CALCUTTA HIGH COURT

Malik Pratap Singh

Vs

Khan Mahomed

(Coxe and Ryves, JJ.)

24.07.1909

JUDGMENT

Coxe and Ryves, JJ.

1. This is a Rule on the Chief Presidency Magistrate of Calcutta and the opposite party to show cause why the order of discharge of Khan Mahomed, passed by the learned Fourth Presidency Magistrate, dated the 27th May last, should not be set aside and a further inquiry ordered.

2. On behalf of Khan Mahomed it has been argued that this Court should not interfere under the Charter Act in the circumstances of this case, and that it has no power under the provisions of the Criminal Procedure Code to order further inquiry in a case in which a Presidency Magistrate has discharged an accused person, and reliance has been placed on three rulings of this Court to which we shall refer later.

3. We think it must be conceded that we can only interfere, if at all, under Section 439 of the Code. There is here no question of jurisdiction. If the Magistrate has erred, his error is merely one of law. It was held in T*ej Ram v. Harsukh*[1] which was followed in *Corporation of Calcutta v. Bhupati Roy Chowdhry*[2] that a High Court cannot interfere, under Section 15 of the Charter Act, with the order of a Court subordinate to it on the ground of an error in law. There must be an error that affects jurisdiction-either want of jurisdiction, or a refusal of jurisdiction, or an illegality in the exercise of jurisdiction. This view is also expressed in *Kedar Nath Sanyal v. Khetra Nath Sikdar*[3]

4. As to our powers under the Criminal Procedure Code, apart from the case law, we would have had no hesitation whatever in holding that this Court has ample powers to interfere. Section 435 enables us to call for the record of any proceeding of any subordinate Criminal Court, and it is beyond doubt that the Court of a Presidency Magistrate is such a Court. Having called for and received such record, our powers of disposing of the case are enumerated in Section 439, and we are enabled to exercise "any" of the powers conferred on a Court of Appeal by Section 423,

among other sections. One of the powers conferred on this Court as a Court of Appeal is the power of directing that an accused be retried or committed for trial. It seems to be quite clear that in a case in which a Presidency Magistrate acquits an accused person, this Court may, in the exercise of its revisional jurisdiction, for proper reasons, set aside the order of acquittal and order a retrial or commitment to the Court of Sessions*: Bellow v. Parker*[4]. It would be strange if the Legislature enabled us thus to interfere in the case of an acquittal, but, nevertheless, gave us no power of interference in the case of an order of discharge.

5. The cases on which reliance has been placed are Kedar Nath Sanyal v. Khetra Nath Sikdar (1907) 6 C.L.J. 705(Supra), *Debi Bux Shroff v. Jutmal Dungarwal*[5] and *Charoobala Dabee v. Barendra Nath Mozumdar*[6]

6. In Kedar Nath Sanyal v. Khetra Nath Sikdar (1907) 6 C.L.J. 705(Suupra) the application to this Court was made under Section 437 of the Code of Criminal Procedure, and it was there held that that section had no application to a Presidency Magistrate. In Debi Bux Shroff v. Jutmal Dungarwal (1906) I.L.R. 33 Calc. 1282(supra) it was held that "this Court cannot direct a further inquiry under Section 437, neither have we power to interfere under Section 439 of the Code." But there, as the report says, it was not contended that this Court could interfere under either of these sections. The argument of the learned Advocate-General in support of the Rule rested on the assumption that this Court could interfere only under Section 15 of the Charter Act. This case is, therefore, not a strong authority on the question now raised, and the dictum that this Court could not interfere under the provisions of the Code may be regarded as obiter. Charoobala Dabee v. Barendra Nath Mozumdar (1899) I.L.R. 27 Calc. 126(Supra), however, is a distinct authority for the proposition that this Court cannot interfere under the Code. On page 129 of the report, the ratio decidendi is expressed as follows: "Section 439 confers on the High Court, as a Court of Revision, all the powers of an Appellate Court under Section 423. But Section 423 does not enable a Court of Appeal to direct that further inquiry be made into a case in which an order of discharge or dismissal may have been passed. Section 423 confers a power to direct further inquiry only in respect of a case of an appeal from an order of acquittal, and that this power is so limited is shown by an express enactment in Section 437 to provide for such orders being passed." This is the only reason that has ever been assigned for the view that the High Court cannot order further inquiry after discharge by a Presidency Magistrate, and it may reasonably be inferred that it was for this reason that the learned Judges held in the two other cases cited that the High Court could not interfere under the Code. Exactly the opposite view was taken in *Golville v. Kristo Kishore Base*[7] and in an unreported case of this Court which is referred to in the judgment in Charoobala Dabee v. Barendra Nath Mozumdar (1899) I.L.R. 27 Calc. 126(Supra). Under these circumstances, we would have expected that the learned Judges who decided this latter case would have referred the question to a Full Bench, and we would have thought it necessary now so to refer it, if we did not think that a Full Bench of this Court had already decided the point.

