1897.

IMPERATRIX v. RATNYA.

specific provision to the contrary it does not affect any special or local law, or any special jurisdiction or power conferred or any special form of procedure prescribed by any other law now in force (see section 7 of Act XIV of 1874), it does not touch the Agent's jurisdiction to refer the case, or the power conferred on us by the Letters Patent to hear and determine it.

From the foregoing review of the course of legislation on this subject, it appears to me that the High Court has jurisdiction to hear and determine the present reference. The case itself is of a simple nature, and presents no special difficulty, but as probably the accused, whose petition is addressed to the Governor in Council, is unaware that we are going to deal with it, I think it would be desirable to direct notice to be given to him before we finally dispose of it.

Note :—After giving notice to the accused the High Court considered the reference, confirmed the conviction and sentence and rejected the appeal.

APPELLATE CRIMINAL.

Before Mr. Justice Candy and Mr. Justice Fulton.

KING-EMPEROR *v.* BALA AND NARAYAN.*

1901.
April 9.

Criminal Procedure Code (Act V of 1898), sections 337 and 339.—Criminal Procedure—Pardon tendered and accepted—Evidence given and pardon withdrawn by Magistrate—Forfeiture of pardon must be proved—When may forfeiture be declared and pardon withdrawn—Practice.

A committing Magistrate, having, under section 337 of the Criminal Procedure Code (Act V of 1898), tendered a pardon to one of three accused persons, examined him as a witness. Subsequently, however, the Magistrate, under section 339 of the Code, withdrew the pardon on the ground that the accused had wilfully concealed a certain fact connected with the offence, and he committed him along with the other accused for trial at the Court of Sessions, where he was found guilty. In giving judgment the Sessions Judge expressed his opinion that the withdrawal of the pardon by the Magistrate was illegal, (1) because such withdrawal could not be made until the close of the trial and should be made by the Court of Sessions, and (2) because the fact, the alleged concealment of which was the ground of the withdrawal, had not been proved. The accused, however,

* Criminal Appeal No. 56 of 1901.

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was found guilty and sentenced. On appeal to the High Court—

Held, that the conviction and sentence should be set aside on the ground that it had not been proved that the pardon had been forfeited under section 339 of the Criminal Procedure Code (Act V of 1898). The alleged fact, the concealment of which was the ground for withdrawing the pardon, had not been proved. If the pardon which had been granted had not been forfeited under section 339, it was still in force and the accused should be discharged.

As the law stands the question in such cases is whether the accused has forfeited his pardon by some act of his own. The question is one of fact in which the Magistrate may hold one opinion and the Sessions Judge another as may happen in the case of any other question of fact in issue in the case. The Sessions Court has to determine for itself on the evidence whether the pardon has been forfeited: for if not, the accused, who has accepted such pardon, cannot be tried.

Quære,—Whether the examination at the committal proceedings before the Magistrate of a person who has accepted a pardon satisfies clause 2 of section 337 of the Code which provides that every such person shall be examined as a witness "in the case" or whether such person must be examined as a witness at the "trial."

Queen-Empress v. *Bhau*(1) doubted.

APPEAL against the conviction and sentence recorded by E. M. Pratt, Sessions Judge of Sholápur-Bijápur, in criminal case No. 49 of 1900.

The accused (1) Bala Narsagavda and (2) Narayan Davlat were charged with the murder of one Meera. The deceased's wife Ameena was charged with abetment of the offence.

In the course of the investigation before the Magistrate on the 4th September, 1900, Narayan Davlat (accused No. 2) was tendered a pardon under section 337, of the Criminal Procedure Code (Act V of 1898) on condition of his making a full and true disclosure of all the facts within his knowledge, and he was examined as a witness on the same day.

On the 6th September the pardon was withdrawn by the Magistrate on the ground that Narayan had not disclosed a certain fact within his knowledge, and Narayan was committed for trial along with the other two accused to the Court of Sessions at Sholápur-Bijápur.

