(1934) 09 BOM CK 0012

Bombay High Court

Case No: Criminal Application for Revision No. 302 of 1934

Emperor		APPELLANT
	Vs	
Ramchandra Babaji Gore		RESPONDENT

Date of Decision: Sept. 10, 1934

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 209

Citation: (1935) 37 BOMLR 16

Hon'ble Judges: Rangnekar, J; John Beaumont, J; Divatia, J

Bench: Full Bench

Judgement

John Beaumont, Kt., C.J.

This is an application in revision which comes before the Court in the following circumstances. The present applicant was charged jointly with accused No. 2, who was his first wife and who has recently died, with the murder of a woman called Tulsa, who was the second wife of the applicant, accused No. 1, so that the charge was under, Section 302 of the Indian Penal Code. The matter was inquired into by the City Magistrate, First Class, Ahmednagar, who discharged the accused. Against that order of discharge, the complainant, who was the uncle of the deceased woman, applied in revision to the Sessions Judge of Ahmednagar, and the Sessions Judge set aside the order of discharge and directed the accused to be tried in the Sessions Court. From that order this application is made.

2. On the application for a rule, it appeared to the bench which heard the application that, whether or not the order of the Sessions Judge was right on the merits, the order was contrary to the ruling of this Court in Parasharam Bhika v. Emperor I.L.R.(1932). 57 Bom. 430 Bom. L.R. 245 and as the bench felt some doubt as to whether the ruling in that case was correct, the rule was made returnable before a full bench.

3. This being a charge u/s 302 of the Indian Penal Code, the case is one exclusively triable by a Court of Session, and therefore the inquiry before the Magistrate had to be conducted u/s 206 and the sections following in Chapter XVIII of the Criminal Procedure Code. Section 208 provides that in such a case the Magistrate shall hear the complainant and take all such evidence as may be produced in support of the prosecution or on behalf of the accused or as may be called for by the Magistrate. Then Section 209 provides that when the evidence referred to in Section 208 has been taken and he has, if necessary, examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, the Magistrate shall, if he finds that there are not sufficient grounds for committing the accused for trial, record his reasons and discharge him. That was the section under which the Magistrate discharged the accused in this case. Then Section 436 enables the Sessions Judge to direct further inquiry to be made in a complaint which has been dismissed u/s 203 or Section 204, or in the case of any person accused of an offence who has been discharged. So that that section covers the discharge of an accused person in respect of an offence not exclusively triable by a Court of Session. Then Section 437 deals with the discharge of an accused exclusively triable by the Court of Session, and under that section the Sessions Judge or District Magistrate, if he considers that an accused person has been improperly discharged by the inquiring Court, may cause him to be arrested, and may thereupon, instead of directing a fresh inquiry, order him to be committed for trial upon the matter of which he has been in the opinion of the Sessions Judge improperly discharged.

4. In the case of Parasharam Bhika v. Emperor the Magistrate had discharged the accused person u/s 253 of the Criminal Procedure Code, which deals with inquiries before a Magistrate in warrant cases triable by a Magistrate. But the Court held that the discharge should really have been u/s 209, and that the principles governing discharges under the two sections, viz., Section 209 and Section 253, are the same. The gist of the decision is contained in the judgment of Broomfield J. at p. 440, where he says this :-

The view we take is that the Magistrate is both entitled and bound to value and weigh the evidence and that, if he disbelieves the evidence and makes an order of discharge, the question whether it ought to be set aside in revision depends on whether it is a reasonable order, the criterion being, not whether the revising Court agrees with it, but whether it is rational in the sense that it cannot be fairly described as perverse or manifestly contrary to the evidence.

