CRIMINAL REFERENCE.

Before Mr. Justice Batchelor and Mr. Justice Rao.

1912.

August 26.

EMPEROR *v.* ABDUL RAHIMAN MOMIN.*

Practice—Question of jurisdiction arising before Magistrate must be decided by himself—Magistrate cannot invite District Magistrate's opinion.

While a Magistrate was trying a case, a question arose whether the accused was amenable to his jurisdiction. The Magistrate felt himself doubtful on the question; and he referred it to the District Magistrate for opinion. On receipt of the opinion, he directed the trial to proceed before him:—

Held, that it was not competent to the Magistrate to seek the opinion of the District Magistrate in the way he did; but that he should finish the inquiry and complete the record by the reception of all evidence of relevant facts including the facts which bear upon the question of the accused's amenability to a British Court's jurisdiction; and then consider for himself the question of law arising on those facts.

THIS was a reference made by W. T. W. Baker, Sessions Judge of Satara.

The accused, a subject of the Aundh State (a place outside British India), was placed for trial before the British Magistrate, Second Class at Koregaon, for the offence of receiving stolen property at Kinai, a village in the Aundh State.

The trying Magistrate, having felt a doubt whether he could try the accused, made a reference to the District Magistrate, stating "that orders may kindly be issued as to whether the trial of the accused may be proceeded with simply because he has dishonestly received stolen property which was stolen in the British Indian village and simply because he was arrested in a British Indian village." The District Magistrate replied to the following effect: "The Magistrate has jurisdiction to try the accused." The Magistrate thereupon ordered the trial to proceed before him.

The accused applied to the Sessions Court to have the order passed by the Magistrate quashed. The Sessions Judge, being of opinion that the offence having been committed

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in foreign territory the Magistrate had no jurisdiction to try the accused, referred the case to the High Court for opinion.

The reference was heard.

S. K. Bakhale, for the accused.

L. A. Shah, acting Government Pleader, for the Crown.

BATCHELOR, J. :—We think that the procedure by which this matter has ultimately found its way to this Court is open to objection. The accused was placed before the Second Class Magistrate on an accusation that he, being a subject of the Aundh State, had, within the limits of that State, dishonestly received certain property which had been stolen in British India. Those circumstances, no doubt, raise a point of law as to whether the accused would be amenable to the jurisdiction of the British Court; and that is a question which could only be decided by a Tribunal placed in full possession of all the facts bearing upon that question. The Second Class Magistrate, however, seeing this legal question looming before him, instead of completing his inquiry, getting upon th record all the evidence that was available and then deciding the point of law, right or wrong, for himself, proceeded to address an official communication to the District Magistrate seeking his advice in the matter. The District Magistrate replied, stating his opinion on the question of jurisdiction, but in our opinion the best reply would have been to direct the Second Class Magistrate to complete his inquiry, and as a Magistrate pass such order as seemed to him to be legal and proper. That is the direction which we must now make. The Second Class Magistrate must finish the inquiry, completing his record by the reception of all evidence of relevant facts, including the facts which bear upon this question of the accused's amenability to a British Court's jurisdiction. With this record thus complete the Magistrate must consider for himself the question of law which arises and must decide it for himself. If he decides it rightly so much the better: if he decides it wrongly there are Tribunals constituted for the purpose of correcting his mistake.

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CRIMINAL REFERENCE.

Before Mr. Justice Batchelor and Mr. Justice Rao.

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August 29.

EMPEROR *v.* INTYA SALABAT KHAN.*

Criminal Procedure Code (Act V of 1898), section 337, clause 3—Tender of pardon —Approver—Breach of the conditions of pardon—Discharge of accused—Forfeiture of pardon—Trial of approver—Approver committed to Sessions Court—Re-trial of the discharged accused—Accused to be committed, if prima facie *case made out, to Sessions Court for joint trial with the approver—Joint trial—Practice and procedure.*

In an inquiry into a charge of dacoity against five accused persons, the Magistrate granted a conditional pardon to one of them. The approver was examined as a witness in the inquiry against the four remaining accused persons; but he denied all knowledge of the alleged dacoity and the accused persons were discharged by the Magistrate under section 209 of the Criminal Procedure Code (Act V of 1898). The pardon granted to the approver was next withdrawn and the case as against him with regard to dacoity was proceeded with under section 339 of the Criminal Procedure Code. It ended in his being committed for trial to the Court of Sessions. The material piece of evidence to be adduced against the approver was his confessional statement which implicated both himself and the four accused persons. The Sessions Judge referred the case to the High Court for an order quashing the commitment and directing the re-trial of the approver along with the discharged accused persons.

