Nahar Singh vs The State on 24 September, 1951

Equivalent citations: AIR1952ALL231, AIR 1952 ALLAHABAD 231

JUDGMENT

Desai, J.

1. This is an application in revision against an order of the Additional Sessions Judge of Agra cancelling a charge framed against the applicant under Section 304A, Penal Code, by a Magistrate and directing him to be committed to the Court of Session to stand trial on the charge of Section 304, Penal Code. The learned Sessions Judge claims to have exercised the powers conferred by Section 437, Criminal P. C., and the question that we have to decide is whether those powers could have been exercised by him in the circumstances of the case In obedience to the learned Judge's order, the learned Magistrate has framed a charge under Section 304, Penal Code, and committed the applicant to the Court of Session. No prayer has been made by the applicant for the quashing of the commitment. It does not matter, however, inasmuch as if the order under revision is set aside, the consequential order can be passed by us quashing the commitment.

2. The applicant was prosecuted by the police under Section 304, Penal, Code for causing the death of a barber by shooting at him. The learned Magistrate commenced proceedings under chap. 18 of the Code. He recorded the evidence for the prosecution and also defence evidence and then framed a charge under Section 304A, Penal Code. He did not pass any order explaining why the charge was framed under Section 804A, Penal Code, and not under Section 304, Penal Code. The charge-sheet is the only document which shows what was done in the case; the order-sheet also contains no order of any kind. Joti, a son of the deceased barber, went up in revision against the framing of the charge to the learned Sessions Judge. The learned Sessions Judge passed the order under revision, treating the not framing of a charge under Section 304, Penal Code as discharge of the applicant. It is important to note that the trial of the applicant under Section 304A, Penal Code was pending in the Court of the learned Magistrate on the date on which the learned Sessions Judge passed the order, and the trial is now pending in the Court of the learned Sessions Judge. Another important, fact to be noted is that there was only one offence alleged against the applicant, namely, that of causing the barber's death by shooting. He is accused of whatever offence is constituted by the act and of no other offence.

3. The relevant portion of Section 437, Criminal P. C. is as follows :

> "When.. . . 'the Sessions Judge'... considers that such case is triable exclusively by the Court of Session and that an accused person has been improperly discharged by the inferior Court, the Sessions Judge . . . may cause him to be arrested, and may thereupon, . . . 'order him to be committed for trial upon the matter of which he has

been . .., improperly discharged."

The sole question for decision is whether the applicant was discharged by the learned Magistrate or not. The learned Magistrate being of the view that the act alleged against the applicant, constituted the offence of Section 804A, and not of Section 304, Penal Code, charged him under Section 304A and refrained from charging him under Section 304, Penal Code.

4. The applicant has admittedly not been expressly discharged. It is contended by the learned Government Advocate that not framing a charge under Section 804, Penal Code, was an implied discharge. Whether it was or not can be ascertained in two ways. The Code exhaustively states the circumstances in which an accused can be discharged and one way is to see if any of those circumstances existed in this case. The other way is to see if the learned Magistrate's framing the charge under Section 304A, Penal Code, instead of under Section 804, Penal Code, produced the effect normally produced by discharge.

5. What amounts to discharging an accused is not explained in the Code. All that the Code lays down is that in certain circumstances an accused must be discharged. It follows as a corollary that there is no discharge in the absence of those circumstances ; at least there is no discharge within the meaning of the Code. The word "discharge" used in Section 437 must have the same meaning as the word bears in other sections. Sections 209, 253, 259, 333 and 494 are the sections which lay down the circumstances in which an accused can be discharged. It is Section 209 under which, according to the State, the applicant has been discharged. Admittedly, the circumstances mentioned in the other sections did not exist in the present case. Section 209 lays down that in an inquiry under chap. XVIII of the Code, if the Magistrate after taking evidence for the prosecution and examining the accused "finding that there are not sufficient grounds for committing the accused person for trial, record his reasons and discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly."

The very words of this section show that the applicant has not been discharged all all. Under it there are two alternative acts to be done by the Magistrate ; one of discharging the accused after recording reasons and the other of trying him himself. The section clearly lays down that both the acts are impossible to be done simultaneously; the word "unless" is very significant. I consider that the language of the section itself is conclusive , unless one strains it, one cannot say that the applicant was discharged even though the learned Magistrate decided to try him before himself. No question of express or implied discharge arises at all; there was no discharge of the kind meant by Section 209 when the Magistrate decided to try the accused before himself.

