1904

SHEO SHANKAR v. PARMA MAHTON.

respect of the money secured by it, and that, therefore, the plaintiff could not complain if he was obliged to pay the amount of that charge along with the mortgage debt. We are unable to agree with him, being clearly of opinion that the later bond does not create any charge whatever upon the property, but is simply a money bond. Therefore, it is unnecessary to consider what the effect would have been if a charge had been imposed on the property in respect of the later debt. Having regard to the provisions of the Transfer of Property Act, and especially the section empowering mortgagors to redeem, to which we have referred, it appears to us that the ruling in *Allu Khan* v. *Roshan Khan* cannot now properly be followed.

For the foregoing reasons, therefore, we allow this appeal, and modify the decree of the lower Courts by the exclusion from the amount payable for redemption of the money secured by the bond of Asarh Sudi 7th, Sambat 1922, as also the costs of the appeal to the lower appellate Court. The respondents must pay to the appellant the costs of this appeal and also the costs of the appeal to the lower appellate Court. We extend the time for payment to the 20th of next July.

Appeal decreed.

1904
April 21.

REVISIONAL CRIMINAL.

Before Mr. Justice Knox and Mr. Justice Aikman.

FATTU AND OTHERS *v.* FATTU.*

Criminal Procedure Code, sections 206 *et seqq—Discharge—Practice—Powers and duties of Magistrate inquiring into case triable by the Court of Session discussed.*

Under Chapter XVIII of the Code of Criminal Procedure a Magistrate inquiring into a case triable by the Court of Session has a wide discretion in the matter of weighing the evidence produced on one side or the other, the remedy for an erroneous exercise of such discretion being provided in the powers conferred on Sessions Judges and District Magistrates by section 436 of the Code. But in the exercise of such discretion, if the question of discharge, or commitment, is one merely of probabilities, the inquiring Magistrate ought rather to leave the decision thereof to the Court of Session than to make an order of discharge because in his opinion the accused ought to

* Criminal Revision No. 145 of 1904.

1904

FATTU v. FATTU.

have the benefit of the doubt. *Chiranji Lal* v. *Ram Lal* (1) discussed. *Queen-Empress* v. *Dukes* (2) referred to by KNOX, J.

IN this case six accused were sent up for trial by the police charged with rioting and with committing culpable homicide not amounting to murder. The Magistrate who inquired into the case wrote a long order, or, as he called it, a judgment, reviewing the evidence, and in the result discharged all the accused. On the complainant's application, the Sessions Judge, acting under the provisions of section 436 of the Code of Civil Procedure, ordered that the accused should be committed for trial. The accused thereupon applied in revision to the High Court, asking that the order of the Sessions Judge might be set aside on the following grounds :—"(1) That the Magistrate was justified in law in exercising his discretion and discharging the accused ; (2) That the case is within the reasoning of the ruling of this Honourable Court, reported in the Weekly Notes for 1889, page 61. (In re *the petition of Kalyan Singh).*"

Mr. *C. Ross Alston*, for the applicants.

KNOX, J.—Two questions of a somewhat difficult nature have had to be considered in this case. The first is, how far do the powers of a Magistrate extend who has taken cognizance of a complaint disclosing an offence triable exclusively by a Court of Session? The second is what are the powers of the District Magistrate and of the Court of Session when it is represented to them that a person accused of such an offence has been improperly discharged?

With reference to the first question, such important changes have been introduced into the several Codes of Criminal Procedure that the precedents which are to be found in the reported cases are hardly safe guides, especially if they are cases decided before Act No. X of 1872 was placed upon the Statute Book. As the law stood in 1861 (*vide* sections 194, 225 and 226 of Act No. XXV of 1861), when a Magistrate, after taking the evidence of the complainant and of such persons as are stated to have any knowledge of the facts which form the subject-matter of the accusation and its attendant circumstances, found that there were not sufficient grounds for committing an accused person to take his trial before the Court of Session, he

(1) Weekly Notes, 1904, p. 5. (2) Weekly Notes, 1899, p. 135.

1904

FATTU v. FATTU.

was bound to discharge him. On the other hand, when evidence had been given before a Magistrate which appeared to be sufficient for the conviction of the accused, the accused person had to be sent for trial before the Court of Session.