Held, that the High Court had the power to direct that the accused persons, who had been discharged, should be subjected to a re-trial jointly with the approver, for under section 437 of the Criminal Procedure Code, the High Court had the power in the case of those accused persons to direct that there should be a fresh inquiry, and if that inquiry ended in the framing of a charge, that they should be committed to a particular Court of Session.

Held, further, that inasmuch as the provisions of sub-section 3 of section 337 of the Criminal Procedure Code were fully carried out at the time when they were applicable, namely, during the pendency of the Magisterial proceedings, they would not constitute any bar against the High Court's ordering that if the inquiry against the discharged persons ended in a commitment, they should be committed to be tried jointly with the approver.

Per Curiam:—Sub-section 3 of section 337 of the Criminal Procedure Code contemplates only a case where there has been a commitment made by the Magistrate to the Court of Session or the High Court. It omits to consider the case where

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the Magistrate himself on his own responsibility discharges the accused person. The meaning of the sub-section is that the approver shall not be set at large until the judicial proceedings pending against the accused are finished. For the purposes of the section it is immaterial whether the proceedings are finished by a Magisterial order of discharge before trial, or by a Judge's order of acquittal after trial. In the case of the Magisterial discharge, the sub-section would be satisfied if the approver were detained in custody or on bail until the order of discharge was made.

THIS was a reference made by F. J. Varley, Sessions Judge of Khandesh.

The facts were that the accused Intya Salabat Khan and four other persons were sent up for trial before a Magistrate of the First Class, on a charge of dacoity, an offence punishable under section 397 of the Indian Penal Code. At the commencement of the inquiry pardon was granted to Intya under section 337 of the Criminal Procedure Code, and the case proceeded against the remaining accused persons. At the trial the approver Intya denied all knowledge of what had taken place, and in the absence of any evidence against them, the rest of the accused were discharged under section 209 of the Criminal Procedure Code. The pardon granted to Intya was withdrawn and the case against him alone was proceeded with, which eventually terminated in his commitment for trial before the Court of Session.

The Sessions Judge referred the case to the High Court in order that the commitment of Intya might be quashed and he be ordered to be re-tried *de novo* along with the discharged persons.

The reference was heard.

M. V. Bhat, for the accused.—The Sessions Judge has first of all recommended in this case that the commitment of Intya be set aside. This, I submit, the High Court cannot do under section 215 of the Criminal Procedure Code as there is no point of law involved.

Secondly, the Sessions Judge desires that the High Court should direct a joint trial of all the accused persons. This is sought to be done in order that the confession of Intya might

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be used against all the accused persons. This could not be done because in the confession Intya has exculpated himself and thrown the whole blame on the four accused. Further, the joint trial of all the accused persons is not competent. Reading together sections 337 to 339 of the Criminal Procedure Code, it seems that the trials of the approver and the accused should always take place separately. There is no reported case on the point. See also *Arunachellam* v. *Emperor*[1] and *Queen-Empress* v. *Bhau*[2].

L. A. Shah, Acting Government Pleader, for the Crown.—Section 215 of the Criminal Procedure Code would present a bar to quashing of commitment unless on a point of law. But the difficulty could be avoided by this Court ordering that the discharge of the remaining accused persons be set aside and that they should be committed to the Court of Session if the inquiry against them ended in a charge. There is nothing in sections 437 to 439 of the Criminal Procedure Code which prevents the High Court from directing that the accused and Intya be tried together, at one trial.

The present case is not covered by sub-section 3 of section 337 of the Criminal Procedure Code. It contemplates a case of commitment made by a Magistrate to the Court of Session of the High Court. So far as this case is concerned, the case against the accused was finished when the Magistrate discharged them. The sub-section was then satisfied. It is no longer applicable to the first proceedings that might thereafter be taken against the accused.

BATCHELOR, J.:—This is a reference made by the learned Sessions Judge of Khandesh in the following circumstances. Five persons were originally sent up for trial before the First Class Magistrate, West Khandesh, on a charge of dacoity under section 397, Indian Penal Code. At the beginning of the Magisterial inquiry pardon was granted to one of the accused, named Intya, whom we will hereafter refer to as the

(1) (1908) 31 Mad. 272. (2) (1898) 23 Bom. 493.