6. Section 253 is somewhat similar to Section 209. It deals with discharge of an accused in a warrant case. An accused can be committed even if the proceedings against him have started as laid down in chap. XXI dealing with the trial of warrant cases. If an accused is prosecuted for an offence exclusively triable by a Court of Session, the Magistrate would proceed as laid down in chap. XVIII. If he is prosecuted for an offence triable by a Magistrate, he would proceed as laid down in chap. XXI (if it is a warrant case); if later on he finds that the accused is guilty of an offence exclusively triable by a Sessions Court, he would have full power to commit him. Section 253 lays down that in a

warrant trial after recording all the evidence for the prosecution and examining the accused, if the Magistrate "finds that no case against the accused has been made out, which, uurebutted, would warrant his conviction, the Magistrate shall discharge him."

The learned Magistrate proceeded as laid down in chap, XVIII ; but even if he be said to have proceeded as laid down in chap. XXI, he has not discharged the applicant within the meaning of Section 253 for the simple reason that he has found some case against him. In a warrant trial an accused would be discharged under Section 253 only if no case of any kind, which would warrant his conviction, has been made out. What kind of case is made out does not matter in the least. So long as any kind of case which would warrant conviction is made out in the view of the Magistrate, there can be no discharge. Here the learned Magistrate thought that an offence of Section 304A had been made out against the applicant and consequently he had not been discharged.

7. I find that none of the circumstances in which an accused is required under the Code to be discharged existed in the instant case ; so it is impossible to say that the applicant had been, even impliedly, discharged within the meaning of the Code.

8. The consequences which naturally follow discharge did not follow the act of the learned Magistrate In Bouvier's Law Dictionary, "discharge" is defined as:

> "the object by which a. person in confinement under some legal process, or held an accusation of some crime or misdemeanour, is set at liberty."

The Dictionary mentions other uses also of the word, for example, when a surety is released from a liability he is said to be discharged, and when a person is released from a debt or a contract the debt or contract is said to be discharged. The word is defined as follows in Tomlin's Law. Dictionary :

> "On writs and process, & o., is where a roan is confined by some legal writ or authority doth that which by law he is required to do; he is released or discharged from the matter for which he was confined."

Osborne's Concise Law Dictionary gives the following definitions: " to relieve a person from an obligation." Wharton gives the following meaning in his Law Lexicon : "to relieve of a duty." Among the various given in Murray's Dictionary are "the act of freeing from obligation, liability or restraint; release, exoneration, exemption: exoneration from accusation or blame; exculpation, acquittal, excuse : release from custody, liberation."

9. The applicant was not exonerated from accusation or blame, exculpated or excused. He-was not freed from any liability. He was being tried for the act and he was being tried notwithstanding the fact that he was being tried for a less severe offence than that for which he was put on trial, that he was being tried before the learned Magistrate himself instead of before a Sessions Court, and that the maximum punishment to which he was liable was less than the maximum punishment to which he would have been liable if committed. He was not released from custody or liberated. Even if he was on bail from before, or had been released on bail by the learned Magistrate after being charged

under Section 304A, that did not amount to his release from custody or liberation; he was still under an obligation to be present in the Court whenever called in the case. He was, therefore, not discharged within the meaning of the word as given by the above mentioned authorities.

10. The Code does not contemplate an implied discharge at all. Sub-section (2) of Sections 209 and 253 allow a Magistrate to discharge an accused at any previous stage of the case if, for reasons to be recorded, he considers the charge to be groundless. Obviously the discharge permitted by the sub sections could be only an express discharge; no accused can be deemed to have been discharged at a previous stage of the case. Section 209 requires the Magistrate to record his reasons before discharging an accused; this also shows that there cannot be an implied discharge. If the reasons are recorded, the discharge would be an express discharge. Under the Code there can be no discharge if proceedings still continue against the accused in the case. One cannot imagine any case under the Code in which an accused is discharged and is still being proceeded against (in the same case).