Act No. X of 1872 conferred wider powers on a Magistrate, and authorized him to summon and examine any person whose evidence he considered essential to the inquiry; he was further authorized to examine the accused. If after this he found that there were not sufficient grounds for committal, he was to discharge the accused, but if evidence had been given which appeared to justify him in sending the accused to take his trial, he was to commit the accused after preparing a charge. It was in 1872 also that there was first introduced a section, which has been reproduced in each succeeding Code, and which empowered the Magistrate, if he thought proper, to summon any of the persons who are named by the accused in the list of witnesses whom he wishes to be summoned, and to take their evidence.

With Act No. X of 1882 a still further change was introduced. The Magistrate holding the inquiry was bound by law to place on record not only all such evidence as might be produced in support of the prosecution, but also all such evidence as might be produced on behalf of the accused, or called for by himself. He was also bound to examine the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him. If after all this had been done the Magistrate found that there were not sufficient grounds for committing the accused person for trial, he was bound to discharge him. If he found that there were sufficient grounds for such committal, he was bound to frame a charge, and, a charge once framed, an order of committal followed in due course.

Lastly, Act No. V of 1898 empowered a Magistrate, if, after hearing the witnesses for the defence, he was satisfied that there were not sufficient grounds for committing the accused, to cancel the charge and to discharge the accused.

The result of this examination of the Codes shows that Magistrates, many of whom may be and are officers of a few

years' standing, and with immature experience, may now be entrusted with very large powers of discharging an accused even when the complaint made against him sets out an offence which such Magistrate cannot try. It is obvious that over such large powers there should be very large powers of check, and as the law widened out powers which were reposed in Magistrates holding inquiries with the one hand, with the other it conferred new and very wide powers upon Magistrates of districts and Sessions Judges, which found no place in the Code of 1861.

Although the point is quite clear, it is well perhaps to set out here that the Magistrate holding the inquiry has never had, and has not under the present Code, any power to declare an accused either guilty or innocent of the offence with which he is charged; he is not a Magistrate holding a trial, and although the dividing line may often be very thin, he has no power to pronounce definitely either upon the guilt or innocence of the accused. He can discharge an accused person at any earlier stage of the inquiry, if he is satisfied that the case is groundless, but with this one exception he has no option but to go on and to hear all evidence produced before him, by whichever side that evidence may be produced, and it is only after recording that evidence that he can consider whether there are or are not sufficient grounds for an order of committal. Lastly, he can, after considering whatever evidence the accused has to produce, decide whether there still remain sufficient grounds for committal, and if there are not, he may then discharge the accused. In the case now under consideration the Magistrate who held the inquiry overstepped, if I may use the expression, the border line. Instead of writing reasons for his order, he wrote what he himself heads "a judgment." I should not, of course, consider the writing he made "a judgment," merely because it is so termed; but as I read what he did write I am convinced the writing is not only in name but in fact a judgment. He criticises the evidence given with painful minuteness; he finds it entirely unreliable and worthless; he considers the defence, and finds himself unable to accept it. He finds no case either under section 147 or section 304 of the Indian Penal Code

1904

FATTU v. FATTU.

against any of the accused, and he winds up with a paragraph saying that he is dealing with the complainant for bringing a false charge and giving false evidence. The learned Sessions Judge who was asked to order a further inquiry considered himself bound by the ruling in *Chiranji Lal* v. *Ram Lal* (1) and ordered the case to be committed to his court. We are asked to revise and set aside the order of the Court of Session on the ground that the Magistrate was justified in law in discharging the accused, and that the case falls rather within the reasoning of the ruling in Weekly Notes, 1899, p. 135. For both these rulings I am responsible, and I am glad of this opportunity to set out somewhat more fully than I then did the principle upon which, in *Chiranji Lal* v. *Ram Lal*, I held that the order of discharge in that case should be set aside and the accused committed to take their trial before the Court of Session. In *Chiranji Lal* v. *Ram Lal* it was clear, as in the present case, from the order passed by the Magistrate who held the inquiry, that the Magistrate had overstepped the boundary line, and had, while nominally holding an inquiry, in reality tried the case before him. That Magistrate, too, after going very minutely into the evidence which he had recorded, arrived at the following conclusion:—"In short, both sides of the case are in a suspicious condition, and there are doubts grave and unusual. Under these circumstances the accused are, in my opinion, entitled to the benefit of the doubt, and it would be a waste of public time to commit the case to Session," etc. Again and again in the course of what this Magistrate too terms 'a judgment' he placed on record words which showed that throughout he was not considering merely whether or not there were sufficient grounds for committing the accused for trial; he was not applying his mind merely as to whether there was or was not sufficient evidence or reasonable ground of suspicion. He was taking upon himself the functions of determining whether the accused was innocent or guilty of the offence with which he was charged, functions which the law had expressly reserved for a Court of higher jurisdiction.