If that ruling is right it involves a considerable departure from the language of Section 437. Section 437 empowers the Sessions Judge to set aside an order of discharge whenever he thinks that the order is improper. If the ruling of this Court is to be accepted, the power can only be exercised when the order is perverse or manifestly unreasonable and inconsistent with an honest appreciation of the evidence before the Court. In considering the circumstances which may entitle a

Sessions Judge to come to the conclusion that an order of discharge is improper, it is necessary, in the first instance, to notice what the Magistrate is required to do in the inquiry before him, that is to say, to consider what would be a proper order. Now, it is quite clear, I think, that u/s 209 the Magistrate has got to consider the evidence. He has got to satisfy himself that there are sufficient grounds for committing the accused person for trial, and to do that he must consider the evidence, both its nature and credibility ; but he has not got to satisfy himself that there is a proper case for convicting the accused ; he is not to try the accused, that being a duty imposed by the Code on the Sessions Court. It is no doubt difficult and undesirable to attempt to define precisely the limits of the powers of Magistrates conducting preliminary inquiries. Experienced Magistrates do not in practice find any great difficulty in dealing with inquiries u/s 206 and the following sections. They have to be satisfied before committing the accused that there is a fit case to be tried. If the Magistrate comes to the conclusion that there is evidence to be weighed, he ought to commit the accused for trial and he ought not to discharge the accused merely because he thinks that if he were to try the case himself he would not be prepared to convict the accused on the evidence before him. But if he comes to the conclusion that the evidence for the prosecution is such that no tribunal, whether a Judge or jury, could be expected to convict the accused, then he ought to discharge him. Sometimes cases arise which are near the line, and the Magistrate may feel legitimate doubt as to his proper course. If he commits a case where he ought to discharge, the result is a waste of public time and money in conducting an unnecessary trial, and this result Magistrates should try to avoid. On the other hand, if he discharges an accused whom he ought to commit, then the Sessions Judge or District Magistrate has power either u/s 436 or Section 437 to take action in the matter. By these sections the Legislature has imposed checks upon improper orders of discharge, and the powers conferred ought not to be frittered away by the Courts. u/s 437, which applies in this case, all that the Sessions Judge has to do is to come to the conclusion that the order for discharge was improper. He may, as it seems to me, reach that conclusion not only on the grounds indicated in the judgment of Mr. Justice Broomfield in the case of Parasharam Bhika v. Emperor, that is to say, that the order was perverse or manifestly unreasonable and inconsistent with an honest appreciation of the evidence in the case ; but also on the ground that the Magistrate has, however competently, taken upon himself the discharge of a duty which under the Code is entrusted to the Sessions Court, that is to say, the duty of appreciation of evidence of doubtful credibility. On that ground, I think, the Sessions Judge clearly can set aside an order of discharge, but I am prepared to go further and to hold that in a proper case he may do so on the ground that he disagrees with the appreciation of evidence by the Magistrate. In saying that I am differing from the view expressed by this Court in In re Narainah Venkatesh (1917) 19 Bom. L.R. 350. In that case the District Magistrate had differed from the inquiring Magistrate in regard to the appreciation of the evidence. The Court held that the District Magistrate had jurisdiction to set aside the order of discharge, but they went

on to say that in the exercise of his discretion the District Magistrate ought not to exercise that power merely because he disagreed with the appreciation of the evidence of the Magistrate conducting the inquiry. I quite agree that in such a case the District Magistrate or the Sessions Judge must bear in mind that the inquiring Magistrate has seen the witnesses, and the Court acting in revision has not done so, and for that reason the Sessions Judge or the District Magistrate should be slow to set aside an order of the Magistrate merely because he disagrees with the Magistrate''s appreciation of the evidence. But I am not prepared to say that in a proper case such a power cannot be exercised.

