1900.

MURLIDHAR v. ANANDRAO.

debtor paid up the balance of the principal within the time fixed by law. This amount was insufficient and he made up the deficiency by two further payments. These payments were held to be not made within time and the sale was allowed to take place. At this sale the brother of the administrator of the minor judgment-creditor bought the property for two rupees although the creditor himself had undertaken to make a bid of 4,000 rupees for the same property. The circumstances of the case were thus such as to justify the lower Appellate Court in holding that there had been great irregularities in the procedure followed by the Subordinate Judge.

Section 244 (*c*) is intended to govern cases such as these, and the District Judge had full jurisdiction to entertain the appeal. The purchaser was evidently a creature of the judgment-creditor, who only put him forward to escape from his own liabilities and get the property sold for two (2) rupees. We accordingly dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Candy, Mr. Justice Ranade and Mr. Justice Whitworth.

1900. December 7.

QUEEN-EMPRESS *v.* HUSSEIN HAJI.*

Criminal Procedure Code (Act V of 1898), sections 337 and 494—Withdrawal of prosecution — Discharge — Acquittal — Evidence — Discharged persons called as witnesses—Competent witness—Practice.

Where the Public Prosecutor with the consent of the Court withdrew from the prosecution of two out of several accused persons tried jointly for an offence under section 4 of the Gambling Act (Bombay Act IV of 1887), and the two accused were thereupon discharged under section 494 of the Criminal Procedure Code (Act V of 1898) and then examined as witnesses for the prosecution,

Held, (WHITWORTH, J. dissenting) that the persons so discharged were competent witnesses.

* Criminal Appeal, No 436 of 1900.

1900.

QUEEN-EMPRESS v. HUSSEIN HAJI.

APPEAL from the conviction and sentence passed by J. S. Slater, Esquire, Chief Presidency Magistrate, Bombay.

The appellant Hussein Haji Abba, along with twenty-four others, was charged before the Chief Presidency Magistrate, under section 4 of Bombay Act IV of 1887, with keeping a common gaming house.

In the course of the trial the Public Prosecutor with the consent of the Court withdrew the charge against two of the accused (Karim and Ibrahim). The Magistrate thereupon discharged them under section 494 of the Criminal Procedure Code (Act V of 1898).

They were then called as witnesses for the prosecution.

The appellant was convicted and was sentenced to pay a fine of Rs. 500 or in default to suffer three months' rigorous imprisonment.

The following passage in the Magistrate's judgment referred to the discharge of Karim and Ibrahim:—

> As regards the position of the witnesses Karim and Ibrahim. They were discharged by me under section 494 of the Criminal Procedure Code. It might have been more in accordance with section 494 if I had acquitted them, but a mere error in making of an interlocutory order of this description comes directly within section 537 (*a*) of the Criminal Procedure Code, and has occasioned no failure of justice or prejudice to the accused. There was an order of discharge against both these accused granted at the request of the Public Prosecutor and in consonance with section 10 of Bombay Act IV of 1887."

The appellant contended *inter alia* that it was irregular and illegal to allow the accused Karim and Ibrahim, who had been discharged under section 494 of the Criminal Procedure Code, to be called and examined as witnesses for the prosecution, and that this irregularity vitiated the whole of the proceedings before the Magistrate.

H. Sealy for the appellant.

Lang (Advocate General) for the Crown.

CANDY, J.—The main question argued in this appeal is whether the witnesses Karim and Ibrahim were competent witnesses. These men with several others were arrested by the Police in a room said to be a common gaming house. When they and the

1900.

QUEEN-EMPRESS v. HUSSEIN HAJI.

other accused were before the Magistrate on 22nd June last, before any evidence had been led, the Public Prosecutor applied under section 494, Criminal Procedure Code, to withdraw from the prosecution of these two men, and the Magistrate consented. These two men were therefore discharged, and this discharge amounted in law to an acquittal. They were no longer accused, and they could never again be charged with the offence of which they were thus acquitted. They were forthwith examined as witnesses; and it is urged that they were not competent witnesses, and that their evidence could not be taken into consideration against accused No. 2, who was convicted and whose appeal is now before this Court.

The argument thus raised amounts to this, that any person whose prosecution has been withdrawn under section 494, Criminal Procedure Code, can never be examined as a witness, either for the Crown or for the defence, in a case in which he had been an accused. I cannot agree with this contention. The cases quoted by the learned counsel, which had reference to witnesses who had been accused and who had been illegally pardoned, have no application to the present case in which there has been no tender of pardon. Other cases quoted by the learned counsel show that these two men were competent witnesses. Thus in *Reg.* v. *Narayan Sundar*[1] one Bhaskar Sunder was one of the persons apprehended and brought before the Magistrate for trial. He was not even discharged; but he was examined as a witness, and the Court (Couch, C.J. and Newton, J.) held "that the witness Bhaskar Sundar was not at the time he was examined charged with the accused and upon his trial although he had been apprehended, and that he was by law a competent witness." So too in *Reg.* v. *Hanmanta*[2] reference was made to the evidence of several witnesses, to the admission of whose evidence objection had been taken on the ground that they also were persons accused before the Magistrate. But it was held that as these persons had been discharged, although some of them were undoubtedly accomplices, they were not accused persons when they were admitted as witnesses, and therefore their evidence was admissible. In the last case quoted by the learned counsel, *Imp.* v. *Lilladhar*[3]

