1899

QUEEN-EMPRESS v. MAHABIR TIWARI.

manner as if he were the sole assailant. If without any dacoity the persons concerned had together attacked Gajraj, and in that attack his arm had been broken, but with no evidence as to who struck that particular blow, or even if the evidence showed that one of them other than the accused had struck it, there can be no doubt that all would, by reason of section 34, have been guilty of causing grievous hurt to him. That principle cannot cease to be applicable because the assault happened to be committed in the course of a dacoity, or because the evidence shows that it was not the appellant's hand which in that dacoity struck the blow causing the grievous hurt. The words "such offender" in section 397 therefore include any person taking part in the dacoity who, though he may not have himself struck the blow causing the grievous hurt, is nevertheless liable for the act by reason of section 34, and I am therefore of opinion that this appellant caused grievous hurt to Gajraj at the time of committing the dacoity; that the case falls within section 397, and that I have therefore no power to reduce the sentence. I dismiss the appeal.

REVISIONAL CRIMINAL.

1899
February 21.

Before Mr. Justice Blair.

IN RE THE PETITION OF KALYAN SINGH.*

Criminal Procedure Code, section 253—Discharge—Evidence—Duty of Magistrate in dealing with the evidence produced in a case triable by a Court of Session.

Held, that a Magistrate inquiring into a case triable by the Court of Session is not bound to commit simply because the evidence for the prosecution, if believed, discloses a case against the accused, but he is competent to consider the reliability of such evidence and to discharge the accused if he find it untrustworthy.

THE facts of this case are as follows :—

Six persons were brought before the District Magistrate of Etah who held an inquiry into an alleged offence of dacoity said to have been committed by them. The fact of the dacoity was

* Criminal Revision No. 14 of 1899.

1899

IN RE THE PETITION OF KALYAN SINGH.

testified to by two men, a sowar and an ekka-driver, who represented themselves to have been the victims of the alleged dacoity, and who profess to identify some of the accused as their assailants. A hospital assistant proved that the sowar arrived at the hospital with a broken arm and other marks of lathi blows. One of the accused made a full confession. The Magistrate discharged all the accused, finding that the stories of the ekka-driver and the sowar were "extraordinarily discrepant," though that of the sowar was "in some respects" supported by the confession, and that the proceedings of the police, which led up to the arrest of the accused, were "bogus." After examination and criticism of the evidence the Magistrate came to the conclusion that "every bit of the evidence bears intrinsic traces of falseness," and that "the evidence in the case could not stand the slightest criticism," and that the confession itself was open to the "greatest suspicion."

Alston for the applicant (*complainant*) contended that the Magistrate's order of discharge was, under the circumstances, illegal. *A primâ facie* case of dacoity against the accused had been disclosed. The dacoity itself was proved, and there was evidence connecting the accused with the said dacoity, which evidence, if believed, was sufficient for a conviction. Dacoity was an offence exclusively triable by the Court of Session, and in discussing and criticizing the evidence on its merits, and in taking upon himself the responsibility of discrediting the confession of one of the accused, the Magistrate had "tried" the case as fully and completely as the Court of Session would have done. It was contended that where the evidence sufficed for a conviction and the offence was one exclusively triable by the Court of Session, a Magistrate was bound to commit. A Magistrate had to see that there were "sufficient" grounds for committing the accused for trial, but this did not mean that he was to take it upon himself to reject evidence and confessions according as he thought them true or not. To do so was to "try" the case, which the Sessions Court alone was entitled to do.

1899

IN RE THE PETITION OF KALYAN SINGH.

BLAIR, J.—This is a petition for revision. I am invited to lay down the general proposition that a Magistrate having before him formally and categorically evidence which discloses a case for trial in some court to which such Magistrate might in his discretion commit, is bound so to commit, and that he is wrong in point of law in exercising a discretion and considering the sufficiency of the evidence. The proposition is dangerously large. It is not the practice of Magistrates within the range of my experience, nor I have heard the law so laid down in England. That is the only question I have to answer, for it is not in this case suggested that the Magistrate who refused to commit did not exercise a judicial discretion when he found that there were not sufficient grounds for commitment. The petition is dismissed.

APPELLATE CIVIL.

1899
March 1.

Before Mr. Justice Banerji and Mr. Justice Aikman.

BHOLAI KHAN (DEFENDANT) *v.* ABU JAFAR (PLAINTIFF.)*

Jurisdiction—Civil and Revenue Courts—Appeal—Suit not tried on the merits in the Court of first instance—Act No. XII of 1881 (*N.-W. P. Rent Act*) *section* 208.

Held, that the application by an appellate court of the provisions of section 208 of Act No. XII of 1881 is not precluded by the fact that the Court of first instance has dismissed the suit on a preliminary point without any trial of it on its merits.

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

Mr. *W. M. Colvin* for the appellant.

Pandit *Sundar Lal* and Maulvi *Muhammad Ishaq* for the respondent.

BANERJI and AIKMAN, J.J.—The appellant, who is a tenant at fixed rates, erected a building on land held by him for agricultural purposes. Thereupon the plaintiff, one of the zamindars of the village, brought the suit, out of which this appeal has

* First Appeal No. 125 of 1898 from an order of L. Marshall, Esq., District Judge of Jaunpur, dated the 16th August 1898.