(1) Weekly Notes, 1904, p. 5.

The second question which had to be considered, *i.e.*, the power of a District Magistrate or Sessions Judge when he considers that an accused person has been improperly discharged, is easily answered. It is evident from the words used in section 436 that the fullest and widest discretion has been given to such officers. From the year 1872 and onwards this power has been entrusted to Judges and Magistrates of Districts. Where a Court of Session or District Magistrate considers that an accused person has been improperly discharged, and orders a commitment, I consider that this Court should be most unwilling to interfere and should require strong grounds before setting aside such an order.

The result is that in this I would refuse this application.

AIKMAN, J.—In this case six accused were sent up for trial by the police, charged with rioting and with committing culpable homicide not amounting to murder. The Magistrate before whom the case came, wrote a long order, or, as he calls it, a judgment, reviewing the evidence, and in the result discharged all the accused. On the complainant's application, the learned Sessions Judge, acting under the provisions of section 436 of the Code of Criminal Procedure, ordered that the accused should be committed for trial. This is an application in revision asking us to set aside the order made by the Sessions Judge under section 436.

As to the functions of a Magistrate who is holding an inquiry under chapter XVIII of the Code of Criminal Procedure into cases triable by the Court of Session, or by the High Court, I am of opinion that he is empowered not only to consider whether the evidence for the prosecution, if true, furnishes sufficient grounds for committing the accused for trial, but that he can go further and weigh that evidence, that is, that he can consider whether it is true. If he arrives at the conclusion, either at the close of the case for the prosecution or after hearing the accused's witnesses, that it is not true, he can give effect to his opinion by discharging the accused. This is clear from the addition made to section 213 by the present Code of Criminal Procedure. By sub-section 2 of that section as it now stands the Magistrate is empowered, after hearing witnesses for the

1904

FATTU v. FATTU.

defence, to cancel the charge which he had framed under section 210, that is, a charge framed when at the close of the case for the prosecution the Magistrate was satisfied that there were sufficient grounds for committing (*vide* section 210). No doubt this gives large powers to officers it may be of only a few years' experience in dealing with serious charges. But the law has provided a safeguard in section 436 of the Code of Criminal Procedure, whereby a District Magistrate or a Court of Session can set aside an order of discharge passed by a Magistrate holding an inquiry under chapter XVIII. Although a Magistrate has this large power of discharging the accused, he should, in my judgment, only exercise it when he is clearly of opinion that the evidence for the prosecution is untrustworthy. If it is a matter of weighing probabilities, he would, I consider, be well advised in leaving the case to the Court which alone is empowered to try it, and should not, as in the case referred to by my learned colleague, discharge the accused because in his opinion the accused ought "to have the benefit of the doubt."

In the case we are dealing with I think it sufficient to say that after reading the judgment of the Magistrate I am of opinion that the learned Sessions Judge was right in taking action under section 436. I would therefore refuse this application.

BY THE COURT.

The application is refused.

1904
April 23.

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

SHEODARSHAN DAS (PLAINTIFF) *v.* AHSAN ALI (DEFENDANT).*

Act No. XII of 1881 *(N.-W. P. Rent Act), section* 93*(i)—Jurisdiction—Suit by muafidar to recover from a lambardar assigned revenue collected on his behalf.*

Held that the provisions of section 93, clause *(i)*, of Act No. XII of 1881 are wide enough to include a suit by a muafidar to recover from another

* Second Appeal No. 574 of 1902 from a decree of H. D. Griffin, Esq., District Judge of Agra, dated the 2nd of May, 1902, reversing a decree of Munshi Muhammad Ali Khan, Assistant Collector, 1st class, Agra, dated the 20th of February, 1902.