(1) (1868) 5 Bom. H. C. R. Cr. 1. (2) (1877) 1 Bom. 610, 619.
(3) (1889) Cr. Rul. No. 18.

the reasoning in *Hanmanta's case*, with regard to an *illegally pardoned accused*, not being a competent witness, was extended to the case of an accused person against whom the Magistrate *illegally* allowed the charge to be withdrawn; his subsequent evidence as a witness was held inadmissible. That was a warrant case, in which a pardon could not be tendered under section 337 or in which the complaint could not be allowed to be withdrawn under section 248. The present case was a summons case, no pardon was tendered; the complaint could have been withdrawn under section 248, and as there was a Public Prosecutor, action could be taken under the special provisions of Chapter XXXVIII, section 494. The consent given by the Magistrate cannot now be attacked; and the evidence, whatever may be its weight, was admissible.

It was urged that a comparison with the provisions of sections 337 to 339 show that it could not have been intended by the Legislature that power should be given to the Police to pick and choose which accused person should get scot-free and be turned into a witness, without any risk whether he deposes truly or falsely. The answer to that argument is that the special provision of section 494 can only be brought into force on the application of the Public Prosecutor, when there is one in the case, and with the consent of the Court. The provisions of section 248 are used when the complainant applies for permission to withdraw his complaint and the Court consents. There is nothing to show that the provisions of section 494 or of section 248 can only be applied when there is a single accused person in the case.

Reference was also made by the learned counsel to section 343; but that evidently refers to the examination of the accused under section 342, and moreover it is clear from the record in this case that the evidence of Karim and Ibrahim was not induced by any influence on the part of the Police. These men voluntarily offered their information, and no doubt they were told that the Public Prosecutor would be asked to make application for the prosecution against them to be withdrawn, and if the Court consented to that they would then be examined as witnesses.

The other points urged on behalf of accused appellants do not require lengthy notice. There was no error in law in adjourning

1900.

QUEEN-EMPRESS v. HUSSEIN HAJI.

the case against accused No. 1, who was ill, and proceeding against the rest of the accused. There is nothing to show that the appellant or his pleader made any application to examine as his witnesses those persons who had been summoned on behalf of accused No. 1. There is nothing even now to show that those persons are material witnesses, and that it is necessary for the ends of justice that their evidence should be recorded. As to the appellant's pleader not being permitted by the Magistrate to sum up this case, while the Public Prosecutor was allowed to reply, it is obvious that these facts do not affect the merits of the case. There is no question as to the appellant having been present when the room was raided by the Police. The only question is whether the room was a common gaming house. It is impossible to read the depositions of the two witnesses Karim and Ibrahim, and of the two Police officers, and the statement made on behalf of accused No. 11, without coming to the conclusion that gambling, and not a game of skill, was going on. I would therefore confirm the conviction and sentence.

As my learned colleague is of opinion that Karim and Ibrahim were in effect illegally pardoned, and I cannot agree with that opinion, the case must be laid before a third Judge under section 429 of the Criminal Procedure Code.

WHITWORTH, J.—The principal question in this appeal is whether the men Karim and Ibrahim, who in the first instance were co-accused with the appellant, were, after the cessation of proceedings against them, competent witnesses against him. It cannot be disputed that any accused person who has been properly and judicially discharged or acquitted becomes a competent witness in the case. But in this connection it is necessary to observe also the principle of the law in respect of pardoning an accused person; and by section 337, Criminal Procedure Code, permission to pardon is restricted to cases in which the offence is triable exclusively by the Court of Session. In the present instance the offence is not of that character, but is one under the Gambling Act triable by a Magistrate. It is necessary to see that while in form following one provision of the law, another provision has not in reality been disobeyed. I think it has. It is not contended on behalf of the Crown in

this case that Karim and Ibrahim were discharged merely upon proper judicial considerations, that is upon a consideration of the law and the evidence as affecting them alone. On the contrary, it is frankly avowed that the prosecution against them was withdrawn in order that they might be used as witnesses against other accused persons in the case. In ordinary judicial course, and if their evidence had not been required to be used against others, they would have remained on trial with the others, and the case of all would have been decided at once. (The fact that on account of the illness of one accused person the case was subsequently split into two does not affect the present question.) That is, they would have been co-accused to the end of the proceedings and could not have been examined as witnesses against the others.

