

PRIVY COUNCIL.

*Before Lord Wright, Lord Romer, Lord Porter, Sir Shadi Lal
and Sir George Rankin.*

BAWA FAQIR SINGH—Appellant,

versus

THE KING-EMPEROR—Respondent.

Privy Council Appeal No. 38 of 1938.

On Appeal from the High Court at Lahore.

*Criminal Procedure Code (Act V of 1898), S. 337, as
amended by Act XII of 1923 — Tender and acceptance of
pardon — Withdrawal under S. 494 from prosecution of
pardoned accused — Pardoned accused examined — Offence
punishable with 10 years' imprisonment — Jurisdiction.*

In a case against six persons under SS. 120-B and 471 of the Indian Penal Code before a Magistrate empowered under S. 30 of the Code of Criminal Procedure, conditional pardons were tendered to two of the accused by the District Magistrate and were accepted by them. The Public Prosecutor then withdrew under S. 494 of the Code of Criminal Procedure from the prosecution of these two accused and examined them as witnesses. The Magistrate proceeded with the trial of the remaining accused and convicted two of them and acquitted two.

Held, that, the pardon having been tendered under S. 337 of the Criminal Procedure Code, the prosecution was bound to proceed in the manner prescribed by that section and could not, after such tender of pardon, ignore that section and proceed under S. 494.

The trial by the Magistrate was, therefore, without jurisdiction, the conviction should be set aside and the case should be remitted to the Magistrate for appropriate action under S. 337 (2-A).

Appeal by Special Leave from a judgment of the High Court (December 2, 1936) which, with a slight modification, confirmed a judgment of the Special Magistrate of Lahore empowered under section 30 of the Code of Criminal Procedure (May 28, 1936).

The material facts are stated in the judgment of the Judicial Committee.

1938

July 21.

1938 June 30. PRINGLE for the appellant: Referred to Sections 337, 339, 343 and 401 of the Code of Criminal Procedure. Section 343 is relied on only to this extent that, in every case in which a bargain is made with an accused person to give evidence, it indicates that the provisions of S. 337 are attracted.

Here steps were taken to obtain the evidence of two of the accused. The Government, in its letter merely says the accused named therein " may be offered a promise of pardon." It is left to the Magistrate to tender the pardon. The District Magistrate did in fact tender a pardon. He could do so only under S. 337. Action having been taken under that section, all the provisions of the section must be observed and the Special Magistrate should have acted under subsection 2-A. He had no power to try the case and the conviction is without jurisdiction and void.

ROBERTS, K. C., WALLACH and MAGAW for the respondent: It is really a question of fact as to what was done here. If the District Magistrate was acting under S. 337, there is a nullity. If, on the facts, it appears that what was done was not done under S. 337, then, whatever was done, the trial before the Special Magistrate was not a nullity. If some official, having no right to do so, tendered a pardon and the witness is examined, the only question would be what weight is to be attached to the evidence.

It is submitted that here action was taken under the powers of the Local Government. It could act outside S. 337. There was an alternative procedure. The prosecution as against one of the accused might be withdrawn and he might be examined. It might be an objectionable course to take, but it would not be illegal.

1938

BAWA FAQIR
SINGH
v.
THE KING-
EMPEROR.

1938
 BAWA FAQIR
 SINGH
 v.
 THE KING-
 EMPEROR.

Reference was made to the English practice and to *Winsor v. Queen* (1) and, on the general right of the Local Government to refrain from prosecution or promise to do so, to *Emperor v. Har Prasad Bhargava* (2).

[SIR GEORGE RANKIN: In that case the witnesses were never accused.]

ROBERTS, K. C. No. It was not a case under S. 337.

Even if there were not a collateral power under the Code and the Local Government promised not to prosecute, the jurisdiction would not be affected. The pardon, here, when looked at is not in terms which would come within S. 337. The letter is a direct order to the Deputy Commissioner to drop proceedings if the witness makes a full disclosure. Section 337 would be inapplicable to the order. No reasons for tendering the pardon were recorded as required by the section. That also goes to show that action was not taken under the section.

