CRIMINAL REVISION.

Before Mr. Justice Caspersz and Mr. Justice Sharfuddin.

1911
June 23.

AMODINI DASEE
v.
DARSAN GHOSE.*

Review in Criminal Cases—Power of a Division Bench of the High Court to review its judgment discharging a Rule before signature—Discharge of the accused in a part-heard case for absence of remaining witnessses without consideration of the evidence already on the record—Criminal Procedure Code (Act V of 1898) ss. 253, 369—Practice.

It is competent to a Division Bench of the High Court, which has erroneously discharged a Rule on a point of law and a misapprehension of the facts in connection therewith, to review its judgment before it has been signed.

In the matter of the petition of Gibbons (1), *Queen-Empress* v. *Lalit Tiwari* (2) referred to.

Queen-Empress v. *Fox* (3) dissented from.

Where a Magistrate, after some of the prosecution witnesses had been heard by another Bench of Magistrates, discharged the accused because the other witnesses were not present, the High Court set aside the order of discharge and directed him to dispose of the case after argument with reference to the evidence already on the record.

On the 11th May, 1910, the petitioner filed a complaint, before the Sub-Divisional Magistrate of Baraset, against the accused, Darsan Ghose, charging him with cheating and criminal breach of trust. The case was compromised and the accused discharged, on the 22nd August, on a petition presented by him. Thereafter the petitioner applied to the same Magistrate for a revival of the case alleging that the petition of compromise was fraudulent inasmuch as it contained terms to which she had not consented. The Sub-Divisional Officer,

* Criminal Revision, No. 440 of 1911, against the order of B. N. Mookerjee, Sub-Divisional Magistrate of Baraset, dated January 10, 1911.

(1) (1886) I. L. R. 14 Calc. 42. (2) (1899) I. L. R. 21 All. 177.
(3) (1885) I. L. R. 10 Bom. 176.

after examining the petitioner and calling for and receiving a report from a subordinate Magistrate, issued a summons against the accused, on the 7th October, under section 417 of the Penal Code. The case was transferred to an Honorary Bench. The trial of the accused commenced on the 1st December, when three witnesses for the prosecution were examined. The accused then took an objection to the jurisdiction of the Bench to hold the trial which was overruled on the 14th December, whereupon he applied for, and obtained, an adjournment till the 7th January, 1911, in order to move the High Court for a transfer. On the 9th January the Sub-Divisional Magistrate withdrew the case to his own file and took it up the next day. The petitioner alleged that, as it was understood that the High Court would be moved for a transfer and there was a possibility of a trial *de novo*, she had not her remaining witnesses present. She applied for an adjournment to enable her to summon them, but the Magistrate refused to grant it and passed the following order: "Complainant present. No evidence is produced. Accused discharged under section 253 Cr. P. C. True—S. 417 I. P. C."

The petitioner, after an ineffectual application to the District Magistrate of Alipore for further inquiry, moved the High Court and obtained a Rule to set aside the order of discharge on the ground that the lower Court ought to have considered the evidence already on the record, and to have held that the same established a *primâ facie* case against the accused.

The Rule came on for hearing before a Bench composed of Caspersz and Sharfuddin JJ., on the 16th June, 1911, but was discharged on the ground that the Sub-Divisional Magistrate had no jurisdiction to revive an order of discharge passed by another Magistrate. A few minutes after the judgment was delivered, and before it was signed, the petitioner's vakil drew their Lordships' attention to the Full Bench case of *Mir Ahwad Hossein* v. *Mahomed Askari* (1), and pointed out that the Sub-Divisional Magistrate had revived an order of dis-

(1) (1902) I .L. R. 29 Calc. 726.

1911

AMODINI DASEE v. DARSAN GHOSE.

charge passed by himself. Their Lordships subsequently re-heard the case.

Babu Bhudeb Chandra Roy, for the petitioners.

Babu Prabodh Kumar Das, for the opposite party.

CASPERSZ AND SHARFUDDIN JJ. When this Rule was heard on the 16th June last, we delivered judgment discharging the same, but on the same day, the case of *Mir Ahwad Hossein* v. *Mahomed Askari* (1) was brought to our notice, and it subsequently appeared that we were under a misapprehension on the facts of the case. As we had not signed our judgment, we thought it proper to hear both the learned vakils again to-day.

It has been contended by the learned vakil for the opposite party that we cannot, having once delivered our judgment, review the same. We entertain no doubt that it is competent to us to do so. The terms of section 369 of the Criminal Procedure Code are general, and we have not signed our judgment. The same view may reasonably be inferred from the case of *In the matter of the petition of Gibbons* (2) and a very extreme case is that of *Queen-Empress* v. *Lalit Tiwari* (3), where it was held that a judgment or order of the High Court is not complete until it is sealed in accordance with the Rules of the Court, and up to that time may be altered by the Judge or Judges concerned therewith without any formal procedure by way of review of judgment being taken.

Our attention was called to a case of the Bombay High Court, *Queen-Empress* v. *Fox* (4). If that case is an authority for the proposition advanced, we must respectfully decline to follow it. We, therefore, proceed to consider this Rule on the merits.

We are invited in this Rule to set aside an order of the Deputy Magistrate discharging the accused, under section 253 of the Criminal Procedure Code, on the 10th January, 1911.

(1) (1902) I. L. R. 29 Calc. 726.
(2) (1886) I. L. R. 14 Calc. 42.
(3) (1899) I. L. R. 21 All. 177.
(4) (1885) I. L. R. 10 Bom. 176.

1911

AMODINI DASEE v. DARSAN GHOSE.

The petitioner charged the accused with an offence under section 417 of the Indian Penal Code, but the accused was discharged on the 22nd August, 1910, by the Deputy Magistrate. The petitioner, however, obtained an order reviving her case from that Magistrate, and it was sent for disposal by the Bench of Honorary Magistrates at Baraset. The Magistrates thereupon examined three witnesses. On the 9th January, 1911, the Deputy Magistrate withdrew the case to his own file, and, next day, passed the following order:—"The complainant present. No evidence is produced. Accused discharged under section 253 of the Criminal Procedure Code. True—section 417 of the Indian Penal Code."

It is this second order of discharge that we are asked to set aside on the ground that the Deputy Magistrate ought to have considered the evidence already on the record and to have held that the same established a *primâ facie* case against the accused.

It is clear on the authority of the Full Bench in *Mir Ahwad Hossein* v. *Mahomed Askari* (1), that it was competent to the Deputy Magistrate to revive the case on application made to him. The case was regularly inquired into by the Baraset Bench. The only defect in the procedure is that the Deputy Magistrate has not said a single word in his order of the 10th January last to show that he had considered the evidence in any way. What the petitioner now seeks is that the evidence should be considered.

We do not desire to fetter the discretion of the Deputy Magistrate in any way, but we suggest that he do fix a date and call upon both parties to appear on that day. Then, arguments should be heard with reference to the evidence already on the record. If, in the opinion of the Deputy Magistrate, the case should not be gone into any further, it will be competent to him to pass an order of discharge under section 253 of the Criminal Procedure Code, which, in that event, will be a perfectly legal order to pass. The Rule is made absolute.

E. H. M. *Rule absolute.*

(1) (1902) I. L. R. 29 Calc. 726.