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Queen-empress Vs. Chotu

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Court : Allahabad

Decided On : Dec-31-1969

Reported in : (1887)ILR9All52

Judge : John Edge, Kt., C.J., ;Straight, ;Oldfield, ;Brodhurst and ;Tyrrell, JJ.

Appellant : Queen-empress

Respondent : Chotu

Judgement :

Straight, J.

1. This is an application by one Chotu for revision of an order of the Judge of Saharanpur of the 27th July last, summarily dismissing an appeal by the applicant from his conviction by the Joint Magistrate of the same place, dated the 7th July, under Section 414 of the Penal Code. The following are the facts material to the question of law raised on behalf of the applicant: On the 16th February last he was brought; before Pandit Hargian Singh, Deputy Magistrate, charged, under Section 411 of the Penal Code, with being in dishonest possession of certain stolen jewellery. Some eleven witnesses, including one Samnai, were examined in support of the case, but in the result the Deputy Magistrate discharged the accused under Section 253 of the Criminal Procedure Code, for reasons which were fully recorded by him in his decision. He, however, put the witness Samai upon his trial for an' offence in regard to the same property, and, after taking

evidence for the prosecution and defence at great length, he ultimately convicted the accused Samai and sentenced him to one year's rigorous imprisonment and a fine of Rs. 25, or in default to be further imprisoned for three months. Samai appealed from this conviction to the Judge, but his appeal was dismissed on the 27th of May. On the same date the Judge directed notice to issue to Chotu in the following terms:'As it would appear that Chotu has been improperly discharged, a notice will issue to him to appear and show cause why an order for retrial shall not pass under Section 437--faced for 3rd June.' On the 3rd June, the Judge, alter expressing himself substantially to the effect that Chotu ought to have been convicted and not discharged, recorded the following order: 'therefore, under Section 437, Criminal Procedure Code, direct that the District Magistrate, by himself, or some Magistrate subordinate to him, make further inquiry into the case of Chotu accused, under Sections 411 and 414, Indian Penal Code.' In obedience to this order, the Joint Magistrate of Saharanpur proceeded to re-try and convict Chotu upon what I consider, and what, for the purpose of this reference, must be taken, to be the same evidence on which he had already been tried and discharged by the Deputy Magistrate. This conviction was appealed to the Judge, who summarily rejected it on the 27th July, and, as I have already said, this order of the Judge, along with that of the Joint Magistrate, afford the subject-matter of this application for revision.

2. Before dealing with the objection that is raised on behalf of the applicant, I think it right to observe that, looking to the peculiar circumstances above disclosed, the Judge acted unwisely, not only in summarily rejecting Chotu's petition, but in not forwarding to this Court a recommendation that the appeal should be transferred to some other Judge for hearing and disposal. It is patent from the remarks made by him in dismissing the appeal of Samai on the 27th May, and in his order of the 3rd June with regard to Chotu, that he had preconceived a very strong opinion as to the guilt of such last-mentioned person which could not but prejudice his mind unfavourably as to any appeal that might be preferred. I should, under the circumstances, have considered it incumbent upon me to quash the Judge's summary order of dismissal, but that it would be precapture for me to do so, having regard to the contention which has been urged before me for the applicant, that the Judge acted ultra vires in making his order of the 3rd June, and that he

was not empowered by Section 437 of the Criminal Procedure Code to do so. It is clear, as I have said, from the terms of the Judge's notice to Chotu to show cause, and from the language of his order of the 3rd June, that be was of opinion that the evidence taken before the Deputy Magistrate established that person's guilt, and that what he intended, and, in fact, ordered, was that Chotu should be re-tried upon the same materials before another Magistrate. He does not pretend to say that he was informed, or had reason to believe, that any fresh evidence was likely to be forthcoming which would elucidate that already given, or reasonably lead to a conclusion different to that already arrived at; on the contrary, his orders were apparently passed and issued entirely upon the materials as they already stood. It was in this sense that the Joint Magistrate obviously understood the order and tried the case, and I cannot help saying, as it seems to me, with less patience and care than was exhibited by the Deputy Magistrate in the original trial. H id the Judge then power to do this under Section 437 of the Criminal Procedure Code? Hitherto I have inclined to the opinion, and have expressed myself to that effect in two cases--Empress v. Bhole Singh, Weekly Notes, 1883, p. 150; Queen-Empress v. Hasnu, I. L R., 6 All., 367,--that he had not the power, and a like view has been enunciated by several Judges of the Calcutta Court--Chundi Churn Bhatacharyia v. Hem Chunder Banerjee I. L. R., 10 Cal., 207; Jeebun, Kristo Roy v Shib Chunder Dass I. L. R., 10 Cal., 1027; Darsan Lall v. Jamuk bill, I.L.R., 12 Cal., 522. Sir Charles Turner, in Queen-Empress v. Amir Khan I. L. R., 8 Mad., 336, in a lengthened judgment, also places a similar interpretation on the section in question. There is, however, a ruling of Nanabhai Haridas, in Queen-Empress v. Dorabji Hormasji I. L. R., 10 Bom., 131, the other way, which very ably and exhaustively discusses the point, and as it is one of great importance and relates to a matter of practice, I think it very desirable it should be settled by the Court at large once and for all. I therefore refer to the Full Bench the following question:

When a Magistrate has discharged an accused person under Section 253 of the Criminal Procedure Code, has the High Court or Court of Session, under Section 437, jurisdiction to direct further inquiry on the same materials, or may a District Magistrate, under like circumstances, himself hold further inquiry or direct further inquiry by a Subordinate Magistrate?

3. Mr. Pogose, for the Applicant.

4. The Public Prosecutor (Mr. C. H. Hill), for the Crown.

Edge, C. J., and Straight, Oldfield, Brodhurst, and Tyrrell, JJ.

5. We are of opinion that the words 'further inquiry' used in Section 437 of the Criminal Procedure Code do not limit the power of this Court, the Court of Session, or the District Magistrate, in regard to the case of an accused who has been discharged, nor do they necessarily prohibit a direction being given or action taken thereunder upon the record, called for and examined, as it stands. By the old Code of 1872, this Court alone had authority to disturb an order of discharge passed under Section 215 or Section 195 of that Act, which was limited to directing the accused person improperly discharged 'to be tried or be committed for trial,' and the jurisdiction of the Sessions Judge and District Magistrate in respect of discharges under Section 215 was confined to reporting the proceedings to this Court for orders. But in Section 439 of the present Code, which replaces Section 297, the revision section of the repealed Act, neither in specific terms nor inferentially is the setting aside an order of discharge provided for, and apparently .for the best of all reasons, namely, that Section 437 has already dealt with the subject. It is nowhere apparent, nor indeed is it likely, that the Legislature intended to cut down the powers of this Court in that behalf, and it seams to his that in using tne expression 'further inquiry' they contemplated conferring u wider discretion than was comprehended in the mere power given by the old Act to order a discharged accused 'to be tried,'--i.e., to be put on his trial by having a charge drawn up and to be tried thereon.' Further inquiry,' moreover, gives the Magistrate directed to make it much greater latitude, and still leaves it open to him when he has made it, if he thinks fit to do so, to pass an order of discharge under Section 253, and no obligation, as was the case under the old Act, rests upon him to frame a charge and proceed as pointed out in Section 254 and following sections. We think that in determining the effect to be given to Section 437 (sic) bear in mind the distinction obviously recognised in the Code between the preliminary proceedings in warrant cases that precede the drawing up of a charge, which may be terminated by an order of discharge that does not amount to an acquittal, nor bar a

second prosecution at the instance of the complainant, and those that ensue after charge framed and plea pleaded, which can only be concluded by an acquittal or a conviction, whereof the accused can afterwards avail himself under Section 403 of the Code. So long as the case continues in the stage of inquiry, the duty of the Magistrate is confined to ascertaining whether there is anything that the person accused ought to be called upon to answer. When once the charge has been framed and a. plea has been taken, the inquiry is turned into a trial, and the evidence in support of the charge already recorded becomes evidence on that trial, subject to the right of the accused as declared in Sections 256 and 257. It therefore comes to this, that the power conferred upon this Court, the Sessions Court, and the District Magistrate, by Section 437, to direct 'further inquiry,' amounts to no more than an authority to set aside an order of discharge, which is no protection to an accused against a second proceeding at the instance of the complainant himself on the same facts in another Court before another Magistrate, so as to enable the Magistrate who passed it, or some other Magistrate, to re-open the matter or look further into it, and determine whether the accused should be put on his trial.

