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a view that, perhaps, the Honourable the High Court may think fit to represent the matter to Government, so that, by a short amending Act, the provision of Chapter XIX., Part A., of the New Code may be made applicable to Courts of Small Causes, as the corresponding provisions of Act VIII. of 1859 had been before. A bill, if I mistake not, for amending one of the schedules of the New Code, is even now before the Calcutta Legislative Council, and, if timely representation be made, the amendment here proposed might be included in it.

"The question for the opinion of the High Court is,—can a Court of Small Causes, in cases coming under the New Code of Civil Procedure, issue certificates against the *moveable* property of the judgment-debtor outside its own local limits?"

PER CURIAM:—Section 5 of Act X. of 1877 enacts that the sections of that Act, which are mentioned in the second schedule, shall be applicable to Courts of Small Causes in the Mofussal. We do not find in that schedule any of the sections from section 223 to section 229 inclusive, nor any portion of section 648, except that which relates to the subject of arrests, and we, consequently, have come to the conclusion that the Legislature has deliberately resolved that Small Cause Courts in the Mofussal shall not be at liberty to execute decrees against property beyond their local jurisdiction. Under these circumstances, we must answer the question submitted to us in the negative, and we decline to make any such representation to Government, as suggested by the learned Judge of the Small Cause Court of Ahmedabad.

[APPELLATE CRIMINAL.]

Before Mr. Justice Melvill and Mr. Justice Kemball.

February 28.

IMPERATRIX *v.* GOWDA'P'A BIN VENKUGOWDA.*

The Code of Criminal Procedure (Act X. of 1872), Sections 44, 142, 215, 295, and 296—Discharge—Revival of prosecution.

When an accused person has been discharged by a Subordinate Magistrate under section 215 of the Code of the Criminal Procedure, and the Magistrate of the District, after calling for the proceedings, considers that the order of discharge

* Criminal Appeal No. 8 of 1878.

was improper, the proper course for the Magistrate of the District to adopt is to refer the proceedings for the orders of the High Court, and not to order a new trial by another Subordinate Magistrate.

THIS was an appeal by the Government of Bombay, under section 272 of the Code of Criminal Procedure against the order of C. F. H. Shaw, Session Judge of Belgaum, reversing, in appeal, the conviction and sentence passed by J. M. Campbell, Magistrate, First Class.

The accused Gowdápá was tried before Ráo Báhádur Rámchandra Bápuji, Magistrate, First Class, on alternative charges of giving false information, with intent to cause a public servant to use his lawful power to the injury of another person, and of giving false evidence in a stage of a judicial proceeding under sections 182 and 193, respectively, of the Indian Penal Code; and was discharged under section 215 of the Code of Criminal Procedure.

The District Magistrate, Mr. Spry, considering an order of discharge to be improper on the ground of its being opposed to the weight of evidence adduced in the case, called for the record and proceedings, professing to act under section 142 of the Code of Criminal Procedure, and referred them to Mr. Campbell under section 44, with a direction to re-try the accused person.

Mr. Campbell proceeded with the trial accordingly, and, finding the accused guilty of giving false evidence, sentenced him to six months' rigorous imprisonment.

Against this conviction the accused appealed to the Court of Session, which, without going into the merits, held the re-trial by Mr. Campbell to be *ultra vires* on the authority of the case of *Mohesh Mistree*,[1] and annulled the conviction and sentence.

Nánábhái Haridás (Government Pleader) for the Government:—The District Magistrate had power to direct a re-trial, although the accused had been discharged: see Explanation II. to section 215 of the Code of Criminal Procedure, adopted in the case of *Rámjoy Mozoomdár*;[2] *Jint Sáhoo* v. *Bheekon Roy*;[3] *Hari Singh* v. *Danish Mahomed*.[4] Under section 142 of the Code the interference by the District Magistrate is warranted, even though

(1) I. L. R. 1 Calc. 282.
(2) 14 Calc. W. R. 6 Cr. Rul.
(3) 18 Calc. W. R. 39 Cr. Rul.
(4) 20 Calc. W. R. 46 Cr. Rul.

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there may be no fresh evidence to weigh. Under this section the District Magistrate can take up any case on mere suspicion. If he had not such a power, Subordinate Magistrates might give perverse verdicts on evidence with impunity. The Government cannot appeal in such a case, for there is no acquittal; and the High Court cannot interfere, for there is no illegality. The result would be to render it impossible to cure failure of justice in a case in which a Subordinate Magistrate chose to discharge an accused person on evidence, which every other Magistrate in the Presidency would consider amply sufficient for a conviction. Mr. Justice Markby, in giving his judgment in *The Empress* v. *Donnelly*,[1] seems to have overlooked such a case as the above.

Mánekshâh Jehángirshâh for the discharged accused:—To warrant the revival of a prosecution against a discharged person, two things are necessary, viz., the Magistrate must be the same, and there must be fresh evidence. The cases of *Mohesh Mistree*[2] and *The Empress* v. *Donnelly*[3] are in point. The case of *Rámjoy Mozoomdár*[4] was a case under section 245 of the old Code, which does not correspond with section 215 of the new one. The case of *Hari Singh* v. *Danish Mahomed*[5] was a case of discharge and revival before the same Magistrate. Section 142 cannot be construed to empower the Magistrate of the District to take up any case, under any circumstances. The Legislature, in enacting this section, was dealing with certain classes of Magistrates in regard to their capacity of taking up cases without a complaint. But it is clear that the cases, here referred to, are original cases, and not those coming under section 215. Section 296 deals with the latter class of cases, and it gives the power of revival to the Court of Session and the District Magistrate in Session cases only. Again, section 298, which empowers the High Court, the Court of Session, and the District Magistrate to order inquiry by express mention, restricts that power to dismissal under section 147, *i.e.*, in cases in which no process has issued. If the Legislature had contemplated to extend their power to cases coming under section 215, they would have said so explicitly.