PRINGLE *in reply*, referred to *Parban Singh v. Emperor* (3) and *Banu Singh v. Emperor* (4) and submitted that the question here was not whether the Local Government had power to offer a pardon. There is no direction to the District Magistrate to offer a pardon. The letter is to the Deputy Commissioner and merely says a pardon may be offered. That is very different from an order granting a pardon. The Inspector of Police in his letter to the District Magistrate gave reasons for which a pardon should be tendered and the District Magistrate endorsed on that, "I agree." That is a sufficient compliance with the requirement that the Magistrate shall record his reasons.

(1) (1866) L. R. 1 Q. B. 289.

(3) (1906) 10 Cal. W. N. 847, 848.

(2) I. L. R. (1923) 45 All. 226.

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

The question in *Hari Har Singha v. Emperor* (1) does not arise here.

Here there is (1) an offence to which S. 337 applies, (2) A pardon by a Magistrate empowered to pardon, and (3) The witnesses to whom pardon was tendered have been examined.

It is, therefore, submitted that the Special Magistrate was bound to commit to the Sessions if he found a *prima facie* case against the accused.

The judgment of the Judicial Committee was delivered by—

LORD WRIGHT.—The appellant was convicted and sentenced on the 28th May, 1936, by the Special Magistrate of the District of Lahore under section 120-B (conspiracy) and section 471 (using as genuine a forged document known to be forged) of the Indian Penal Code. The sentence was a sentence of rigorous imprisonment for five years. The conviction and sentence were confirmed on appeal. The ground of this appeal is that the Special Magistrate had no jurisdiction to try the case, since it came within the provision of section 337 of the Code of Criminal Procedure, and could only be lawfully tried in the circumstances of the case by the High Court or Court of Session. This objection was overruled by a decision of the High Court of Lahore and in effect it is from that decision that this appeal is brought.

The facts which are so far as relevant not in dispute may be shortly stated. The appellant, an advocate of the High Court, acted as counsel for G. S. Kochar, who was plaintiff in a suit in the Court of the Senior Subordinate Judge based on a promissory

1938

BAWA FAQIR
SINGH
v.
THE KING-
EMPEROR.

1938

BAWA FAQIR
SINGH
v.
THE KING-
EMPEROR.

note. The plaintiff succeeded against two of the defendants, both before the Subordinate Judge and on appeal. Meantime complaints had been made by Durga Das, the defendant, against whom the case was dismissed, that his signature to the promissory note had been forged. On the 14th May, 1928, the District Magistrate, acting on a police report, directed the issue of warrants against six persons, including the appellant and two other persons Sain Dass and Vishwa Mitter. On the 3rd June, 1928, the District Magistrate had brought before him Sain Dass, who was then in custody, and read over to him a document which had been enclosed with a letter sent to him by the Local Government. The letter, which was in answer to a communication from the District Magistrate on the question of obtaining evidence from one or more of the accused persons, was in the following terms:—

“ Subject:—Grant of a promise of pardon to
SAIN DASS, son of L. Nagar Mal.

“ Sir,

“ In reply to your unofficial note No.751, dated the 19th May, 1928, I am directed by the Governor in Council to state that Sain Dass may be offered a promise of pardon in the terms of the enclosed draft.

“ The said enclosed draft ran as follows:—

“ ‘ PROMISE.’

1. B. Shamsheer
Singh, son of Bir
Singh.

2. Ram Lal, son of
Kesho Ram, Clerk,
Post Master Gen-
eral's Office.

3. Ganda Singh
Kochar, son of M.S.
Kochar.

4. Vishwa Mitter,
son of Dina Nath,
Clerk, Ferozapore
Arsenal.

“ Whereas SAIN DASS, son of L. Nagar Mal, caste Khatri, Manager, Central Co-operative Bank, Karnal, has undertaken to make a full and true disclosure of the whole of the facts within his knowledge regarding the criminal activities of B. FAQIR SINGH, son of B. Bir Singh, Bhalla, Advocate, High Court, Lahore, and other persons mentioned in the margin, and whereas His Excellency the Governor in Council is pleased to

direct that on condition of the said Sain Dass making such a full and true disclosure, no proceedings shall be taken against him with respect to the said offences, the Deputy Commissioner of Lahore is hereby authorised to inform the said Sain Dass that no proceedings will be taken against him if he makes a full and true disclosure of the whole of the circumstances of the cases in question within his knowledge and repeats the same when called upon to do so in any court of justice.

