GUJARAT HIGH COURT

Kalu Khoda

Vs.

State (Gujarat)

Criminal Revn. Appln. Nos.364, 365, 366 and 367 of 1961, with Criminal Revn. Application No.89 of 1962

(J.M. Shelat, P.N. Bhagwati and A.R. Bakshi, JJ.)

07.03.1962

JUDGMENT

J.M. Shelat, J.

1. These are four Criminal Revision Applications, together with an application No.89 of 1962 for bail, by the accused in Sessions Case No.15 of 1961.

2. On the 19th of September, 1960, at about 10-0 P.M. the accused Kalu Khoda, Taj Mahomed Siddi and five others were said to have committed dacoity at the house of one Mohanlal Narbheram in the village Tatania, Amreli District. The accused, Taj Mahomed and five others were charge-sheeted in respect of the aforesaid offence in the Court of the learned Judicial Magistrate, First Class, Dhari, under sections 395, 398 read with section 109 of the Penal Code and section 19(e) of the Arms Act. That case was numbered as Criminal Case No.804 of 1960. The accused Kalu Khoda could not be charge-sheeted at that time as he was absconding and, therefore, a separate charge-sheet had to be lodged in the Court of the same learned Magistrate, being Criminal Case No.405 of 1961. It was only on 23rd of March 1961 that the accused Kalu Khoda was arrested. One of the accused persons, Nanjj Suleman, was in the meantime, tendered pardon by the Sub-divisional Magistrate, Amreli. The learned committing Magistrate examined some of the witnesees in case No.804 of 1960 against Taj Mahomed and others, but the prosecution did not examine the approver Nanji Suleman in respect of the case against the accused Kalu Khoda, no witnesses were examined at all by the prosecution, not even the approver Nanji Suleman. The orders committing accused Taj Mahomed and others and Kalu Khoda were respectively passed on the 17th January 1961 and 16th of May 1961 committing them in respect of the aforesaid offence to the Court of Session, Amreli.

3. On the 6th of June 1961, the learned public Prosecutor filed an application in both the Sessions

Cases, being Sessions Cases Nos.6 and 15 of 1961 praying that a reference should be made to this Court for quashing the committing orders passed by the learned committing Magistrate on the ground that contrary to the provisions of sub-section (2) of section 337 of the Code of Criminal Procedure, the approver Nanji Suleman had not been examined in the Court of the committing Magistrate in both the cases. In the alternative, it was prayed that one month's adjournment should be granted in both the cases to enable the State to file Revision Applications to this Court for the purpose of quashing the aforesaid committal orders. It is, in these circumstances, that these applications have come up for hearing before us.

4. The accused Kalu Khoda, in his application No.89 of 1962, has prayed that he should be released on bail as the illegality, if any, in the aforesaid committal orders was due to the failure on the part of the prosecution to examine the approver and that quashing the committal proceedings as also the committal orders would mean that he would have to remain for a long time in custody as an undertrial prisoner for no fault of his.

5. The learned Assistant Government Pleader contended before us that the two committal orders passed by the learned Magistrate, Dhari, should be quashed as they had been passed in breach of the mandatory provisions of sub-section (2) of section 337 of the Code. He contended that section 207A(4) of the Code would have no application to these cases, that the provisions of section 207A(4) are general provisions, while the provisions of sub-section (2) of section 337 are special provisions applicable to cases where a person is tendered pardon and has accepted such pardon and therefore it is mandatory that such a person must be examined before a committal order can be passed in such a case. He also contended that the breach of the provisions of sub-section (2) of section 337 would constitute illegality, it being the breach of mandatory and not directory provisions and consequently, section 537 would have no application in such a case.

6. The accused Kalu Khoda and others, though served, did not appear either in person or through an advocate and as these cases involve, in our view, questions of some importance, we requested Mr. Desai to appear amicus Curiae. We are grateful to Mr. Desai for having rendered us considerable assistance in these cases.