5. In so far as the powers of the Magistrate u/s 209 are concerned, I think that the views I have expressed are in accordance with all the earlier authorities in this Court, particularly, Queen Empress v. Namdev Satvaji I.L.R(1887) 11 Bom. 372, In re Bai Parvati I.L.R (1910) 35 Bom. 163 : 2 Bom. L.R. 923, and Emperor v. Varjivandas I.L.R.(1902) 27 Bom. 84 :4 Bom. L.R. 779 and in so far as the judgment of Mr. Justice Broomfield in Parasharam Bhika v. Emperor restricts or enlarges the powers of the Magistrate u/s 209 beyond the extent to which they have been laid down in those cases, I think the decision cannot be supported. But the main criticism upon Parasharam Bhika v. Emperor is in regard to the restriction which it places upon the jurisdiction of the Sessions Judge to interfere u/s 437. In my opinion the words of the Code are quite general, and enable the Sessions Judge or the District Magistrate to interfere whenever he thinks that the order of the Magistrate is improper, and there was no justification for restricting that power in the manner in which the case of Parasharam Bhika v. Emperor seeks to restrict it. I think that that case was wrongly decided and should be over- ruled.

6. With regard to the merits of the present case, there is no doubt that where the Sessions Judge does interfere with an order of discharge u/s 437 and directs the accused to be tried by the Court of Session, this Court has power to interfere in revision, but we should be slow to exercise that power. Generally speaking, if the Sessions Judge thinks that there is a case to be tried, it ought to be tried. But, in my opinion, this is one of those rare cases in which we ought to interfere.

7. The learned Magistrate gave a detailed judgment in which he discussed the prosecution evidence, and it is clear that in discharging the accused he so acted, not because in weighing the evidence of the prosecution and the evidence of the defence he thought that the prosecution failed ; he discharged the accused because he was satisfied that no tribunal could possibly convict on the evidence before him. He points out that of the witnesses called by the prosecution only one man, named Mukunda, gave evidence which in any way supported the charge of murder. The evidence of that witness is that he saw the dead body of the woman alleged to have been murdered being brought out of the hut of the accused and thrown into a well. Even if that evidence be accepted, it would hardly lead to more than an inference that the evidence of a crime had been concealed which might support a charge u/s

201 of the Indian Penal Code, but would afford no evidence as to who committed the murder, if murder had been committed. But apart from that, the witness came forward with his story to the complainant at a late stage, and there is some reason for thinking that he was not on the scene of offence when he says he was, and all the witnesses that he relies upon to corroborate his story contradict him. I think, therefore, the Magistrate was right in the view he took that no Court could possibly convict the accused upon the uncorroborated evidence of that witness. The learned Sessions Judge in setting aside the order of the Magistrate says that there are suspicious circumstances about the case, and I am not disposed to differ from him as to that. But suspicious circumstances alone cannot lead to conviction. The Sessions Judge, apart from suspicious circumstances, says that he sees no reason for disbelieving Mukunda. It may be that Mukunda is telling the truth, but as I have said, it would be quite impossible for any Court to accept his evidence, contradicted as it is by other witnesses, and base a conviction solely upon it. That being so, it seems to me that, though the learned Sessions Judge had jurisdiction to set aside the order of the Magistrate, he was wrong in this case in doing so.

8. I think, therefore, we must allow the application, set aside the order of the Sessions Judge, and direct the accused to be discharged and his bail bond cancelled.

Rangnekar, J.

9. On the merits of the case I desire to say nothing and I agree with the learned Chief Justice that the application must be allowed.

10. The other question raised before us is, whether the decision in Parasharam Bhika v. Emperor I.L.R.(1932) 57 Bom. 430 : 35 Bom. L.R. 245 is correct, and if so, to what extent, the applicant''s contention being that the ruling in that case was ignored by the Sessions Judge.

11. There are four propositions which my brother Broomfield has laid down in that case : viz., (1) that there is no distinction between an order of discharge passed u/s 253 and u/s 209 of the Criminal Procedure Code ; (2) that u/s 209 the Magistrate is both entitled and bound to weigh and value the evidence; (3) that if the Magistrate disbelieves the evidence and makes an order of discharge, the Sessions Judge ought not to set aside the order merely because he disagrees with it and substitute his own opinion on the facts in place of that of the Magistrate ; and (4) that an order of discharge made by a Magistrate after hearing all the evidence for the prosecution and defence ought not to be set aside unless it can be said that the order is perverse or manifestly unreasonable and inconsistent with an honest appreciation of the evidence before the Court.