By order of the Governor in Council.

(Sd.) H. M. COWAN,

Simla : Home Secretary to Government.

Dated the 29th May, 1928. Punjab.”

Sain Dass, when the draft was read over to him, accepted the terms. The District Magistrate then recorded the following order :—

“ Sain Dass present. Conditions explained to him and accepted by him. Public Prosecutor is authorised to withdraw the case against him.

(Sd.) F. H. PUCKLE,

District Magistrate.

3-6-28.”

Mr. Puckle held the offices both of District Magistrate and Deputy Commissioner.

The proceedings in the case were very delayed and protracted. Eventually, after various protests and objections by the appellant, the Public Prosecutor applied to Mr. Luthra, the Special Magistrate, to whom the case had been transferred and who was vested with the powers under section 30 of the Code, for permission to withdraw from the prosecution of Sain Dass. The Special Magistrate, by order, dated the 4th July, 1932, allowed the Public Prosecutor to withdraw the case under section 494 of the Criminal Procedure Code.

1938

BAWA FAQIR
SINGH
v.
THE KING-
EMPEROR.

1933

BAWA FAQIR
SINGH
v.
THE KING-
EMPEROR.

The appellant objected to this order on various grounds, in particular that the case could only properly proceed under section 337, whereas the prosecution were seeking to have the case tried otherwise than before the Sessions Judge as section 337 would require. Sain Dass was thereupon called on the 9th March, 1933, as a witness for the prosecution before the Magistrate, Mr. Luthra. On the 7th April, 1933, another of the accused, Vishwa Mitter, was called before an Additional District Magistrate at Lahore, and a conditional promise of pardon was read over to him by the Magistrate, the same procedure being followed as in the case of Sain Dass. Vishwa Mitter accepted the offer. An application was then made to the Special Magistrate, Mr. Luthra, for leave to withdraw the case against Vishwa Mitter under section 494 of the Code. Objection was made by the appellant on much the same grounds as in the case of Sain Dass, but the Magistrate made the order and in due course Vishwa Mitter gave evidence before the Magistrate.

On the 26th May, 1936, Mr. Luthra, having completed the prolonged proceedings, gave judgment acquitting two of the accused, but finding the appellant and one other of the accused guilty under sections 120-B, 467 and 471 of the Indian Penal Code, and imposing on the appellant and the other accused who was found guilty, a sentence of rigorous imprisonment for five years. This sentence was confirmed on appeal with a variation in respect of the conviction.

During the proceedings it was clear that the Special Magistrate did not intend to commit the accused to the Sessions Court as required by section 337. Not only did he sanction the discharge of Sain Dass and Vishwa Mitter under section 494, but he framed charges against the appellant before the

examination of the witnesses was completed, under section 254, instead of proceeding under sections 206—210, which apply to committal for trial. The appellant objected to this course, claiming that he was entitled to be committed for trial under section 337, but his objections were overruled, eventually by a Divisional Bench of the High Court consisting of Mr. Justice Bhide and Mr. Justice Coldstream, who on the 29th October, 1934, delivered judgment, rejecting the objection with the result that the trial continued and was concluded before the Magistrate as already stated.

The question is whether section 337 and the material sections which follow have been brought into operation by what was done by the magistrates when they offered a tender of pardon to the two approvers, and by what happened subsequently. It will be convenient to summarise briefly the relevant sections of the Code.

