

applied. There is, therefore, no necessity to consider the point that, although the amount of compensation awarded to the complainant against all the petitioners was over Rs. 50, because each petitioner was liable to pay under Rs. 50, therefore it could be said that each petitioner had been fined less than Rs. 50. I think the Rule must be made absolute and the appeal must go back to the Sessions Judge to be dealt with according to the merits.

SHAH, J.:—I agree.

Rule made absolute.

R. R.

CRIMINAL REVISION.

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

EMPEROR v. MOTILAL HIRALAL*.

Criminal Procedure Code (Act V of 1898), sections 164 and 337—Accused—Tender of pardon—Tender can only be made in course of an inquiry under the Criminal Procedure Code—Pardon tendered not in the course of such inquiry—Evidence given under such a tender of pardon cannot form the basis of an alternative charge of giving false evidence—Indian Penal Code (Act XLV of 1860), section 193.

Under the provisions of section 337 of the Criminal Procedure Code, 1898, a tender of pardon can be made only during an inquiry into an offence under the Code.

Where a pardon has been tendered not during an inquiry under the Criminal Procedure Code, and the approver makes a statement under the pardon, such statement cannot form the basis of an alternative charge of an offence punishable under section 193 of the Indian Penal Code, 1860.

THIS was an application under the criminal revisional jurisdiction from conviction and sentence passed by M. M. Mehta, Resident Magistrate, First Class, Nadiad, confirmed, on appeal, by D. C. Mehta, Additional Sessions Judge of Ahmedabad.

* Criminal Application for Revision No. 103 of 1921.

1921.

RODRIKS
v.
PAPA DADA.

1921.

June 22.

1921.

EMPEROR
v.
MOTILAL
HIRALAL.

In the course of police investigation into a case, known as the Nadiad Derailment Case, the applicant was tendered a pardon under section 337 of the Criminal Procedure Code by the District Magistrate of Kaira. The applicant accepted the pardon and in his examination before the Magistrate stated that he was one of the persons who uprooted the rails which caused derailment of the troop-train on the 11th April 1919.

The police investigation was not followed by inquiry under the Code. The Nadiad Derailment Case was made over for trial to a Special Tribunal constituted under the Defence of India Act, 1915.

The applicant was examined as a witness at the trial before the Special Tribunal. He deposed there that he had no hand in the derailment and that his earlier statement was induced by improper motives.

The applicant was then charged, on an alternative charge of making two contradictory statements, with an offence punishable under section 193 of the Indian Penal Code.

The trying Magistrate convicted the applicant of an offence under section 193, para. 2, of the Indian Penal Code, and sentenced him to suffer rigorous imprisonment for six months.

The conviction and sentence were, on appeal, confirmed by the Additional Sessions Judge.

The applicant applied to the High Court.

Binning with *H. V. Divatia*, for the accused:—There can be no charge of perjury against the accused as his first statement on oath before the District Magistrate on which the alternative charge is founded is illegal and *ultra vires* for two reasons.

Firstly, the District Magistrate had no jurisdiction to grant pardon under section 337, Criminal Procedure

Code, as there was no "offence under inquiry" at that time. "Inquiry" in that section means the judicial inquiry contemplated by Chapter XVIII of the Code. That is clear from the wording of sections 337 and 338. Admittedly no such inquiry was pending at that time. The police had made a Jahir report of the offence to the Resident Magistrate at Nadiad under section 157, Criminal Procedure Code, but that Magistrate had merely ordered the report to be filed without taking any action on it. So that even if the word "inquiry" be taken in a wider sense, no such inquiry was pending before the Resident Magistrate within the meaning of section 159, Criminal Procedure Code, much less before the District Magistrate to whom no report at all was made by the police. The statement before the District Magistrate looks as if it were taken under section 164, Criminal Procedure Code, but a statement taken under that section must be before the commencement of the inquiry, while under section 337 pardon can only be granted when the offence is under inquiry. Thus, in any view of the case, the District Magistrate had no jurisdiction to grant pardon and take the accused's statement at that stage.