12. It is obvious that ''the real question is, first, what is the extent of the jurisdiction of the Magistrate in an inquiry into cases triable by the Court of Session under Chapter XVIII of the Criminal Procedure Code ; and, secondly, the jurisdiction of the Sessions Judge or the District Magistrate to interfere with an order of discharge

made by the Magistrate, and this depends upon the true construction of certain sections of the Criminal Procedure Code. I propose to deal with the questions raised in the light of the relevant sections, apart from any authority, in the first instance.

13. Chapter XVIII deals with inquiry into cases triable by the Court of Session or the High Court. Section 207 provides that the procedure in the sections following in that Chapter shall be adopted in inquiries where the case is triable exclusively by a Court of Session or in the opinion of the Magistrate ought to be tried by such Court. The distinction between these two classes of cases is clear from the Code itself. Schedule II shows that there are certain offences which are exclusively triable by the Court of Session. It also shows that certain classes of Magistrates have concurrent jurisdiction with the Court of Session. As to these latter class of cases, the Magistrate may commit the accused for trial if in his opinion the case is one which ought to be committed to the Sessions Court. Section 208 provides that the Magistrate has to hear the complainant and take all evidence in support of the prosecution and also on behalf of the accused, or such evidence as may be called for by the Magistrate. Section 209 (J) provides that when the evidence referred to in Section 208, i.e., the evidence on behalf of the prosecution as well as any led on behalf of the accused, has been taken and the accused has been examined, if necessary, if the Magistrate finds that there are not sufficient grounds for committing the accused person for trial, after recording his reasons he should discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate. This shows that the Magistrate has to consider the evidence which is led before him carefully, and where the offence disclosed is not exclusively triable by a Court of Session, it is open to him to try the accused or to transfer the case to some other Magistrate competent to try it. Sub-section (2) of Section 209 provides that it is competent to a Magistrate at any stage in the course of the inquiry, for reasons to be recorded by him, to discharge the accused if he considers the charge to be groundless. Then comes Section 210, which says that if the Magistrate is satisfied that there are sufficient grounds for committing the accused for trial, he should frame a charge, and u/s 211 require the accused to give in a list of witnesses whom he wishes to summon at the trial. Section 212, however, allows the Magistrate to examine any such witnesses named in the list, and Section 213 says that after examining such witnesses if the Magistrate is satisfied that there are not sufficient grounds for committing the accused for trial, he is competent to cancel the charge and discharge the accused.

14. It will be seen from these sections that an order of discharge can be made at three distinct stages : (1) at any stage of the inquiry, if the Magistrate considers the charge to be groundless ; (2) upon a consideration of the evidence for the prosecution and for the accused ; and (3) even when he thinks that there are sufficient grounds for committing the accused and frames a charge, upon examination of further witnesses called by the accused, after the charge is framed, if in the opinion of the Magistrate there are not sufficient grounds for committing the

accused, he may cancel the charge and discharge the accused.

15. It seems to me to be impossible to hold upon the plain construction of these sections that the Magistrate is a recording machine,-a view often pressed before the Courts. In my opinion these sections show that a Magistrate holding an inquiry has wide powers, and for the proper and effective exercise of the same, he must weigh and appreciate the evidence before him. But, excepting the case where in his opinion the charge is groundless, he can discharge the accused only when he considers that there are not sufficient grounds for committing the accused for trial.

16. The question then arises, when it can be said that there are "sufficient grounds" for committing the accused for trial. The words in question were considered in Queen Empress v. Namdev Satvaji I.L.R.(1887) 11 Bom. 372, and the test there laid down was that when credible witnesses make statements which, if believed, would fairly sustain or justify a conviction at the trial, the Magistrate must commit the accused for trial. The same view was taken, and this case was approved, in Emperor v. Varjivandas I.L.R.(1902) 27 Bom. 84 :4 Bom. L.R. 779, in which the Court observed as follows (p. 88) :-

The words in section 209 [of the Criminal Procedure Code] ''sufficient ground for committing'' have been explained to mean, not sufficient 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... 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 prima 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.

