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The sanads, therefore, appear only to determine what Government had power to determine—the conditions of continuance or resumption and the terms on which such conditions would on application and payment be enlarged; but, so long as those conditions were fulfilled, no more affected the right which adoption might confer than the right which survivorship or inheritance might confer under the law applicable to the holders.

Decree confirmed.

CRIMINAL REVISION.

Before Mr. Justice Crowe and Mr. Justice Aston.

1902. *September* 25.

EMPEROR *v.* VARJIVANDAS *alias* KALIDAS BHAIDAS.*

Jurisdiction—Revisional Jurisdiction of High Court—Criminal Procedure Code (Act V of 1898), sections 423, 439—Presidency Magistrate—Discharge of accused person under section 209 of Criminal Procedure Code (Act V of 1898)—Order of discharge set aside by High Court and order made that accused be arrested and committed for trial at the Sessions of the High Court—Practice—Procedure—Sufficient ground for committing for trial, what is.

Under sections 439 and 423 of the Criminal Procedure Code, the High Court has jurisdiction to set aside an order of discharge passed by a Presidency Magistrate, if such preliminary be necessary, and to direct that a person improperly discharged of an offence be arrested and forthwith committed for trial.

The fact, that by section 439 of the Criminal Procedure Code (Act V of 1898) the High Court in its revisional jurisdiction may exercise all the powers given to it as a Court of Appeal (by section 423), except (see paragraph 4) the power of converting a finding of acquittal into one of conviction, seems to point to the conclusion that all other powers not expressly excluded may be exercised by the High Court as a Court of Revision.

The words in section 209 of the Criminal Procedure Code "sufficient ground for committing" mean, not sufficient ground for convicting, but refer to a case in which the evidence is sufficient to put the accused on his trial, and such a case arises when credible witnesses make statements which, if believed, would sustain conviction. It is not necessary that the Magistrate should satisfy himself fully of the guilt of the accused before making a commitment. It is his duty to commit when the evidence for the prosecution is sufficient to make out

* Criminal Application for Revision, No. 142 of 1902.

a *primâ facie* case against the accused, and he exercises a wrong discretion if he takes upon himself to discharge an accused in the face of evidence which might justify a conviction.

RULE granted under section 435 of the Criminal Procedure Code (Act V of 1898) to the Public Prosecutor, calling on Varjivandas *alias* Kalidas Bhaidas to show cause why the order passed by Mr. Binning, Acting Chief Presidency Magistrate, discharging him under section 209 of the Criminal Procedure Code, should not be set aside and why he should not be committed to the Court of Sessions for trial on charges under sections 471 and 109 of the Indian Penal Code (XLV of 1860).

The said Varjivandas (with four other accused) was charged before the Chief Presidency Magistrate with using and abetting the use of a forged document, but, under section 209 of the Criminal Procedure Code, was discharged by the Magistrate, who was of opinion that there was no evidence against him.

The Public Prosecutor thereupon applied to the High Court under section 435 of the Criminal Procedure Code (Act V of 1898), contending that sufficient evidence had been given to justify the committal of the accused for trial. The High Court granted the rule as above set forth.

Scott (Advocate General) (with him *Nicholson*, Public Prosecutor) for the Crown.

Branson (with him *G. S. Rao*) for the accused.

CROWE, J.:—This was a rule granted to the Public Prosecutor calling on Varjivandas *alias* Kalidas Bhaidas to show cause why the order passed by Mr. Binning, Acting Chief Presidency Magistrate, discharging him under section 209 of the Criminal Procedure Code (Act V of 1898), should not be set aside and why he should not be committed to the Court of Sessions for trial on charges under sections 471 and 109 of the Indian Penal Code.

Mr. Branson, who has appeared to show cause against the rule, has contended that it is not competent to this Court to set aside the order and direct the commitment of the accused either under the provisions of the Code of Criminal Procedure or under the Charter or the Charter Act, and that the prosecution is not prejudiced in any way because it is open to them to make a fresh

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application, the order of discharge not amounting to an acquittal. The learned Counsel drew our attention to several Calcutta cases in which, he argued, there was considerable divergence of opinion, and submitted that there was no authority in any ruling of the Bombay High Court for the construction which had been placed on section 15 of the Charter Act and section 28 of the Charter by the Calcutta High Court.

The first case to which our attention was drawn is that of *Charoobala* v. *Barendra Nath* (1) in which the Court, consisting of Prinsep and Hill, JJ., differing from Ghose and Wilkins, JJ., in *Colville* v. *Kristo Kishore*,(2) held that the High Court has powers of revision in respect of an order of discharge passed by a Presidency Magistrate, by reason, not of section 28 of the Letters Patent, 1865, but of section 15 of the Charter Act (24 and 25 Vic., c. 104). Their Lordships added that the High Court had no power under the Code of Criminal Procedure to interfere in revision with an order of dismissal or discharge passed by a Presidency Magistrate. In *Colville* v. *Kristo Kishore* (2) the Court had held that under sections 435 and 439, read with section 423 of the Criminal Procedure Code, it had power to revise the proceedings of a Presidency Magistrate and order a further enquiry to be made, and that it had the same power under clause 26 of the Letters Patent of 1865.

