CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Ameer Ali.

BAIJANATH PANDEY (PETITIONER) *v.* GAURI KANTA MANDAL (OPPOSITE PARTY).* 1893 *February* 3.

Sessions Judge, power of, in Revision—Further inquiry, power of Sessions Judge to direct—Criminal Procedure Code (Act X of 1882), ss. 423, 435, 436 and 439.

A complaint was made before a Magistrate, which involved a charge of dacoity against the accused person and others. The Magistrate in dealing with the case proceeded under section 209 of the Code of Criminal Procedure, and finding no case of dacoity *primâ facie* established, proceeded to frame charges under section 254 of the Code charging the accused with offences under sections 380 and 448 of the Penal Code, *viz.*, theft in a building and criminal trespass. Having heard the whole of the evidence, he then acquitted the accused under section 258 of the Code, and gave him sanction under section 195 to prosecute the complainant under section 211 of the Penal Code. The complainant then applied to the Sessions Judge to revoke that sanction. The Sessions Judge proceeded to consider the whole case, and finding that a proper inquiry had not been made and all evidence available not taken, and that had this been otherwise, a sessions case might have been established, directed the Magistrate to hold a further inquiry, and to proceed in accordance with the result of such inquiry, either to commit the accused to the sessions, or grant the sanction, as the case might be.

Held, that the Sessions Judge had exercised a jurisdiction not vested in him by law. Acting as a Revision Court he could send for the record for any purpose mentioned in section 436, but he was not competent under section 436 to direct a fresh inquiry, inasmuch as the accused had not been improperly discharged of an offence triable exclusively by a Court of Sessions, but had been acquitted of an offence within the Magistrate's jurisdiction. The Sessions Judge had, in fact, exercised the jurisdiction vested in him as an Appellate Court under section 423, as if an appeal had been presented to him from an order of acquittal; such powers in revision cases are only conferred on the High Court.

* Criminal Revision No. 588 of 1892, against the order passed by Baboo Brajendra Kumar Seal, Sessions Judge of Rajshahi, dated the 3rd December 1892, revising the order of Baboo Khagendro Nath Mitter, Deputy Magistrate of Malda, dated 17th November 1892.

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THE circumstances which gave rise to this application to the High Court were as follows:—

The complainant was one Gauri Kanta, *mandal* or chief tenant of Gauri Kanta tola, the property of Chutterput Singh, a zemindar, who it appeared was on bad terms with a neighbouring zemindar, named Hari Mohan Missir, and the accused (petitioner before the High Court), Baijanath Pandey, was a *barkandaz* of the latter.

Gauri Kanta tola, the scene of the occurrence which gave rise to the case, was bounded by either properties also belonging to Chutterput Singh or those of Hari Mohan Missir. Some time before the occurrence in question, some of the ryots of Hari Mohan Missir left his tola and went and settled in Gauri Kanta tola. On the 8th August 1892, Gouri Kanta Mandal presented a petition to the Magistrate complaining that some of Hari Mohan Missir's people had asked him to leave the estate of Chutterput Singh and settle himself on their master's estate, but that he had declined, and that on the morning of the 4th August, one Rubi Singh, a constable, and another constable, had come to his house and informed him that he was wanted by the Sub-Inspector in connection with an assault on another constable, into which case the Sub-Inspector was making an inquiry at a place not very far from his house; that he promised to go to the Sub-Inspector but did not go; that on the same afternoon at about 3 P.M., Baijanath Pandey and two other *barkandazes* of Hari Mohan Missir, along with some 12 or 13 coolies, came variously armed, entered his house and plundered it; that the Sub-Inspector, named Fakir, who was near to his house at the time, took no notice of the outrage, and that when he complained to him, he would not listen to his complaint. On their allegation, Gauri Kanta Mandal charged Baijanath Pandey and the other men whom he could not name, with having committed dacoity, and the Sub-Inspector with having committed an offence under section 217 of the Penal Code, and asked the District Magistrate himself to hold an inquiry or to depute some other officer to do so. Their complaint was made over to a Deputy Magistrate, Baboo Khagendro Nath Mitter, who recorded the statement of Gauri Kanta Mandal on the back of it, but did not apparently ask him any questions

relating to the refusal of the Sub-Inspector to listen to his complaint. On the statement being taken down, the Inspector of Police was directed to investigate the matter. It also appeared that eight other ryots living in Gauri Kanta tola presented similar complaints, and they stated that all the houses of the ryots had been plundered. There were some thirty families living in that tola, and, on the Inspector going to make his investigation, the remaining 21 ryots also made similar complaints to him.

