

The evidence here shows that the accused is one of the persons who live in that house, and the accused is one of the adult male members of the family. The finding of an unlicensed gun in the house would to my mind raise a presumption against all the adult male members that it was in their possession and control, and they might one and all be tried on that charge. Under these circumstances I consider it would be for these persons to show that they were not in possession of the gun in question. It is open to the police to prosecute one or all of the adult male members for an offence of this nature, and in the present case the police selected Sikhdar for prosecution for the apparent reason that they had information that Sikhdar had been taking part in a dacoity, and they searched the house where he lived in that connection. I consider that the conviction of Sikhdar on the evidence was correct, and I refuse this reference. Let the papers be returned.

1931

 EMPEROR
 v.
 SIKHDAR.

Before Mr. Justice Bennet.

RAM KHELAWAN *v.* SHEO NANDAN AND OTHERS.*

Criminal Procedure Code, sections 350A and 439—Bench consisting of three Magistrates—One of them absent during part of trial—Invalidity—Revision from acquittal—Discretion.

 1931
 December,
 7.

One out of three members constituting a Bench of Magistrates was absent during the examination-in-chief of the witnesses for the complainant. This member along with another gave a decision acquitting the accused, while the decision of the third member was for conviction, so that the accused was acquitted. It was *held* in revision at the instance of the complainant that the order of acquittal was invalid under section 350A of the Criminal Procedure Code as the Magistrates constituting the Bench had not been present throughout the proceedings.

It was *held*, further, that although the Local Government might have appealed against the acquittal and did not,

* Criminal Reference No. 644 of 1931.

1931

RAM
KHELAWAN
v.
SHEO
NANDAN.

the High Court had power to interfere with an order of acquittal in revision; the question was one of discretion as to whether in any particular case the High Court should or should not order a retrial. In this case the order of acquittal being inherently defective and invalid, and the complainant not having had a fair hearing, the High Court ordered a retrial.

The Assistant Government Advocate (Dr. M. Wali-ullah), for the Crown.

Mr. A. P. Pandey, for the opposite parties.

BENNET, J. :—This is a recommendation by the learned Sessions Judge of Ghazipur that a certain order of acquittal passed by a Bench should be set aside and a retrial ordered. The facts are very simple. The complainant produced his witnesses before the Bench and while his witnesses were making their examination-in-chief a member of the Bench, Babu Sheo Shankar Singh, was absent. This Magistrate was present during the rest of the trial and he took part in the decision along with two other Magistrates who had been present during the whole trial. Of the two Magistrates present during the whole trial one was for acquittal and one was for conviction. Babu Sheo Shankar Singh was for acquittal, and therefore the accused was acquitted on the decision of Babu Sheo Shankar Singh and Babu Tirloki Nath Singh. Learned counsel first of all relied on the ruling reported in *Emperor v. Mathura* (1), in which it was held that the provisions of section 350 of the Code of Criminal Procedure would apply to a somewhat similar case before a Bench. But subsequent to that ruling, by Act XVIII of 1923 an additional section 350A was added to the Code of Criminal Procedure specially dealing with this question of changes in the constitution of a Bench of Magistrates during the hearing of a case. That section therefore alters the law which was laid down in the ruling quoted, and the ruling is no longer any authority for the present law.

(1) (1918) I.L.R., 41 All., 116.

1931

 RAM
 KHELAWAN
 v.
 SHEO
 NANDAN.

Section 350A clearly states that the order of a Bench of Magistrates would not be invalid on account of changes where the Bench was duly constituted, "and the Magistrates constituting the same have been present on the Bench throughout the proceedings". In the present case one of the Magistrates constituting the Bench which passed the order was not present throughout the proceedings. The order is therefore invalid according to the provisions laid down in section 350A.

Learned counsel next argued that this Court should not interfere in revision in a case of this nature, because the order was one of acquittal and because the Local Government might have appealed under section 417 of the Code of Criminal Procedure and did not appeal. It is obvious in the first place that this Court has power to interfere with an order of acquittal in revision, otherwise the Code would not contain the provision in section 439(4) that in revision a High Court should not convert a finding of acquittal into one of conviction. The question is one of discretion as to whether in any particular case the High Court should or should not order a retrial. In *Pahalwan Singh v. Sahib Singh* (1) STUART, J., laid down: "The acquittal is a good order of acquittal in so far that it contains no inherent defects"; and therefore in that particular case he would not interfere. The present case, however, is very different, because there are inherent defects in the order of acquittal, and under section 350A it is an invalid order. In that particular case on page 384 it was stated: "Whether the decision was right or wrong, it is idle to suggest that there has been a miscarriage of justice." The present case, however, seems to be rather different, as the complainant has not had a fair hearing and one member of the court which decided the case did not hear the statements of the witnesses for the complainant in examination-in-chief. Learned coun-

1931

RAM
K. HELLAWAN
v.
SHIBO
NANDAN.

sel went into details of the case and pointed out that it was a case where the complainant stated that he had sowed a certain crop as a tenant and the accused as zamindars had uprooted that crop by force and taken it away. The two Magistrates who acquitted the accused considered that it was not satisfactorily proved that the complainant sowed the crop or that the accused uprooted it. If the complainant succeeded in proving his case the complainant would probably receive compensation from the accused and therefore the matter would be one of importance to him. Under these circumstances I consider that this order of acquittal should be set aside, and I accordingly set it aside and direct that the case be retried according to law.

Before Mr. Justice Bennet.

1931
December,
8.

ALI HUSAIN AND ANOTHER v. LACHHMI NARAIN
MAHAJAN AND OTHERS.*

Criminal Procedure Code, sections 243, 244—Plea of accused that acts alleged constituted no offence—Duty of Magistrate to take the evidence for the prosecution—Provincial Insolvency Act (V of 1920), sections 28(2) and 31—Protection from arrest upon adjudication order—Criminal Procedure Code, section 439—Revision from acquittal—Discretion.

Section 28(2) of the Provincial Insolvency Act, 1920, does not operate as any protection from arrest of a judgment-debtor who has been adjudicated an insolvent. Such protection is dealt with by section 31, under which a specific protection order has to be passed.

Upon the arrest of an insolvent in execution of a decree he obstructed the process server by refusing to accompany the latter. At his trial for an offence under section 186 of the Indian Penal Code the accused pleaded that the acts alleged formed no offence. Thereupon the Magistrate did not take the evidence of any of the prosecution witnesses but proceeded to decide upon the argument of law that by virtue of section

* Criminal Reference No. 657 of 1931.