REVISIONAL CRIMINAL.

1915
March, 11.

Before Mr. Justice Chamier and Mr. Justice Piggott.

EMPEROR *v.* GANGUA *

Criminal Procedure Code, section 339—Pardon—Forfeiture of pardon—Procedure—Witness giving evidence at a sessions trial on a conditional pardon disbelieved by Judge.

A conditional pardon was given to G and he was tendered as a witness in a Sessions trial. The Judge before whom he was examined was of opinion that G had not spoken the truth, and, acquitting the accused, directed the prosecution of G. G did not plead his pardon before the committing Magistrate, but did plead it before the Sessions Judge, who set aside the commitment and discharged the accused. *Held* that G was entitled to raise the plea before the Sessions Judge though he had not raised it before the committing Magistrate. *Held* also that the Sessions Judge in the former trial had no authority to direct the prosecution of G on any specific charge, but if he thought that G had wilfully concealed anything essential or given evidence on any point which was positively false, he was entitled to record an opinion to that effect and to invite the attention of the District Magistrate to his opinion or possibly to suggest the propriety of G's prosecution. *Emperor* v. *Kothia* (1), *Kullan* v. *Emperor* (2), *Alayirisami* v. *Emperor* (3), *Emperor* v. *Abani Bhushan* (4), referred to.

THE facts of this case are fully stated in the judgement of the Court.

The Assistant Government Advocate (Mr. R. *Malcomson*), for the Crown.

The opposite party was not represented.

CHAMIER and PIGGOTT, JJ.—In this case it appears that one Gangua was suspected of having taken part in a serious dacoity, committed at a village called Manpore in the Etawah district on the 23rd of October, 1913. He made a confession before a Magistrate and received a conditional promise of pardon. He was produced before the Sessions Judge as a witness against Abadua and others (Sessions Trial No. 8 of 1914, Etawah Sessions). The learned Sessions Judge who tried that case came to the conclusion that Gangua had not given true evidence. We have examined the judgement in that case, and in some points we find it a little difficult to follow the reasoning of the learned Sessions Judge. Apparently, however, he was of opinion that Gangua had in any

* Criminal Revision No. 113 of 1915, from an order of L. Marshall, Sessions Judge of Mainpuri, dated the 30th of November, 1914.

(1) (1906) I. L. R., 30 Bom., 611. (3) (1910) I. L. R., 33 Mad., 514.
(2) (1908) I. L. R., 32 Mad., 173. (4) (1910) I. L. R., 37 Calc., 845.

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case, whether he was actually concerned in the dacoity or not, made false statements regarding a certain pair of earrings produced as one of the exhibits in the case. He concluded his order, after directing the acquittal of the accused persons then before him, with the following words :—" The approver has not spoken the truth and he will, therefore, forfeit his pardon. The confession made by him may be sufficient for his own conviction on the original charge of dacoity, though it is valueless without corroboration as against his associates. I direct the prosecution of Gangua on a charge under section 397." In accordance with this order proceedings were taken against Gangua and he was committed for trial. In the committing Magistrate's court Gangua did not plead the pardon, and it was apparently taken for granted that the Sessions Judge's order of the 26th of May, 1914, quoted above, was conclusive on this point. When Gangua was placed on his trial before the successor of the learned Sessions Judge who had passed the order of the 26th of May, 1914, he did plead that he had not broken any of the conditions on which pardon had been tendered him, and therefore had not forfeited his pardon. Upon this the learned Sessions Judge appears to have called upon the pleader employed to conduct the prosecution in that particular case to state what evidence he relied upon in order to prove that Gangua had forfeited his pardon. He made a note of various statements on this point made by the pleader, and thereupon passed an order accepting the prisoner's plea that he had not broken the conditions of his pardon, acquitting him and directing his immediate release. The record was called for by this Court on a perusal of the Sessions statements for the district of Etawah for the month of November, 1914, and is before us in order that we may consider the propriety of the above proceedings. We have examined a number of reported cases, in which the question of the change in the law effected by the substitution of the word " forfeited " for the word " withdrawn " in section 339 of the Code of Criminal Procedure has been considered by various High Courts. We may refer to *Emperor* v. *Kothia* (1) ; *Kullan* v. *Emperor* (2) ; *Alagirisami* v. *Emperor* (3) ; *Emperor* v. *Abani Bhushan Chukerbutty* (4).