(1) I. L. R. 2 Calc. 405. (2) I. L. R. 1 Calc. 282. (3) I. L. 2 Calc. 405.
(4) 14 Calc. W. R. 65 Cr. Rul. (5) 20 Calc. W. R. 46 Cr. Rul.

Revival of a case, in the absence of fresh evidence, amounts to an appeal from one Magistrate to another of co-ordinate jurisdiction, which this Code of Criminal Procedure nowhere allows. Section 297 gives to the High Court ample powers to deal with perverse verdicts by Subordinate Magistrates; but with regard to Courts other than the High Court this section is also restrictive, for, by expressly mentioning certain sections, it excludes all the others.

The judgment of the Court was delivered by

MELVILL, J.:—In this case Gowdápá bin Venkugowdá was accused before a First Class Magistrate, Mr. Rámchandra Bápuji, of an offence triable by the Magistrate, and was discharged by him under section 215 of the Criminal Procedure Code. The District Magistrate thereupon called for the record of the case; and, not being satisfied with the reasons given for the order of discharge, sent the record to another First Class Magistrate, Mr. Campbell, with an order directing him to try the case afresh. Mr. Campbell convicted the accused; but, on appeal to the Sessions Court, the conviction was reversed, on the ground that it was not competent to the District Magistrate to revive the proceedings, after Gowdápá had been discharged by Mr. Rámchandra Bápuji. In support of this conclusion the Sessions Judge relied on the decision of the Calcutta High Court in the case of *Mohesh Mistree and another*.[1]

The District Magistrate professes to have acted under section 142 of the Criminal Procedure Code, and he referred the case to Mr. Campbell under section 44.

Although the terms of section 142 are very wide, yet, looking to the position of that section in chapter XI, which is headed "Of complaints to a Magistrate," we think that, in enacting that section, all that the Legislature was at the moment intending, was to draw a distinction between different classes of Magistrates, and to declare that, while Magistrates generally are not competent to try a case without complaint, certain Magistrates are empowered, without any complaint and on mere suspicion, to take cognizance of offences. Whatever may be the effect of the words, we do not think it was the intention of the section to give to the

(1) I. L. R. 1 Calc. 282.

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District Magistrate any power of interference with, or revision of, the decision of the Subordinate Magistrates, which is not conferred upon him by other portions of the Code. We do not think, therefore, that we should be justified in holding that the District Magistrate derives any such power of interference or revision from the very extensive words of section 142, if it appears from other portions of the Code that it was intended to restrict his powers in that respect.

Now, section 296 expressly empowers the Magistrate of the District to interfere in cases of discharge by a Subordinate Magistrate in Sessions cases only. In such cases the Magistrate of the District may order a committal to the Sessions Court, or in certain cases may order the Magistrate, who has discharged the accused, to make a new inquiry. According to the ordinary rules of construction, the conclusion from this express provision, is that in cases other than those specified in section 296, the Magistrate of the District cannot order a fresh inquiry, when there has been a discharge by a Subordinate Magistrate. It would be to render section 296 meaningless and useless if we were to hold that the District Magistrate could, by means of the fiction of taking up a case "upon suspicion," exercise the same power in all cases, which is expressly given to him in a certain class of cases only.

It is not necessary for us to say whether there might not be circumstances under which the Magistrate of the District might take up a case under section 142, after a discharge by a Subordinate Magistrate. It is sufficient to say that that section cannot empower him, as he has done in this case, to call for the record of a case in which there has been a discharge by a Subordinate Magistrate, and merely on the ground that he differs from the conclusion arrived at by the Subordinate Magistrate on the evidence, to direct another Subordinate Magistrate to make a fresh inquiry into the case. An accused person might, if this were permitted, be harassed beyond all measure. The Magistrate of a District, if not satisfied with the order of discharge passed by one Subordinate Magistrate, might refer the case for fresh inquiry to every one of his subordinates in succession; and, if each inquiry resulted in the discharge of the accused, the District Magistrate might, as a last resource, proceed to try the case himself.

The Magistrate of the District in this case professes to have called for the record under section 142. That section gives no power to call for proceedings. The only section which gives that power, is section 295, and under that section the District Magistrate must be held to have acted. And we agree with the decision of the Calcutta Court in *Mohesh Mistree's* case[1] to the effect that if a case come before the Magistrate under section 295, the proper and only course for him (except in Sessions cases) is to report it for the orders of the High Court.

The pleader, who has supported this appeal on behalf of the Government, has pressed upon our consideration the argument that, if this view of the law be correct, there is no remedy in the case of a perverse discharge by a Magistrate, in the face of evidence which demanded a conviction. A perverse acquittal, he argued, might be rectified by an appeal; but an order of discharge would be practically irreversible, unless it involved some error in law. To this it is sufficient to answer that, if the Legislature had intended to give to the District Magistrate a power to order a fresh trial in all cases of discharge, it would not have expressly conferred that power in Sessions cases only; and that the powers given to the High Court by section 297 are probably sufficiently extensive to enable this Court to deal with every case in which an order of discharge could properly be regarded as perverse.

For these reasons we think that the order of the Sessions Court, reversing the conviction of Gowdápá, was a right order, and we accordingly reject the appeal made by the Government of Bombay.

Appeal rejected.

(1) I. L. R. 1 Calc. 282.