The Inspector after holding his inquiry, reported that the facts had been so much exaggerated that it was impossible to ascertain what had actually taken place, and he reported the case as false.

On this report being submitted to the District Magistrate, an order was passed on the 6th September stating "that the view expressed by the Inspector that only some *dhan* claimed by one side had been cut in the field by the men of the other side with the assistance of the zemindar's *nagdis* is probable, but the charge of plundering houses is apparently a false one," and the complainants were called upon to show cause on the 14th September why they should not be prosecuted under section 211 of the Penal Code.

On the 16th September the Magistrate recorded the following order:—"Among the complainants Gauri Kanta Mandal is the headman. I select his case for a judicial inquiry. Summon Baijanath Pandey, section 380 and 147, Penal Code. Summon the witnesses named by Gauri Kanta. The case is made over to Baboo Khagendro Nath Mitter for early trial."

The case was then taken up by Baboo Khagendro Nath Mitter, who, after recording certain evidence, considered he was justified in framing charges under sections 380 and 448. He then proceeded to hear the evidence for the defence and acquitted the accused under section 258 of the Code of Criminal Procedure, and directed that the complainant (Gauri Kanta Mandal) should be prosecuted under section 211.

Gauri Kanta Mandal then applied to the Sessions Judge to send for the record and revoke the sanction, on the ground that it was bad in law and not justified by the facts of the case.

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The Sessions Judge in his judgment, after setting out the facts of the case referred to above, continued as follows :—

"Now it does not appear that the complaint made against the Sub-Inspector, of his having refused to hear the complainant when he went to complain to him soon after the occurrence, has been inquired into at all. The Sub-Inspector, who was within half a mile of the scene of occurrence at the time, has not been examined; the Inspector who held the inquiry has not been examined. The complaint that was made was of a very serious nature. It was stated that the whole village was plundered, and when complaint was made to the Sub-Inspector, he refused to take cognizance of the offence. The complainant broadly charged the Sub-Inspector with an offence under section 217. That the Sub-Inspector was engaged at the time inquiring into the case of the assault on a constable said to have been committed on the 2nd August by the servant of Chutterput Singh is certain. That the said constable was attacked and severely beaten is also certain. He had nine marks of injuries on different parts of his body, one of which was severe, and the others slight. That case came on for trial before the Deputy Magistrate, Baboo Sitakanta Ghose, who on a careful consideration of the evidence came to the following conclusion: "I cannot hold that the complainant was beaten by the accused persons. I am rather inclined to believe that he was most probably beaten while assisting the men of Hari Mohan and Gopimohon Baboos in looting paddy of the ryots of Katabu Deara as alleged by the accused."

Thus we have the following facts:—(1) A constable was severely assaulted by Chutterput's men on the 2nd August at a place near to Gauri Kanta tola, when he assisted Hari Mohan's men in looting the *dhan* belonging to the ryots of Chutterput. (2) That some of the ryots of Hari Mohan had left his estate and settled in Gauri Kanta tola, the property of Chutterput, and that Chutterput and Hari Mohan were at open war with one another. (3) That the Sub-Inspector, Fakir Chand, was engaged at a place not very far from Gauri Kanta tola to inquire into the said assault case. (4) That when he was so engaged the whole village is said to have been plundered by Hari Mohan's men. (5) It is certain that if the house of a single ryot was plundered in the way it is said to have been done, it was dacoity. (6) The evidence is that when the Sub-Inspector did not hear the complainants they went to the Naib of Chutterput the next day, and he brought them to Malda on the day following. Sunday intervened, and the petitions of complaint were filed before the Magistrate on the 8th August. The Magistrate made the order for the inquiry on the 8th August, and we find that the Inspector did not go to the scene of occurrence before the 14th August. In a case like this no time should have been lost in holding a strict inquiry.

It is no argument to say that the witnesses are not disinterested men. The witnesses must be either Chutterput's or Hari Mohan's tenants. Hari Mohan's tenants could not be expected to give evidence in favour of the prosecution, and all the ryots living in Gauri Kanta tola were complainants. It is quite possible that matters have been exaggerated and not all, but only the houses of those tenants who had left Hari Mohan's estate and Gauri Kanta's, the head ryots, had been looted, but on examining the papers in connection with the inquiry held by the Inspector, and the evidence, I am satisfied that there is a *substratum* of the truth.

