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answering the second and third questions in the way I do, since, of course, the opinion of my learned brothers will prevail.

BY THE COURT (SRIVASTAVA, A.C.J., ZIAUL HASAN, J. and SMITH, J. dissenting):—The first question is answered in the affirmative; hence the other questions do not arise.

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SRIVASTAVA, A.C.J. and SMITH, J.:—The facts of this case have been fully stated in the order of reference to a Full Bench, dated the 11th of January, 1934. They need not therefore be repeated. The answer given by the majority of the Full Bench to the first question referred to them is in the affirmative. This answer seems to us to be decisive of the appeal. The only argument urged on behalf of the appellant is that the question of *benami* was never specifically raised in the pleadings and that the answer given by the Full Bench being based on the view that Nur Mohammad was the *benamidar* for Mohammad Ramzan, an issue should be remitted to the lower court for a finding on this point. If there is any force in the appellant's contention he ought to have urged it before the Full Bench. We feel ourselves bound by the decision of the Full Bench in this matter, and are clearly of opinion that in view of the decision of the Full Bench it is not open to us to go into the question now raised on behalf of the appellant. No other point being urged, we dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL

Before Mr. Justice E. M. Nanavutty

KALLU (ACCUSED-APPELLANT) *v.* KING-EMPEROR (COMPLAINANT-OPPOSITE PARTY)*

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Criminal Procedure Code (Act V of 1898), sections 253(2), 350, 435 and 437—Accused charged with offence not exclu-

*Criminal Revision No. 37 of 1934, against the order of A. Monro, I.C.S., District Magistrate of Lucknow, dated the 21st of December, 1933.

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sively triable by Court of Session—Charge framed—De novo *trial—Accused discharged—Discharge order amounts to acquittal—District Magistrate, if can order further enquiry—No illegality, impropriety or irregularity in proceeding of trying magistrate—District Magistrate whether can set aside order of discharge.*

In the case of an offence of causing death by a rash and negligent act punishable under section 304A, I. P. C., it being triable not only by a Court of Session but also by a Magistrate of the first class, the District Magistrate has no jurisdiction to order a further enquiry under section 437 of the Code of Criminal Procedure.

Where on an examination of the record under section 435 the District Magistrate cannot find an illegality, impropriety or irregularity or anything incorrect in the proceedings of the trying magistrate he has no power to take action under section 437 or to set aside an order of discharge on other grounds. *Etzad Husain and others* v. *Amjad Husain* (1), *Ramanand and others* v. *King-Emperor* (2), *Baij Nath Pandey* v. *Gauri Kanta Mandal* (3), and *Prankhang and others* v. *King-Emperor* (4), relied on.

Where after a charge has been framed there is a *de novo* trial and the accused is discharged, such an order of discharge amounts to an acquittal and no further enquiry can possibly be held or is legally permissible. *T. Sriramulu and others* v. *K. Veerasalingam* (5), and *Bugtha Simhadri Naidu* v. *Behava Sitharama Patrudu and others* (6), relied on.

Dr. *Qutub-uddin Ahmad*, for the applicant.

Mr. *S. C. Dass*, holding brief of the Government Advocate, for the Crown.

NANAVUTTY, J.:—This is an application for revision of an order of the learned District Magistrate of Lucknow, dated the 21st of December, 1933, directing a further enquiry under the provisions of section 437 of the Code of Criminal Procedure against Kallu, Abdulla and Chhiddu in respect of an alleged offence under section 304 of the Indian Penal Code.

I have heard the learned Counsel for the applicant as also the learned Assistant Government Advocate and examined the record of the case.

(1) (1932) 9 O.W.N., 442.
(2) (1931) 9 O.W.N., 134.
(3) (1893) I.L.R., 20 Cal., 633.
(4) (1912) 16 C.W.N., 1078.
(5) (1914) I.L.R., 38 Mad., 585.
(6) (1915) 32 I.C., 129.

In the first place it is contended that the learned District Magistrate of Lucknow usurped a jurisdiction which was not vested in him inasmuch as he purported to order a further enquiry under section 437 of the Code of Criminal Procedure in respect of an offence which was not exclusively triable by the Court of Session. Section 437 of the Code of Criminal Procedure runs as follows:

> "When, on examining the record of any case under section 435 or otherwise, the Sessions Judge or District Magistrate considers that such case is triable exclusively by the Court of Session and that an accused person has been improperly discharged by the inferior Court, the Sessions Judge or District Magistrate may cause him to be arrested, and may thereupon, instead of directing a fresh enquiry, order him to be committed for trial upon the matter of which he has been, in the opinion of the Sessions Judge or District Magistrate, improperly discharged."

In the present case the offence under section 304-A of the Indian Penal Code, that is to say causing death by any rash and negligent act is an offence which is triable not only by a Court of Session but also by a Magistrate of the first class. That being the case, the learned District Magistrate had no jurisdiction to order a further enquiry under section 437 of the Code of Criminal Procedure.

