CRIMINAL APPELLATE.

Before Mr. Justice Aston and Mr. Justice Beaman.

EMPEROR *v.* KOTHIA VALAD NAVALYA BHIL.*

1906. *August* 30.

Criminal Procedure Code (Act V of 1898), sections 337, 338—Accomplice—Pardon—Grant of conditional pardon—The pardoned accomplice giving full and true story of the crime, but retracting it in cross-examination before the Sessions Court—Order of Sessions Court to Committing Magistrate to withdraw the pardon—Forfeiture of pardon—Trial of accused for the offence—Commitment—Conviction on his plea of guilty—Irregularity—Illegality—Practice and Procedure.

The accused was one of several persons accused of murder. He accepted a tender of pardon made to him by the Committing Magistrate on the conditions set out in section 337 of the Criminal Procedure Code. He was examined as a witness for the Crown before the Committing Magistrate, and he made a full and true disclosure of the whole of the circumstances within his knowledge relating to such offence. He repeated them in his examination-in-chief before the Sessions Judge, but resiled from his statements in cross-examination. At the conclusion of the trial, in which the accomplices were convicted of murder, the Sessions Judge sent the pardoned accomplice in custody to the Committing Magistrate with an order directing that he should be committed for trial for the same murder. The Magistrate accordingly withdrew the pardon and committed the accused to the Sessions Court to take his trial for the murder aforesaid. The Sessions Judge convicted the accused of murder on what was described as his plea of guilty and was sentenced to transportation for life. On appeal,

Held, by Aston, J., that the Sessions Judge had no authority under the Code of Criminal Procedure to order the accused to be committed for trial for the murder in respect of which a pardon had been tendered; and, further, that the accused's trial was conducted with material irregularity which seriously prejudiced the accused and occasioned a failure of justice.

Held, by Beaman, J., that the Sessions Judge, who presided at the first trial, had no power to make the order purporting to have been under section 339 of the Criminal Procedure Code, directing the commitment of the accused on the ground that he had forfeited his pardon; and that the procedure adopted was both wrong and illegal.

Per Aston, J.—It is open to a pardoned accomplice, if placed on trial as an accomplice who has *forfeited* the pardon already accepted by him, to plead in bar of trial that he did comply with the condition on which the tender of pardon was made, and such plea in bar of trial would have to be gone into and decided

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before the accused is called on to enter his plea in defence to the charge of having committed the offence in respect of which the pardon was tendered.

Section 339 of the Criminal Procedure Code does not enact that a person who has accepted a tender of pardon, renders himself liable to be tried for the offence in respect of which pardon was tendered, if he gives false evidence; what the section says is that he renders himself so liable (or forfeits the pardon) if by giving false evidence he has not complied with the condition on which the tender was made.

Per Beaman, J.:— At the termination of the trial in which the pardon was given, the accomplice must be discharged by the Court. Then if so advised, the Crown may re-arrest and proceed against him for the offence in respect of which he was given a conditional pardon. When put upon his trial for that offence, he may plead to a competent Court his pardon, in bar. And that is a plea that the Court would be bound to hear and decide upon before going further and putting him on his defence. In deciding it the Court would have to raise the issues whether he had or had not complied with the conditions of the pardon, whether he had or had not made a full and true disclosure of the whole facts. And where after having admittedly done that he had at a later stage recanted, that recantation amounted to giving false evidence within the meaning of section 339 of the Criminal Procedure Code, and worked a forfeiture of the pardon.

APPEAL from conviction and sentence recorded by R. S. Tipnis, Sessions Judge of Khandesh.

The facts of the case were briefly as follows:

One Amiruddin was formerly Karbhari to the Chieftain of Gangtha (Chikli) Estate, but had left his service and was living at Bhaver near Talvada. He was murdered on the night of the 4th December 1904 and for a long time the Police were without a satisfactory clue. At last Kothia (the present accused) was induced by the promise of pardon to confess that he in company with one Godia Vanji and five others had murdered the deceased.

Kothia was accordingly offered under section 337 of the Code of Criminal Procedure (Act V of 1898) a full pardon by the Committing Magistrate, on condition of his giving a full and true account of the circumstances within his knowledge relating to the offence.