11. It is necessary at this stage to make it clear that I am dealing with a case in which only one offence is said to have been committed by the accused. If an accused is tried for two or more distinct offences, he can certainly be discharged in respect of one or more and be proceeded against in respect of others. Great confusion would result from the failure to distinguish between a trial for one offence and a trial for more than one offence. The general rule is: "For every distinct offence . . . there shall be a separate charge, and every such charge shall be tried separately"; Section 283, Cr.P.C. In certain circumstances a joint trial for two or more offences is permitted; they are mentioned in Sections 234 and 235. But these are enabling provisions; they permit a joint trial but do not make it obligatory. The word used in them is "may". Section 403 also does not impose any obligation of joint trial. Three offences of the same kind committed by an accused in the course of one year can be tried together; Section 234. Thus a person can be charged in one trial with three thefts committed within a year. Distinct offences committed in one transaction can be tried together; Section 235(1). Thus a person can be charged in one trial with rioting and causing hurt in the course of the riot. These provisions must be distinguished from other which permit a trial for several offences, not distinct from one another, constituted by one act. Different offences constituted by one act, or major and minor offences can be charged in one trial with offences of Sections 380 and 381, I.P.C. for stealing his master's property from a building, or with offences of Sections 304 and 325, I.P.C. for killing somebody. The provision of Section 236 is of a particular importance; it is that if a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with all or any of such offences, or, in the alternative, with having committed any one of the said offences. Thus if he does an act which results in somebody's death, he may be charged in one trial with offences of Sections 304 and 304A, I.P.C., or with Section 304, I.P.C. only or with Section 304A, I.P.C. only. What is noteworthy is that he may be charged with even one of the several offences which are constituted by the facts proved. It is not necessary to charge him with all possible offences constituted by the facts proved. So if he is charged with one offence, it cannot possibly be said that he is discharged. Even if he is charged with Only one offence he can be convicted of whatever offence which, at the end of the trial, is proved to have been committed; this is what Section 237 lays down. It uses the words "for which he might have been charged", and not "of which he was discharged". I need not say anything about Section 239 which deals with joinder of accused with or without joinder of offences.

12. Joinder of two or more distinct offences or charges is permitted by the Code only to save time, money and labour. It is a measure of convenience only. One should not look for any other purpose or effect of joinder of offences. If a person is tried for two distinct offences, it is as good as two trials, one for each offence, and not only must the merits of the two offences be kept separate, but also nothing which happens in the trial for one offence should effect the trial for the other offence. Neither the prosecution nor the defence should be in a better or in a worse position, nor can the Court have greater power, in the trial of one offence on account of the pendency of the trial for the other. If one offence is not proved, the accused can be discharged even though he is being tried for the other. If he had been tried separately for the two offences, he could have been discharged in one case without the discharge in any way affecting his trial in the other case. The trial in the other case could not possibly have prevented his discharge in the former case. The mere fact that for the sake of convenience and facility the two trials are allowed to be merged in one should not produce a different legal result. In one trial the accused can be discharged in respect of one matter, while he is being proceeded against in respect of the other matter. This is the only case in which an accused can be discharged as well as charged. I have said earlier that the Code does not contemplate a case in which an accused is discharged and at the same time is being charged and tried. That is because the Code lays down the procedure for a trial for only one offence in accordance with the general rule. When a joint trial for two distinct offences is allowed the provisions of the Code should be applied separately to the trial for each offence. The joint trial is in effect two trials. And though in the joint trial there are discharging of the accused and charging him with an offence, in fact he is discharged in one trial and charged in the other. When our brethren Dayal and V. Bhargava, JJ. Said "an order of discharge is really an order by which a Court puts an end to the proceedings against the accused with respect to any particular offence" Abdul Waheed v. Rex, 1950 All. L. J. 647 at p 649.

they meant the proceedings in a trial for one offence and not in a trial for two or more offences. The learned Government Advocate said that discharge may be in the middle of the trial and need not be only at its termination; this is true in the case of a trial for two or more offences but not of, a trial for only one offence.

13. The diversion is regretted, but it was necessary. An express order of discharge is necessary because it terminates the proceedings against the accused in respect of the particular matter. When that is the only matter for which he was tried, there will invariably be an express order. It may be wrongly worded, but the order is bound to be there. Even in a joint trial for two or more offences there ought to be an express order of discharge if the Magistrate finds that one or more of the offences are not proved. If a man is tried for two distinct offences and there is no evidence to prove one, the Magistrate should while framing a charge in respect of the other pass an order of discharge in respect of the former. If he simply frames a charge without passing an express order of discharge he commits an irregularity, and the accused would be deemed to have been discharged in respect of the former offence. I think this is the only case in which discharge can be implied.