7. Two questions were canvassed before us and both of them involve questions of interpretation of some of the sections of the Code of Criminal Procedure and in particular, section 337. They are:

> (1) Whether the Sub-divisional Magistrate, who tendered pardon in these cases, is, after the passing of the Bombay Act 23 of 1951, competent to tender pardon?
> (2) Assuming that he is, whether the failure to examine, in the course of the committal proceedings, the person who was tendered pardon and who accepted such pardon, rendered the committal order passed by the learned Magistrate illegal.

These very questions were decided in an unreported decision by the High Court of Bombay, in *Jasvantlal Purshottamdas v. The State*[1], to which sitting with Mr. Justice Shah, I was a party, in that case also, three questions were raised on behalf of the applicant-accused, namely,

> (1) Whether a Sub-divisional Magistrate has under section 337 of the Code no power to tender pardon?
>
> (2) Assuming that he has such power, whether he has not to obtain sanction of the Sessions Judge and whether in default of such sanction, his tendering the pardon

[1] in Criminal Revn. Application No.739 of 1958, D/-2-9-1958 (Bom)

> would be vitiated? And
>
> (3) Whether the failure to examine an approver by a committing Magistrate would render the committal proceedings and the committal order illegal by reason of the provisions of sub-section (2) of section 337?

8. All the three contentions raised on behalf of the applicant-accused in that case were negatived. The decision, in *Mahla v. Emperor*[2], which was cited in that case was also considered and found not to apply to a case where a committal order was challenged. It was argued before us that this decision is not correct and requires reconsideration.

9. The contention of Mr. Desai was that the decision in Jasvantlal Purshottamdas's case Cri. Revn. Appln. No.739 of 1938, D/-2-9-1958 (Bom) was not correct because it recognised a power in a Sub-divisional Magistrate to tender pardon which, after the enactment of Bombay Act 23 of 1951, cannot be said to have still been retained in that officer. To appreciate that contention, it becomes necessary to examine some of the provisions of the Code dealing with the appointment and the powers of Magistrates. Section 10 of the Code, as it stood prior to 1951, dealt with the power of the State Government to appoint a Magistrate of the first class to be a District Magistrate. Sub-section (2) of that section empowered the State Government to appoint any Magistrate of the first class to be an Additional District Magistrate and such Additional District Magistrate was to have all or any of the powers of a District Magistrate under the Code or under any other law for the time being in force, as the State Government may direct. Section 12, as it stood prior to the enactment of Bombay Act 23 of 1951, dealt with the appointment of subordinate Magistrates and provided that the State Government may appoint as many persons as it thinks fit, besides the District Magistrate, to be Magistrates Of the first, second or third class in any district outside the presidency towns and the State Government or the District Magistrate, subject to the control of the State Government, may, from time to time, define local areas within which such persons may exercise all or any of the powers with which they may respectively be invested under the Code. Section 13 gave power to the State Government to place a Magistrate of the. first or second class in charge of a sub-division and such Magistrates were called Sub-divisional Magistrates. That section also gave power to the State Government to delegate its powers to the District Magistrate. Thereafter Bombay Act 23 of 1951 was enacted under which sections 10, 12 and 13 inter alia were considerably, amended. Section 10 was amended by

deleting there from the words "a Magistrate of the first class". As amended, that section reads as follows:

> "(1) In every district outside greater Bombay the State Government shall appoint a District Magistrate.
> (2) The State Government may appoint one or more Additional District Magistrates and an Additional District Magistrate shall have all or any of the powers of a District Magistrate under the Code or under any other law for the time being in force, as the State Government may direct".

It would thus appear that a District Magistrate or an Additional District Magistrate, is no longer a Magistrate of the first class. Sections 12 and 13 of the Code were likewise amended by Bombay Acts in 1953 and 1954, presumably for the purpose of bringing

[2]31 Cr. LJ 111 : (AIR 1930 Lah 95)

about separation of the judiciary and the executive and in pursuance of that object a distinction was made in the Code between Judicial Magistrate and Sub-divisional Magistrate and other Magistrates, who may conveniently be called Executive Magistrates. In section 12, the marginal note was changed from "Subordinate Magistrate" to "Judicial Magistrates" and section 12 as amended reads as follows:

> "(1) The State Government may appoint as many persons as it thinks fit to be Magistrates of the first, second or third class in any district outside Greater Bombay and the Sessions Judge, subject to the control of the High Court, may, from time to time define local areas within which such persons may exercise all or any of the powers with which they may respectively be invested under this Code." Thus, in the case of Magistrates who are known as judicial Magistrates, the different categories, viz., of the first, second and the third cases, are retained and the power to delimit the territorial jurisdiction of such Magistrates is transferred to the Sessions Judge, subject to the control of the High Court, instead of the District Magistrate. Similar amendment was carried out in Section 13 and it is noticeable that in the case of Sub-divisional and Taluka Magistrates, who, as aforesaid, may be called Executive Magistrates, there are no longer any categories as in the case of Judicial Magistrates, the only division amongst them being that of Sub-divisional Magistrates and Taluka Magistrates. The distinction between Judicial Magistrates and Executive Magistrates is clearly brought out by amendment of Section 17 by Bombay Act 23 of 1951. As that section stood prior to 1951, all Magistrates appointed under Sections 12, 13 and 14 were Subordinate to the District Magistrate, but after Bombay Act 23 of 1951 was enacted, Magistrates appointed under Section 13 were made subordinate to the Sessions Judge. It would appear that in pursuance of the policy of separation of the judiciary and the executive, the executive Magistrates were no longer entrusted with judicial powers in connection with an inquiry or a trial or a criminal case except in limited and specified cases.

10. It was contended by Mr. Desai that in view of these changes made in the Code in pursuance of the policy of separation of the judiciary and the executive, a Sub-divisional Magistrate cannot have the judicial function of tendering pardon under Section 337(1) of the Code. Section 337 (1), however, provides that in the case of any offence triable exclusively by the High court or a Court of Session, or any of the offences enumerated therein, a District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or any Magistrate of the first class, may, 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 supposed to have been directly or indirectly concerned in or Privy to the offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof. Mr. Desai argued that though a Sub-divisional Magistrate is included amongst officers named in Section 337(1), it was through mistake or error that a Sub-divisional Magistrate has been retained among the officers named in that section. He contended that the powers of Magistrates are to be found in Section 36 of the Code and unless such powers are found as provided in that section, a Sub-divisional Magistrate cannot be said to have the power to tender pardon under Section 337(1) of the Code. Section 36 of the Code lays down that "all Judicial and Executive Magistrates other than Special Judicial and Executive Magistrates, have the powers, hereinafter respectively conferred upon, them and, specified in the third Schedule". Such powers are called their "ordinary powers". Mr. Desai urged that what Section 36 provides is that the ordinary powers of Magistrates either Judicial or Executive are only those powers respectively conferred upon them by the Code and are also specified in the third Schedule. He argued that if any of these powers were not to be found in Schedule III, which deals with the ordinary powers of Magistrates, such power cannot be said to have been conferred upon such Magistrates. Part III of Schedule III deals with the ordinary powers of a Magistrate of the first class and item (9a) in that part expressly provides for the power of such a Magistrate to tender pardon to an accomplice during inquiry into a case by himself under Section 337. Part IV of Schedule III deals with ordinary powers of a Sub-divisional Magistrate appointed under Section 13 of the Code and it is quite clear from that part that there is no such item setting out the power under section 337 to such a Sub-divisional Magistrate. In part V of Schedule III which deals with the ordinary powers of a District Magistrate and which was introduced by Act 18 of 1923, there is a specific item, No.(7a) which sets out the power of such a District Magistrate to tender pardon to an accomplice at any stage of a case under Section 337 of the Code. That power has been retained even after the enactment of Bombay Act 23 of 1951, that is to say, even after the separation of the judiciary and the executive. The position, therefore, under Schedule III after Act 18 of 1923 and Bombay Act 23 of 1951, is that Magistrates of the first class, who are Judicial Magistrates and District Magistrates are shown to have the power under Section 337 to tender pardon to an accomplice. But such power is not included in Parts III and IV of Schedule III which set out the ordinary powers of a Taluka Magistrate and a Sub-divisional Magistrate.