Section 337 is limited to certain offences, including those triable exclusively by the High Court or Court of Session, or any offence punishable with imprisonment which may extend to 10 years. These latter words cover the offences with which the appellant was charged. The section empowers certain magistrates, at any stage of the investigation or inquiry into or the trial of the offence, with a view to obtaining the evidence of any person concerned in or privy to the offence, to tender to him a pardon on condition of his making a full and true disclosure of what he knows relative to the offence. A magistrate who tenders a pardon under the section is to record his reasons for so doing, and furnish a copy to the accused if required. Every person accepting a tender under the section is to be examined in the Court of the magistrate and in the subsequent trial if any.

1938

BAWA FAQIR
SINGH
v.
THE KING-
EMPEROR.

1936

BAWA FAQIR
SINGH
v.
THE KING-
EMPEROR.

Sub-section 2-A is the section vital to this case.

It provides that :—

“(2-A) In every case where a person has accepted a tender of pardon and has been examined under sub-section (2), the Magistrate before whom the proceedings are pending shall, if he is satisfied that there are reasonable grounds for believing that the accused is guilty of an offence, commit him for trial to the Court of Session or High Court, as the case may be.”

Section 338 gives power to the Court to which commitment is made to tender or order the magistrate to tender a pardon on the similar condition. Section 339 deals with the trial of a person to whom a conditional pardon has been granted under sections 337 and 338 if the Public Prosecutor certifies that he has not fulfilled the condition of full and complete disclosure. Section 339-A provides that a person by whom a tender of pardon has been accepted, when tried under section 339, is to be asked whether he pleads that he has complied with the conditions of the pardon, and if it is found that he has, he shall be acquitted.

Before considering the rival contentions in this appeal, it will be necessary to refer to section 494, which it is said on behalf of the respondent, is the section used in the proceedings. That section enables the Public Prosecutor with the consent of the Court to withdraw from the prosecution before the jury return a verdict or where there is no jury before judgment is pronounced, whereupon the accused shall be discharged if the withdrawal is made before a charge has been framed, or if it is made after a charge has been framed or no charge is required, he shall be acquitted.

The respondent claims that it was under section 494 that the charge was withdrawn by the Public Prosecutor, that this was done with the consent of the

Court, and accordingly that the accused has no right to claim that he is entitled under section 337 to trial by the High Court or a Sessions Court, while the approver cannot claim the benefit of the procedure for his trial provided by sections 339 and 339-A. Under clause (a) of section 494 the approver is merely discharged, which means that he may again be put on trial for the same offence.

It is clear that in the case of each of the two approvers, Sain Dass and Vishwa Mitter, the application to withdraw was made and the consent of the Court was given as under section 494. But the issue to be determined here is whether the action previously taken in tendering a conditional pardon and on its being accepted, examining the approvers did not constitute action only consistent with being taken under section 337 and therefore debarring the prosecution from claiming that they were entitled thereafter to ignore the provisions of section 337 and proceed under section 494. Their Lordships are of opinion that the prosecution were not so entitled, and therefore it is not necessary here to discuss the precise effect of section 494 or to consider any question which might arise in regard to section 343, which by its express terms does not apply to section 337 if action were not taken under that section. In their Lordships' judgment what was done here comes substantially within section 337. The offences charged were within the section. The tender of pardon was made by a magistrate, within the terms of the section. It was expressly made on condition of the person to whom it was addressed making a full and true disclosure of the whole of the facts (or circumstances) within his knowledge. It is next to be observed that the persons who accepted the tenders of pardon from the magistrates, were severally examined before the magistrate taking cognizance of the offence.

1938

BAWA FAQIR
SINGH
v.
THE KING-
EMPEROR.

1938

BAWA FAQIR
SINGH
v.
THE KING-
EMPEROR.

