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provided by section 225 *B*. I do not propose to reduce it below the maximum period specified in that section, because this was an escape from a jail, and the escape of a person imprisoned for want of furnishing security to be of good behaviour is a serious matter. I direct that the conviction in this case be recorded under section 225 *B* of the Indian Penal Code and the sentence reduced to one of rigorous imprisonment for six months.

Conviction altered.

Before Mr. Justice Piggott.

EMPEROR *v.* RAHU AND OTHERS.*

1920 *July*, 23.

Criminal Procedure Code, sections 110, 107, 169, 55 - *Arrest on suspicion of a complicity in particular dacoity—Evidence insufficient—Detention in custody with a view to proceedings under section* 110, *illegal without re-arrest under section* 55.

Certain persons who had been arrested (under section 54 of the Code of Criminal Procedure) on suspicion of having been concerned in a dacoity were committed to the local jail on a Magistrate's warrant. Before the formal conclusion of the investigation, the investigating police officer reported to the Magistrate that there was no sufficient evidence upon which to charge these persons with participation in the dacoity. They were not, however, released, but the Magistrate passed an order directing them to be detained in jail pending the result of a police inquiry with reference to their liability to be proceeded against under section 110 of the Code of Criminal Procedure. Twelve days after the passing of this order information was laid before a Magistrate having jurisdiction under section 110 and an order was duly framed under section 112 and communicated to the persons concerned.

Held that the order for the detention of such persons after the police had reported that there was no evidence against them on the specific charge of dacoity was illegal unless and until they were re-arrested by the police under section 55. *Emperor* v. *Maiku* (1) referred to.

THE facts of this case are fully set forth in the judgment of the Court.

Mr. *Nihal Chand* and Babu *Kirpa Ram Dany*, for the applicants.

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

PIGGOTT, J.:—This is an application in revision in connection with a proceeding under section 110 of the Code of Criminal

*Criminal Revision No. 384 of 1920, from an order of J. F. Sale, District Magistrate of Moradabad, dated the 25th of May, 1920.

(1) (1919) I. L. R., 41 All., 483.

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Procedure in which ten persons were originally involved. All of them have been ordered to furnish security to be of good behaviour. Eight of these appealed to the District Magistrate, but without success. The application before me is on behalf of four of these persons. The record shows that the ten men concerned were first arrested on suspicion in connection with a particular case of dacoity. They were arrested, therefore, under section 54 and not under section 55 of the Code of Criminal Procedure. Action was then taken under section 167, of the same Code and these men were lodged in the local jail under the warrant of a Magistrate. The investigation into the case continued for some time longer, and before it was completed, and before any final report had been sent in under section 173 of the Code of Criminal Procedure, the investigating police officer came to the conclusion that there was no sufficient evidence or reasonable cause of suspicion to justify further proceedings against these ten men on the dacoity charge. It does not seem to me that the Code of Criminal Procedure makes any express provision for a case like this, in which an accused person, after having been arrested, forwarded to a Magistrate and confined under a Magistrate's warrant, is found by the investigating police officer to have been arrested upon insufficient evidence. I should have thought that ordinarily a person so arrested would remain in custody until the final report under section 173 of the Code had been submitted and would then be released under the Magistrate's order on the ground that the police report disclosed no adequate ground for further proceedings. I am told, however, that the practice generally adopted is to stretch the provisions of section 169 of the Code of Criminal Procedure, although that section in terms applies only to the case of an accused who has never been forwarded to a Magistrate. Apparently the common procedure is for the investigating police officer to report to the Magistrate under whose warrant the accused has been committed to jail that he desires to release him under section 169 of the Code of Criminal Procedure. The Magistrate then sends for the accused from the jail, discharges him from the custody of the jail authorities and hands him over to the investigating police officer. When this has been done the police officer can exercise the

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authority given him by section 169 aforesaid to release the accused.

