28 C. 211.

1900 DEC. 14 & 18.

ORIGINAL CRIMINAL.

28 C. 211.

[211] ORIGINAL CRIMINAL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice.

QUEEN-EMPRESS *v.* DOLEGOBIND DASS.*

[14th and 18th December 1900.]

Complaint—Dismissal of Complaint—Discharge of accused—Re-arrest of accused without previous order of discharge being set aside—Code of Criminal Procedure (Act V. of 1898), ss. 252, 253, 403, 436, and 437—Indian Post Office Act (VI of 1898), s. 52—Power of Judge of High Court presiding at the Criminal Sessions to refer to Full Bench point raised by accused before he is called upon to plead—Letters Patent, High Court, 1865, cl. 25.

There is no express provision in the Code of Criminal Procedure to the effect that the dismissal of a complaint shall be a bar to a fresh complaint being entertained so long as the order of dismissal remains unreversed.

An accused person was arrested on the charge of having stolen a registered letter from the Post Office, and was brought up before a Bench of Presidency Magistrates, charged with offences under s. 381 of the Penal Code and s. 52 of the Post Office Act, 1898. He was discharged on the same day, the Bench considering the evidence insufficient. Subsequently the accused was re-arrested on substantially the same charge and was committed by the Chief Presidency Magistrate for trial upon further and fresh evidence. Upon an application by the accused to have the order of commitment discharged on the ground that the Chief Presidency Magistrate had no jurisdiction to make the commitment, as the previous order of discharge had not been set aside—

***Held*, that the commitment was good. *Nilratan Sen* v. *Jogesh Chundra Bhuttacharjee* (1) distinguished; *Grish Chunder Roy* v. *Dwarka Dass Agarwallah* (2) dissented from; *Opoorba Kumar Sett* v. *Probod Kumary Dassi* (3) followed.**

***Held*, further that where a point is raised on behalf of the accused before he is called upon to plead, the Judge presiding at the Sessions has no power under the Charter to refer the matter to a Full Bench.**

IN this case the prisoner, who was employed in the General Post Office, was arrested on the 23rd July 1900 on the charge of having stolen a registered letter from the Post Office, and on the **[212]** 25th July was brought up before a Bench of Presidency Magistrates; charged with offence under s. 381 of the Indian Penal Code and s. 52 of the Indian Post Office Act of 1898. He was discharged on the same day, the Bench considering that the evidence was insufficient to warrant a conviction. On the 6th September 1900 the prisoner was re-arrested on substantially the same charge, and on the 17th October he was committed for trial by the Chief Presidency Magistrate upon further and fresh evidence to the High Court.

Before the prisoner was called upon to plead at the Sessions trial before the High Court, Mr. *Mehta*, who appeared on behalf of the prisoner, applied to have the order of commitment of the Chief Presidency Magistrate discharged on the ground that he had no jurisdiction to make the commitment, as the previous order of discharge had not been set aside by any authority.

The *Standing Counsel* (Mr. *P. O'Kinealy*) for the prosecution.

Mr. *Mehta* for the prisoner.

1900, DECEMBER 14. Mr. *Mehta* submitted that the order of commitment of the Chief Presidency Magistrate to this Court should be

* Original Criminal.

(1) (1896) I. L. R. 23 Cal. 983.
(2) (1897) I. L. R. 24 Cal. 528.
(3) (1893) 1. C. W. N. 49.

1900 DEC. 14 & 18.

ORIGINAL CRIMINAL.

28 C. 211

discharged, on the ground that he had no jurisdiction to make the commitment, as the previous order of discharge has not been set aside by any authority.

The order of discharge passed by a Presidency Magistrate can only be set aside by the High Court. The case of *Grish Chunder Roy* v. *Dwarka Dass Agarwallah* (1) is entirely in my favour. Assuming that the Chief Presidency Magistrate had the power to set aside an order of discharge made by another Presidency Magistrate, the commitment is still bad, because the Chief Presidency Magistrate did not set aside the previous order of discharge, nor did he give the prisoner any notice to show cause why that order should not be set aside. That an order of discharge should be first set aside before fresh proceedings can be taken is clearly laid down by Banerjee, J., at p. 988 in the case of *Nilratan Sen* v. *Jogesh Chundra Bhuttacharjee* (2).