Secondly, the District Magistrate acted illegally in examining the accused on oath at the time of granting the pardon. Under clause (2) of section 337, the person accepting the pardon is to be examined as a witness in the case, i. e., at the magisterial inquiry or at the trial, but not before. It cannot be said that the Magistrate had the power to examine the accused under clause (4) of that section. The examination contemplated in that clause is the examination at the time of the magisterial inquiry. Besides the grant of pardon being without jurisdiction, the accused remains an accused and does not become a witness. No oath can, therefore, be administered to him.

1921.

EMPEROR

MOTILAL
HIRALAL.

1921.

EMPEROR
v.
MOTILAL
HIRALAL.

Bahadurji, Acting Advocate-General, with *S. S. Patkar*, Government Pleader, for the Crown :—The District Magistrate had the power to grant the pardon as the offence was under inquiry at that stage. “Inquiry” is not confined to magisterial inquiry but includes an inquiry made by a Magistrate at any stage: see the definition of inquiry: section 4 (k), Criminal Procedure Code; *Bhallu Singh v. Queen-Empress*⁽¹⁾ and *Queen-Empress v. Batera*⁽²⁾. When the accused was sent to the District Magistrate, it was virtually a report by the Police under section 157, and the District Magistrate must be deemed to have been inquiring into the offence under section 159. The word “inquiry” is used in section 337 in its ordinary and popular sense. As soon as information is given to the authorities that an offence has been committed, it is an offence under inquiry. The word “inquiry” would include the inquiry made by the District Magistrate for the purpose of granting a pardon.

The statement is taken by the District Magistrate under clause (4) of section 337. That clause gives him the power to examine the person on oath soon after the grant of pardon so that he may be fixed down to the statement and not allowed to turn round afterwards.

Lastly, even if the District Magistrate was not empowered to grant pardon, he did so in good faith, and the irregularity is cured by section 529, clause (g), Criminal Procedure Code.

MACLEOD, C. J. :—The accused was convicted by the First Class Resident Magistrate of Nadiad of intentionally giving false evidence under section 193 of the Indian Penal Code and sentenced to six months' rigorous imprisonment. An appeal to the Additional Sessions Judge was dismissed. The accused has now

⁽¹⁾ (1897) P. R. No. 3 of 1897 (Cr.). ⁽²⁾ (1898) P. R. No. 3 of 1898 (Cr.).

asked us to exercise our revisional jurisdiction in his favour.

1921.

The facts may be stated very shortly.

EMPEROR
v.
MOTILAL
HIRALAL.

The accused was suspected of having been concerned with what is well known as the Nadiad Derailment Case. The offence was committed on the 12th April 1919. On the 11th May, the accused was brought before Mr. Ker, the District Magistrate, who tendered him a pardon on the usual terms under section 337 of the Criminal Procedure Code; he was then examined by the District Magistrate and stated how he along with others uprooted the rails just before the passing of the troop train. The accused was examined as a witness in the case before the Special Tribunal on the 25th and 26th July 1920, when he swore that he had nothing whatever to do with the offence and that his statement before the District Magistrate had been induced by dishonest motives. Thereafter the requisite sanction was obtained from the High Court and the Special Tribunal, and after trial he was convicted as aforesaid on the ground that he had made two contradictory statements on oath one of which he must have known to be false. Two main objections have been taken to the decisions of the lower Courts.

It is contended (1) that the pardon granted by the District Magistrate was illegal inasmuch as the Magistrate had no jurisdiction to grant pardon under section 337 of the Criminal Procedure Code because the pardon must relate to an offence under inquiry, that is to say, under a magisterial inquiry which has commenced under Chapter XVIII of the Criminal Procedure Code. That, as the grant of pardon was illegal, the accused's statement on oath before the District Magistrate was inadmissible in evidence and could not be made an alternative ground for giving false evidence.

1921.

EMPEROR
v.
MOTILAL
HIRALAL.