The peculiar feature of the present case was that the investigating police officer or officers, although failing to find sufficient evidence to justify further proceedings against any of these ten men on the charge of dacoity, came to the conclusion that the ten persons arrested were members of a gang associated together for the purpose of habitually committing thefts and robberies. They desired in fact to institute proceedings against them under section 110 of the Code of Criminal Procedure. A report substantially to this effect was submitted to the Magistrate by whose warrant the accused had been committed to the jail. The order passed on this report was in my opinion irregular and not to be justified by anything in the Code of Criminal Procedure. Sufficient information had not been laid before the Magistrate to warrant his passing an order under section 112 of the Code of Criminal Procedure. Indeed it would appear that he was not the Magistrate who had jurisdiction to pass any such order. If, therefore, the ten accused persons were to be discharged from custody, so far as the dacoity case was concerned, no Magistrate had any authority to direct their further detention in custody on a different matter, unless and until they had been re-arrested by the Police under section 55 of the Code of Criminal Procedure. The Magistrate, however, seems to have treated this as a mere technical difficulty and to have assumed that there had been a purely formal discharge of the accused under section 169 of the Code of Criminal Procedure, but he ought to have allowed the Police to re-arrest them under section 55 of the same Code. The order he passed was that the ten accused persons should be further detained in jail unless they could furnish security for their appearance when required. It was not until 12 days after this that a formal report was laid by a competent police officer before a Magistrate having jurisdiction in the matter under section 110 of the Code of Criminal Procedure, and three days later the said Magistrate having caused the ten accused to be brought before him from the jail drew up and communicated to them the necessary order under section 112 of the Code of Criminal Procedure initiating the prosecution for bad livelihood. It has been contended before me that,

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on the principles laid down by a learned Judge of this Court in *Maiku* v. *King-Emperor* (1), these irregularities attendant on the initiation of the proceedings would in themselves justify this Court in quashing the orders which have been passed against these accused persons, or at any rate against those eight out of the ten accused who contested the matter in the trial court and appealed to the District Magistrate. I think this contention is based on some misapprehension as to the meaning of the decision above referred to and the evils against which that decision was directed. This Court was dealing in that case with an accused person who had been tried and acquitted and ordered to be released by a competent Court, but who was then immediately re-arrested, not because of any fresh information received as to his character or repute, but in accordance with a standing order, most improperly issued in that particular district, directing that all accused persons acquitted on a charge of dacoity should be immediately arrested under section 55 of the Code of Criminal Procedure. I am of opinion that, although the proceedings prior to the passing of the order under section 112 aforesaid were irregular, and though I have thought it right to point out my objections to those proceedings, the irregularity was cured when the accused persons came before the Magistrate on the 13th of February, and the Magistrate, having jurisdiction to do so, proceeded upon proper materials to pass the formal order under section 112 of the Code of Criminal Procedure.

Having said this, however, I feel bound to add that the curious fashion in which this prosecution for bad livelihood was initiated has led me to examine the record with greater strictness than I should otherwise have thought necessary.

[His Lordship then proceeded to deal with the merits.]

I have come to the conclusion that the prosecution case against three, at any rate, of the applicants Rahu, Narpat and Kharga, is a bad one, and that the orders against them are liable to be set aside, not merely on the general merits of the case but on a specific ground which has been repeatedly held by this Court to be sufficient to warrant interference in revision. Rahu and Narpat are brothers, Jats by caste. As against the allegations

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made by the prosecution witnesses they were able to produce an exceedingly voluminous body of evidence for the defence, no fewer than 46 witnesses coming forward to give them a good character. The defence witnesses, moreover, proved that these men are substantial cultivators, that their methods of life are such as to render it distinctly unlikely that they could find time to indulge in the habitual commission of theft or robbery. This large body of defence evidence has been brushed aside by the courts below upon what seems to me wholly inadequate grounds. The District Magistrate himself was satisfied that these two men were substantial cultivators, with a considerable amount of occupancy land. He thinks that the evidence produced by them in their defence is wholly discounted by the fact that 38 of their witnesses are their caste-fellows, many of them coming from villages four miles or more distant from that in which Rahu and Narpat reside, and that these witnesses came forward at their trial voluntarily, without being summoned. Some of the witnesses admitted frankly that they had come forward because they regarded these accused as *Sarpanch*, or heads of their brotherhood, and looked upon it as a slur upon the brotherhood generally that these men should be treated as habitual thieves and robbers. I cannot see in this fact anything which should discredit the evidence for the defence. On the contrary, it impresses me with the good faith of the witnesses and their honest and emphatic belief that these two men have been prosecuted in consequence of some private feud, of which there are certainly traces on the record, and that they really are respectable persons enjoying the confidence of their community. [His Lordship then discussed the case of the other applicants.] The result is that I dismiss this application so far as Cheta is concerned. I allow the applications of Rahu, Narpat and Kharga and set aside the orders requiring them to furnish security to be of good behaviour. If these men are in custody they will be forthwith released; if they have furnished security their own recognizance bonds and those of their sureties will be discharged.

Application allowed.