"approver"; and the case proceeded against the remaining four accused. The case, however, never went beyond the Magistrate's Court, for in that Court the approver, examined as a witness, denied all knowledge of the alleged dacoity, and in the absence of material evidence against the four accused, they were discharged by the Magistrate under section 209 of the Criminal Procedure Code. After that was done, the pardon which had been tendered to the approver was withdrawn. The case against him in regard to the dacoity was proceeded with under section 339 of the Criminal Procedure Code, and it has ended in his being committed for trial to the Court of Session.

The learned Sessions Judge points out that the result of these proceedings, if they are to terminate where they now stand, is that the four accused persons, who were discharged, will escape ever having been tried upon one material piece of evidence, which was not laid before the Magistrate, but which could be laid before the Court, if the discharged accused are ordered to be re-tried along with the approver. This piece of evidence is a confession which was made by the approver, and which is said to incriminate both himself and the other accused.

The question which we have to answer is whether we have power to direct that the accused persons, who were discharged, shall be subjected to a re-trial jointly with the approver. We are of opinion that that question must be answered in the affirmative. It is clear that, under section 437 of the Criminal Procedure Code, in the case of any accused person who has been discharged, we have power to direct further inquiry. We have also power to direct, if that inquiry should end in the framing of a charge, that the accused person be committed for trial to a particular Court. *Primâ facie*, therefore, we have power to order in the case of these accused persons, who were discharged, that there shall be a fresh inquiry, and if that inquiry ends in the framing of a charge, the four accused persons shall be committed to the Court of Session in Khandesh.

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It is said, however, that under section 337 of the Criminal Procedure Code, sub-section 3, we have no power to direct that the trial of the four accused persons should be joint with that of the approver. But we are unable to accept the argument. It is clear that sub-section 3 of section 337 contemplates only a case where there has been a commitment made by the Magistrate to the Court of Session or the High Court. It omits to consider the case now before us, that is to say, the case where the Magistrate himself on his own responsibility discharges the accused person. It seems to us, however, manifest that the meaning of sub-section 3 is merely this : that the approver shall not be set at large until the judicial proceedings pending against the accused are finished. It is, we think, for the purposes of the section, immaterial whether the proceedings are finished by a Magisterial order of discharge before trial or by a Judge's order of acquittal after trial. In the case of the Magisterial discharge the sub-section would, we think, be satisfied if the approver were detained in custody or on bail until the order of discharge was made.

Now in the case before us these requirements of sub-section 3 have been satisfied. The inquiry has proceeded to its lawful end. During that inquiry the approver was examined as a witness, as required by sub-section 2 of the section; the approver was detained in custody or bail until the end of the proceedings; and the Magisterial inquiry terminated by the Magistrate's order discharging these accused persons. When that order was made it seems to us that the provisions of sub-section 3 were spent, and are inapplicable to any proceedings held thereafter.

The present position of affairs is that the approver is under an order of commitment in the Court of Session, and that the four accused persons are discharged. Seeing that the provisions of sub-section 3 were fully carried out at the time when they were applicable, namely, during the pendency of the Magisterial proceedings, we are of opinion that they do not now constitute any bar against our ordering that, if the inquiry against the discharged persons ends in a commitment, they be

committed to be tried jointly with the approver. We do not discuss the various cases, notably *Queen-Empress* v. *Bhau*[1], to which reference was made in argument, because none of these cases appears to us to have any direct bearing upon the state of facts now before us.

The next point taken was that this Court has no power to set aside the commitment of the approver, as the Sessions Judge in his reference asks us to do. Under section 215 of the Criminal Procedure Code, a commitment once made can be quashed by this Court upon a point of law only; and there is some difficulty in holding that the point now under consideration is a point of law. Without deciding that question, however, it appears to us that we can attain the object aimed at by another means. As we have said, it will be enough for us to direct that the District Magistrate, either himself, or by a competent Magistrate whom he may depute, do hold a fresh inquiry in the case of the four accused persons; to direct further that if upon that inquiry the Magistrate is of opinion that a charge should be framed, he shall frame a charge committing these accused persons for trial to the Court of Session; that in that case the trial of these four accused persons shall be held jointly with the trial of the approver already committed; and that in order that no practical difficulty be created by these directions the trial of the approver before the Court of Session be delayed until the Magistrate has passed his final order in the inquiry into the case of the four accused persons.

Order accordingly.

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(1) (1898) 23 Bom. 493.