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We are satisfied that the Sessions Judge's order of the 26th of May, 1914, was irregular and has given rise to the difficulties experienced by the Magistrate and the Sessions Judge in dealing with this matter. The Sessions Judge before whom Gangua gave evidence at the trial of Abadua and others had no doubt authority to pronounce his opinion as to the truthfulness or otherwise of the whole or any part of Gangua's evidence, apart from the question whether it was sufficient for the conviction of any of the accused persons then on their trial. If he came to the conclusion that Gangua had wilfully concealed anything essential, or given evidence on any point which was positively false, he was entitled to record an opinion to that effect and to invite the attention of the District Magistrate to his opinion, or possibly to suggest the propriety of Gangua's prosecution. He had no authority to direct the prosecution of Gangua on any specific charge. When the committing Magistrate took up this matter it was open to Gangua to have pleaded his pardon in that court, precisely as he did afterwards before the Court of Session. If he had done so, the Magistrate would have been bound to enquire into the matter, at least to the extent of satisfying himself that there was *primâ facie* ground for holding that Gangua had forfeited his pardon, and to include in his commitment order a statement of the evidence on which he relied as establishing this fact. Probably the form of the order passed by the Sessions Judge at the trial of the case against Abadua and others prevented the committing Magistrate from looking at the matter from this point of view. When the case against Gangua came before the Sessions Court, Gangua was entitled to plead his pardon, and the Sessions Judge was right in recording the plea and in asking the pleader employed to conduct the prosecution what evidence he intended to offer in disproof of the same. Ordinarily, in our opinion, the proper course to have followed in such a case would be, first of all, to have put in evidence the record of the statement made by Gangua as a witness at the former trial, together, if necessary, with evidence as to the identity of the person making that statement. In order to form an opinion whether in the course of that statement Gangua had given false evidence, or had wilfully concealed anything essential, it might very possibly have been necessary for

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the learned Sessions Judge to have recorded evidence in the case, or at any rate the evidence particularly bearing on the question of the recovery of the pair of earrings already alluded to. In passing an order of acquittal without taking any evidence, and without any withdrawal of the prosecution by a public prosecutor properly authorized to withdraw the same under section 494 of the Code of Criminal Procedure, the learned Sessions Judge adopted in our opinion an irregular procedure. At the same time, under the circumstances of this particular case, we are not disposed to interfere. The fact of the matter is, as already pointed out, that the courts concerned, and we have no doubt also the District Magistrate, were placed in a difficulty by the irregular order passed by the Sessions Court on the 26th of May, 1914. Apparently, in the opinion of those responsible for conducting the prosecution, Gangua had not given false evidence, either in respect of this pair of earrings or in any other matter of importance. Consequently, when the learned pleader instructed by the District Magistrate was called upon to inform the Sessions Judge what evidence there was on which he relied as showing that Gangua had forfeited his pardon, he was unable to state that evidence to the satisfaction of the Sessions Court. It would seem that this prosecution ought never to have been instituted and would never have been instituted, but for the Sessions Judge's order of the 26th of May, 1914. For these reasons we decline to interfere in this matter, and merely order that the record be returned. If Gangua is under arrest he should be at once released; otherwise his security is hereby discharged.

Record returned.

Before Mr. Justice Chamier.

EMPEROR *v.* BHAJAN TEWARI.*

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Civil Procedure Code (1908), *sections* 68 *and* 70; *schedule III—Execution of decree by Collector—Delegation to Assistant Collector of functions of Collector —Application to Assistant Collector to take action* ultra vires—*Act No. XLV of* 1860 *(Indian Penal Code), section* 182.

A obtained a decree for money against *B*. In execution thereof certain immovable property was ordered to be sold, and the execution was transferred to the Collector of Basti under section 68 of the Code of Civil Procedure. The

* Criminal Revision No. 117 of 1915, from an order of Shibhan Lal, Magistrate, first class, of Basti, dated the 8th of January, 1915.