

duties as public servants. Mr. Das, who was engaged in searching the house of Mukhtar Ahmad, accused, on suspicion that he might find there cocaine, committed a number of irregularities in conducting this search. He had no warrant authorising him to make this search; he brought with him only one search witness (section 103 of the Code of Criminal Procedure), and nothing in sections  $\frac{102}{48}$  of the same Code justified him in directing a constable to scale the outer wall and effect a burglarious entry into the house. Following the precedent set by the reported decision of this Court, which I have already quoted, I set aside the conviction of Mukhtar Ahmad, and Amir Ahmad, under section 332 of the Indian Penal Code and in lieu thereof, convict them of the offence of causing hurt under section 323 of the same Code. I reduce the sentence to one of imprisonment for such period as they may have already undergone, together with a fine of Rs. 15 each. Any fine in excess of this amount which has been paid by applicants will be refunded. The accused need not surrender and their bail-bonds are discharged.

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*Order modified.*

## MISCELLANEOUS CRIMINAL.

*Before Mr. Justice Piggott.*

DHARAM SINGH AND ANOTHER v. JOTI PRASAD\*

*Criminal Procedure Code, section 206 et seq.—Discharge—Practice—Power and duties of Magistrate inquiring into case triable by the Court of Session.*

When a Magistrate has heard the evidence of the prosecution with entire disbelief, when he considers himself in a position to show that the prosecution witnesses are totally unworthy of credit, and *a fortiori* when, after examining certain witnesses named on behalf of the accused, he has come to the conclusion that evidence given by them is reliable and disproves that given by the prosecution he is well within his discretion in discharging the accused. *Fattu v. Fattu* (1), *Sheo Bux v. King-Emperor* (2) and *In re Bai Parvati* (3) referred to.

THIS was an application for transfer, under section 526 of the Code of Criminal Procedure, of a case pending in the court of the District Magistrate of Saharanpur arising out of an application under section 436 of the Code of Criminal Procedure

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 March, 29.

\* Criminal Miscellaneous No. 8 of 1915.

(1) (1904) I. L. R., 26 All., 564. (2) (1904) 9 C. W. N., 829.

(3) (1911) I. L. R., 35 Bom., 163.

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asking the Magistrate to direct further inquiry into the case of certain persons who had been discharged on an inquiry by a magistrate subordinate to him. The facts out of which the application arose are fully stated in the order of the High Court.

Mr. C. Dillon, Mr. G. P. Boys and Mr. Nihal Chand, for the applicants.

Mr. W. Wallach and Babu Satya Chandra Mukerji, for the opposite party.

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

PIGGOTT, J.—As long ago as the 27th of January, 1914, a serious riot accompanied, with loss of life, took place at a certain village in the Saharanpur district. A number of persons were put on their trial and convicted of offences punishable under sections 148 and 304 of the Indian Penal Code. They appealed to this Court and their appeals were disposed of by an order, dated the 27th of July, 1914, by which the appeals of three of the appellants were allowed and those of the remaining appellants dismissed subject to some modification of the sentences passed. In the course of the enquiry and trial ending with the appellate judgment of this Court above referred to, a question arose as to whether there was not reason to suppose that the persons put on their trial in that case had been acting under the instigation of other and more influential persons, who though not present at the riot themselves, had been guilty of abetment of the same within the meaning of the Indian Penal Code. An enquiry was ordered against two persons, Rana Dharam Singh and Durga Prasad, and one might have hoped that this enquiry would long since have been terminated in the conviction of these persons, or in their acquittal or in their final discharge. The proceedings were unfortunately delayed by an application for transfer made to this Court, the groundlessness of which has been sufficiently exposed by the actual result of the subsequent proceedings. This Court having refused to interfere, the enquiry against these two persons came before a Joint Magistrate of ability and experience, who had not long previously been exercising the powers of a Sessions Judge. He recorded the evidence for the prosecution, examined the accused persons, and at their request, exercised the discretion

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conferred upon him by section 212 of the Code of Criminal Procedure to summon and examine some of the witnesses named in the list given to him on behalf of the said accused. As the result of his enquiry he discharged both the accused. An application was thereupon filed in the court of the District Magistrate of Saharanpur by a gentleman of the name of Rai Bahadur Lala Jyoti Prasad, who appears to have some interest in the success of this prosecution, asking the District Magistrate to exercise the powers conferred upon him by section 436 of the Code of Criminal Procedure, to order Rana Dharam Singh and Durga Prasad, to be committed for trial before the Court of Session. The matter was again brought before this Court on an application for transfer. Unfortunately the proceedings in this Court were delayed by various accidental circumstances, and it became a question whether this proceeding could be allowed to drag its course much longer without scandal to administration of justice. I finally called for the record of the proceedings in the Joint Magistrate's court, and gave notice, both to the prosecution and to the defence, that I proposed to take the whole matter up, in the exercise of the revisional jurisdiction of this Court. I have, to-day, examined the record, considered the evidence in detail and heard the arguments addressed to me on both sides. There has been some discussion also on a point of law which is supposed to arise with regard to the discretion of a Magistrate in conducting an inquiry preliminary to commitment. The law, so far as this Court is concerned, seems to have been definitely laid down in the case of *Fattu v. Fattu* (1), where some older cases of this Court are referred to and considered. It has been urged upon me in argument that the learned Judges of the Calcutta High Court, as for instance in the case of *Sheo Bux v. King-Emperor* (2), have taken a somewhat different view regarding the discretion of a Magistrate under the circumstances stated. One learned Judge of that Court laid it down, in effect, that a Magistrate conducting preliminary enquiry had only to consider whether there was evidence against the accused person or persons upon which a jury could lawfully convict them of the offence alleged against them, and if he found that this was so, had no discretion but to commit the accused