14. There are several provisions in the Code giving strong support to the proposition that framing a charge is absolutely inconsistent with discharging (always remembering that a joint trial for two or more offences is in reality two or more separate trials). I have already mentioned the provision in Section 209. Section 210 lays down that if the Magistrate is satisfied that there are sufficient

grounds for committing the accused for a trial he should frame a charge against him. This provision permits the framing of any charge, not necessarily that for an offence exclusively triable by a Court of session. A Magistrate can commit an accused to a Court of Session for trial even for an offence of Section 379, Penal Code (if he wants the accused to be punished with more than two years' imprisonment). In the case at hand the learned Magistrate could have committed the applicant to stand trial even for the offence of Section 304A, if he wanted him to be fined more than us. 1000. If the learned Magistrate had actually committed the applicant to the Court of Session under Section 304A, I doubt if he could be said to have discharged him. If there was no discharge then, there is no reason why discharge should be implied merely because the learned Magistrate has decided to try the applicant on the charge himself. Whether an accused is discharged or not does not at all depend upon whether he is committed or not to a Sessions Court. If after framing a charge under Section 210 the Magistrate, after hearing defence evidence, is satisfied that there are not sufficient grounds for committing the accused, he can cancel the charge and discharge him; see Section 213(2). The words "cancel the charge" and "discharge the accused" show that there can be no discharge so long as the accused remains charged. An accused is discharged under Section 253 if no case of any kind, whether mentioned in the complaint or report for prosecution or not, is made out against him by the evidence. An accused who is charged cannot be discharged so long as the charge stands, he can be convicted or ho can be acquitted, but he cannot be discharged under any provision of the Code. The only instance of discharge after being charged is that mentioned above, but there the charge is first cancelled. When there can be no discharge in the face of a charge, it is difficult to understand how discharge can come into existence just on account of a charge being framed. The applicant, for example, is said to have been discharged by the mere act of the learned Magistrate's framing a charge against him under Section 304A. It is not contended that he was discharged before the charge was framed against him; the discharge is said to have come into existence as the result of the charge. Such an anomalous position is not contemplated by the Code at all.

15. When an accused is convicted of an offence or acquitted, he is deemed to have been acquitted of all other offences which could have been made out from the evidence on the record. For instance, if he is convicted under Section 325, Penal Code, for causing the death of another person by striking him, he will be deemed to have been acquitted of the offences of Section 304, or Section 302 or any other offence which can at all be made out from the evidence. There is a clear authority of the Judicial Committee of the Privy Council for this proposition Kishan Singh v. Emperor, 50 ALL, 722, There is no provision in the Code under which discharge would be transformed into acquittal. By no process can discharge be transformed into acquittal. The acquittal, in such a case, comes into existence for the first time when the accused is acquitted or convicted of some other offence. So long as he is under trial, he cannot be said to have been acquitted at all. If the acquittal comes into existence for the first time when the ease ends and it could not have possibly resulted from discharge, it follows that there never was any discharge. Referring to the above example of an accused convicted under Section 325, Penal Code, he is deemed to have been acquitted of the charge of Section 304 or Section 302 on his being convicted under Section 325. Since this acquittal did not grow out of any discharge, it means that he was never discharged of the offence of Section 804 or 302. He cannot be said to have been both discharged and acquitted; a discharged person cannot possibly be acquitted. So it cannot be said that he was discharged in the beginning and that on his conviction under Section 325, acquittal was superimposed. The only view possible is that he was

never discharged.

16. Section 403 of the Code enacts that a person who has been once tried and convicted or acquitted of an offence cannot be tried again not only for the same offence but also on the same facts for any other offence for which a different charge might have been made against him under Section 236 or for which he might have been convicted under Section 237. The explanation to the section lays down that the discharge of an accused is not an acquittal for the purposes of the section. It follows that when an accused, liable to be charged with two or more offences under Section 236, is charged with only one, it does not amount to his being discharged of the others. How this follows can be made clear by taking an example. Take the case of a person who could have been charged on the same facts either under Section 804 or under Section 302 or under both in the alternative. If he is charged under Section 304 and acquitted, he cannot be tried again on the same facts under Section 302; his second trial is barred by Section 403. I do not think this can be disputed. But if the accused were deemed to have been discharged of the offence of Section 302 on account of his being charged under Section 304, the discharge not being acquittal for the purposes of the section, the accused would not have been saved from second trial for the offence of Section 802. I take the liberty of repeating that there being no provision for discharge blossoming into acquittal, the discharge would have remained discharge in respect of the acquittal of the charge of Section 304.