Of the five Mahanandatola men examined by the Inspector, all appeared to have proved the occurrence, and one of them has been examined in Court, of them one is a school pandit having some position. His statement, as recorded by the Inspector, appears to have a ring of truth in it. Then the Jitutola men have not been examined.

The Inspector went to the place 10 days after the occurrence, and his report shows that he saw that the grain lay scattered about in several houses.

If the facts stated by the complainant be true it is a case of dacoity, and as such triable exclusively by the Court of Sessions.

I would ask the Magistrate to cause further inquiry to be made by examining the Sub-Inspector, the Inspector and Mahanandatola men who had been examined by the Inspector. It is also desirable to examine some of the respectable residents of Jitutola.

If after making the enquiry the inquiring officer is satisfied that a *primâ facie* case of dacoity has been made out, he should commit the case to the Sessions for trial. If after inquiry he is satisfied that a *primâ facie* case has not been established, he should discharge the accused, and if after the thorough inquiry he is satisfied that the case is false, he should, as he has done, direct the prosecution of the complainant on a charge under section 211 direct that further inquiry be made accordingly.

Baijanath Pandey then applied to the High Court to set aside the order on the ground that it was illegal and made without jurisdiction. In his petition he contended, *inter alia*, that, as he had been acquitted under section 258 after the charge had been framed, and witnesses on both sides examined, the Sessions Judge was wrong in directing a further trial; that the Sessions Judge had erred in directing the examination of the Sub-Inspector and the other persons ordered to be examined by him, the complainant never having sought to examine them; that the Sessions Judge was not competent to open up the whole matter when the only complaint before him was that the sanction under section 195

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should not have been given; that the Sessions Judge had no power to order the inquiring officer to commit the petitioner to the Sessions, if a *primâ facie* case be made out; and that the Sessions Judge's action in the matter was wholly irregular, illegal and unwarranted by the facts of the case.

On this application a rule was issued which now came on for argument.

The *Standing Counsel* (Mr. *Phillips*) and Baboo *Jogesh Chunder Dey* for the petitioner.

Mr. *Pugh*, Baboo *Dwarka Nath Chuckerbuty*, and Baboo *Digambur Chatterjee* for the opposite party.

The *Standing Counsel* (Mr. *Phillips*.)—Upon a full consideration of the facts of this case, the Magistrate has acquitted Baijanath of the charges brought against him, *viz.*, theft and house-trespass, sections 380 and 448 of the Penal Code, and has given him sanction to prosecute the complainant under section 211. Against this order, the complainant moved the Sessions Judge in order to get the sanction revoked, and the Sessions Judge instead of confining himself to the matter legally before him, has ordered a further inquiry against Baijanath under section 437 of the Code of Criminal Procedure, on the ground that the greater offence of dacoity had been committed. The Sessions Judge had no power, under that section, to re-open a case like this, in which the accused had been acquitted. [PRINSEP, J., referred to paragraph 2 of section 403 of the Code of Criminal Procedure.] That section has no application to the present case. Here the Magistrate had all the facts before him, and upon these facts he did not even believe the smaller offence of theft to have been committed. Paragraph 2 of that section does not apply to a case in which all the facts of a case are before the Court, and nothing new in the shape of evidence is forthcoming.

Mr. *Pugh*, *contra*.—The Judge believes that a most serious offence has been committed, and he is of opinion that there should be a further inquiry. He is clearly within his jurisdiction in directing a further inquiry. The last paragraph of section 403 immediately before the explanation, applies to this case. [PRINSEP, J.—Suppose in this case Baijanath had not been acquitted,

but convicted of theft, and the matter had come before the District Judge, not in appeal, but in revision under section 437, could he have ordered a fresh inquiry on the higher charge of dacoity? The High Court would have the power to do so, but not the Sessions Judge.] The High Court has the power, and this is enough for me, as the whole case is now before your Lordships, and you should, I submit, in the interests of justice, order a fresh inquiry. [AMEER ALI, J.—The illustrations to section 403 do not help you.] In the present case the Magistrate did not try the accused for the higher offence of dacoity; there was no such charge against him; the illustrations to section 403 are all with reference to cases where an accused person has been tried for the higher offence and acquitted. I do not, however, wish to argue that the Sessions Judge had the power to order a further inquiry in a case like this: the objection, however, is only technical. It is clear that this Court has all the power of a Court of appeal in revision, and that further inquiry should be directed by this Court in order that justice should be done.