11. In view of this position, Mr. Desai's contention was that it was clearly the intention of the Legislature not to retain after the enactment of Bombay Act 23 of 1951, power under Section 337(1) in a Sub-divisional Magistrate and Taluka Magistrates. He urged that the omission of that power in the respective parts of Schedule III dealing with Sub-divisional Magistrates and Taluka Magistrates show that when amendments were carried out by Bombay Act 23 of 1951, the draftsman forgot to delete the words "Sub-divisional Magistrate;" from amongst the officers mentioned in section 337 (1) and, therefore, we should hold on a true construction of that sub-section that a Sub-divisional Magistrate has no longer the power to tender pardon to an accomplice. In our view, this contention cannot be sustained. It is not given to a Court of law to construe a section on the footing that the Legislature had committed an error. The statute should be taken as it stands and it is the duty of the Court to uphold the plain meaning of the words used in the section unless such interpretation is inconsistent with the manifest intention of the Legislature or leads to an absurd or unreasonable result. It is no doubt true that Section 36 provides that the ordinary powers of Magistrates, Judicial and Executive, are those conferred by the Code and specified in the third Schedule. But that does not mean that powers provided for under the provisions of the Code, but which may not have been set out in the third Schedule, are not powers exercisable by the Magistrates. The Schedule merely enumerates the powers conferred upon Magistrates by the provisions of the code, but that does not mean that though a power is expressly granted or conferred by the Code but has been omitted to be set out in the Schedule it is not a power exercisable by a Magistrate or which cannot be exercised by him. It is clear that it is not the Schedule, though it forms part of the Code, which confers powers, it is the section or sections of the Code which confer such powers upon a Magistrate. Therefore, if a section confers power but that power is not set out in the Schedule, it does not mean that such a power does not exist or is not conferred.

12. It was then contended that assuming that sub-section (1) of Section 337 confers the power to tender pardon to a Sub-divisional Magistrate, the proviso to that section furnishes a clear indication that a sub-divisional Magistrate is not competent to exercise such power. Prior to 1951 the proviso to section 337(1) provided that, where an offence is under inquiry or trial no Magistrate of the first class other than the District Magistrate shall exercise the power thereby conferred unless he was the Magistrate making the inquiry or holding the trial and where the offence was under investigation, no such Magistrate should exercise the said power unless he was a Magistrate having jurisdiction in a place where the offence might be inquired into or tried and the sanction of the District Magistrate was obtained to the exercise thereof. The proviso undoubtedly was intended to lay down the mode of exercise of the power conferred under sub-section (1) of Section 337. Thus in the case of an offence under investigation, the power was to be exercised as laid down by the proviso by such Magistrate, that is to say, by the Magistrate of the first class having jurisdiction in, the place where the offence might be inquired into or tried and where the sanction of the District Magistrate had been obtained to the exercise thereof. Thus, the exercise of the power conferred by Sub-section (1) of Section 337 was qualified by the condition laid down in the proviso. But it is clear from the proviso that these qualifications

applied to Magistrates of the first class only and did not apply for instance in the case of a District Magistrate who was expressly exempted from the operation of the proviso as also a Presidency Magistrate, who under Section 6 was not a Magistrate of the first class and to whom therefore the proviso did not apply. As the proviso, now stands as amended, it lays down that.

> "Where the offence is under inquiry or trial no Magistrate of the first class shall exercise the power hereby conferred unless he is the Magistrate making the inquiry or holding the trial, and, where the offence is under investigation no such Magistrate shall exercise the said power unless he is a Magistrate having jurisdiction in a place where the offence might be inquired into or tried and the sanction of the Sessions Judge has been obtained to the exercise thereof".

The only change that is made is that instead of the sanction of the District Magistrate, the sanction of a Sessions Judge is required. Except for that change, the proviso is the same as before. In the case of offence under investigation, which is the case for inquiry before us, the proviso lays down three conditions for its application:

> (1) that the Magistrate must be of the first class,
> (2) that he has jurisdiction in a place where such an offence would be inquired into or tried, and
> (3) that he has obtained the previous sanction of the Sessions Judge.