(1) (1904) I. L. R., 26 All., 564. (2) (1904) 9 C. W. N., 329.

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for trial. This does not seem to me to follow from the provisions of section 209 or 210 of the Code of Criminal Procedure, and seems scarcely consistent with the provisions of the second clause of section 213 of the same Code. The Bombay High Court, *In re Bai Parvati* (1), has held, in express terms, that, where a committing Magistrate finds that there is no evidence whatever, or that the evidence tendered for the prosecution is totally unworthy of credit, it is his duty, under section 209 of the Criminal Procedure Code, to discharge the accused. In my opinion when a Magistrate has heard the evidence for the prosecution with entire disbelief, when he considers himself in a position to show that the prosecution witnesses are totally unworthy of credit, and *a fortiori* when, after examining certain witnesses named on behalf of the accused, he has come to the conclusion that the evidence given by them is reliable and disproves that given by the prosecution witnesses, he is well within his discretion in discharging the accused. The question then before me is merely whether there has been a wrong exercise of discretion in the present case. By calling up the matter in revision I have virtually taken upon myself the exercise of the discretion conferred by law on a District Magistrate or a Court of Sessions. My reasons for doing this I have already explained. I think it is expedient that this matter should be disposed of once for all either by my directing the commitment of Rana Dharam Singh and Durga Prasad to the Court of Session or by an order dismissing the application of Rai Bahadur Lala Jyoti Prasad against the order of discharge. In my opinion the reasons given by the Magistrate in the present case for discrediting the prosecution evidence are sound and convincing. As regards some of the witnesses incidents had occurred in the course of the enquiry by which their evidence was thoroughly discredited and would have been something of a scandal to the administration of justice to permit the same witnesses to repeat their false evidence, with necessary corrections and amendments, in the presence of the Sessions Court. The witness Harbans was asked in cross-examination a question so entirely relevant and proper that, after perusal of his evidence-in-chief, this was the very first question which presented itself to my mind and I

(1) (1911) L. L. R., 35 Bom., 163.

enquired whether it had not been put to the witness. After fencing with it for a while, the witness ended by refusing to answer it at all. It would have been most improper to have allowed this witness to appear again as a prosecution witness against the accused persons and the Joint Magistrate would have exercised a sound discretion in taking immediate notice of the gross contempt of court committed by him. During the examination of another witness an episode occurred from which the Joint Magistrate inferred, and in my opinion rightly inferred, that the prosecution witnesses were being improperly coached outside the court room with reference to what was going on inside. These are sufficiently weighty circumstances for consideration. Apart from them I am satisfied that the evidence which the Joint Magistrate declined to believe is unworthy of credit. The witnesses are not speaking of anything which actually occurred in their presence. Whether there was or was not a gathering at the building, which they speak of as the zamindar's *dera*, on the night to which their evidence refers, I am confident that these witnesses were not present at that gathering and did not see or hear what they profess to have done. The order of discharge in this case is a very proper one and is not to be interfered with. It may be taken that I have exercised the powers of this Court under section 536, clause (3), and also under section 429 of the Code of Criminal Procedure to call up the pending application of Rai Bahadur Lala Jyoti Prasad from the court of the District Magistrate of Saharanpur to this Court, and my order thereon is that this application be, and it is hereby, dismissed.

*Proceeding set aside.*

### PRIVY COUNCIL.

PUTTU LAL AND OTHERS (PLAINTIFFS) v. PARBATI KUNWAR  
AND ANOTHER (DEFENDANTS).

[On appeal from the High Court of Judicature at Allahabad.]

*Hindu Law—Adoption—Adoption, by widow acting with her deceased husband's authority, of her brother's son—Authority to adopt a particular boy whom her husband could and would have adopted had he lived—Rejection of the extension by Nanda Pandit in Dattaka Mimamsa to adoption by females of rule of Hindu Law against adoption of son whose mother the adopter could not have legally married.*

P.C.\*  
1915  
April 15, 16.  
May 6.

\* Present :—Lord DUNEDIN, Lord ATKINSON, Sir GEORGE FARWELL and  
Sir JOHN EDGE.