That would have been their position if the proceedings had been conducted to the end upon purely judicial considerations, and they have been removed from that position by the Magistrate looking beyond the judicial case as against them and in effect assuming the right of pardon which did not pertain to him in the case. The Magistrate has indeed purported to act not under section 337 but under section 494, Criminal Procedure Code, under which he consented to the withdrawal of the prosecution against Karim and Ibrahim; but the action was essentially the granting of a pardon to the two men or a consent to their being pardoned by the prosecution. It is needless to enquire whether the men first volunteered to give evidence of their own accord or whether the police pressed or advised them to do so. It would be impossible to ascertain exactly how far each party made an advance. But it is certain, and is not disputed, that an understanding was arrived at by which on the one hand they were to give evidence and on the other the prosecution against them was to be withdrawn. That is in effect they were pardoned.

It is necessary to reconcile the provisions of sections 337 and 494, and that can, I think, be done only in the way indicated above, namely, by taking "the consent of the Court" in section 494 as meaning consent based solely upon a judicial consideration of the case against the person from whose prosecution the Public

1900.

QUEEN-EMPRESS v. HUSSEIN HAJI.

Prosecutor desires to withdraw, and not upon any consideration of the uses to which that person may be put in a case other than his own. And indeed, apart from any conflict with section 337, I should think that to be the most natural interpretation of the section.

The case has rested mainly upon the evidence of these two witnesses, and if that be excluded the remaining evidence is, I think, insufficient to establish that the house was being used as a common gaming house. Nor indeed has it been argued that it is so sufficient. I would therefore reverse the conviction and sentence.

There being a difference of opinion between Candy and Whitworth, JJ., the case was referred to a third Judge (Ranade, J.) under section 429 of the Criminal Procedure Code, Act V of 1898, who delivered the following judgment.

RANADE, J.:—The only question of law on which there is a difference of opinion necessitating the reference under section 429 is whether Karim and Ibrahim, who were co-accused with the appellant, were competent witnesses after the Public Prosecutor, with the consent of the Presidency Magistrate, withdrew from the prosecution instituted against them and they were discharged by the Magistrate. The Magistrate's judgment shows clearly that his order should have been not one of discharge but of acquittal. This admitted mistake is one which is covered by section 537, as it did not result in any failure of justice. If the Presidency Magistrate had acquitted Karim and Ibrahim, it is obvious that they would have been competent witnesses against the present appellant. The provisions of section 337 expressly lay down that a person who is directly or indirectly concerned in any offence, and who has received a pardon on his undertaking to give full and true disclosures, is a competent witness. A pardoned accomplice is certainly a less reliable witness than a co-accused in respect of whom the Public Prosecutor, with the consent of the Court, withdraws the prosecution, and who is thereupon acquitted by the Magistrate. The withdrawal of the prosecution in one case, like the acceptance of pardon in the other, restores to the accused his competency as a witness. In the present case though Karim and Ibrahim were apprehended with

1900.

QUEEN-EMPRESS v. HUSSEIN HAJI.

the appellant, the cross-examination of these witnesses shows clearly that from the first they were acting in full sympathy with the instructions of the police, and it was on that account that they were treated with special indulgence, and finally the prosecution was withdrawn against them. The considerations which influenced the Presidency Magistrate to give his consent were judicial considerations such as those referred to in section 337. The distinction made by Whitworth, J., appears not to be borne out by the evidence in this case, and I feel satisfied that the decisions referred in the judgment of Candy, J.—*Reg.* v. *Narayan*[1] and *Reg.* v. *Hanmanta*[2]—fully apply. In one of these cases the accused had been, as in the present case, discharged, yet it was held that the accused were competent witnesses. On the whole I am disposed to agree with Mr. Justice Candy in holding that Karim and Ibrahim were competent witnesses, and that their evidence along with the other police testimony fully justified the conviction and sentence passed by the Magistrate.

APPELLATE CIVIL.

Before Mr. Justice Ranade and Mr. Justice Crowe.

1900.
December 12.

RAMDHAN (ORIGINAL DEFENDANT), APPELLANT, *v.* MANIBAI (ORIGINAL PLAINTIFF), RESPONDENT.*

Will—Construction—Executor—Suit by legatee against executor for arrears of rent—Limitation.

A Hindu died leaving a son, a daughter, a widow and a brother's widow. He left a will whereby he directed that the two widows should receive "half and half" the annual income realized from the four houses which he specified and that on the death of one of them the survivor should take the whole for her life. The son was to make repairs and to pay the municipal taxes payable in respect of the said houses, but he was to have "no manner of right whatever to the income" thereof. He was also to provide the widows with food and clothing for their life and to provide the expenses of the marriage of the testator's daughter. Except as above mentioned the whole of the testator's property, moveable and immoveable, was left to the son. The plaintiff (one of

* Second Appeal No. 392 of 1900.

(1) (1868) 5 Bom. H. C. R. 1. (2) (1877) 1 Bom. 610. p. 619.