

think that they are not uninstrucive for us in applying the law as embodied in the Indian Statute. Whereas a mortgagor has an absolute right to redeem the mortgage this right has been conceded to other persons, like a puisne mortgagee, for the protection of the rights possessed by them. If the puisne mortgagee has lost all remedies available to him in respect of his own mortgage, he is left with nothing which might need protection. We must therefore hold that the plaintiffs' right to enforce their mortgage having long since become barred by time they had no subsisting interest in or charge upon the mortgaged property within the meaning of section 91 of the Transfer of Property Act at the time of the institution of the present suit. The suit has therefore been rightly dismissed.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

*Before Mr. Justice E. M. Nanavutty and Mr. Justice
G. H. Thomas*

1934
December, 3

KING-EMPEROR (COMPLAINANT) v. SADANAND (ACCUSED)*
*Criminal Procedure Code (Act V of 1898), sections 337(2), 339
and 532—Pardon—Commitment of person to whom pardon
has been tendered—Certificate of Public Prosecutor necessary
before trial commences in Court of Session—Certificate not
necessary in Magistrate's Court before commitment—Accomplice
retracting confession after accepting pardon—Withdrawal of
pardon before trial begins in Court of Session—
Examination of the accomplice, if still necessary.*

The certificate of the public prosecutor, which is required as a pre-requisite for the trial of a person to whom a pardon has been tendered, has to be filed before the trial of the accused commences, and the trial of the accused for an offence under section 396 of the Indian Penal Code really begins in the Court of Session. The preliminary enquiry before the Committing

*Criminal Reference No. 44 of 1934, made by S. M. Ahmad Karim, Additional Sessions Judge of Bahraich.

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Magistrate is not the trial of the accused. It is not, therefore, absolutely essential that the certificate of the public prosecutor should be filed in the Court of the Committing Magistrate before the enquiry into the offence commences. If such a certificate of the public prosecutor is deemed necessary for the purpose of initiating proceedings in the Committing Magistrate's Court, the provisions of section 532 of the Code of Criminal Procedure empowers the Court of Session to accept the commitment even if it is irregular unless that Court considers that the accused has been injured in his defence thereby. *In re the Sessions Judge of Tanjore* (1), and *Nga Wa Gyi v. King-Emperor* (2), followed.

It is obligatory upon the prosecution under section 337(2) of the Code of Criminal Procedure to examine in the Court of Session an accomplice, who, after accepting a pardon, retracts his confession, and his pardon is, in consequence, withdrawn before the trial begins in the Court of Session. *Nayeb Shahana v. Emperor* (3), dissented from.

The Government Advocate (Mr. H. S. Gupta), for the Crown.

NANAVUTTY and THOMAS, JJ.:—This is a reference made by the learned Additional Sessions Judge of Bahraich under section 438 of the Code of Criminal Procedure.

The facts out of which this reference arises are briefly as follows:

In a case of dacoity with murder under section 396 of the Indian Penal Code one Sadanand made a confession which was recorded on the 19th of January, 1934, and the case was started on the 30th of January, 1934. The prosecuting inspector of police reported on the 20th of March, 1934, to the Magistrate that a pardon may be tendered to Sadanand. The Magistrate thereupon passed an order on the same date granting pardon to Sadanand under section 337 of the Code of Criminal Procedure and on the same date Sadanand's statement on oath was recorded by the Magistrate. On the following day Sadanand refused to take an oath or to continue

(1) (1918) 35 M.L.J.R., 259.

(2) (1925) I.L.R., 3 Rang., 55.

(3) (1934) I.L.R., 61 Cal., 399.

giving an account of the occurrence. He stated that all that he had deposed to on the previous day was false and made under the influence of some drug. Thereupon Sadanand was remanded to the jail lock-up and not sent up as a witness to the Court of Session. It was the duty of the Committing Magistrate, who committed the co-accused of Sadanand to the Court of Session on the 27th of March, 1934, to stand their trial on a charge under section 396 of the Indian Penal Code, to have sent up Sadanand as a witness before the Court of Session. Sub-section 2 of section 337 of the Code of Criminal Procedure lays down that every person accepting a tender under this section shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any. This provision of law was overlooked by the learned Committing Magistrate. The trial of the co-accused of Sadanand, however, ended in an acquittal on the 7th of May, 1934. The accused Sadanand was all the time in the jail lock-up. On the 7th of April, 1934, the Court muharrir attached to the Court of the Committing Magistrate reported to the prosecuting inspector of police the facts relating to Sadanand's grant of a pardon and his refusal to avail himself of that pardon and requested that the report be forwarded to the court muharrir attached to the Court of the Sessions Judge for necessary action. The court muharrir of the Additional Sessions Judge of Bahraich reported that the trial had ended on the 7th of May, 1934. The prosecuting inspector of police then put up this report before the Committing Magistrate, and the Magistrate Mr. Krishnanand fixed a date for hearing and a case under section 396 of the Indian Penal Code against Sadanand was registered on the 12th of May, 1934, and the 21st of May, 1934, was fixed for evidence in that case. Sadanand admitted before the Committing Magistrate that he had not complied with the condition imposed upon him at the time that he was granted a pardon.