In my opinion the test laid down in this case is correct. To put it in simple language, all that the Magistrate has to see is whether there is a prima facie case on which the accused can be put on his trial. In most j cases no difficulty arises, but cases do occur which are on the border line as to which no hard and fast rule can be laid down. But I do not see why a Magistrate cannot discharge the accused when on a consideration of the whole of the evidence before him he is of opinion that there is no credible evidence against the accused. I do not see why he cannot say so. There is no harm in taking this view as the Magistrate has to give his reasons, and if they do not appeal to the Sessions Judge, it is, as I shall presently show, open to him to set aside the order, in this respect, therefore, I agree with my brother Broomfield.

17. There has been some discussion before us as to the distinction between an order of discharge u/s 209 and one u/s 253. I do not propose to examine the question, as it is not strictly necessary to do so on this application.

18. This brings me to the other point in the case as regards the jurisdiction of the Sessions Judge. The relevant sections are Sections 435 to 438 in Chapter XXXII,

which deals with reference and revision. Section 435 empowers the Courts mentioned therein, including a Sessions Judge, to call for and examine the record of any proceeding before any criminal Court inferior to it or him. The object of the power which is thus conferred on the Courts mentioned therein is to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceeding of the inferior Court. It will be seen from the terms of this section that the revisional powers conferred upon the Courts named in this section are very wide. Then Sections 436, 437 and 438 provide for the action to be taken by the Sessions Judge in the exercise of his revisional jurisdiction. Section 436 empowers the Sessions Judge to order further inquiry into any complaint which has been dismissed u/s 203 or Section 204(5), or into the case of any person accused of an offence who has been discharged. Section 437 provides that upon examining the record of any case u/s 435 or otherwise the Sessions Judge considers that such case is triable exclusively by the Court of Session and that the accused ;person has been improperly discharged by the inferior Court, he may cause him to be arrested and may order him to be committed for trial. Section 438 enables the Sessions Judge to report for the orders of the High Court the result of his examination of the record in all other cases.

19. A careful examination of these sections shows that Section 435 explains the revisional jurisdiction of the Courts mentioned therein over inferior Courts, and as to the true meaning of the section I can do no better than to refer to the observations of Mr. Justice Wilson in Hari Dass Sanyal v. Saritulla I.L.R.(1888) Cal. 608. This is what he stated (p. 618) :-

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.

Then Sections 436, 437 and 438 state the action the Sessions Judge ran take when he acts in the exercise of his revisional jurisdiction, or in simple language, tell him what he can do. Now with reference to orders of discharges by the inferior Courts, it will be seen that u/s 436 the Sessions Judge can set aside the order of discharge and order further inquiry in any case except when the order of discharge is made in a case exclusively triable by a Court of Session, and when the order of discharge is in a case triable exclusively by the Court of Session, the Sessions Judge can only act u/s 437.

20. Now there is some distinction between these two sections, and it is this. Section 436 provides that the Sessions Judge can set aside an order of discharge and order further inquiry when he is acting in the exercise of his revisional jurisdiction, whereas Section 437 provides that he can make an order of commitment when the accused was improperly discharged. The question then arises whether there is any real distinction between the revisional jurisdiction of the Sessions Judge when he

acts u/s 436 and when he acts u/s 437. One thing is clear and that is the action to be taken under both the sections by the Sessions Judge when he considers that interference is necessary is only in the exercise of his revisional jurisdiction. It is not easy to understand why the Legislature has used the words "improperly discharged" in Section 437. The learned Government Pleader argues that in spite of the use of this expression there is substantially no difference between Sections 436 and 437 as to the jurisdiction of the Sessions Judge in revision as to orders of discharge made by the Court holding an inquiry under Chapter XVIII, and I am inclined to agree with his contention. I think what is meant by this particular expression is nothing more than what Mr. Justice Crowe said in Emperor v. Varjivandas, to which I have referred, in these words (p. 88):-

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 ?