We do not think it is necessary to go so far afield as the Charter or Charter Act in order to find authority for the power to revise the proceedings of a Presidency Magistrate, as the provisions of the Criminal Procedure Code seem perfectly clear on the point. The sections which bear on the question of the revisional powers of the Court are sections 435-439. Under section 435 the High Court has power to call for and examine the record of any proceedings before any inferior Criminal Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed. It cannot be contended that the Court of the Presidency Magistrate is not within the term "any inferior Criminal Court," as section 441 explicitly refers to certain proceedings which may be taken by

(1) (1899) 27 Cal. 126. (2) (1899) 26 Cal. 746.

any Presidency Magistrate when its record is called for by the High Court under section 435. Section 439 enumerates the powers which the Court may exercise in revision, and it declares that in *any* proceeding, the record of which has been called for, or reported for orders or otherwise comes to its knowledge, the High Court may in its discretion exercise any of the powers conferred on a Court of Appeal by certain preceding sections, among others by section 423. Now among the various powers specified in section 423 is the power of directing that an accused may be committed for trial. It is not necessary that the Court should be exercising its functions in an appeal from an acquittal. What the law says is that it may exercise the same power in revision, in any proceeding whatever, as it could have exercised in hearing an appeal from an acquittal. This was the view adopted by the Allahabad High Court in *Empress* v. *Ram Lal Singh and others*,[1] with which we express our concurrence.

But it was contended that this power could not be exercised in the case of an accused person who had been discharged, as special provision had been made for such cases in section 437, which did not include orders of discharge passed by Presidency Magistrates. The answer to that argument appears to be that it was the intention of the Legislature in framing section 439 to make the terms thereof sufficiently wide and comprehensive to cover all cases which were not included in section 437, and that it could never have been intended that the High Court should not possess the same powers with respect to the proceedings of Presidency Magistrates which are specially conferred on Sessions Judges and District Magistrates with respect to the revision of the sentences, findings or orders of the Courts subordinate to them. However that may be, it is clear in the wording of the section that in any proceeding the powers enumerated in section 423 may be exercised, subject only to the limitation set forth in paragraph 4, that nothing in the section shall be deemed to authorise a High Court acting in revision to convert a finding of acquittal into one of conviction. The fact that this particular power, which is conferred by section 423 on Courts in the exercise of their appellate jurisdiction, is excluded in express

(1) (1883) 6 All. 40.

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terms in section 439 seems clearly to point to the conclusion that all the other powers not expressly excluded may be exercised by the High Court as a Court of Revision. We notice that in the Full Bench decision in *Hari Dass Sanyal* v. *Saritulla*,(1) Wilson, J., whose judgment was concurred in by a majority of the Court, stated his opinion that the High Court, under section 423 embodied in section 439, could set aside an order of discharge and direct a charge to be framed and tried by the proper Court. After pointing out that sections 435 to 439 must be read together, and reciting the terms of section 435, he remarks: "This I read as an express enactment that every finding, sentence or order is liable to review, not only on the ground of illegality or irregularity, but also on the ground of incorrectness, that is to say, on the ground that it is wrong on the merits. And an order of discharge is no exception to the general rule. I do not mean to say that an order of discharge may not, under the subsequent sections, be set aside on other grounds, such as the discovery of fresh evidence, but only that it is liable to be so dealt with on any of the grounds here mentioned.

"The second point for enquiry is, what tribunals have jurisdiction to set aside an order of discharge? This Court has power under section 439 to deal as a Court of Revision with any finding, sentence or order which comes under its notice." In consideration, then, of sections 439 and 423 of the Criminal Procedure Code when read together, we think it is clear that the Court has jurisdiction to set aside an order of discharge if such preliminary be necessary, and to direct that a person improperly discharged of an offence be arrested and forthwith committed for trial, and this view is covered by the authorities.

The next point which arises is whether the order of discharge was illegal or incorrect or otherwise improper, *i. e.*, was it wrong on the merits? The order of the Presidency Magistrate is briefly expressed in these words: "No. 4 is discharged for want of evidence." The words in section 209, "sufficient ground for

(1) (1888 15 Cal. 608.

committing," have been explained to mean, not ground for convicting, but where the evidence is sufficient to put the accused on his trial, and such a case arises when credible witnesses make statements which, if believed, would sustain conviction. The weighing of their testimonies with regard to improbabilities and apparent discrepancies is more properly a function of the Court having jurisdiction to try the case. It is not necessary that the Magistrate should satisfy himself fully of the guilt of the accused before making a commitment. It is his duty to commit when the evidence for the prosecution is sufficient to make out a *primâ facie* case against the accused, and he exercises a wrong discretion if he takes upon himself to discharge an accused in the face of evidence which might justify a conviction.