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After a preliminary enquiry the case was committed to the Court of Session on the 30th of May, 1934. This reference has been made by the learned Additional Sessions Judge to this Court on the 25th of September, on the ground that there was no certificate of the public prosecutor under section 339 of the Code of Criminal Procedure and that, therefore, the commitment appeared to be defective.

In our opinion the commitment of the accused to the Court of Session made by the learned Magistrate is not illegal. *In re the Sessions Judge of Tanjore* (1) it was held by two learned Judges of the Madras High Court that an enquiry before the Committing Magistrate was not a trial and did not come within the prohibition contained in section 233 of the Code. The certificate of the public prosecutor, which is required as a pre-requisite for the trial of a person to whom a pardon has been tendered, has to be filed before the trial of the accused commences, and the trial of the accused for an offence under section 396 of the Indian Penal Code really begins in the Court of Sessions. The preliminary enquiry before the Committing Magistrate is not the trial of the accused. It is not therefore, absolutely essential that the certificate of the public prosecutor should have been filed in the Court of the Committing Magistrate before the enquiry into the offence commenced. In *Nga Wa Gyi v. The King-Emperor* (2) it was held that what was forbidden by section 339 of the Code of Criminal Procedure was the trial of an accused person without the certificate of the public prosecutor and that the enquiry before the Magistrate not being a trial which in this particular case had to be held by the Court of Session as a court of original jurisdiction, the provisions of section 339 of the Code of Criminal Procedure had been duly complied with on the production of the certificate in the Court of Session. It was held further that if such a

(1) (1918) 35 M.L.J.R., 259.

(2) (1925) I.L.R., 3 Rang., 55.

certificate of the public prosecutor were to be deemed necessary for the purpose of initiating proceedings in the Committing Magistrate's Court, the provisions of section 532 of the Code of Criminal Procedure empowered the Court of Session to accept the commitment even if it was irregular unless that Court considered that the accused had been injured in his defence thereby. It was also held in that case that no objection having been taken by the accused to the irregularity either before the Committing Magistrate or before the Court of Session even after the point had been prominently brought to his notice, no ground existed for setting aside the proceedings as totally invalid.

In this connection our attention has been invited to a ruling of the Calcutta High Court reported in *Nayeb Shahana v. Emperor* (1), in which it has been held that it is not obligatory upon the prosecution under section 337(2) of the Code of Criminal Procedure to examine in the Court of Session an accomplice, who, after accepting a pardon, retracts his confession, and his pardon is, in consequence, withdrawn before the trial begins in the Court of Session. With due respect to the learned Judges who decided that case were are of opinion that the imperative provisions of sub-clause (2) of section 337 of the Code of Criminal Procedure cannot be ignored in this manner. In our opinion the decision of the Rangoon High Court quoted above is fully applicable to the facts of the present case and we, therefore, consider that the commitment of Sadanand to the Court of Session by the learned Magistrate is perfectly regular and the learned Additional Sessions Judge should proceed with the trial of the case without any further delay.

We will now proceed categorically to answer the questions raised by the learned Additional Sessions Judge in his order of reference.

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As to point (a) we hold that the absence of the certificate of the public prosecutor in the proceedings before the learned Committing Magistrate does not in any way vitiate the commitment of the accused to the Court of Session. As to point (b) we have the assurance of the learned Committing Magistrate that he never refused to accept the certificate of the public prosecutor at any stage of the proceedings and that as a matter of fact no such certificate of the public prosecutor was tendered before him. We, therefore, need not decide this point at all. It is a matter for the district authorities to settle it as they think best. As to point (c) we hold that the learned Additional Sessions Judge can accept the certificate of the public prosecutor before the trial commences in his Court and if he so accepts it, the trial of the case will be perfectly valid. As to point (d) we hold that the certificate that should be filed in this case before the trial commences in the Court of Session should be the certificate of the public prosecutor. Section 27, Chapter III, at page 8 of the Police Regulations lays down that prosecuting inspectors of police and prosecuting sub-inspectors of police have under section 492 of the Code of Criminal Procedure been appointed public prosecutors within their districts of posting for cases tried or enquired into by Magistrates after investigation by the police. It is, therefore, clear that in this case the certificate of the prosecuting sub-inspector does comply with the provisions of section 339 of the Code of Criminal Procedure and should be accepted by the learned Additional Sessions Judge as a valid certificate before proceeding with the trial of the accused Sadanand for an offence under section 396 of the Indian Penal Code.

Let the record of the case be returned to the Court of the Additional Sessions Judge of Bahraich together with a copy of our reply to his reference.

Case remanded.