinion, holding that, as there is no appeal to a private prosecutor in the case of an acquittal, there can be no revision as here claimed.

Some of my colleagues, however, do not appear fully to have apprehended my reference as I intended to put it, and if I could have anticipated their difficulty I would have endeavoured to have put the question referred in clearer terms than I have used. But, looking at the case in the light in which its mere statement would be at once understood by the legal profession at home, it did not occur to me to be more precise, but let me here explain myself more clearly by a brief reference to the opinions of my colleagues. Mr. Justice Turner comes nearer my own views of the case in the sense I have alluded to, when he expresses himself favourably as regards our revisional power in all cases where there is error in law, adding that, "if the facts found by the subordinate Court constituted the offence charged, and through error of law the subordinate Court held that they did not constitute the offence, and consequently acquitted the accused, or if the subordinate Court improperly excluded relevant evidence, and consequently acquitted the accused, in both these cases I should hold that this Court had power to intervene as a Court of Revision"—his meaning, I presume, being that, if the subordinate Court acquitted from an ignorant conception of the legal insufficiency of the facts, this Court could interfere. On the other hand, Pearson, Spankie, and Oldfield, JJ., although differing in opinion as to our powers of revision in cases of acquittal, do not appear to have considered that legal error or material error was shown in the reference, and that it had yet to be ascertained. Mr. Justice Spankie in such a case as this is against any revision on our part at all, while I suppose the meaning of the opinion of Pearson

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and Oldfield, JJ., is that we may send for the record and then see what the error, if any, was.

But there was a question preliminary to such an order which I intended should be first entertained and decided, *viz.*, whether the petition before us shows, *on the face of it*, a case which we can entertain at all, in other words, assuming the statement in the petition to be true, does it on its face show legal error? This is a question that lies on the threshold of the case, and must be first determined before we even admit the application, much more before we make any order for the record. The Sessions Judge acquitted the accused, and it is alleged by the petitioner that not merely the facts, but the facts found by the Sessions Judge himself, were sufficient to convict. Now does such a statement show or does it not show, *on the face of it*, legal or material error? There is here evidently the same question that is raised, the same legal or material error that is intended by, for example, the demurrer to an indictment at home, and legally demonstrated when well taken as a plea—for I think any one acquainted with the principle of the English demurrer in criminal pleading must perceive at once that the principle here sought to be applied is analogous.

Such was the reference I intended, and the question involved appeared to me to be a very simple one, and sufficient to raise the question and enable us to come to a decision as to the powers of revision given to High Courts in all cases. It was occasioned not only by the consideration I had given to the powers of this Court under the Criminal Procedure Code, but also by the judgments alluded to in my order of reference. No prosecutor other than the Government can appeal against a judgment of acquittal. This power, however, is expressly given to the Government by s. 272 of the Criminal Procedure Code. Such an appeal, I take it, is an appeal *on the merits* of the case, that is, an appeal on the ground that the trial in the Court below has miscarried by the reason of the Judge or Magistrate not having sufficiently weighed or considered the evidence, and that there has been an acquittal, whereas there ought to have been a conviction. Such is the appeal which in the case of an acquittal the Government can make. A private prosecutor, however, has no such power.

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But, although a private prosecutor has no such power of appeal against a judgment of acquittal on the merits, can he apply to this Court for *revision* under s. 297 of the Criminal Procedure Code? or in other words, is insufficiency of facts to support a conviction such a legal error, on the face of the acquitting judgment, or otherwise such a revisional question, as can be entertained under s. 297?

In the Calcutta case above referred to, *Queen* v. *Hatu Khán* (1), it was stated that the Deputy Magistrate, after hearing two of the prosecutor's witnesses only, and without taking the evidence of the remaining witnesses named by the prosecutor (two of them at least were present at the trial), and without examining the prosecutor himself in the presence of the accused, passed a judgment of acquittal under s. 211 of the Indian Penal Code. The Magistrate, however, being of opinion that such a judgment was illegal reported the case for orders to the High Court of Calcutta, and it came on for hearing before Markby and Birch, JJ., the judgment of the Court being delivered by Mr. Justice Markby, who said :—" We do not think that we have power to do what the Officiating Magistrate asks, namely, to set aside the acquittal of the prisoner, and to direct a retrial. The proceedings of the Deputy Magistrate were undoubtedly illegal, but they have resulted in the acquittal of the prisoner, and we are not empowered by the Criminal Procedure Code to interfere when a prisoner has been improperly acquitted. If a prisoner has been improperly discharged we may order him to be tried, or to be committed for trial, under the second clause of s. 297. If the Legislature had also intended us to interfere when the prisoner was acquitted, it would undoubtedly have been so expressed in that case." The case (2) which came before Mr. Justice Turner in this Court is scarcely in point. It was one in which the Sessions Judge had acquitted the prisoner, one Bisheshar Pandey, who was charged under s. 497, Indian Penal Code (adultery), and 498 (enticing or taking away or detaining with a criminal intent a married woman), and two other persons, Balak and Mussammat Bhagia, of abetment of the offences, and the private prosecutor presented a petition to this Court in which it was objected that " the acquittal was bad in law, the state-

(1) 12 B. L. R. App. 22. (2) H. C. R., N.-W. P., 1874, p. 357.

