

recovery of the costs of the Court of first instance is dismissed. The appellant will get her costs of this appeal.

Appeal decreed.

1898

MAQBUL
FATIMA
v
LALTA
PRASAD.

1898
July 22.

REVISIONAL CRIMINAL.

Before Sir Louis Kershaw, Kt., Chief Justice, and Mr. Justice Aikman.

QUEEN-EMPRESS v. BRIJ NARAIN MAN.*

Criminal Procedure Code, section 339—Pardon—Tender of pardon by Magistrate inquiring into a Criminal case—Pardon withdrawn after some of the witnesses for the prosecution had been examined—Effect of withdrawal of pardon at that stage.

A Magistrate inquiring into a charge of dacoity tendered a pardon to one of the accused persons. The pardon was accepted, and the person to whom it was tendered was examined as a witness for the prosecution. Subsequently, and after certain other witnesses for the prosecution had been examined the Magistrate, being of opinion that the person to whom pardon had been tendered had not made a full disclosure of the facts of the case, withdrew the pardon, put the person to whom it had been tendered back in the dock, and ultimately committed him along with the other accused to the Court of Session. *Held*, that the commitment of the person whose pardon had been withdrawn must be quashed, inasmuch as he had had no opportunity of cross-examining the witnesses for the prosecution who were examined before his pardon was withdrawn; but that it was not necessary that, if a fresh commitment could be made in time, his trial before the Court of Sessions should be postponed until the trial of his co-accused had been completed. *Queen-Empress v. Sudra* (1) and *Queen-Empress v. Mulua* (2) referred to.

THE facts of this case sufficiently appear from the order of the Court.

Mr. S. S. Singh and Pandit Madan Mohan Malaviya, for the applicant.

The Officiating Government Advocate (Mr. A. E. Ryves) for the Crown.

KERSHAW, C. J. and AIKMAN, J.—This is an application asking this Court to quash a commitment. The applicant Brij Narain Man was implicated in a dacoity: a pardon was tendered

* Criminal Revision No. 345 of 1898.

(1) I. L. R., 14 All., 336.

(2) I. L. R., 14 All., 502.

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to him by the Magistrate under the provisions of section 337 of the Code of Criminal Procedure, and by him accepted. He was in the course of the inquiry examined as a witness. The Magistrate came to the conclusion that Brij Narain Man was wilfully concealing material circumstances relating to the case, in particular, that he designedly in his statement omitted mention of his father and of his brother, who, according to the evidence, were also implicated in the crime. The Magistrate accordingly withdrew the offer of pardon, and, treating Brij Narain Man as an accused person, in the result, committed him along with the other accused persons to the Court of Session for trial under section 395 of the Indian Penal Code. The learned counsel who has appeared in support of the application puts forward two grounds as grounds which would justify us in quashing the commitment of his client. One of these is, that the withdrawal of the tender of pardon by the committing Magistrate is improper. This was explained to us as meaning that there was nothing to show that the statement made by Brij Narain Man when examined as a witness was other than a true and full disclosure of the circumstances within his knowledge relating to the offence and the persons concerned in the committal of the offence. The question whether or not the applicant made a full and true disclosure of all he knew regarding the dacoity is clearly a question of fact. Now, according to section 215 of the Code of Criminal Procedure, a commitment once made by a competent Magistrate can be quashed by this Court only, and only on a point of law. This ground therefore would not justify us in interfering with the commitment. The other ground urged is, that it was illegal for the Magistrate to take the applicant from the witness-box and commit him for trial along with the other accused. Reliance is placed on the decision of this Court in *Queen-Empress v. Sudra* (1), and the case of *Queen-Empress v. Mulra* (2). The latter case was a case in which during the course of a trial a Sessions Judge, being of

(1) I. L. R., 14 All., 386.

(2) I. L. R., 14 All., 502.

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opinion that an accused person to whom a tender of pardon had been made, and who had accepted that pardon and had given evidence at the trial, was giving false evidence, forthwith put him as an accused person into the dock and proceeded at once with his trial. The former case was one on all fours with this, *i.e.*, it was one in which the approver's pardon was withdrawn by the committing Magistrate and he was committed to the Sessions. We are of opinion that upon the second ground the commitment must be quashed, and for this reason. An order committing a person to take his trial at the Court of Session is an order which is passed to his prejudice, and the evidence upon which such an order is made must be the evidence of witnesses whom the accused person has had an opportunity of cross-examining. If he has not had that opportunity, it cannot but be said that he has been prejudiced. Now the order withdrawing the pardon of the applicant and directing that he should be treated as an accused person was made after some, at least, of the evidence in the inquiry preliminary to commitment had been taken, and as regards this evidence it is admitted that the applicant had no opportunity of cross-examining. For this reason we quash the commitment of Brij Narain Man Tewari to the Court of Sessions on the charge under section 395 of the Indian Penal Code, leaving the Magistrate to take such further proceeding against the applicant as he may deem necessary and as may be warranted by law. The learned counsel for the applicant has asked us to lay down that in the event of his client being after a fresh inquiry committed to the Court of Session and this commitment being made before the trial of the other accused has come on, he shall not be tried along with them. It is no doubt true that in the case *Queen-Empress v. Sudra* (1), the learned Judge who decided the case remarked as follows:—"It is, in my opinion, the intention of law that a person to whom a tender of pardon has been made in connection with the offence should not be tried for an alleged breach of the conditions upon which the pardon

(1) I. L. R., 14 All., 336.

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was tendered until the original case has been fully heard and determined." We fully agree with the law as laid down in *Queen-Empress v. Mulua* (1) namely, that the trial of an approver whose pardon is withdrawn at the trial should not be merely a continuation of the trial at which he gave false evidence, but a trial, so far as he is concerned, *de novo*. We are unable to follow the learned Judge who decided the case *Queen-Empress v. Sudra* in the opinion expressed in the passage quoted above. We are unable to find anything in the Code of Criminal Procedure which would render it necessary that an approver whose pardon has been withdrawn by the Magistrate and who has been committed by the Magistrate in time to stand his trial along with the other accused in the case should be tried separately from them. We assume that the commitment referred to is not open to objection on the ground of any illegality such as exists in this case. The joint trial under such circumstances could not, in our opinion, prejudice the approver in any way; nor could it prejudice the accused who are jointly tried with him. We allow this application and quash the commitment of Brij Narain Man Tewari.

APPELLATE CIVIL.

1898
July 22.

Before Mr. Justice Burkitt.

RADHA KISHEN AND ANOTHER (PLAINTIFFS) v. FATEH ALI RAM
(DEFENDANTS).*

Act No. IV of 1882 (Transfer of Property Act) section 59—Act No. I of 1872 (Indian Evidence Act) section 68—Attesting witness—Scribe of a deed.

Held, that a deed may be legally proved by the evidence of the scribe thereof who has signed his name, but not explicitly as an attesting witness, on the margin, and has been present when the deed was executed. *Muhammad Ali v. Jafar Khan* (2), followed.

* Second Appeal No. 858 of 1897, from a decree of Maulvi Muhammad Ismail Khan, Subordinate Judge, of Ghazipur, dated the 9th April 1897 confirming a decree of Munshi Achal Behari, Munsif of Ghazipur, dated the 6th January 1897.

(1) I. L. R., 14 All., 502.

(2) Weekly Notes, 1897, p. 146.