The words "such Magistrate" in the latter part of the proviso must mean a Magistrate of the first class and, therefore, a Judicial Magistrate as, there are no longer any divisions of the first class or second class or third class in the case of Executive Magistrates. It is clear from the words used in the proviso that it does not apply or touch Magistrates of categories other than the Magistrates of the first class, namely, a District Magistrate or a Presidency Magistrate or a Sub-divisional Magistrate. Mr. Desai contended that if this interpretation were to be accepted, it would mean as if by the amendment of the proviso, a Sub-divisional Magistrate, has been conferred wider powers than those he enjoyed under the proviso as it was prior to 1951. Under the proviso as it stood them, it is true the there were certain qualifications to the exercise of the power under Section 337(1) by a Sub-divisional Magistrate, namely, that where the offence was under inquiry or trial only such Magistrate could exercise the power, if he was the Magistrate making the inquiry or holding the trial, and, where the offence was under investigation, only such Magistrate could exercise the power who had jurisdiction in a place where the offence might be inquired into or tried and had obtained the sanction of the District Magistrate. Whereas, now, if a literary construction were to be given to the proviso as amended, those restrictions would no longer be there and a Sub-divisional Magistrate would be entitled to exercise the power conferred upon him without any restrictions even with regard to jurisdiction and the sanction of the District Magistrate. There is considerable force in this argument because where a Judicial Magistrate exercises the power in a case where the offence is under investigation, he has to obtain the

sanction of the Sessions Judge and he must also be a Magistrate having territorial jurisdiction in a place where the offence, might be inquired into or tried. If on the other hand, that power were to be exercised by a sub-divisional Magistrate, there would be no restriction on him at all, not even of the necessity of obtaining the sanction of the District Magistrate which prior to 1951 he had to obtain. There is equally force in the contention of Mr. Desai that such a result would be inconsistent with the object of Bombay Act 23 of 1951, namely, separation of the judiciary and the executive. Mr. Desai also rightly contended that on such a result, a Sub-divisional Magistrate would be able to interfere in an inquiry or a trial held by a Judicial Magistrate or even a Sessions Judge, if he were to be held to have an unqualified power to tender pardon at any stage of the case, namely, either during the investigation or during the inquiry or the trial. He urged that the intention of the Legislature could not be to bring about such a strange result. In support of this contention Mr. Desai relied upon a passage from Maxwell on the interpretation of Statutes, 10th Ed. page 252, where the learned author observed as follows:

> "It has been asserted that no modification of a language or a statute is ever allowable in construction except to avoid an absurdity which appears to be so not to the mind of the expositor merely, but to that of the Legislature, that is, when it takes the form of a repugnancy".

Dealing with that proposition in the cases set out in foot-note (p) on that page, the learned author observes:

> "in this case the Legislature shows in one passage that it did not mean what its words signify in another and a modification is therefore called for and sanctioned beforehand, as it were, by the author. But the authorities do not appear to support this restricted view. They would seem rather to establish that the judicial interpreter may deal with careless and inaccurate words and phrases in the same spirit as a critic deals with an obscure or corrupt text when satisfied, on solid grounds, from the context or history of the enactment, or from the injustice, inconvenience, or absurdity of the consequences to which it would lead, that the language thus treated does not really express the intention and that this amendment probably does".

But can we say that the provisions of Section 337 of the code and the other provisions to which our attention was drawn by Mr. Desai must lead us to the conclusion that there are "solid grounds" to believe, that the Legislature did not intend to confer or retain the power to tender pardon to a Sub-divisional Magistrate or that after Bombay Act 23 of 1951, it wished to restrict the power conferred upon him by sub-section (1) of Section 337? The passage relied upon by Mr. Desai from Maxwell appears in the Chapter dealing with "Exceptional Construction". At page 229, the very same author, however, observes:

> "Where the language of a statute, in its ordinary meaning and grammatical construction,

> leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence". X X X X X "Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftrnan's. unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. Nevertheless, the Courts are very reluctant to substitute words in a Statute, or to add words to it and it has been said that they will only do so where there is a repugnancy to good sense".