[213] The *Standing Counsel* submitted that under the circumstances of the case, the rulings quoted by Mr. Mehta did not apply. This is a warrant case, and it was retried upon further additional evidence, which satisfied the Magistrate that the prisoner should be committed. There was nothing wrong in this commitment, as will appear on reference to the following cases: *Hari Singh* v. *Danish Mahomed* (3); *Empress* v. *Donnelly* (4); *Queen-Empress* v. *Puran* (5); *Virankutti* v. *Chiyamu* (6); and *Opoorba Kumar Sett* v. *Probod Kumary Dassi* (7).

Mr. *Mehta* in reply.—The cases cited with the exception of *Opoorba Kumar Sett* v. *Probod Kumary Dassi* (7) are not in point. They refer to District Magistrates, who are expressly empowered under the Code to institute fresh proceedings. [MACLEAN, C. J.—Do you, Mr. Mehta, lay down the broad proposition as a proposition of law that, if a Presidency Magistrate discharged an accused person, and then upon fresh evidence an application was made for a retrial, the accused person could not be retried unless the order of discharge were set aside ?] Whether there is fresh evidence or not is, it is submitted, immaterial, because the question is whether a Presidency Magistrate has jurisdiction to retry a person already discharged, unless the order of discharge is first set aside by a competent tribunal. [MACLEAN, C. J.—What is there in the Code to warrant that view?] There is nothing in the Code expressly prohibiting the Magistrate from so acting, but at the same time, I submit, there is nothing in the Code authorizing a Presidency Magistrate. My contention is that if the Legislature intended to give Presidency Magistrates such a jurisdiction there would have been express provision for it in the Code. By ss. 435 to 439 of the Code such a jurisdiction is expressly given to the High Court and District Magistrates, and if the Legislature intended to give a similar power to the Presidency Magistrates the words "Presidency Magistrate" would have been inserted. The case of *Opoorba* **[214]** *Kumar Sett* v. *Probod Kumary Dassi* (8) was distinguished in the case of *Grish Chunder Roy* v. *Dwarka Das Agarwallah* (9) and is distinguishable from the present case. This point is of considerable importance, and if the Court entertains any doubt, I ask that it may be referred to a Full Bench.

(1) (1897) I. L. R. 24 Cal. 528.
(2) (1896) I. L. R. 23 Cal. 988.
(3) (1878) 20 W. R. Cr. 46.
(4) (1877) I. L. R. 2 Cal. 405.
(5) (1886) I. L. R. 9 All. 85.
(6) (1884) I. L. R. 7 Mad. 557.
(7) (1893) 1 C. W. N. 49.
(8) (1893) 1 C. W. N. 49.
(9) (1897) I. L. R. 24 Cal. 528.

1900 DEC. 14 & 18.

ORIGINAL CRIMINAL

28 C. 211.

[The *Standing Counsel*.—Under the Charter your Lordship has no power to refer the point to a Full Bench, as it was raised before the prisoner was called upon to plead and could not be said to have arisen in the trial. MACLEAN, C. J.—If this objection had been taken during the course of the trial, I might have referred the matter to a Full Bench, but as the objection has been taken before the trial commenced, I apparently have no power to do so, even if I so desired.]

Cur. adv. vult.

1900, DECEMBER 18. MACLEAN, C. J.—This in an application by the accused to have the order of commitment of the Chief Presidency Magistrate, Mr. Pearson, discharged, on the ground that he had no jurisdiction to make the commitment, as a previous order of discharge had not been set aside by any competent authority. The facts are as follows On the 23rd of July last the accused was arrested on the charge of having stolen a registered letter from the Post Office, and on the 25th July was brought up before a Bench of Presidency Magitrates, charged with offences under s. 381 of the Indian Penal Code and s. 52 of the Indian Post Office Act, 1898. He was discharged on the same day, the Bench considering that the evidence was insufficient to warrant "a conviction," by which I presume they meant a commitment. On the 6th September the accused was re-arrested on substantially the same charge, and on the 17th October he was committed for trial upon further and fresh evidence —a very salient feature in the case—to the present sessions. The point for determination is, whether the commitment is valid, and I shall confine my remarks to the case immediately before me, *viz.*, the case of a commitment by a Presidency Magistrate.