7. In the Full Bench case of *Dwarka Nath Mondul v. Beni Madhab Banerjee*[8] Ghose J., at page 667, is reported to have said-" It is, however, said that Sections 436 and 437 do not apply to Presidency Magistrates [see the observations of the learned Chief Justice in *Queen-Empress v. Dolegobind Dass*[9] but, conceding that this is so, there can be, I think, no doubt that Sections 435 and 439 are applicable; and they confer upon the High Court the power of sending for the record of any inferior tribunal, and reversing the order of the Magistrate, including the power of ordering a further inquiry in the case of an improper discharge. And this was the view that was adopted in respect to an order made by a Provincial Magistrate in the Full Bench case of *Hari Dass Sanyal v. Saritulla*[10]*".* The learned Judge then goes on to deal with the case of Charoobala Dabee v. Barendra Nath Mozumdar (1899) I.L.R. 27 Calc. 126(Supra) and observes: "I am here confronted by certain observations of Sir Henry Prinsep and Hill JJ. in the case of Charoobala Dabee v. Barendra Nath Mozumdar (1899) I.L.R. 27 Calc. 126(Supra) where, in referring to the power of the High Court under Section 439 read with Section 423, they stated that the latter section does not enable a Court of Appeal to direct that further inquiry be made into a case in which an order of discharge or dismissal may have been passed.'" And he proceeds to point out that that view, which, as we have pointed out, is the real basis of all the decisions that we have quoted, is opposed to the view of the Full Bench in Hari Dass Sanyal v. Saritulla (1888) I.L.R. 15 Calc. 608(Supra).

8. It has been argued, however, that in this latter case the present question was not before the Full Court. Wilson J. in delivering his judgment, with which four other learned Judges of this Court concurred, stated that the three questions before the Court were-" (i) On what grounds is an order of discharge made under Section 209 or Section 253 liable to be set aside by a Court of Revision ? (ii) What Courts have jurisdiction to set it aside, and (iii) What orders are proper to be made if an order of discharge is to be set aside;" and he came to the conclusion that "the High Court, under Section 423 embodied in Section 439, can set aside the order of discharge, and direct a charge to be framed and tried by the proper Court. It can, under Section 437, and probably also under Section 439, order a further inquiry instead of a committal." These observations are perfectly general, and we think apply equally to all orders of discharge passed by subordinate Criminal Courts. In the Bombay High Court in *Emperor v. Varjivandas*[11], the ruling of this Court in Colville v. Kristo Kishore Bose (1899) I.L.R. 26 Calc. 746(Supra) was followed, and the opposite ruling in *Charoobala Dabee v. Barendra Nath Mozumdar*[12] was dissented from, and in that case also, the decision of the Full Bench in *Hari Dass Sanyal v. Saritulla*[13] was relied upon. For these reasons, I think we have full power under the Criminal Procedure Code to order a further inquiry in this case, if there appear good reasons for so doing.