(2) That the District Magistrate had no jurisdiction to examine the accused as a witness because under section 337 the examination is to be made in the case, i.e., at the time of the magisterial inquiry or at the regular trial.

If these arguments are to be given effect to, it must follow that no pardon can be tendered under section 337 until the commitment proceedings have commenced, nor can the evidence of a suspect be obtained in exchange for a pardon although it may often happen that without such evidence it would be useless to institute proceedings against any one for the offence in question. It is difficult to believe that the Legislature ever intended to restrict the granting of pardons in such a way, but the question is whether section 337 can be construed in the way in which it has been suggested by Mr. Binning that it should be construed.

Now "inquiry" is defined in section 4 (*k*) of the Code as any inquiry other than a trial which may be conducted by a Magistrate under the Code. The term is not confined to proceedings in which an accused is placed before a Magistrate charged with an offence. Under section 159 a Magistrate may make a preliminary inquiry in order to ascertain whether an offence has been committed and if so whether any persons should be put upon their trial. No doubt in section 164 it is provided that statements and confessions recorded thereunder should be recorded before the commencement of the inquiry or trial, and inquiry there refers to the commitment proceedings, while the Police proceedings in Chapter XVII are called "investigation". But it is difficult to see how it can be said that if a Magistrate is instituting an inquiry under section 159 into an offence, that offence is not under inquiry. However, it does not appear in this case that Mr. Ker

was holding a preliminary inquiry under section 159. The Additional Sessions Judge has got over this difficulty by saying that Mr. Ker had to make an inquiry in order to ascertain if the accused was willing to accept a pardon on the usual terms. This is ingenious but hardly satisfies the rules of construction. Evidently from the record Mr. Ker thought that the term "under inquiry" in section 337 was not used in a technical but in a popular sense, since he considered that the offence was under inquiry from the 12th April, the date on which it was committed. Section 337 is the first section in a Chapter headed "General Provisions regarding inquiries and trials." It is certainly open to argument that "inquiries" could only mean inquiries held according to the terms of the Code, and that, therefore, an offence under inquiry could only mean an offence which was being inquired into by means of an inquiry instituted according to the provisions of the Code, and not an offence which was being inquired into in a popular sense, since it may always be said that as soon as an offence is committed and becomes known to the authorities inquiry naturally follows and it becomes an offence under inquiry. The Code makes no mention of an inquiry by a Magistrate to ascertain whether a certain person is willing to accept the terms on which a pardon is offered to him. A Magistrate must no doubt ask certain questions, but questions are also asked before a confession is recorded and it does not follow that the offence then becomes an offence under inquiry. It does not appear, therefore, in this case that when the accused was tendered a pardon by Mr. Ker the offence was under inquiry, unless the words "under inquiry" can be used in their popular sense. A further difficulty arises in the construction of this remarkably ill-drawn section, because it is nowhere stated directly that the District Magistrate,

. 1921.

EMPEROR
v.
MOTILAL
HIRALAL.

1921.

EMPEROR
v.
MOTILAL
HIRALAL.

when the pardon has been accepted, shall take down the statement on oath of the person who has accepted the pardon. Sub-section (1) deals merely with the tender of a pardon : sub-section (2) says that a person who has accepted a pardon shall be examined as a witness in the case.

Sub-section (4) provides that a Magistrate who has tendered a pardon and has examined the person to whom it is granted shall not try the case if it is triable by a Magistrate. That might happen if the evidence of the approver showed that a minor offence had been committed and not an offence triable exclusively by a High Court or a Court of Session. A perfectly plausible construction of the section is that the District Magistrate may tender a pardon although he is not the Magistrate inquiring into the case provided an inquiry under the Code is proceeding. He could then take down the statement of the approver under section 164 if an inquiry was proceeding under section 159, but if the inquiry was proceeding under Chapter XVIII, the approver would have to be sent to be examined as a witness by the Magistrate holding the inquiry.

In this case it is not suggested that an inquiry was proceeding under section 159, so the offence was not under inquiry and a pardon could not be tendered.