6. In regard to the question put by this reference, therefore, we cannot say that there is an absolute defect of jurisdiction either in this Court, or the Sessions Court, or the District Magistrate to direct, or in the District Magistrate to make, the further inquiry mentioned in Section 437 on the same materials as were before the Magistrate who passed the order of discharge. It is within the bounds of possibility that cases may and will occur in which a Magistrate has taken so wholly erroneous a view of the law applicable to the facts proved, or has formed such absurd and irrational conclusions from those facts, or has conducted his inquiry in so slip-shod and perfunctory a fashion that to leave the matter as he has left it would be to countenance a positive miscarriage of justice. We must credit the Legislature with having foreseen that such a state of things might arise; and when we turn to the Code to find the remedy, if any, provided to meet such a contingency, Section 437 at once naturally presents itself. Why, then, should we insist upon giving a narrow and limited construction to the governing words of that section which will make it operative in only a very limited number of cases within the mischiefs it was provided for, whereas a more liberal interpretation will include all? It is observable,

also, that in Section 437 the word 'improperly' to be found in Section 436 is dropped, and its omission seems to us to indicate that, far from limiting the scope and effect of the section, it was intended to confer a very wide discretion, so as to meet not only cases in which an improper discharge had been made, but those in which, upon the facts as they stand, the discharge is proper, but further inquiry is necessary. By way of illustration of what we have been saying,' let us take a case in which A charges B with cheating, and proves that on a particular date B made certain representations to him, on the strength of which he parted with so many rupees, and that such representations were false to the knowledge of B. The Magistrate making the inquiry, after hearing the witnesses for the prosecution, erroneously holds that though the representations are satisfactorily proved to have been made, they are insufficient in law to sustain a charge of cheating within the meaning of the Penal Code, and accordingly discharges the accused. Here there is no need for the prosecutor to produce further evidence, as there is ample on the record already, and yet justice requires that the matter should be set right. Or take a case in which a complainant has preferred (say) a charge of assault, and has named a number of witnesses to give evidence for him; but the Magistrate only thinks it necessary to summon a few of them, and thereupon proceeds with his inquiry, and after hearing them, discharges the accused upon the ground that the story for the prosecution is so improbable and the demeanour of the witnesses was so unsatisfactory as to make him believe the charge a false one. Here his order might be a perfectly good and defensible one on the materials before him. But the complainant says: 'If the other witnesses I wished to call had been summoned, they would have put a very different complexion on the case.' This Court, or the Sessions Court, or the District Magistrate, might find it very difficult to hold that the Subordinate Magistrate had improperly exercised the discretion given him by the second paragraph of Section 252, or that his order of discharge was improper, and yet it might be felt in regard to the peculiar and particular facts of the case that, in the interests of justice, it was right the inquiry should be re-opened and the other persons named summoned to give their evidence. We put these two cases as extreme instances in the one direction or the other, which it is obviously right and proper there should be some provision in the law to meet, and which we think fall within the mischiefs which Section 437 was intended to cure. If it does not

provide for them, then no remedy is to be found in any other section of the Code; and the position would seem to be reached that the Legislature, while taking away an important and necessary power possessed in terms by this Court under the old Act, imposed on themselves the labour of framing a separate section to confer a discretion of a very limited kind, and one which the Magistrate, who passed the order of discharge, might, at the instance of the complainant, himself exercise without direction from any superior authority. This we cannot believe to have been the case, and with the greatest deference to the opinions of the learned Judges of Calcutta, Madras, and this Court, in the cases mentioned in the referring order, we cannot but think that the considerations of which we have been speaking were not pressed upon their attention or present to their minds when their judgments were delivered, and if they were, they were not discussed and answered. We agree in the main with Nanabhai Haridas, J., in Queen-Empress v. Dorabji Hormasji I. L. R., 10 Bom., 131, and hold, for the reasons given, that the question put by this reference must be replied to in the affirmative. In doing so, however, we feel bound to impress on Sessions Judges and Magistrates that in exercising the powers conferred by Section 437, they should, in the first place, always allow the person who has been discharged an opportunity of showing cause why there should not be further inquiry before an order to that effect is made, and next, that they should use them sparingly and with great caution and circumspection, especially in cases where the questions involved are mere matters of fact. As to the mode in which, their discretion should be regulated under such circumstances, we think the remarks of Straight and Tyrrell, J.T., in Queen-Empress v. Gayadin I. L. R., 4 All., 148, in reference to appeals from acquittals, may appropriately apply and should be consulted.

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