17. A Sessions Judge or District Magistrate is empowered by Section 436 of the Code to make, or order, further inquiry "into the case of any person accused of an offence who has been discharged." Now if an accused is charged under Section 315, Penal Code and is deemed to have been discharged as far as the offence of Section 307, Penal Code is concerned, the Sessions Judge or District Magistrate can only order an inquiry into the charge of Section 307, Penal Code ; he cannot interfere with the trial proceeding on the charge of Section 325, Penal Code. A High Court possesses inherent powers and in exercise of those powers may quash the proceedings pending under Section 325, Penal Code, but a Sessions Judge or District Magistrate does not possess inherent powers and cannot quash those proceedings. The Legislature could not have intended that the accused should be subjected to two trials or proceedings on the same allegation. If not, while he is being tried under Section 325, Penal Code, he cannot be proceeded against on the charge of Section 307, Penal Code; in other words, Section 486 of the Code would not apply and he would not be deemed to have been discharged. The language of Section 437 of the Code is inconsistent with the idea of implied or incomplete discharge. It uses the word "case" and not "offence". The discharge is from the case and not of any particular offence. The words "upon the matter of which he has been ... improperly discharged" are not without significance. The Legislature has not used the words "upon the offence of which he has been ... improperly discharged." Usually the word "discharge" is used in the Code without any qualification. If there were anything like an accused person's being charged with one offence and discharged of another offence (of course, based on the same allegation), one would have come across words like "discharged of this offence or that." Section 437 is probably the only section which qualifies the discharge of an accused by using the words "upon the matter of which he has been ... discharged", but even here the word "offence' is not used. The "matter" means the allegation. So long as some charge is framed to cover the allegation, there is no discharge. I do not understand why an accused, charged with, one offence should be deemed to have been discharged as regards all other offences which could possibly have been made out from the evidence. Proviso (b) to Section

437 allows the Sessions Judge or District Magistrate, who thinks that the evidence shows that some other offence has been committed by the accused, to direct the inferior Court to inquire into that offence. If the inferior Court is already trying the accused, even if for some other offence based on the same evidence, there would be no sense in the Sessions Judge's or District Magistrate's directing it to inquire into the offence because it is always open to the inferior Court to convict the accused of the offence committed by him by applying the provisions of Section 237 of the Code. In order to render the proviso not redundant, it must be held that an accused, undergoing a trial for one offence, is not to be deemed to have been discharged as regards other offences which might be made out from the same evidence.

18. No injustice, anomaly or absurdity is likely to result from the view that the discharge contemplated by Section 437 does not include not framing a charge under the section when a charge under another section is framed. The Magistrate is not prevented from committing the accused at a later stage; Section 347 gives him full power to do this, so long as he has seizin over the case. So long as the case is not decided by him, nobody-can predicate that the accused would not be committed by him. If he retains the power of commitment, it would be difficult to say that the accused has been discharged. When in a trial for one offence a Magistrate discharges an accused he becomes functus officio as regards that trial; he has no power of reviewing or revising the order of discharge. If a second complaint on the same allegations is presented before him, he can take cognisance of it; the discharge order may be set aside by a superior Court under Section 436 or 437 or 438; bat he himself cannot do anything after the discharge. If he is trying the accused for two distinct offences, the mere accident that two trials have been combined into one for the Bake of convenience would not enhance his powers If he frames a charge in respect of one offence only, whether he says anything regarding the other or not, he has discharged him as regards it, and he would have no power to convict him of it while convicting or acquitting him of the former. Suppose an accused is being tried for causing simple hurt to A and grievous hurt to B. These are two distinct offences; on account of their having been committed in one transaction, their joint trial is permitted. But they could be tried separately also. If the Magistrate frames a charge against the accused under Section 325, Penal Code for causing grievous injury to B and does not frame any charge in respect of the injury caused to A, the accused is discharged as regards the injury caused to A. If he had been tried separately, on his being discharged in the case relating to the injury caused to A, he would have left the Court and the Magistrate would have been left with no jurisdiction at all over him. The Magistrate himself could not have revised the order of discharge and put him on trial again. Merely because he is being tried jointly the Magistrate would not have power of charging him under Section 323, Penal Code, at a later stage while trying him on the other charge of Section 325, Penal Code or of convicting him under both sections. Neither Section 227 nor Section 437 of the Code would apply. Section 227 only permits alteration of, or addition to, a charge ; it presumes the existence of a charge. If there is no charge at all, the section cannot come into operation. Section 347 applies when an inquiry or trial is proceeding. When a charge is framed in respect of one matter and no charge is framed in respect of the other distinct matter, there is no inquiry or trial as regards the other matter, and the Magistrate would have no power of committing the accused for trial upon the other matter. In the present ease there is only one matter. The applicant has done only one act and not two or more distinct acts. When the learned Magistrate thought that the act is punishable under Section 304A, Penal Code and framed a charge under that section, he has not discharged or lost jurisdiction

