

## CRIMINAL REVISION.

*Before Mr. Justice Pratt and Mr. Justice Fawcett.*

IN RE DAGDOO BAPU.\*

1921.

June 15.

*Criminal Procedure Code (Act V of 1898), sections 337, 512—Tender of pardon—Inquiry before Magistrate—Approver's evidence taken under section 512, Criminal Procedure Code—Pardon validly tendered.*

In an inquiry into an offence of murder against the accused and another, it appeared that the latter who was the principal offender had absconded. A pardon was tendered to the accused and evidence recorded under section 512 of the Criminal Procedure Code. A question having arisen whether the tender of pardon was invalid:—

*Held*, that the pardon was validly tendered. The offence of murder was under inquiry and in order to secure the approver's evidence as to that offence a pardon was tendered, and the proceeding under section 512 was only ancillary to that inquiry.

The tender of a pardon does not prevent the prosecution from proceeding against an approver as an accused person. If the prosecution is so revived it is for the approver to plead the pardon as a defence. It is open to the prosecution to proceed against the approver on the ground that he has not performed the condition of the pardon in that he gave false evidence under section 512 of the Criminal Procedure Code.

If, however, the prosecution do not desire to proceed further with the case against the principal offender, the Magistrate has power to discharge the approver from custody.

THIS was an application made by Chunilal H. Setalvad, Second Presidency Magistrate of Bombay, for cancellation of the tender of pardon granted by him to Dagdoo Bapu, on the 26th November 1920.

The facts of the case were set out in the said application as follows:—

I have the honour to request you to move their Lordships on the Appellate Side to revise and cancel an order made by me on the 26th November 1920 granting a pardon under section 337, Criminal Procedure Code, to one Dagdoo Bapu who was charged before me by the Bombay Police under section 302, Indian Penal Code. A copy of the application for the pardon and my order thereon are herewith attached. The facts of the case are as follows:—

On the 7th September 1920 last the accused Dagdoo Bapu was placed before me under section 302, Indian Penal Code, and postponements were granted on

\* Criminal Application for Revision No. 84 of 1921.

the application of the Police to enable them to arrest the principal offender one Dhondoo Sumbhoo against whom a proclamation was issued.

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As no trace of the absconding offender could be found and as he failed to surrender in response to the proclamation, the Police applied that evidence be recorded against him under section 512, Criminal Procedure Code and also that a pardon be tendered to the accused in custody, viz., Dagdoob Bapu upon condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence under section 302, Indian Penal Code. This application was granted by me and Dagdoob Bapoo was examined as a witness under section 512, Criminal Procedure Code. Dagdoob Bapu was also ordered to be released on bail in the sum of Rs. 1,000 and one surety in a like amount. As he was unable to furnish bail he has remained in custody.

The Police now apply that the conditional pardon granted to Dagdoob Bapu be withdrawn as he has not made a true statement of the facts and has wilfully given false evidence. On going into the matter more fully and on hearing the public prosecutor for the Crown, I find that my order granting Dagdoob Bapu a pardon in order to enable him to give evidence under section 512, Criminal Procedure Code, was irregular.

On a clearer consideration of the law I am of opinion that a proceeding under section 512, Criminal Procedure Code, is neither an enquiry nor a trial as contemplated by section 337, Criminal Procedure Code, and I submit this view for the consideration of their Lordships. The present effect of my order is, that it is impossible to judge (without a full enquiry or trial in the presence of the offender) whether the statement made by Dagdoob Bapu is true or false and therefore whether the pardon granted to him should be withdrawn. As the principal offender has not been arrested an enquiry or trial is a very remote prospect and Dagdoob Bapu being unable to furnish bail would under the present circumstances have to remain in custody until the trial is terminated by the Sessions Court—an entirely indefinite period. Further even if I hold that the statements made by Dagdoob Bapu are false, the case being solely triable by the Sessions Court, I do not think I would be in order in withdrawing the pardon.

I am, therefore, respectfully of opinion that my order in granting a pardon in proceeding under section 512, Criminal Procedure Code, was irregular and should be cancelled. I may mention that the Public Prosecutor agrees with this view.

The application was heard.

S. S. Patkar, Government Pleader, for the Crown.

No appearance for the accused.

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PRATT, J.:—This is a reference made by the Second Presidency Magistrate of Bombay requesting revision of an order made by him on the 26th November 1920, granting a pardon to an accused Dagdoo Bapu under section 337, Criminal Procedure Code.

The offence under inquiry was an offence of murder and the accused was placed before the Magistrate on a charge of that offence on the 7th September 1920. But as the prosecution case was that another accused, Dhondoo Sumbhoo, who had absconded, was the principal offender the pardon was tendered. The principal offender has not been arrested, and it appears there is no prospect of his arrest or trial.

The prosecution desire the discharge of Dagdoo Bapu as otherwise he would be detained for an indefinite period in the custody as an approver.

The Magistrate suggests that the pardon was invalid, as it was not tendered for the purpose of an inquiry but for the purpose of securing evidence under section 512, Criminal Procedure Code. There is no substance in this distinction. The offence of murder was under inquiry and in order to secure the approver's evidence as to this offence a pardon was tendered, and the proceeding under section 512 was only ancillary to that inquiry. There is, therefore, no ground for revision of the Magistrate's order under section 337.

We would point out, however, that there is no occasion for revision of the order. The tender of a pardon does not prevent the prosecution from proceeding against an approver as an accused person. If the prosecution is so revived it is for the approver to plead the pardon as a defence: see *Emperor v. Kothia*<sup>(1)</sup> and *Emperor v. Sabar Akunji*<sup>(2)</sup>. It is open to the prosecution to proceed against the approver Dagdoo on the

<sup>(1)</sup> (1906) 30 Bom. 611.

<sup>(2)</sup> (1914) 42 Cal. 756.

ground that he has not performed the condition of the pardon in that he gave false evidence under section 512 Criminal Procedure Code.

Or on the other hand, if the prosecution do not desire to proceed further with the case against the principal offender, Dhondoo, the Magistrate has power to discharge the approver from custody. Sub-section 3 of section 337, Criminal Procedure Code, implies that there is a trial in progress and its object is to secure the evidence of the approver for such trial. If there is no such trial and no likelihood of such a trial, then *cessante ratiōe lex ipsa cessat*.

*Rule discharged.*

R. B.

### APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.*

BABAN HEMRAJ AND ANOTHER, HEIRS OF THE DECEASED HEMRAJ GANU CHAPARBUND (ORIGINAL PLAINTIFF), APPELLANTS *v.* THE CITY MUNICIPALITY, POONA (ORIGINAL DEFENDANT), RESPONDENT<sup>o</sup>.

*Bombay District Municipal Act (Bombay Act III of 1901), section 167†—Contract with Municipality—Breach of contract—Levying of fines and penalties for the breach—Suit to recover the amount of fines and penalties so levied.*

<sup>o</sup> Second Appeal No. 689 of 1920.

† The section runs thus :—

No suit shall be commenced against any Municipality, or against any officer or servant of a Municipality, or any person acting under the orders of a Municipality, for anything done, or purporting to have been done, in pursuance of this Act, without giving to such Municipality, officer, servant or person one month's previous notice in writing of the intended suit and of the cause thereof, nor after six months from the date of the act complained of ;

and in the case of any such suit for damages, if tender of sufficient amends shall have been made before the action was brought, the plaintiff shall not recover more than the amount so tendered, and shall pay all costs incurred by the defendant after such tender.

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