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KABIR BAKSHI.

v.
THE CROWN.

been directed to furnish security under section 118 of the Code that he was further directed to restrict his movements to the limits of his village.

I accordingly set aside the latter part of the Magistrate's order, but my order will in no way affect the direction by the Magistrate that the accused is to furnish security for his good behaviour.

Revision accepted.

CRIMINAL REVISION.

Before Mr. Justice Martineau.

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July 14.

MAHANDU AND OTHERS — *Petitioners,**versus*THE CROWN—*Respondent.*

Criminal Revision No. 228 of 1919.

Criminal Procedure Code, Act V of 1898, section 337—Accomplice—statement on oath by an accused person who has accepted a pardon, but has not been discharged—whether evidence against the other accused—case not exclusively triable by Sessions Court.

M., one of the accused persons, was offered a pardon on 6th June 1918. On the 11th June the case was *chained* by the Police and *M.* was entered as one of the accused persons in the *chalan* as well as in the opening sheet of the Magistrate's proceedings. *M.*'s evidence was recorded by the Magistrate on the 4th July. The case was not one exclusively triable by the Court of Session or High Court.

Held that, as the case was one not exclusively triable by a Court of Session, section 337 of the Code was inapplicable.

Held also that, as there had been no verbal or written order of discharge by the Magistrate, *M.* was still an accused person on the 4th July when he was examined and his evidence was consequently not admissible against the other accused.

Bann Singh v. Emperor (1), referred to.

Sardar Khan v. Emperor (2), distinguished.

(1) (1906) I. L. R. 33 Cal. 1353.

(2) 21 P. R. Cr. 1904.

Revision from the order of A. Campbell, Esq., Additional Sessions Judge, Lahore, dated the 23rd December 1918, confirming that of J. E. Keough, Esquire, Additional District Magistrate, Lahore, dated the 5th November 1918, convicting the Petitioners.

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NAND LAL, for Petitioners.

NEMO, for Respondent.

MARTINEAU, J.—On the night between the 9th and 10th of January 1918 a burglary was committed in the shop of Dalip Singh, a cloth merchant of Shahdara, and a quantity of cloth and other property was stolen. The petitioners have been convicted of the offence, and the conviction rests principally on the evidence of an accomplice named Musa, who has given evidence in consequence of a promise made to him under the authority of the Local Government that he would not be prosecuted if he made a true statement.

The case not being one triable exclusively by a Court of Session, section 337, Criminal Procedure Code, does not apply, and the question arising is whether Musa's evidence is admissible. This question was decided in the affirmative by Mr. Prenter in his order of the 18th November 1918 and the appeal was then heard on the merits by his successor Mr. Campbell, who upheld the convictions.

The promise of immunity from prosecution was made to Musa on the 6th June 1918, the case was chalaned by the police on the 11th June, and Musa's evidence was recorded by Mr. Marsden on the 4th July. The question whether that evidence is admissible depends upon whether or not Musa was an accused person when he gave it. Mr. Prenter holds that Musa was not an accused person in the case from the commencement of the trial, and that even if he was, technically, an accused he was actually, though not by order in writing, discharged before he gave his evidence, *i.e.*, he was given fully to understand that he was no longer an accused person.

I am unable to agree with this view. In the *chalan* sent up by the police on the 11th June Musa

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was entered as one of the accused persons and he was also shown as an accused in the opening sheet of the Magistrate's proceedings. There is a note in the *chalan* to the effect that a promise had been made to Musa that he would not be prosecuted and that he should be discharged from his bail and examined as a witness. This shows, not that he was not an accused person at that time, but only that the police wished him to be made a witness. They did not themselves remove him from the category of the accused, and in fact had no power to do so as Musa could be discharged only by the order of the Magistrate.

It appears clear therefore that Musa was an accused person at the commencement of the enquiry before Mr. Marsden. There was admittedly no written order by Mr. Marsden discharging him, and I can find nothing to indicate that any verbal order of discharge was ever given. Musa no doubt understood, when the promise of immunity from prosecution was made to him on the 6th June, that he would be examined as a witness, but the promise was not an order of discharge. Moreover, it was necessary that he should be discharged by a written order before he could cease to be an accused person (see *Banu Singh v. Emperor*) (1).

The learned Sessions Judge has relied on *Sardar Khan v. Emperor* (2) in which it was held that an accomplice whom the Local Government had promised not to prosecute in respect of an offence to which sections 337 to 339, Criminal Procedure Code, did not apply, and who had been sent up as a witness for the prosecution, was not an accused person and that his evidence was therefore admissible. With all respect I am unable to agree with that decision, as in my view the accomplice after having been arrested by the police would not cease to be an accused person by the mere fact that the police did not send him up for trial. That case is, besides, distinguishable from the present one, for there the accomplice was sent up before the Magistrate as a witness whereas in the present case he was sent up as an accused person. Moreover,

(1) (1906) I. L. R. 33, Cal. 1353,

(2) 21 P. R. (Cr.) 1904.

the learned Judge who decided that case observed in his judgment that if the accomplice had been sent up as an accused person his evidence would have been inadmissible.

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I hold therefore that Musa remained an accused person up to the time of his giving evidence, and that he was consequently not a competent witness and his evidence is inadmissible.

[*The remainder of the judgment is not required for the purposes of this report—Ed.*]

Revision accepted.

APPELLATE CIVIL.

Before Mr. Justice Shadi Lal and Mr. Justice Dundas.

JIWAN DAS AND OTHERS (DEFENDANTS)—

1919

Appellants

July 21.

versus

THARAJ AND OTHERS (PLAINIFFS)—

Respondents.

Civil appeal No. 226 of 1916.

Mortgage—Redemption—Consolidation of several mortgages on different properties—agreement not to redeem one mortgage without the others must be clearly proved—Transfer of Property Act, IV of 1882, section 61.

The question arising in this appeal was whether plaintiff could redeem his mortgage of 18th August 1882 without redeeming also his two subsequent mortgages of 9th September 1882 and of 8th February 1889. The mortgages related to different properties. In the mortgage of September 1882 it was stipulated that the mortgage would be redeemed along with the prior mortgage, dated 18th August 1882, while in the 1889 mortgage it was agreed that "should the mortgagor redeem the land mortgaged by the deeds of the 18th August 1882 and 9th September 1882, they will redeem the present charge at the same time."

He'd, that although the parties contemplated that the money due on all the mortgages should be paid at the same time that was not enough to establish the defendant's plea of consolidation, but that it was incumbent upon the latter to show that plaintiffs expressly and unequivocally contracted themselves out of their right to redeem the first mortgage without redeeming at the same time the two later mortgages.