In the second place the examination under section 435 of the Code of Criminal Procedure by the District Magistrate of the record prepared by the trying Magistrate, who first heard this case, has not revealed the commission of any irregularity or illegality by Mr. S. M. Zakir, who had discharged the accused, and, therefore, it was not open to the learned District Magistrate to take any action under section 437 of the Code of Criminal Procedure when no such irregularity or illegality had

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Nanavutty, J.

been discovered by him. In *Etzad Husain and others* v. *Amjad Husain* (1), it was held by the late Mr. Justice Raza that where in an order of discharge passed by a trying Magistrate it was not suggested that the trying Magistrate had overlooked or ignored any evidence nor could it be said that the view taken by the trying Magistrate was palpably unreasonable or perverse and it was found that the trying Magistrate had seen and heard the witnesses and was not satisfied with their evidence and the order of discharge was one which could not be said to be either perverse or *prima facie* incorrect, then a further enquiry under section 436 of the Code of Criminal Procedure was not to be ordered in the case.

The same view was taken in another ruling of this Court reported in *Ramanand and others* v. *King-Emperor* (2).

In the third place it is to be noted that the charge sheet against Kallu, Abdulla and Chhiddu had been framed by the trying Magistrate on the 30th of June, 1933, and that being so the order of discharge of the accused virtually amounts to an acquittal of the accused, and the learned District Magistrate was not justified in setting aside such an order on his own initiative without moving the local Government to file an appeal under section 417 of the Code of Criminal Procedure for setting aside the order of acquittal.

In *Baijnath Pandey* v. *Gauri Kanta Mandal* (3) it was held that the Sessions Judge as a Court of revision could send for the record of any criminal case from a Subordinate court for any purpose mentioned in section 435 of the Code of Criminal Procedure but that he was not competent under section 436 to direct a fresh enquiry, inasmuch as the accused had not been improperly discharged of an offence triable exclusively by a court of Session, but had been acquitted of an offence within the jurisdiction of the Magistrate and the Sessions

(1) (1932) 9 O.W.N., 442. (2) (1931) 9 O.W.N., 134.
(3) (1893) I.I R., 20 Cal., 633.

Judge had, in fact, exercised a jurisdiction not vested in him by law. These remarks of the Calcutta High Court apply with full force to the action of the learned District Magistrate in the present case.

Nanavutty, J.

In *Prankhang and others* v. *King-Emperor* (1) it was held by the learned Judges of the Calcutta High Court that it was open to a District Magistrate to order further proceedings in any case under section 437 of the Code of Criminal Procedure but that the powers conferred upon him were limited by the words "on examining any record under section 435" and that section 435 laid down that a Court may call for and examine any record for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such inferior court. Where, therefore, the District Magistrate could find no illegality or impropriety or irregularity or nothing incorrect in the proceedings of the inferior court, he was not empowered to set aside an order of discharge upon other grounds, or upon no grounds at all.

Again in *T. Sriramulu and others* v. *K. Veerasalingam* (2), it was held that where a Magistrate framed charges against an accused person and was succeeded by another Magistrate, who re-commenced the case under section 350 of the Code of Criminal Procedure, and discharged the accused under section 253(2) of the Code of Criminal Procedure, the accused was *autrefois acquit* and that no further enquiry could be held into the case. In the present case also the accused had been charged under section 304A of the Indian Penal Code and had been discharged under section 253(2) of the Code of Criminal Procedure, and, therefore, no further enquiry into their case is now permissible.

In *Bugtha Simhadri Naidu* v. *Behava Sitharama Patrudu and others* (3), it was held that a *de novo* trial

(1) (1912) 16 C.W.N., 1078. (2) (1914) I.L.R., 38 Mad., 585.
(3) (1915) 32 I.C., 129.

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held under section 350 of the Code of Criminal Procedure, did not imply the cancellation of a charge previously framed against the accused and consequently an order subsequently passed letting off the accused was one of acquittal and not of discharge. This ruling applies with full force to the facts of the present case. Here too after the charge had been framed on the 30th of June, 1933, there was a *de novo* trial and the accused have been discharged. Such an order of discharge amounts to an acquittal and no further enquiry can possibly be held or is legally permissible.

Nanavutty, J.

In *Ramanand and others* v. *King-Emperor* (1), it was held by a learned Judge of this Court that where an accused person had been discharged by the trying Magistrate and where two views were possible regarding the guilt of the accused, but where the decision of the Magistrate was not manifestly perverse or *prima facie* incorrect, a Court of revision should not interfere with the order of discharge.

For the reasons given above I allow this application for revision, set aside the order of the learned District Magistrate directing a further enquiry and direct that all proceedings taken against the applicant Kallu and his co-accused Abdulla and Chhiddu be dropped and no further action be taken against any one of them.

Application allowed.

REVISIONAL CRIMINAL

Before Mr. Justice G. H. Thomas

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PANDIT MATHURA PRASAD NAITHANI (COMPLAINANT-APPLICANT) *v.* PANDIT CHAKRA DHAR JAYAL (ACCUSED OPPOSITE-PARTY)*

Criminal Procedure Code (Act V of 1898), section 439—Defamation case—Acquittal—Magistrate finding that imputations were

*Criminal Revision No. 31 of 1934, against the order of H. J. Collister, I.C.S., Sessions Judge of Lucknow, dated the 13th of January, 1934.

(1) (1932) A.I.R., Oudh, 114=9 O.W.N., 134.