It is a well settled canon of construction that even though a Court is satisfied that the Legislature did not contemplate the particular consequences of an enactment, it is bound to give effect to its clear language. In *Cox v. Hakes*[3], Lord Herschell observed;

> "It is not easy to exaggerate the magnitude of this change i.e. that discharge from custody by a Court of competent jurisdiction does not protect from further proceedings; nevertheless, it must be admitted that, if the language of the Legislature, interpreted according to the recognised canons of construction, involves this result, your lordship must frankly yield to it, even if you should be satisfied that it was not in the contemplation of the Legislature"
>
> .

In our view, though the amended proviso would mean on a plain consideration that the power to tender pardon to a Sub-divisional Magistrate is without any qualifications, it would not for that reason only be competent of this Court to refrain from giving the ordinary and dictionary meaning to the words used in that proviso. We would also not be entitled to speculate as to the intention of the Legislature except such as it appears from the words used in that proviso Or to delete or substitute words except in exceptional cases where the literary construction would lead to repugnancy or to absurdity or to unreasonableness, in these circumstances, though the amended proviso would seem to permit the exercise of the power to tender pardon without the qualifications which existed in the proviso prior to 1951, we would not be justified in coming to the conclusion that a Sub-divisional Magistrate for that reason alone has not been conferred the power to tender pardon under Section 337(1) of the Code. In our view, the decision on that question in Cri. Revn. Appln. No.739 of 1958, D/-2-9-1958 (Bom), is correct and we

[3](1890) 15 AC 506

agree with the same.

13. The next question is whether the committal proceedings and the order would be illegal, if, in breach of sub-Section (2) of Section 337, the committing Magistrate commits an accused to the Court of Session without the prosecution examining the person who has been tendered pardon and who has accepted the same. In 31 Cri LJ 111 : (AIR 1930 Lahore 95), already referred to, the High Court of Lahore held that Section 337(2) meant that any person who has accepted a

tender of pardon must be examined as a witness in the Court of the committing Magistrate and also at the subsequent trial of every person tried for the same offence and that non-compliance with that provision rendered the committal proceedings as well as the trial illegal. No grounds however have been given there for the conclusion that the proceedings in both the Courts are vitiated as illegal except that sub-section (2) of Section 337 is mandatory in character. But there are several provisions in the Code which are couched in imperative language yet the breach thereof has been held to be merely an irregularity curable under Section 537 of the Code, unless such a breach has resulted either in prejudice or failure of justice to the accused. In each case, therefore, it has to be ascertained whether the provision is mandatory in nature or merely directory. If there is a breach of the former, obviously it results in illegality which vitiates the proceedings. Further the decision in 31 Cri LJ 111 : (AIR 1930 Lahore 95) was given before Section 207A of the Code was enacted and, therefore, no question as to whether that section affected section 337(2) arose in that case. In Cri. Revn Appln. No.739 of 1958, D/-2-9-1958 (Bom) also the question whether the committal order was under Section 337(2A) or under Section 207A was not argued nor was considered, nor was the question whether Section 207A was superimposed on Section 337(2A) canvassed or considered.

14. There is no doubt that whereas Section 207A is a general provision laying down procedure for all committal proceedings, Section 337(2A) is a special provision touching cases where a person concerned in an offence is made an approver. Though Section 207A was enacted later than section 337(2-A), the former cannot be said to have been superimposed on the latter. The committal order passed in a case, where a person is made an approver is not one made under Chapter XVIII, but, is one made under Section 337(2A) and, therefore, the procedure laid down for committal proceedings in Section 207A must be read subject to the expression (Sic) provision of sub-section (2A) of section 337. Under sub-section (2A) of Section 337, there are two pre-requisites before a Magistrate can pass a committal order against an accused person, namely,

(1) there must, be a person who has accepted tender of pardon, and
(2) such a person has been examined under sub-section (2) of Section 337.