The pardoned man (Kothia) then gave what appeared to have been a true account before the Magistrate and before the Sessions Judge, but when cross-examined in the Sessions Court he stated

that the account he had given was false and he had been told by the Police to give it.

The Sessions Judge at the end of the trial, which resulted in the conviction of all the accused, passed an order under section 339 of the Code of Criminal Procedure (Act V of 1898) ordering Kothia to be tried for the murder, and sent him to the Committing Magistrate.

The Committing Magistrate revoked the pardon tendered to the accused and held proceedings for his commitment.

The accused admitted before the Committing Magistrate that he first gave a true statement and then declared it was false; but stated that he was told to do so by the pleader for the defence.

The Magistrate then charged the accused Kothia with committing an offence under section 302 of the Indian Penal Code (Act XLV of 1860) and committed him for trial to the Sessions Court.

In the Sessions Court the accused pleaded guilty of the offence of murder. The learned Sessions Judge convicted the accused on his own plea of guilty and sentenced him to suffer transportation for life. His reasons for accepting the plea of guilty were as follows:—

"The cancellation of the pardon once granted to the accused was within the authority of the Sessions Court. It cannot now be questioned, nor can the accused escape from the consequences of his crime by pleading that he forfeited that pardon in consequence of bad advice. In any case it is not an extenuation of the offence.

"Perhaps his trial for giving false evidence might have sufficed the ends of justice, more especially as I find that the record discloses that the present accused took a subordinate part in the murder, and it was through utter foolishness more than anything else that he forfeited his pardon."

The accused appealed to the High Court against this conviction and sentence.

M. M. Karbhari (*amicus curiæ*) for the accused:—The procedure adopted by the Sessions Judge was illegal. He had no power to send the accused in custody to the Committing Magistrate or to detain him in custody after the termination of the trial. Section 337, clause 3, Criminal Procedure Code, provides that the

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accused who has been tendered a pardon should be detained in custody until the termination of the trial. Section 476 of the Code does not apply, because powers under that section are only to be exercised in cases of those offences enumerated in section 195 of the Code.

There is no provision in the Code which indicates what Court is competent to forfeit the pardon, under section 339. Generally the sanction of the High Court should first have been obtained under section 339, clause (3), to show that the approver has given false evidence and that the pardon should therefore stand forfeited. There are no doubt decided cases showing that the Court granting the pardon can revoke it, but the words used in section 339 are "by giving false evidence," and not, "by giving evidence which in the opinion of the Court tendering the pardon is false."

Now a pardon can only be forfeited if the approver has not complied with the conditions on which the tender of pardon was made. Mere giving false evidence is not enough. Here the accused has no doubt admitted giving false evidence in his cross-examination, but this is not enough for the purposes of sections 337 and 339. Take the case of an approver deliberately making a statement implicating himself as well as the other accused persons; and it is subsequently found that he gave false evidence in order to screen himself or some other person or persons, against the accused, then that case is covered by sections 337 and 339. Reading sections 339 and 337 together we see that if the approver by wilfully concealing anything essential or by giving false evidence does not make a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence, &c., he forfeits his pardon and is liable for being tried for the principal offence. In this case the disclosure made by the accused before the Committing Magistrate and in his examination-in-chief is relied upon in the principal case and is there held to be full and true, and all that the accused is charged with doing is that he withdrew his statement in his cross-examination before the Court of Sessions. Now apart from the fact of his being guilty of giving false evidence, if the disclosure is believed to be full and true then I submit the accused does not forfeit pardon. He may be liable to be tried for giving

false evidence, but he cannot on that account be said to have forfeited his pardon and rendered himself liable to be tried for the principal offence.

The Government Pleader for the Crown :—The withdrawal of the pardon should be made under section 339, Criminal Procedure Code, by the Court that granted it: *Queen-Empress* v. *Manick*[1] and *Queen-Empress* v. *Ramasami*[2]. After the termination of the trial in which the present accused was an approver, the accused was sent to the Committing Magistrate who had tendered the pardon. The pardon was withdrawn by the proper authority, *viz.*, the Magistrate who tendered it, and hence there was no bar to the trial of the present appellant.

The appellant has no doubt made a full and true disclosure, but at the same time he has given evidence in his cross-examination which he admitted to be false and hence he forfeits the pardon under section 339 of the Criminal Procedure Code.