Confining myself to the order of discharge falling u/s 437, the position seems to me that in a case triable exclusively by the Court of Session the Sessions Judge can set aside the order and commit the accused for trial (1) when he considers that the charge was not groundless, and (2) when he considers that there are sufficient grounds for commitment, both on facts and on legal grounds, or even when the proceedings before the inferior Court were not regular, and that is the meaning of the expression "improperly discharged". This then being the extent and scope of the revisional jurisdiction of the Sessions Judge, it is difficult to see how it can be said that an order of discharge made by a Magistrate after hearing all the evidence for the prosecution ought not to be set aside unless "the order is perverse or manifestly unreasonable and inconsistent with an honest appreciation of the evidence by the Court." Nor is there, with sincere respect for Mr. Justice Broomfield, any warrant for the proposition the learned Judge laid down in Parasharam Bhika v, Emperor in these words (p. 540) :-

...the question whether it ought to be set aside in revision depends on whether it is a reasonable order, the criterion being, not whether the revising Court agrees with it, but whether it is rational in the sense that it cannot be fairly described as perverse or manifestly contrary to the evidence.

Having said this, there are some points to which I might usefully refer, j The first is that this Court has always held that the power in revision has to be used not freely but sparingly, not as if the revising Court is sitting in appeal from a judgment of the lower Court. That rule is good enough for the guidance of the High Court, and a fortiori I think that rule is binding on all subordinate Courts. The second point is that the Sessions Judge must remember, first, that the Magistrate who discharged the accused had the advantage of seeing the witnesses for himself. Thirdly, the object of the legislature in requiring an inquiry before a trial in the Court of Session is to prevent commitment of cases in which there is no reasonable ground for conviction and to save people from the anxiety of undergoing prolonged and expensive trials

and to save the time of the Sessions Court from being wasted. These considerations, I think, should be borne in mind by the Sessions Judge when he is acting in the exercise of his revisional jurisdiction, and will make it obvious that the power to interfere in revision is not to be exercised freely. If these considerations are borne in mind, then I have no doubt that the powers u/s 437 would not be exercised as freely as one would think. When, however, the Sessions Judge interferes with an order of discharge, he must clearly indicate the reasons which would justify him for doing so, so that the order of the Sessions Judge may in turn be examined by this Court if, and when, it is challenged.

21. In this view it is not necessary to refer to the cases cited before us. The result of a careful consideration of the sections and the cases is, in my opinion, as follows :-(1) That it is competent to the committing Magistrate at any stage of the preliminary inquiry to discharge the accused if he considers the charge to be groundless for reasons to be recorded by him. (2) The committing Magistrate is entitled to weigh and appreciate the evidence led on behalf of the prosecution and on behalf of the defence, and if on a consideration of this evidence he is of opinion that there are not sufficient grounds for committing the accused for trial, in other words, there is no case which would fairly justify or sustain a conviction at the trial, or no evidence on which any reasonable person can hold the accused to be guilty, then it is his duty to discharge the accused. (3) If after a charge is framed and a list of further witnesses put in by the accused and the Magistrate after examining any such witnesses thinks that there are not sufficient grounds for committing the accused for trial, it is his duty to cancel the charge and discharge the accused. (4) The expression "sufficient grounds" means when credible witnesses make statements which, if believed, would sustain a conviction, (5) The Sessions Judge has jurisdiction to interfere in revision but such jurisdiction should be exercised only if he thinks that the order is illegal or incorrect or otherwise improper. (6) The expression "improper" in this connection means that in the opinion of the Sessions Judge there were sufficient grounds before the Magistrate on which he ought to have made an order for committal. (7) The power in revision must not be used freely. (8) The Sessions Judge must give reasons for his interference, so that if the matter comes to this Court, this Court may have materials before it for deciding whether the Sessions-Judge acted properly in interfering with the order of discharge.
Divatia, J.

22. I agree and have nothing to add.