The other construction would be that as soon as the authorities are informed about an offence having been committed the offence becomes an offence under inquiry and the District Magistrate has jurisdiction to tender a pardon.

But assuming that the District Magistrate has power to tender a pardon if the offence is under inquiry in the popular sense, it is difficult to see how it can be said that if he examines on oath the person who has accepted the pardon, he does so under the provisions

of section 164 which enable a Magistrate to record the statements of witnesses or the confessions of accused persons before the commencement of the inquiry or trial. No doubt it would be desirable, if an accused person sent to a Magistrate for his confession to be recorded, says that he will not confess but if he is tendered a pardon he will make a statement, that the Magistrate should have power to tender a pardon and take the statement on oath, but, as far as I can see, this power has not been given by the provisions of the Code.

A similar question arose in the Court of the Judicial Commissioner of Sind in the case of *The Crown v. Andal*⁽¹⁾. The opponent, under suspicion of having committed a murder with two other persons, was placed by the investigating Police before the District Magistrate who tendered him a pardon which was accepted. He was then examined under section 164, Criminal Procedure Code. He made a statement implicating himself and the other two persons who were then placed before the Sub-Divisional Magistrate on a charge of murder. The opponent was examined before the Committing Magistrate and denied nearly every statement of fact that he had made to the District Magistrate. An application was then made to sanction his prosecution for giving false evidence. It was suggested that the pardon was illegally tendered by the District Magistrate as the inquiry under Chapter XVIII of the Code had not commenced. Pratt, J. C., after referring to Prinsep's Commentary on Criminal Procedure Code which supported the suggestion, said (p. 175) :—

“ He (the author) appears to limit the scope of the section to a procedure by which a person over whom the Magistrate is exercising jurisdiction as an accused person and who is therefore incapacitated by section 842 (4) from

1921

EMPEROR
v.
MOTILAL
HIRALAL.

(1) (1911) 5 Sindh L. R. 174.

1921.

EMPEROR
v.
MOTILAL
HIRALAL.

giving evidence—can be converted into a witness. There is no authority for so limiting the section and I do not think the words of the section justify the limitation. The section refers to the 'offence under inquiry' but the word inquiry is not necessarily limited to an inquiry under Chapter XVIII, see the definition of the word in section 4 (k) of the Code and its use in section 159 where a Magistrate may make an inquiry for the purpose of assisting the Police in the discovery and arrest of the offender."

It is quite true that the District Magistrate need not be the Magistrate inquiring into the offence, but if the word 'inquiry' in the term 'offence under inquiry' is to be construed as defined in section 4, then no doubt it must be shown that some inquiry under the provisions of the Code was proceeding before the District Magistrate could tender a pardon. Therefore, with all due respect, there seems to be a fallacy in the argument of the learned Judicial Commissioner as he considered the offence was under inquiry though it was not shown that any inquiry under the Code was proceeding. It would have been different if he had considered that the word inquiry was used in its popular sense.

If, then, there are two possible constructions of section 337 the accused is entitled to the benefit of that construction which is in his favour. I cannot but regret the conclusion to which I have been forced to come. The only remedy, in my opinion, is for the Legislature at the earliest opportunity to recast section 337 so as to make it clear (1) that the term "offence under inquiry" includes an offence under investigation, (2) that a District Magistrate or Presidency Magistrate, when the pardon has been accepted, can take the approver's statement on oath so that it can be the basis of an alternative charge of perjury if he contradicts himself when giving evidence in the case.

The rule must be made absolute.