[215] It is clear that the discharge of the 25th July could in no sense operate as an acquittal of the accused, the case being a warrant-case. This has not been disputed. Consequently, when the case was brought before Mr. Pearson, he was bound to hear it under s. 252 of the Code, unless it can be shown that he had no jurisdiction to hear it until, as is contended, the order of the 25th July had been set aside by the High Court. "There is no express provision in the Code to the effect that the dismissal of a complaint shall be a bar to a fresh complaint being entertained so long as the order of dismissal remains unreversed" [see *per* Banerjee, J., in *Nilratan Sen* v. *Jogesh Chundra Bhuttacharjee* (1).] I agree in that. If, then, there be no express provision in the Code, what is there to warrant us is implying or in effect introducing into the Code a provision of such serious import, a provision which, in certain cases, would render s. 252 of the Code almost nugatory. In the absence of any other provision in the Code to justify such an implication—and my attention has not been directed to any such provision except ss. 436 and 437, which do not apply to Presidency Magistrates—I can appreciate no sound ground for the Court so acting; were it to do so it would go perilously near to legislating, instead of confining itself to construing the Acts of the Legislature.

Moreover, it seems contradictory to say that, whilst the order of discharge in a case such as the present does not amount to an acquittal, it is yet necessary to have it discharged by the High Court before either the same or another Magistrate of co-ordinate jurisdiction can hear the complaint under s. 252. Neither necessity nor convenience warrants such a conclusion; there is nothing in the Code which compels it: and the balance

(1) (1896) I. L. R. 23 Cal. 988.

1900 DEC. 14 & 18.

ORIGINAL CRIMINAL

28 C. 211.

of the decided cases appears to be against it. The cases of *Hari Singh* v. *Dansih Mahomed* (1) [decided so far back as 1873], the clear dictum of Markby, J., concurred in by Prinsep, J., in *Empress* v. *Donnelly* (2); *Queen-Empress* v. *Puran* (3); and *Virankutti* v. **[216]** *Chiyamu* (4) support the view of the Crown. These were not cases relating to Presidency Magistrates, but in the case of *Opoorba Kumar Sett* v. *Probod Kumary Dassi* (5) the precise point now under discussion was decided by Prinsep and Trevlyan, JJ., and decided against the contention of the present accused.

On the other side, reliance is placed upon the cases of *Nilratan Sen* v. *Jogesh Chundra Bhuttacharjee* (6) and *Grish Chunder Roy* v. *Dwarka Dass Agarwallah* (7). The former was not concerned with the case of a fresh commitment by a Presidency Magistrate and the argument therefore based upon ss. 436 and 437 of the Criminal Procedure Code, which do not apply to Presidency Magistrates, and which argument as I read the case was the foundation of that judgment (*see* page 988 *per* Banerjee, J.) can have no application to the case now before the Court. I notice that O'Kinealy, J., in that case rests his decision upon "the constant practice of this Court," as to which one might feel some doubt, having regard to the cases I have referred to. The case, however, of *Grish Chunder Roy* v. *Dwarka Dass Agarwalluh* (7) is distinctly in point, and I respectfully dissent both from its reasoning and its conclusion. It is fallacious to treat the second hearing as an appeal from the decision on the first hearing, and to say there is no provision in the Code for such an appeal. This argument overlooks the fact that the Magistrate is bound to hear the case under s. 252, unless the Code precludes him from so doing until the previous order of discharge has been set aside. But, as I have already pointed out, the Code does not do that either expressly or by necessary implication. Again, the learned Judges distinguish the case of *Opoorba Kumar Sett* v. *Probod Kumary Dassi* (5) on the ground that there the order for the issue of fresh process was made by the *same* Magistrate who had discharged the accused. But what difference can that make if the real principle be that no fresh process can he issued unless **[217]** and until the previous order of discharge has been set aside by the High Court. If the principle be that the previous order of discharge must be set aside by the High Court—and that is the principle contended for—before fresh process can issue, it would amount to an absurdity to say that the *same* Magistrate can issue such process, though the order has not been set aside, but that *another* Magistrate of co-ordinate jurisdiction cannot do so, but must wait till the order has been set aside.

