of the mortgaged property from destruction, forfeiture or sale. That ground, however, is disposed of by the lower appellate Court's finding of fact that the payments were not necessary for any such purpose.

The result is that we must allow this appeal, set aside the decision of the learned Judge of this Court, and restore that of the lower appellate Court with costs.

*Appeal decreed.*

## APPELLATE CRIMINAL.

1899
*March* 23.

*Before Sir Arthur Strachey, Knight, Chief Justice.*

QUEEN-EMPRESS *v.* MAHABIR TIWARI.*

*Act No. XLV of* 1860 *(Indian Penal Code), sections* 34, 397—*Dacoity—Commission of grievous hurt in the course of a dacoity—Person liable under section* 34, *liable also under section* 397.

*Held*, that the words "such offender" in section 397 of the Indian Penal Code include any person taking part in the dacoity who, though he may not himself have struck the blow causing the grievous hurt, is nevertheless liable for the act by reason of section 34 of the Code.

THE material facts of this case are as follows:—On the night of the 24th of February 1898, one Gajraj was sleeping at his threshing floor. He was awakened by a noise and saw some five or six thieves going off with loads from his threshing floor, while some others were engaged in picking up loads for themselves. Gajraj at once caught one of them, the appellant Mahabir. The other men then attacked him and beat him with lathis until he was forced to let Mahabir go, whereupon Mahabir also beat him. Meanwhile the other men at the threshing floor had been aroused and approached near enough to see and recognize the thieves. Two of these men also received lathi blows and they ran off and hid themselves among the stacks on the threshing floor. Two men then came running up from their fields close by, and on their approach the thieves ran away. Gajraj was carried away from the threshing floor insensible, and on examination it was found that one of his arms was broken, but

* Criminal Appeal No. 126 of 1899.

1899

QUEEN-EMPRESS v. MAHABIR TIWARI.

it did not appear from the evidence which of the dacoits had caused that particular injury. On these facts the Sessions Judge convicted Mahabir under section 397 of the Indian Penal Code and sentenced him to seven years' rigorous imprisonment. Mahabir appealed to the High Court.

Mr. *B. E. O'Conor* for the appellant.

The Government Pleader (Munshi *Ram Prasad*) for the Crown.

STRACHEY, C. J.—Mr. *O'Conor*, who holds Mr. Colvin's brief for the appellant, states that he does not propose to press this appeal except upon the question of sentence. The appellant has been convicted of an offence punishable under section 397 of the Indian Penal Code, and has received the minimum sentence under that section, namely, seven years' rigorous imprisonment. Unless therefore that section is inapplicable, I have no power to reduce the sentence. Mr. *O'Conor* has contended that the section does not apply, because, according to the evidence for the Crown, and in particular that of the complainant Gajraj, the blow which caused grievous hurt by breaking Gajraj's arm, and which was struck during the commission of the dacoity, was struck, not by the appellant, but by another of the dacoits. He supports this argument by reference to the case in the Madras High Court (Weir 99) cited in Mr. Mayne's note to section 397, and to the use of the expression "such offender," which implies that the liability to enhanced punishment under the section is limited to the offender who actually causes grievous hurt. There can be no doubt, however, that the appellant was one of the persons committing the dacoity; and the evidence shows, that upon Gajraj seizing the appellant while the dacoits were engaged in plundering the threshing floor, all the dacoits attacked and beat him with lathis, and that the appellant similarly joined the rest in so beating him. It is thus clear that the attack on Gajraj was made by the dacoits, including the appellant, in furtherance of the common intention of all, and therefore each of them was liable under section 34 of the Code in the same

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.