SHAH, J. :—The accused in this case has been convicted under section 193, Indian Penal Code, in respect of two contradictory statements made by him. The first

statement was made by him on the 11th May 1919 before the District Magistrate of Kaira, when a pardon was tendered to him, under section 337, Criminal Procedure Code, in respect of the offence connected with the derailment near Nadiad in April 1919 punishable under section 126 (b) of the Indian Railways Act (IX of 1890). The second statement was made by him in July 1919 when he was examined as a witness in the Nadiad Derailment Case which case was tried by the Commissioners appointed under the Defence of India Act IV of 1915. It is not disputed now, and it is obvious, that these two statements are contradictory, and that one or the other must be false to the knowledge of the accused. The prosecution do not seek to prove that the statement made by the accused as a witness at the trial is false, but rely upon the alternative charge based upon the two contradictory statements. If, therefore, it can be shown by the accused that the first statement by him before the District Magistrate cannot form the basis of an alternative charge, the prosecution must fail.

It is urged on his behalf that the first statement cannot be made the basis of an alternative charge, firstly, because the District Magistrate had no power to tender him a pardon at that stage and to examine him on oath under section 337, and, secondly, because the statement recorded by him is not provided for by the Code of Criminal Procedure, and cannot be used against him, quite apart from the question of the power of the District Magistrate to tender a pardon at that stage.

The undisputed facts relevant to these contentions may be briefly stated. The crime of derailment was committed on or about the 11th April 1919, and it was under investigation on the 11th of May. The accused was taken to the District Magistrate for a pardon. The District Magistrate first tendered the pardon to the

1921.

EMPEROR
v.
MOTILAL
HIRALAL.

1921.

EMPEROR
v.
MOTILAL
HIRALAL.

accused, and then recorded his statement in question on oath. There was no inquiry then going on at the time under Chapter XVIII, and as the accused in the derailment case were tried under the Defence of India Act, no such inquiry was ever made. A report of the crime was made to the City Magistrate of Nadiad, under section 157, Criminal Procedure Code, and it is not suggested that he had started any inquiry under section 159 at the time. The District Magistrate in fact never acted under section 159. In his evidence he states as follows:—"Beyond making these approvers and taking their statements I have done nothing in this case." It is also clear from his evidence that the statement in question was recorded under section 337, Criminal Procedure Code.

As regards the first contention it seems to me on a proper construction of section 337 that the District Magistrate had no power to tender the pardon under that section at that stage as the offence was not then under "inquiry" but under "investigation." In the case of offences triable exclusively by a Court of Session or High Court "inquiry" under the Code ordinarily means the inquiry under Chapter XVIII of the Code by the Committing Magistrate. The expression "any Magistrate of the First Class inquiring into the offence" used in section 337 (1), in my opinion, ordinarily indicates a Magistrate holding an inquiry under Chapter XVIII. That, at any rate, is the only inquiry which is necessary under the Code in the case of offences exclusively triable by a Court of Session. The scheme of the Code and also the general provisions in Chapter XXIV relating to inquiries and trials go to show that the word "inquiry" is used to indicate a judicial proceeding as distinguished from "investigation" and "trial". The word "inquiry" is used in various sections of the Chapter, for instance,

1921.

 EMPEROR
 v.
 MOTILAL
 HIRALAL

in sections 341, 342, 346, 347, 350, 351 and 352. In all these sections, having regard to the context, there could be no doubt that "inquiry" means the judicial proceeding contemplated by Chapter XVIII or any judicial inquiry provided by the Code: but it does not indicate any inquiry under Chapter XIV relating to investigation. It is difficult to believe that in section 337 the word is used to indicate any other proceeding. If the word was used in the popular sense to indicate generally any offence exclusively triable by a Court of Session under investigation, the Legislature could easily have used an appropriate expression to indicate its meaning in that sense. The learned Advocate General has contended that the word "inquiry" is used not in the sense defined by the Code but in a popular sense: but I am unable to accept that contention. If that was the meaning, section 338 would be unnecessary, as it could easily have been incorporated as part of section 337, for the stage after commitment would also be included in the scope of the word "inquiry". But the Legislature has made a definite provision for tendering a pardon at any stage after the commitment indicating thereby that that stage is not meant by the word "inquiry" used in section 337. I do not see any reason to assume that in such a general provision the Legislature must necessarily indicate all stages prior to commitment. It may well be that the Legislature only meant to provide for a tender of pardon after the case was before the committing Magistrate for "inquiry" under Chapter XVIII.