ASTON, J. :—The appellant, a Bhil named Kothia valad Navalya, was one of the persons accused of murder in the case of *King-Emperor* v. *Godia and 5 others*. He accepted a tender of pardon made to him by the Committing Magistrate on the conditions set out in section 337 of the Criminal Procedure Code (Act V of 1898), and was examined as a witness for the Crown at the trial of his accomplices in the Sessions Court of Khandesh, for an offence of murder.

At the trial he, according to the case presented by the learned Government Pleader for the Crown in the appeal now before us, made "a full and true disclosure of the whole of the circumstances within his knowledge relative to such offence, and to every other person concerned, whether as principal or abettor, in the commission thereof" and so far had fully complied with the condition on which pardon was tendered and accepted.

The Sessions Judge nevertheless, at the conclusion of the trial of the abovementioned case in which the accomplices were convicted, sent the pardoned accomplice Kothia (present appellant) in custody to the Committing Magistrate with an order directing that he should be committed for trial for the same murder.

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This order, which purports to have been made under section 339 of the Code of Criminal Procedure, was made because this pardoned accomplice after fulfilling the statutory conditions on which the tender of pardon was made and accepted, had on a later date, and in cross-examination, resiled from his statement made in examination-in-chief having, as this Bhil approver alleged, been meanwhile suborned by a Nandurbar Pleader.

The result of this order is that after the further step was taken of getting the pardon "withdrawn" by the Magistrate who had tendered it, this approver was committed to the Sessions Court to take his trial for the murder aforesaid and was convicted of murder on what is described as his plea of guilty and has been sentenced to transportation for life.

Against this conviction and sentence he appeals to this Court and his main ground of appeal is that faith has not been kept with him, because although it is true that he did under evil influence give false evidence when cross-examined, he had in fact already fulfilled the conditions on which he had accepted the tender of pardon.

Under section 337, Criminal Procedure Code, a conditionally pardoned accomplice if not on bail shall be detained in custody until the termination of the trial, and in the present appeal the authority of the Sessions Judge to order at the close of the trial such approver to be discharged from custody, has not been questioned. It is, I think, open to argument whether if a Sessions Judge is of opinion that the pardon has become forfeited, he has not also authority to order a conditionally pardoned accomplice to be remanded in custody until the proper authority has had reasonable time to decide whether further proceedings are to be taken against him from the stage where his prosecution was interrupted by the tender of pardon. But the learned Government Pleader has not attempted to justify the Sessions Judge Mr. Gidumal's order directing the prosecution of the present appellant, an order purporting to be made under section 339 but for which that section gives no authority.

It has however been contended that as the pardon was "withdrawn" by the proper authority, namely, the Magistrate

who tendered it, there was no bar to the trial of the present appellant, and the cases *Queen-Empress* v. *Manick Chandra Sarkar* [1] and *Queen-Empress* v. *Ramasami* [2] were cited in support of this contention.

But there is no provision in any of the sections of the Code for cancelling, or revoking, or withdrawing a pardon. Section 339 of the earlier Code Act X of 1882 as amended by Act V of 1898 no longer contains the word *withdrawn*. It contemplates a pardon being *forfeited* under that section, but neither in this section nor in any other part of the Code is it enacted that the forfeiture of a pardon depends upon the opinion of the Judge or Magistrate trying a case in which the conditionally pardoned accomplice has agreed to make a full and true disclosure.

It is therefore open to a pardoned accomplice, if placed on trial as an accomplice who has *forfeited* the pardon already accepted by him, to plead in bar of trial that he did comply with the condition on which the tender of pardon was made, and such plea in bar of trial would have to be gone into and decided before the accused is called on to enter his plea in defence to the charge of having committed the offence in respect of which the pardon was tendered.

The Sessions Judge (Mr. Tipnis), who convicted the appellant, was therefore doubly wrong in ruling (1) that "the cancellation of the pardon once granted to the accused was within the authority of the Sessions Court" and (2) that "it cannot now be questioned".

The record shows that the position of the appellant was not explained to him as to this, before he was called upon to make his plea in defence and was convicted of the murder in respect of which a pardon had been tendered conditionally.