The *Standing Counsel* (Mr. *Phillips*) in reply, was pointng out that the Sessions Judge had exercised the power of an Appellate Court under section 423 (*a*), which he clearly had no right to do, as the matter was before him in revision, when he was stopped by the Court.

The judgment of the High Court (PRINSEP and AMEER ALI, JJ.) was as follows:—

The complaint originally made before the Magistrate indicated the commission of what is known as a sessions case, probably dacoity. The Magistrate, in dealing with the case, proceeded under section 209 of the Criminal Procedure Code, which declares that if the Magistrate should find that there are not sufficient grounds for committing the accused for trial, he should discharge him, unless it appears to the Magistrate that such persons should be tried before himself or some other Magistrate, in which case he shall proceed accordingly. The Magistrate found that no sessions offence was *primâ facie* established, and he, accordingly, proceeded to hold the trial himself, that is to say, he proceeded under section 254 of the Code, and he framed a charge in writing against

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the accused, of the offence of theft in a building under section 380, and criminal trespass under section 448, Indian Penal Code. Finally, the Magistrate acquitted the accused and, under section 195 of the Code of Criminal Procedure, he gave sanction to prosecute the complainant under section 211 of the Penal Code for making a false complaint. The complainant then went to the Sessions Judge and asked to have this order revoked. The Sessions Judge proceeded to consider the entire case, not merely whether sanction to prosecute should or should not be given, and finding that proper inquiry had not been made, as all the evidence available had not been taken and that, if such inquiries were held, a sessions offence might be established, he directed that further inquiry should be held, and that the Magistrate should proceed in accordance with the result of such inquiry, leaving it still open to him, if he should find that the complaint was false, to give sanction to prosecute the complainant under section 211, Penal Code. On an application made on behalf of the accused persons in that case to set aside this order as without jurisdiction, a rule was granted, which has now come on for hearing.

On full consideration of the arguments of the learned Counsel, who appeared on both sides, we have no doubt that the Sessions Judge in this matter has exercised a jurisdiction which was not vested in him by law. If he proceeded to exercise the powers of revision as he seems to have done, he was competent to send for the record for any of the purposes mentioned in section 435. But he was not competent under section 436 to direct a fresh inquiry to be made, inasmuch as the accused had not been improperly discharged of an offence triable exclusively by a Court of Sessions but had been acquitted of an offence within the Magistrate's jurisdiction, in proceedings, as already pointed out, under sections 209, 234 and 258. The Sessions Judge, as a matter of fact, has exercised a jurisdiction vested in him as an Appellate Court under section 423, as if an appeal had been presented to him from the order of acquittal passed by the Magistrate. Such powers are in Revision conferred under section 439 only on the High Court. In the present rule, we desire to express no opinion on the merits of the case, but merely to hold that the order of the Sessions Judge directing further inquiry is bad, and must therefore be set aside.

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As we have been pressed to express some opinion regarding the effect of the Sessions Judge's order on the sanction given by the Magistrate to prosecute under section 211, Penal Code, we would merely say that as we understand the effect of the order of the Sessions Judge, it is to revoke the sanction given. The propriety of the order sanctioning the prosecution or revoking it is not before us.

Rule made absolute and order set aside.

H. T. H.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Beverley.

ALTA SOONDARI DASI (PETITIONER) *v.* SRINATH SAHA (OPPOSITE PARTY).*

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Appeal—Appeal from order—Order to person holding certificate under Act XXVII of 1860 *to furnish security where portion of the property held as security has been sold—Succession Certificate Act (VII of* 1889).

An order by which a person who had obtained a certificate under Act XXVII of 1860 was directed to furnish security to the extent to which the security originally furnished had been diminished by the sale of a portion of the property is not an order from which an appeal lies either under Act XXVII of 1860 or Act VII of 1889.

IN this case a certificate under Act XXVII of 1860 was granted to the petitioner, as the widow of one Radha Nath Shaha, on 23rd of August 1889, on her furnishing security to the extent of Rs. 5,000, the grant being opposed by Srinath Saha. She furnished two sureties, who gave security to the extent of Rs. 2,500 each. Some of the property given by the sureties as security having been sold—that of one surety for arrears of Government revenue, and that of the other for arrears of rent under Regulation VIII of 1819, the petitioner was called on to show cause why she should not furnish security to the extent to which the former security had become diminished by the sale of the property offered as

* Appeal from Original Order No. 181 of 1892, against the order of J. Knox-Wight, Esq., District Judge of Jessore, dated the 19th February 1892.