It is further urged that the word "inquiry" as defined in section 4 (*h*) includes every inquiry other than a trial conducted under this Code by a Magistrate or Court, and that it would include the inquiry made by the District Magistrate for the purpose of granting a pardon to the accused. Section 159 is relied upon by

1921.

EMPEROR
v.
MOTILAL
HIRALAL.

the prosecution for the purpose of showing that there may be an inquiry by a Magistrate before the inquiry under Chapter XVIII before the Committing Magistrate has commenced. I shall first deal with the argument based on section 159. That section does not help the prosecution in this case. No doubt an inquiry conducted by a Magistrate under that section would be an inquiry conducted under the Code and would be included within the meaning of "inquiry" as defined in the Code. But I feel some difficulty in holding that such inquiry is included within the meaning of the word as used in section 337, for the inquiry, referred to in section 337 with reference to an offence exclusively triable by a Court of Session, would be, I think, such an inquiry as is necessary under the Code, while the preliminary inquiry contemplated by section 159 is by no means a necessary step in the proceedings connected with every such offence. It is difficult to hold that in such a general provision a stage of the proceeding is indicated by the word "inquiry" which is not by any means an essential stage in the proceedings connected with an offence exclusively triable by a Court of Session. At the same time as a matter of construction it is difficult to hold that an inquiry held by the Magistrate under section 159 is not an inquiry conducted under the Code. I do not desire to decide this point as it is not necessary to do so. Assuming that a preliminary inquiry under section 159, Criminal Procedure Code, is included within the scope of the word "inquiry" used in section 337 (1) it is clear that in the present case no such inquiry was going on at the time when the pardon was tendered to the accused. The report under section 157, Criminal Procedure Code, was made to a Magistrate other than the District Magistrate, and it is common ground that that

1921.

Magistrate was not making any inquiry under section 159 at the time. It is not disputed that the District Magistrate made no inquiry under section 159; and indeed it is not clear under the circumstances whether he could have held any inquiry under that section, even if he was minded to do so.

EMPEROR
v.
MOTILAL
HIRALAL

As regards the argument that the inquiry which the District Magistrate made under section 337 was itself an inquiry under the Code within the meaning of the definition of that word, it is enough to point out that the Code itself does not make any provision for any inquiry by the District Magistrate or any other Magistrate in connection with a tender of pardon. He may make such formal or informal inquiry as he likes for his guidance. But it is entirely a matter of his choice. Any such inquiry as he makes would not be an inquiry conducted under the Code within the meaning of section 4 (*k*). No doubt the law requires him to state his reasons for tendering a pardon. But no inquiry is provided by the Code; and I feel no hesitation in holding that the proceeding which the District Magistrate made for recording his reasons for tendering the pardon was not an inquiry within the meaning of section 4 (*k*). It would follow that the tender of pardon on the 11th of May was not within the scope of section 337 (*i*) and that the accused could not have been examined on oath by him at the time. The statement, therefore, cannot form the basis of an alternative charge.

Ordinarily it may not be a matter of any practical moment whether the pardon is tendered before or after the inquiry is started, as the person to whom the pardon is tendered would be examined as a witness at the inquiry before the Committing Magistrate and afterwards at the trial, when the pardon would be in force. But it becomes a matter of importance when

1921.

EMPEROR
v.
MOTILAL
HIRALAL.

the District Magistrate, not conducting any inquiry under the Code, examines a person on oath before the committal proceedings are started, and when that statement is sought to be made the basis of an alternative charge as in the present case. I do not say that the District Magistrate could not have recorded the statement of the present accused on the 11th of May. He might do so for the purpose of enabling himself to determine at the proper time whether or not the person concerned had fulfilled the condition on which the pardon was tendered to him after he was examined as a witness in the case.

The fact that in this particular case no inquiry under Chapter XVIII of the Code was made, as the trial was held under the Defence of India Act, does not affect this conclusion: and it is not suggested before us that the circumstance can affect it in any way.