If the Magistrate then finds that there are reasonable grounds for believing that the accused person before him is guilty of the offence with which he is charged, he is then to commit him to a Court of Session. The discretion left to the prosecution to adduce such evidence as it thinks fit before the committing Court under Section 207A(4) does not apply to a case under Section 337 (2A) in view of the imperative language used in sub-Section (2) of Section 337 and the stage provided for in sub-section (2-A) thereof, when a committal order can be passed, viz. after the acceptance of tender of pardon and the examination of the person accepting such tender. Besides, under sub-section (2A) of Section 337, a Magistrate comes to the conclusion that there is a prima facie case against an accused person, not only from the police papers as in the case falling under Section 207A, but from the materials before him including the examination of the person who has been tendered pardon. That appears to be clear from the fact that sub-section (2) expressly

requires such a person to be examined. Under sub-section (2-A) of Section 337, therefore, there are two conditions precedent which have to be observed before a committal order can be passed, viz.

> (1) that there is a person who has accepted a tender of pardon, and
> (2) that such person has been already examined under sub-section (2).

As has often been observed, the provisions of sub-section (2) of Section 337 are for the benefit of an accused in such a case and are inserted in the interests of justice.

15. The tender of pardon is made on the footing that an approver shall make a full and frank disclosure at all stages of the case. That being so, the failure to examine him before the committing Magistrate would not only be in breach of the express provisions of sub-section (2) of section 337 but would also be inconsistent with and in violation of the duty to make a full disclosure at all stages. The breach of sub-section (2) of section 337, therefore, is of a mandatory rather than a mere directory provision and such a breach would render the proceedings and the order illegal. The intended benefit for an accused for which sub-section (2) of section 337 appears to have been enacted would seem to consist in

> (1) that the approver would have to disclose his evidence at the preliminary stage before the committal order is passed, and
> (2) that an accused thus not only knows what the evidence is against him but gets an opportunity to rely upon the deposition of an approver before the committing Court for the purpose of proving the approver's evidence at the trial untrustworthy, if there are contradictions or improvements.

There can be thus no question that if the approver is not examined at both the stages, as required by sub-section (2), the accused in the trial would lose this benefit and it cannot be gainsaid that he would be prejudiced if he were to lose the opportunity of showing the approver's evidence unreliable. It would be deprivation of an important and in some cases a vital right which would cause him prejudice resulting in failure of justice. Even if, therefore, the breach of sub-section (2) is not to be regarded as illegal, section 537 of the Code would not cure such an irregularity and that section cannot be invoked to cure any such irregularity.

16. Though the tender of pardon by the Sub-divisional Magistrate at the stage of investigation in this case and its acceptance by the approver Nanji Suleman cannot be said to be incompetent or unauthorized as contended by Mr. Desai, the failure on the part of the prosecution to examine the approver before the committing Court rendered the proceedings before the former and the committal order illegal and void. We, therefore, make the rule absolute in Criminal Application No.364 of 1961 and No.367 of 1961 and set aside the orders of the learned committing Magistrates committing the accused to the Court of Session, Amreli. No orders on the other two

Criminal Revision Applications.

17. As regards the application for bail by Kalu Khoda, it is no doubt true that the rest of the accused in this case have been granted bail, but, there is one circumstance in the case of the accused Kalu Khoda which has to be taken into consideration and that is that prior to his arrest, the accused Kalu Khoda had been absconding for a number of months. Ordinarily, that circumstance would have made us reluctant to grant his application for bail in a case where the charge is one of dacoity, but, the setting aside of the committal order passed in this case will have the effect of delaying the disposal of the two Sessions Cases. That delay has been caused not by any default on the part of the accused Kalu Khoda but due to the failure of the prosecution to follow the provisions of sub-section (2) of section 337. Taking that fact into consideration, we think that, it is just and proper that the accused Kalu Khoda be released on bail on his furnishing a personal recognizance of Rs. 5000/- and a surety for the like amount provided that the accused Kalu Khoda will also present himself on every Saturday in the Court of the committing Magistrate unless any such Saturday happens to be a holiday or a close day, in that event, he should present himself on the following Monday. The committing Magistrate will hold a fresh inquiry in accordance with law and in the light of the observations made hereinbefore and he shall dispose of the inquiry as expeditiously as possible.
Order accordingly.