The first paragraph of section 339, Criminal Procedure Code, runs as follows:—"Where a pardon has been tendered under section 337 or section 338, and any person who has accepted such tender, has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on

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which the tender was made, he may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the same matter."

It will be seen that this section does not enact, that a person who has accepted a tender of pardon renders himself liable to be tried for the offence in respect of which pardon was tendered, if he gives false evidence. What the section says is that he renders himself so liable (or forfeits the pardon) if by giving false evidence he has not complied with the condition on which the tender was made.

That condition is the condition set out in section 337 and the learned Government Pleader has very fairly conceded that this condition had been complied with before the appellant gave the evidence which he admitted was false.

The appellant is a Bhil and the Sessions Judge before recording his plea as a plea of guilty should in a case like the present one have been careful to ascertain whether he meant to admit that he had not complied with the condition on which the tender of pardon was made.

It was not disputed at the hearing that the appellant did comply fully with the statutory condition before he gave false evidence and it appears to me that the appellant in his plea at trial did not intend to admit anything to the contrary.

It appears for the reasons already stated that the Sessions Judge had no authority under the Code to order the present appellant to be committed for trial for the murder in respect of which a pardon had been tendered, and further this appellant's trial was conducted with material irregularity which seriously prejudiced the accused and has occasioned a failure of justice.

It is not necessary to decide in this appeal whether the pardon was in the above circumstances forfeited, it is sufficient to say that the question whether the pardon was in fact forfeited should have been inquired into and decided at the trial of appellant before he was called upon to plead to the charge of murder.

We set aside the conviction and sentence and direct that appellant be discharged.

Our acknowledgments are due to Mr. Karbhari who argued the case as *amicus curiæ* for the appellant.

There is no indication in the record whether investigation has been made into the charge made by the appellant against a Nandurbar pleader of suborning evidence.

BEAMAN, J.:—We are much indebted to Mr. Karbhari who argued this appeal as *amicus curiæ*. The questions arising upon sections 337, 339, Criminal Procedure Code, as to the proper mode of procedure when an accomplice to whom pardon has been tendered has in the opinion of the authorities forfeited the pardon, are, in the present state of the law, of some complexity and importance. The reported decisions, to which reference is commonly made in cases of the kind, do not tend to throw much light on the subject. Doubtless what is discussed and has been the occasion of some differences of opinion in most of them, is due to the wording of the law as it stood before it was amended by the present Act. Thus the proposition for which there is plenty of authority in the case law that the proper person to withdraw a pardon is the person who tendered it—a proposition which is, I think, answerable for a good deal of confusion of thought, might have once been appropriate for controversy, but hardly is so now. Apart from the fact that the existing law makes no mention of withdrawing or cancelling a pardon at all, the proposition is in itself disputable. For to take a simple case, can it be seriously contended that where a Magistrate of the first class has tendered a pardon, and where the accomplice has given evidence in the Sessions Court which the presiding Judge believes to be full and true, it is open, notwithstanding that belief, to the Magistrate who did not hear the evidence given to form his own opinion and thereupon to withdraw the pardon and put the accomplice on his trial for the principal offence? One difference between the Madras and the Bombay High Courts pivots upon a point with which I am not now directly concerned. And a great deal of judicial interpretation has been stripped of authority and rendered obsolete by the change of language in

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the Statute. We have not now to consider what the law was but what it is. And the law contains no provision whatever for any one withdrawing, revoking or cancelling a pardon. It does not go beyond defining the manner in which a pardon once tendered and accepted may be forfeited. Sections 337-338 lay down the conditions upon which and the officers by whom a pardon may be tendered. Then if the accomplice accepts the conditions and the pardon is given, the law goes on to say that his evidence shall be taken and that he shall be kept in custody until the termination of the case. If the case ends in the Sessions Court, the Sessions Judge will be bound to detain him till it is finished; no longer: and so if the case ends in the High Court, that Court will have to detain him till it is finished. But no authority is given to any one to detain him an hour longer. It is not for the Judges of the Sessions or the High Court to exercise a discretion in the matter, and to say that they will detain him in order that further proceedings may be taken against him, much less, of course, to direct that such proceedings be instituted. Last, the law states how the pardon may be forfeited. Comparing these provisions, we shall see that a pardon is offered upon two main conditions, first that the accomplice shall make full, second a true disclosure of all he knows about the crime. And the pardon is forfeited by his failure to comply with these two conditions in two corresponding ways, first by concealing some material fact, that is to say, by not making a full, or by giving false evidence, that is, by not making a true disclosure. And I think that the words "false evidence" must be read subject to the limitations of their context, as defining one of the modes of non-compliance with the conditions of the pardon, and not in their fullest literal sense. It is plain that the latter could not have been meant. For no one would maintain that a man who had been pardoned for making a full and true disclosure of a murder, and had done so, and a month afterwards had given false evidence in an assault case, had thereby forfeited his pardon and rendered himself liable to be tried for the murder. Looking at the section in that way it appears to me open to very real doubt whether the appellant had forfeited his pardon. Most assuredly it was a