Even assuming that the pardon was properly tendered at the time, I am by no means satisfied that the examination of the accused at that time was provided by the section. The examination of the person as a witness in the case is obligatory under section 337 (2). In the present case as no inquiry under Chapter XVIII was necessary according to the special procedure laid down in the Defence of India Act, the only examination of the accused as a witness in the case was possible at the trial. The examination of the accused, such as was held on the 11th May by the District Magistrate, is not provided by the section. It is urged that though such an examination does not fall under sub-section (2) it is clearly covered by sub-section (4). The lower Courts have accepted this view. But I am unable to see how sub-section (4) can help the prosecution. It does not, in my opinion, provide for any examination of the person other than that required by sub-section (2). But it only specifies

the consequence of an examination by the Magistrate after the pardon is tendered. That examination has reference to the examination of the person as a witness at the inquiry under Chapter XVIII. It is clear that the examination as a witness in the case under sub-section (2) could be held only at the inquiry under Chapter XVIII or at the trial. When a Magistrate tenders a pardon and examines him as a witness at such an inquiry, sub-section (4) provides that he shall not *try* the case. It is conceivable that apart from this provision the Magistrate may be able to *try* the case if he finds, in the course of the inquiry under Chapter XVIII, that the offence is a minor offence triable by him, or if he happens to be a Magistrate specially empowered to *try* the case under section 30 of the Code. Sub-section (4) is, therefore, enacted to prevent the Magistrate, who examines the person as a witness in the case, from proceeding to try it; but it is not meant to provide for any examination of the person as a witness other than that indicated by sub-section (2). As I have already pointed out the District Magistrate, for his own guidance, may examine him after tendering the pardon. But that would not be an examination required by section 337, though even such an examination may perhaps disqualify him from *trying* the case as the wording of sub-section (4) is apparently wide enough to include it. I see no ground, however, to hold that any examination other than that mentioned in sub-section (2) is required by sub-section (4). It seems to me that the statement referred to in section 339, sub-section (2), is the statement made by the approver as a witness at the inquiry under Chapter XVIII or at the trial and no other. I am, therefore, of opinion that the statement in question could not be used in evidence against him when the pardon is forfeited, and could not form the basis of the alternative charge laid against him.

1921.

EMPEROR
v.
MOTILAL
HIRALAL.

1921.

EMPEROR
v.
MOTILAL
HIRALAL.

I do not think that section 164, Criminal Procedure Code, which was referred to in the argument, can apply to this statement. It is not recorded under that section. The District Magistrate's evidence makes it clear that he acted under section 337. ^o Even apart from that circumstance I do not think that the statement in question could properly be recorded under section 164 which refers to statements of witnesses, who want to make them voluntarily before the inquiry or trial has commenced. A statement recorded when a pardon is tendered may not be a completely voluntary statement. It is apparently made under the influence of the tender of pardon. Though that influence is legally permissible, subject to the provisions contained in sections 337 to 339, it is sufficient to take the statement out of the scope of section 164. Apart from the pardon probably the statement in question, if the accused was then prepared to make it, could have been recorded only as a confession under section 164.

I have considered the decisions in *Bhalla Singh v. Queen-Empress*⁽¹⁾ and *The Crown v. Andal*⁽²⁾. Though we are not bound by them they are authoritative pronouncements on the construction of section 337. After a careful consideration of the provisions of the Code, with great respect to the learned Judges, I am unable to accept their reading of section 337. I have stated my reasons for the construction of the section which I accept. I do not suggest that the matter is free from difficulty. But on the whole it seems to me that the statement recorded by the District Magistrate is one not required to be recorded under section 337 and cannot be made the basis of an alternative charge under section 193, Indian Penal Code.

I would set aside the conviction and sentence and acquit the accused.

Rule made absolute.

R. R.

(1) (1897) P. R. No. 3 of 1897 (Cr.).

(2) (1911) 5 Sindh L. R. 174.