9. The complainant, Malik Pratap Singh, complained against Khan Mahomed of having cheated him in respect of a sum of Rs. 3,550 on the 4th and 5th of December 1908 and on the 8th of January 1909, at 37 Ezra Street, by false representation. The case was instituted by the police under Section 420 of the Indian Penal Code, and was so regarded by the learned Presidency Magistrate. The complainant and a large number of witnesses were examined for the prosecution, and the prosecution case was closed on the 29th April 1909. Thereupon, the learned Magistrate

wrote out an order submitting the case for the opinion of this Court under Section 432 of the Criminal Procedure Code. It appeared to him to be very doubtful whether the charge of cheating under Section 420 could possibly lie, but he seemed to be of opinion that a charge under Section 409 might be sustained. He says-"I think in this case the accused was entrusted with the money by the prosecutor within the meaning of Section 405 of the Indian Penal Code, and he spent part of it, namely, Rs. 2,774, not in the way he should have done but in distinct violation of the terms of the trust or the contract." Throughout the whole of the inquiry no question was asked -bearing on the issue as to whether the accused had misappropriated the complainant's money. This Court returned the Reference to the learned Presidency Magistrate pointing out that it did not strictly arise under Section 432, but that it was open to him to charge the accused in the alternative under Sections 420 and 409, or under Section 409, if the evidence disclosed that offences under these sections or either of them had been committed. He, thereupon, recalled the complainant on the 14th May, and the complainant then stated that he had asked the accused for the money and that he had not been paid. No further inquiry seems to have been made, and on the 27th May the learned Magistrate decided that, in the absence of a definite direction from this Court, he was bound to rely on two unreported cases which he set out in his order and discharge the accused. In the first case, all that was proved was that the dhobi had not returned some clothes which the complainant said he had given to him to wash. There was no finding that the dhobi had converted them to his own use. The fact that when charged he, to save himself, falsely denied that he had received the clothes, would not necessarily establish his guilt. He might have lost them or sent them to another customer by mistake. It does not appear he denied receipt before the institution of the case. In the second case, there was no finding in the lower Court's judgment as to any dishonest misappropriation by the accused or conversion to his own use of the ornaments said to have been pledged by the complainant. In the absence of such a finding no conviction could be had. The ruling does not lay any general rule of law. It seems to us that the facts on which those two cases were decided are very different. In this case, the accused has admitted that he received Rs. 3,550 for the purpose of purchasing specific articles, that he only spent a small amount of that money in purchasing a few of those articles, and he further admits that the balance is still with him. The reason why he states he did not spend all the money on the objects for which it was given to him is that the complainant telegraphed to him stopping him. He admits that the rest of the money is in his hands, but denies that the complainant ever asked him to return it. Under these circumstances, a charge of criminal misappropriation under Section 409 of the Indian Penal Code may be established. But we think that there has been no proper inquiry into this charge. There is apparently some evidence that the accused absconded, a fact which, if proved, might have an important bearing on the question whether he had misappropriated the money, but the Magistrate apparently has not considered this evidence, nor has he attempted to elicit when and under what precise circumstances the demand for the money, if any, was made, and what answer or explanation was then given by the accused. These points are of vital importance, and when they have been lost sight of we think there are prima facie grounds for holding that further inquiry should be held.

10. We, therefore, order that the record be returned to the learned Presidency Magistrate, and direct him to inquire further into the charge under Section 409 of the Indian Penal Code.

Cases Referred.

1(1875) I.L.R. 1 All. 101
2(1898)I.L.R. 26 Calc. 74
3(1907) 6 C.L.J. 705
4(1903) 7 C.W.N. 521
5(1906) I.L.R. 33 Calc. 1282
6(1899) I.L.R. 27 Calc. 126
7(1899) I.L.R. 26 Calc. 746
8(1901) I.L.R. 28 Calc. 652
9(1900) I.L.R. 28 Calc. 211
10(1888) I.L.R. 15 Calc. 608
11(1902) I.L.R. 27 Bom. 84
12(1899) I.L.R. 27 Calc. 128
13(1888) I.L.R. 15 Calc. 608