question to be enquired into in a proper way and not to have been disposed of as it was in the Sessions Court which tried and sentenced him. This being the law, what is to be done where a person to whom pardon has been given, has in the opinion of the Crown forfeited it? Brushing aside all the confusion arising from the decisions of Courts on this and allied subjects, and keeping a single eye upon what the law says, the answer seems to be plain. At the termination of the trial in which the pardon was given, the accomplice must be discharged by the Court. Then if so advised, the Crown may re-arrest and proceed against him for the offence in respect of which he was given a conditional pardon. When put upon his trial for that offence, he may plead to a competent Court his pardon, in bar. And that is a plea that the Court would be bound to hear and decide upon before going further and putting him on his defence. In deciding it the Court would have to raise the issues whether he had or had not complied with the conditions of the pardon; whether he had or had not made a full and a true disclosure of the whole facts. And where, as in the present case, after having admittedly done that, he had at a later stage recanted, whether that recantation amounted to giving false evidence within the meaning of section 339 and worked a forfeiture of the pardon? Such questions, it seems to me plain, would have to be enquired into and answered at the trial and in the presence of the prisoner; they are not to be settled by an *ex parte* opinion of this or that officer, in the form of a sanction or a direction to the police or to any other subordinate Court to proceed as though no pardon had been given and accepted. Had this procedure been followed it may very well be doubted whether the appellant would ever have been put on his trial for the murder at all; or whether if he had, the Sessions Court would have held that his pardon had been forfeited. But the procedure that was adopted has shut him out of all possibility of these advantages. The Sessions Judge who presided over the first trial, made an order purporting to have been under section 339 directing the commitment of the appellant on the ground that he had forfeited his pardon. Now it is perfectly plain that the Judge had no power to make any such order. In form it is an

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order under section 476; but that section limits the Judge's power to offences of a special kind, among which it is hardly necessary to say murder is not included. By making such an order professedly under section 339 the Sessions Judge prejudged the question whether the appellant had really forfeited his pardon. And this could after all be only, as far as he was concerned, a matter of opinion. He believed that the accomplice had given false evidence within the meaning of section 339; but the Court which had to try him for the murder might have thought otherwise. If the Sessions Judge had formed that opinion not upon a mere contradiction, but, as is often the case, on the general nature of the testimony given, it is clear that when the pardon was pleaded in bar, he would have been liable to be called as a witness to state the grounds of his opinion and if necessary to be cross-examined upon them. But the Court which tried the prisoner when he was re-arrested and sent up on the strength of this order, held that it was concluded by the order from going into any question of the kind. This shows how seriously the appellant was prejudiced by the procedure (a procedure which in my opinion was wrong and illegal) that was adopted. The appellant did admittedly make a full and true disclosure of the whole facts, and it was only at a later stage that he was suborned, as he says, in a weak moment to recant. Considering that his evidence was used and relied upon, and seems to have been the main ground upon which the prisoners in the first trial were convicted, it may well be doubted whether the Crown would have regarded the late and superfluous retractation of that evidence, as constituting a forfeiture of the pardon, but for the unauthorized command of the Judge. As to that however we do not feel called upon to express any opinion now, nor upon the further question whether should the Crown be advised to proceed further against the appellant a competent Court would hold upon all the facts that the pardon had been forfeited. It is sufficient to say that we think that the prisoner has been so seriously prejudiced by the procedure followed, that we ought to set aside the conviction and sentence, leaving it to the Crown, if so advised, to institute a prosecution in proper form against the accused appellant.

R. R.