It is contended by the learned Advocate General that there was sufficient evidence before the Magistrate to justify the committal of the accused and he refers to the admissions made by accused himself before Mr. Karsandas Chhabildas, Third Presidency Magistrate, to the *primâ facie* evidence of a conspiracy between all the accused and the evidence as to what was said, done or written by the other accused in reference to the common intention as bearing on the guilt of the accused, and also to the evidence of several independent witnesses examined in the course of the enquiry as to the conduct of the accused. It seems hardly necessary to go beyond the statement made by accused to Mr. Karsandas Chhabildas who has been examined as a witness in the case. He states that accused was brought to his bungalow, and he asked him if he wished to make a statement, and if any inducement or threat had been used, or any police officer had told him to tell an untruth, and he said "No," but he wanted legal advice and asked the witness to give him advice, which he refused to do and also refused to take down his statement. After some further conversation he went away and returned in the afternoon, when he made a statement, in the course of which he said that accused 2 asked him to have a copy made of the will the draft of which was produced by accused 2; that he got it copied in a book by a Brahman in a house in Barbhaya Moholla; that Vithal Jumakhram attested it in his presence; that he asked accused 2 why this was done as there was no signature, and that accused 2 replied that Vithaldas might turn round, it was better

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to take his signature at once. Accused 2 took away the book and two or three days later he returned to his house and said he wanted a jeweller's signature, whereupon accused told him to go and see Lakhmidas Nagardas; subsequently Lakhmidas Nagardas came to see him and asked what the signature was for and he said, "I do not know: accused 2 knows; go and ask him." The Magistrate has made a note on his deposition to the effect that Mr. Kapadia objected to the evidence, as he said there was an inducement to accused, and he adds: "On reading the evidence of Mr. Sloane and Mr. Karsandas I am of opinion there is no evidence of this, and I think that conversation may be admitted."

Without going into the question of the documentary and other evidence respecting which contentions as to its admissibility have been raised, we think it sufficient to say that there is on the record of the magisterial enquiry sufficient *primâ facie* evidence to require the committal of the accused for trial by the Court of Session.

We therefore direct that the accused Varjivandas *alias* Kalidas Bhaidas be committed to the Court of Session on the charges under sections 471 and 109 of the Indian Penal Code.

ASTON, J.:—I am of the same opinion. Jurisdiction to order committal of an accused person who has been improperly discharged under section 209 of the Criminal Procedure Code is clearly given to a High Court by section 439, whether the inferior Court which discharged the accused be a Presidency Magistrate or not. It is not necessary that there should be a right of appeal in order that the High Court may exercise the revisional power conferred by section 439. Seeing that this power to order in revision that an accused who has been improperly discharged shall be committed is clearly given by section 439 by express words, it is more reasonable to treat the power conferred by section 437 on a High Court to order further inquiry in the case of any accused person who has been discharged as redundant, than to treat section 437 as restricting the power expressly conferred by section 439 to order committal for trial.

On the merits I concur that the evidence recorded by the Magistrate who made the magisterial enquiry and committed

other accused persons for trial establishes as against the accused Kalidas Bhaidas a *primâ facie* case such as to require the committal of this accused on the charges specified.

As to the form which this Court's order should take, I would add, because much was said at the hearing as to this Court's power to set aside an order of discharge, that I know of no warrant or authority in the Code of Criminal Procedure for the doctrine that an order of discharge under section 209 needs to be set aside before an order for committal of an accused person held to be improperly discharged, can be made. Section 403 of the Criminal Procedure Code seems to be authority to the contrary. The learned Advocate General, however, asked, I presume *ex majore cautela*, that this may be made part of this Court's order if the accused be ordered to be committed for trial, and such an order has accordingly been included.

APPELLATE CIVIL.

Before Mr. Justice Crowe and Mr. Justice Aston.

RAMJI HARIBHAI AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* BAI PARVATI (ORIGINAL DEFENDANT), RESPONDENT.*

1902. *September* 30.

Transfer of Property Act (IV of 1882), section 59—Attestation of mortgage-bond—Meaning of the word "attested"—Attestation in the presence of the mortgagor after having received from him a personal acknowledgment of his signature.

A mortgage-bond was signed by the mortgagor, was attested by three witnesses and was duly registered. In a suit for the mortgage-debt it appeared from the evidence that none of the attesting witnesses had actually seen the execution of the deed by the mortgagor, but must have attested merely on the mortgagor's admission of his signature. The lower Courts held that this was not sufficient under section 59 of the Transfer of Property Act (IV of 1882), and that the mortgage was, therefore, invalid. On appeal to the High Court,

Held, that the attestation was sufficient. A mortgage-deed is attested within the meaning of section 59 where the witnesses have signed it in the presence of the mortgagor after having received from him a personal acknowledgment of his signature.

* Second Appeal No. 200 of 1902.