The Sessions Judge, however, was of opinion that it was necessary under section 337 (2) of the Criminal Procedure Code (Act V of 1898) that Narayan should be examined as a witness at the trial, and that the Magistrate was wrong in withdrawing

(1) (1898) 23 Bom. 493.

the pardon before the trial in the Sessions Court had begun. He therefore referred the matter (No. 114 of 1900) to the High Court, requesting that Narayan's commitment might be quashed. On that reference the High Court passed the following order:

The Sessions Judge should proceed with the case. The accused Narayan Davlat was examined as a witness by the Magistrate, who withdrew the pardon, as in his opinion the condition on which it was granted was not complied with.

The Sessions Judge thereupon proceeded with the trial, and agreeing with the assessors found Bala and Narayan (accused Nos. 1 and 2) guilty of murder and sentenced them each to transportation for life. Ameena was found not guilty of the offence charged and she was discharged.

In passing judgment the Sessions Judge expressed his opinion that the withdrawal by the Magistrate of the pardon which had been tendered to Narayan and accepted by him was illegal: (1) because in his view the Magistrate had no power to withdraw it, such withdrawal not being legally possible until the close of the trial of the other accused, and only to be made by the Court of Sessions, (2) because the fact, the non-disclosure of which by Narayan was the ground of the withdrawal, had not been proved and was certainly not within Narayan's knowledge. In his opinion Narayan's evidence was true.

In his judgment the Sessions Judge made the following observation with regard to the case of Narayan:

I may add that I propose at the expiry of the period of appeal to move Government to grant accused No. 2 a pardon. The committing Magistrate tendered him a pardon and withdrew it as soon as he had given his evidence on the ground that he had concealed Nimgaoda's share in the murder. It seemed to me and—with due submission to the ruling of the High Court—it seems to me that this procedure was illegal. The Code does not say by whose order a tender of pardon may be withdrawn or the person to whom pardon has been tendered ordered to be tried. Section 337 (2) requires, however, that he should be examined as a witness in the case. This cannot be done if the tender of pardon is withdrawn before the trial has begun. The inference is that the law intends that the pardon should not be withdrawn by the Magistrate but by the Court of Session, or at any rate that the order for the trial should not be made until the close of the trial of the other accused. It is obvious that until the close of the trial all the materials by which the truth of the evidence given can be tested are not exhausted. Taking this view of the law I addressed the High Court to quash the commitment of accused No. 2, but I was directed to proceed with the trial.

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Now I do not concur with the reason given by the Magistrate for withdrawing the pardon. I think it probable that Nimgaoda was an accomplice, but I do not think it proved that he was. The assessors do not think that he was an accomplice at all. There is certainly no reason for supposing that he was an accomplice to the knowledge of accused No. 2. I think the evidence given by accused No. 2 was true, and if that evidence had been given before me, I should not have withdrawn the pardon. It is, however, not open to me to acquit him on this ground, for he does not plead that he gave true evidence.

The procedure followed has therefore led to this surprising result, that I am passing sentence on a man who I think ought to-day to be at liberty. The only way out of this *impasse* will be to address Government to give accused No. 2 the benefit of the pardon that the Magistrate tendered him. But perhaps the High Court may in appeal see their way to reconsider its order and quash his commitment and conviction.

Bala and Narayan appealed.

There was no appearance on either side.

CANDY, J.:—I concur with Mr. Justice Fulton in holding that the appeal of No. 1, Bala, should be dismissed, and that the conviction of No. 2, Narayan, should be set aside, and that he should be discharged. As I was a party to the order of this Court, dated 29th November 1900, declining to quash the commitment of accused Narayan, I may add that the case of *Queen-Empress* v. *Bhau*[1] was not brought to our notice nor were the numerous cases which are quoted in Sohoni's Criminal Procedure Code. Whether our order was correct or not, we cannot now reconsider it and quash the commitment. But it does not follow that the conviction of Narayan must stand. If it appears that his pardon has not been forfeited under section 339, then obviously it is still in force, and he must be discharged. I agree with the view taken by the Sessions Judge that the pardon has not been forfeited.

FULTON, J.:—I think that accused No. 1, Bala, has been rightly convicted and that his appeal should be dismissed.