The requirements of sub-section 2-A then automatically came into force, which are that the accused, if there are reasonable grounds for believing that he is guilty of the offence, is to be committed to the Court of Session or High Court. It is said that the magistrate has not recorded his reasons as required by sub-section 1-A. But that is merely an irregularity on the part of the magistrate. The right of the accused or the approver cannot be affected because the magistrate has failed to comply with a requirement imposed for the benefit of the accused. Nor is it material in their Lordships' judgment that the magistrate in tendering the pardon did so after consulting the Local Government and with its authority. That is an internal matter of administration, which cannot affect the position of the accused or the approver. The essential fact is that the pardon was tendered to the approver by the magistrate. It is obvious that the proceedings so taken under section 337 were different in character from the course which would have been taken under section 494. This latter section belongs to a different chapter of the Code. Section 337 falls under Chapter XXIV, which deals with general provisions as to inquiries and trials. Section 494 falls under the Chapter XXXVIII, which is headed "of the Public Prosecutor," that is to say, the former section deals with the action of a judicial, the latter with that of an executive, officer. Section 494 says nothing about pardons at all. It gives a general executive discretion to withdraw from the prosecution subject to the consent of the Court, which may be determined on many possible grounds, one of which no doubt is that the person in respect of whom the charge is withdrawn may be willing to give evidence. But the whole procedure and the various consequences under section 494

differ from those under section 337. No doubt, at a later stage in the present proceedings the prosecution sought to bring themselves under section 494, by purporting to take action under it, but it was then, in their Lordships' judgment, too late to change the position either as against the appellant or as against either of the approvers. It is said that the Local Government did not intend to act under section 337, but if their overt acts are such as to be only capable of being referred to that section, their intention not to act under it cannot matter. It is not necessary to consider whether the prosecution had a desire to reap the benefits of section 337, while also desiring to evade the consequence of having to try the case before the High Court or Court of Session, because in their Lordships' judgment it is impossible thus to make the best of both worlds. If the manner in which the tender of pardon is made, follows in substance the method prescribed in section 337, then the section must apply. Minor and immaterial irregularities or variations cannot be taken to affect the operation of the section. Their Lordships do not seek in deciding as they do to throw any doubt on the general prerogative right to pardon. They are dealing here with the special statutory machinery provided under section 337, with its peculiar feature that the pardon under that section is tendered as a judicial act and under the special precautions, rules and consequences which the statute sets out. One consequence, perhaps the most important, is that when a magistrate has tendered the pardon the trial must not be by another magistrate even though he is vested under section 30 of the Code to try such an offence, but by the High Court or Sessions Court.

For these reasons their Lordships are of opinion that the trial was without jurisdiction and hence that

1938

BAWA FAQIR
SINGH
v.
THE KING-
EMPEROR.

1938
 BAWA FAQIR
 SINGH
 v.
 THE KING-
 EMPEROR.

the appeal should be allowed and the conviction and sentence set aside. In their opinion the case should be remitted to the magistrate with direction to him to take the appropriate action under section 337 (2-A).

They will humbly so advise His Majesty.

C. S. S.

Appeal allowed.

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondent: *The Solicitor, India Office.*

REVISIONAL CRIMINAL.

Before Young C. J. and Tek Chand J.

ISMAIL—Petitioner,

versus

JAGAT SINGH AND OTHERS—Respondents.

Criminal Revision No. 300 of 1937.

Criminal Procedure Code (Act V of 1898), SS. 107, 112, 117, 118 — Application under S. 107 — Magistrate whether competent to refer the matter to Police for preliminary enquiry.

Held, that the order of a Magistrate to the Police to make preliminary enquiry and report, after receiving an application under S. 107, Criminal Procedure Code, is not illegal as there is nothing in the Code which forbids a Magistrate, before whom information has been lodged for taking proceedings under S. 107 Criminal Procedure Code, to refer the matter to the Police for preliminary enquiry.

Shamas-ud-Din v. Ram Dyal Singh (1), Hari Singh v. Jagta (2), and Criminal Revision No. 703 of 1936, Crown v. Kishan Chand (unpublished), over-ruled.

Other case law discussed.

Case reported by Mr. P. R. B. May, Sessions Judge, Gurdaspur, with his No. 111-R., dated 1st June, 1937.

(1) (1923) 76 I. C. 25.

(2) 1928 A. I. R. (Lah.) 694.