There is one feature in the last two cases I have mentioned which, *qua* the facts but not the principle, distinguishes them from the present: in both these cases the order for issue of fresh process was made on the same evidence. That is not the case here: and, upon this point, I only desire to add that no Presidency Magistrate ought, in my opinion, to rehear a case previously dealt with by a Magistrate of co-ordinate jurisdiction upon the same evidence only, unless he is plainly satisfied that there has been some manifest error or manifest miscarriage of justice. Whilst fully recognizing that we must follow the law and practice as laid down in the Indian Codes, it is perhaps not wholly immaterial to

(1) (1873) 20 W. R. Cr. 46.
(2) (1877) I. L. R. 2 Cal. p. 411.
(3) (1886) I. L. R. 9 All. 85.
(4) (1884) I. L. R. 7 Mad. 557
(5) (1893) 1 C. W. N. 49.
(6) (1896) I. L. R. 23 Cal. 983.
(7) (1897) 1 I. L. R. 24 Cal. 528.

mention, looking to the source from which those Code have in a great measure originated, that the view I have laid down above is consistent with that which holds in Criminal Courts in England.

For these reasons I refuse the application to quash the commitment.

1900 DEC. 14 & 18.

ORIGINAL CRIMINAL

28 C. 217.

28 C. 211.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Handley.

SUNDER DASADH (*Complainant*) *v.* SITAL MAHTO AND OTHERS (*Accused*).* [20th August, 1900.]

***Penal Code** (Act XLV of 1860), s. 206.—Attachment of crops in execution of certificate under Public Demands Recovery Act—Want of sanction not occasioning failure of justice—Code of Criminal Procedure (Act V of 1898), ss. 195, 438, and 537—Public Demands Recovery Act (Bengal Act I of 1895), ss. 7, 8, 19 and 22.*

The cutting and carrying off crops, which the accused knew to be under attachment in execution of a certificate under the public Demands Recovery Act [218] of 1895, is an offence under the latter part of s. 206 of the Penal Code. The amount due under the certificate cannot be regarded as a forfeiture or fine, but is money due under a decree, the certificate having the force and effect of a decree of a Civil Court.

Where such an offence was taken cognizance of by a Magistrate without sanction for the prosecution being given, as should have been the case, but there was nothing in the proceeding to show that the want of such sanction had in fact occasioned a failure of justice, *Held*, that the conviction was not bad only on that account.

IN this case the petitioners were convicted and sentenced to fine under s. 206 of the Penal Code for having cut and carried off crops which they knew to be under attachment in execution of a certificate under the Public Demands Recovery Act (Bengal Act I of 1895). The Sessions Judge of Shahabad being of opinion (1) that s. 206 of the Penal Code did not apply to the case of property attached under the Public Demands Recovery Act, and (2) that the sanction required by s. 195 of the Code of Criminal Procedure was wanting, referred the matter to the High Court under s. 438 of the Code of Criminal Procedure. The letter of reference was as follows:—

In a proceeding under the Public Demands Recovery Act (Bengal Act I of 1895) in connection with an estate under the Court of Wards, some fields were attached. Subsequently the three accused, it is alleged cut the crop.

They were prosecuted under s. 206, Penal Code, and have been sentenced to pay a fine of Rs. 20 each, in default to undergo three weeks' rigorous imprisonment.

The order appears to me to be bad for two reasons: (1) that s. 206, Penal Code, does not apply to the case of property attached under the Public Demands Recovery Act; (2) that the sanction required by s. 195, Code of Criminal Procedure, is wanting.

I do not think it can be said that property attached for the realisation of a demand under a certificate is taken as a "forfeiture" or in "satisfaction of a fine." The demand is a debt due in this case to the Court of Wards. The word "forfeiture" appears to me to apply to cases where forfeiture is part of the penalty provided for an offence, *e.g.*, for an offence under s. 121, Penal Code. The word "fine" appears to me to apply to such cases as a fine under the Penal Code, or when a fine is imposed as a penalty by any other Act or Regulation, such as a fine imposed on a juror or assessor for non-attendance in obedience to a summons, or a fine imposed for failure to supply *rasad* for troops.

[219] The Magistrate also does not defend the order as coming under the first part of s. 206, but as coming under the latter part, and he relies on s. 8 of the

* Criminal Reference No. 149 of 1900, made by C. P. Beachcroft, Esq., Sessions Judge of Shahabad, dated the 28th July 1900.