As regards accused No. 2, Narayan, I am of opinion that the conviction must be set aside and that he must be discharged on the ground that it is not proved that the pardon granted to him by the Magistrate has been forfeited under section 339 of the Code of Criminal Procedure.

(1) (1898) 23 Bom. 493.

The learned Sessions Judge considered that the Magistrate who had tendered the pardon had no jurisdiction to commit the accused before the close of the trial of the other accused. In this view the Judge is supported by the decision of this Court in *Queen-Empress* v. *Bhau*.[1] But so far as the present case is concerned, the matter has been settled by the order of this Court of the 29th November, 1900, and cannot be reopened: *Imp.* v. *Fox*.[2] For the purposes of this case then, the commitment must be held to be good: and on the general question of the proper construction of section 337 it is sufficient to point out that I do not wish to be understood as concurring in the decision in *Queen-Empress* v. *Bhau*.[1] The section says that every person accepting a tender under this section shall be examined as a witness in the case, and I am doubtful whether it is correct to treat the word "case" as equivalent to "trial." A person accepting a pardon who is examined in the committal proceedings may be said, without inaccuracy, to be examined in the case; and it is not by any means certain that the Legislature was referring to his examination at the trial in the Sessions Court, when it said that he shall be examined in the case. In many instances it would obviously be unsafe for the Magistrate to hold that such person had forfeited his pardon until the trial of the co-accused had been concluded, but in other cases the perjury before the Magistrate might be so clear and palpable as to make it useless to delay the committal. It seems to me therefore impossible to lay down any rule applicable to all cases to determine at what stage it is expedient to commit an accused, who has in the opinion of the Magistrate forfeited his pardon; and I am inclined to think that the Legislature by using a general term like "case" instead of the word "trial" meant to abstain from laying down any such rule. It will be observed that in section 339 the word "withdrawn" in the former Code has disappeared and been replaced by the word "forfeited." As the law now stands, the question is whether the accused has forfeited his pardon by some act of his own—not whether the Magistrate has validly withdrawn it. This question is one of fact on which it is clear that the Magistrate may hold one opinion and the Sessions Court another, just as may happen

(1) (1898) 23 Bom. 493. (2) (1885) 10 Bom. 176.

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on any other question of fact at issue in the case. The Sessions Court has to determine for itself on the evidence before it whether the pardon has been forfeited: for if not, the accused, who has accepted such pardon cannot be tried. Here the Sessions Judge thought that Narayan was not proved to have wilfully concealed anything essential or to have given false evidence, differing on this point from the Magistrate, who thought that he had given false evidence and therefore committed him. I agree with the Sessions Judge. There may be some suspicion against Nimgouda, but the evidence does not disclose any case against him, in regard to which it can be said with any certainty that Narayan has wilfully concealed anything essential or given false evidence. His conviction therefore must be reversed and he must be discharged.

Order accordingly.

FULL BENCH.

APPELLATE CRIMINAL.

Before Sir L. Jenkins, Chief Justice, Mr. Justice Candy, Mr. Justice Fulton, Mr. Justice Crowe, and Mr. Justice Chandavarkar.

KING-EMPEROR *v.* PARBHUSHANKAR.*

1901.

April 15.

Criminal Procedure Code (Act V of 1898), sections 269 and 418—Offence triable with the aid of assessors tried in fact by a jury—Trial by jury—Appeal on a matter of fact—Practice—Procedure.

Under section 418 of the Criminal Procedure Code (V of 1898) no appeal lies on matters of fact where an accused person is convicted by a jury on a charge which ought to have been tried with the aid of assessors.

An accused person was charged with and tried for offences under sections 302, 304 and 325 of the Penal Code (Act XLV of 1860). Under the first of these charges he was triable by a jury. Under the latter two he was triable with the aid of assessors. He was, however, tried for all three offences by a jury who found him guilty on the third charge. The Judge accepted the verdict and sentenced the accused to four years' rigorous imprisonment. The accused appealed.

* Criminal Appeal No. 4 of 1901.