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ment of Mussammat Bhagia being sufficient to establish the offences charged against the accused." Such an objection scarcely shows an error in law. It would rather appear to have been error or mistake on the part of the Judge in not giving due effect to the evidence, and that therefore the petition was really an appeal on the merits, which of course could not be entertained. But the petition was entitled in revision, and it suggested that the acquittal was "bad in law" for the reasons stated, and the case was argued before my learned colleague as one in revision, the counsel who appeared against the petition referring to the judgment of Mr. Justice Markby in the Calcutta case (1). In the order passed by Mr. Justice Turner it was stated that the reasons for the acquittal were not obvious and it then proceeded :—"However, there has been an acquittal, and, as the learned counsel who appears for the accused in this Court contends, this Court has no power to disturb an acquittal save on the appeal of Government. The provisions of s. 297 only permit the Court to interfere and order a new trial when an accused person has been discharged without being put on his trial." The judgment of my honorable and learned colleague is so reported, but from the opinion he has recorded in the present case I am glad not to be driven to the conclusion that he necessarily holds against our power to revise.

Respecting, however, the opinion I have quoted of Mr. Justice Turner and the judgment of Mr. Justice Markby in the Calcutta case (1), I stated in my order of reference that I was inclined to think that these learned Judges were right, but that the question was not without difficulty and doubt, suggesting at the same time considerations in favour of the remedy sought in the case before us. I pointed out that "the powers of revision by this Court under s. 297 of the Criminal Procedure Code are very large, literally unlimited, and there might be great hardship in preventing a private prosecutor from showing to this Court, in the way of *revision*, that the facts and evidence relied on in defence afforded no answer whatever to the charge; and it might be argued to be impolitic and scarcely intended that, while the Government cannot only *appeal*, but, according to the judgments above referred to, can also apply for revision—and in all cases—a private prosecutor has no remedy by resort to this Court against the igno-

(1) 12 B. L. R., App. 22.

rance, and it may be the corruption, of a local Magistrate or Judge exculpating and acquitting an offender against the Penal Code in the face of the clearest evidence and the undoubted facts even where these facts are found by such Magistrate or Judge himself," and that the right to present such a petition "appears to be covered by the terms of s. 297 and revision is not necessarily the same thing as an appeal. The object of s. 272 of the Criminal Procedure Code, which gives an appeal to Government against a judgment of acquittal, was perhaps simply to allow the public prosecutor in such a case a rehearing on the merits, without any desire to limit or curtail the powers of revision whatever the extent of these may be." And having now fully considered the question, I have formed the opinion very clearly, first that a private prosecutor who can show on the face of his petition a proper case for revision of a judgment of acquittal is entitled to have it entertained under s. 297 of the Criminal Procedure Code and to an order on it for a new trial, or otherwise as to this Court in such a case might seem proper, and secondly that, inasmuch as the petition in the present case states that the facts found by the Sessions Judge were sufficient to convict, the petition was a petition in revision which the private prosecutor was entitled to present, and that her prayer that the records of the case be called for in order to consider the suggestion for a new trial should be granted.

So far, therefore, I must qualify the concurrence I expressed in favour of the ruling, at least, of Mr. Justice Markby (1). According to the report of the procedure in the lower Court in the case before that learned Judge and Mr. Justice Birch, I think they ought to have entertained the application and to have ordered a new trial; and I am clearly of opinion that the High Court has the power which these Judges appear to repudiate. In the other case in this Court my learned colleague Mr. Justice Turner appears to have considered and, as I have already observed, correctly, that the case before him was really one of appeal on the evidence; but when he goes on to state that "the provisions of s. 297 only permit the Court to interfere and order a new trial when an accused person has been discharged without being put on his trial," I must remark that it does not necessarily follow that

(1) 12 B. L. R., App. 22.

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there is no course open to a private prosecutor, or for that matter to any prosecutor public or private, under s. 297, who complains of an illegal acquittal after trial.

But there is a question of considerable importance which was referred to at the hearing of this case, and as I have formed an opinion of my own on the subject I desire to express it. The question is this, whether the first substantive portion of s. 297 is complete in itself, giving the High Court the full general powers of revision thereby appearing to be conferred, and that the paragraphs which follow this general portion of the section are to be considered merely as examples or illustrations in the way of express enactment, or whether the first part of this section is to be considered as merely introductory to the particular provisions which follow in the succeeding enactments and that these particular provisions contain all the powers given to the High Court? Now, on this subject, I am clearly of opinion that the first part of s. 297 is not merely introductory to the particular enactments which follow, but that it is, on the contrary, a substantive and complete enactment in itself, without any necessary reference to the clauses which follow; and of course the powers thus given to the High Court are large and full, if not unlimited.

It occurs to me to add that, in my opinion, s. 272 giving the Government the power of appeal against a judgment of acquittal did not affect or interfere with, much less take away, any rights or remedies competent to prosecutors, public or private, under s. 297—that s. 272 was simply an addition to the provisions of the Code of Criminal Procedure, and that before it was passed prosecutors could avail themselves of the revisional powers of this Court, whether in the case of acquittal, or otherwise, and that they can do so still.

As regards, therefore, the question of our powers in the case before us and the sufficiency of that case in law, I am of opinion that the petition ought to be admitted and entertained, and I admit it accordingly as an application that may be entertained and disposed of under s. 297 of the Criminal Procedure Code, and I direct the records to be sent for and notice to issue to the other side.