over him and he can, at any time before convicting or acquitting him, frame a charge under Section 304, Penal Code and commit him for trial. Another remedy is that the complainant can file another complaint under Section 304, Penal Code, this complaint would not be barred by the provisions of Section 403; see Sub-section (4) and illus. (g). Commitment can be ordered even by the High Court in exercise of its powers under Section 439, the exercise of which does not depend upon any "discharge." Finally, after the Magistrate has passed a judgment of conviction or acquittal, Government can file an appeal against the acquittal of the charge of Section 304, Penal Code.

19. The facts in Abdul Waheed v. Rex, (1950 ALL. L. J. 647) are exactly similar to those of the case at hand and it was decided in that case that in such circumstances a Sessions Judge has no power under Section 437 to order the accused to be committed. In Bilodar v. Emperor, A.I.R. (13) 1926 Oudh 194, Ashworth J., observed that the discharge contemplated by Section 437 is absolute and not partial or implied discharge. The same view was taken by the Court in Nasimullah v. Emperor, A.I.R. (28) 1941 Oudh 409. Gandi Appa Razu v. Emperor, 43 Mad. 330 is a Madras case in which the same view was taken by a Division Bench. In that case the accused was prosecuted under Sections 147 and 302, Penal Code, but was charged only under Sections 147, 323 and 325. The complainant applied to the District Magistrate to revise the charge under Section 435 of the Code. Krishnan J. observed that there was no express order of discharge as to Section 304, Penal Code, and that order of discharge could not be implied inasmuch as the trial had not come to a close and it was still open to the Magistrate to frame further charges and commit the accused under Section 347 of the Code. 20. The contrary view has been taken in Sheo Narain v. Badha Mohan, A.I.R. (6) 1919 ALL. 66, Amir Hasan v. Rex, A.I.R. (35) 1948 ALL. 405, Ganga Datta v. Emperor, A.I.R. (23) 1936 Nag. 87, Sultan Ali v. Emperor, 36 Cr.L.J. 466 (Lah.) and in In re Lakshmayya, A.I.R. (32) 1945 Mad. 459. The case of Shevaram was expressly dissented from in Abdul Waheed v. Rex, 1950 ALL. L. J. 647. The observation in Amir Hasan's case that omission to frame a charge is tantamount to an implied order of discharge also was dissented from by the Bench. In Ganga Datta's case Gruer J. followed Sheo Narain Singh v. Radha Mohan and Krishna Reddi v. Subbamma, 24 Mad. 136 and applied the analogy of the principle laid down in Kishan Singh v. Emperor, (50 ALL. 722). With great respect to the learned Judge I would point out that the principle laid down in Kishan Singh's case cannot be applied to discharge. When an accused is tried by a Magistrate to the end on a charge of Section 304A, Penal Code, whether the case ends in conviction or acquittal, he can be deemed to have been acquitted of the charge of Section 304 or 302, Penal Code, but it does not follow that not framing a charge amounts to discharging. There is a fundamental difference between acquitting and framing a charge under one section and not framing it under another section. On acquittal the Magistrate becomes functus officio and can do nothing further in the matter. But so long as he is trying the accused on any charge whatsoever, he retains full freedom to alter the charge or add to it and commit the accused. The learned Judge also relied upon the fact that the Magistrate had considered the question of charging the accused with the graver offence and had decided against it. He thought that:

> "Where a Magistrate deliberately frames a charge on the minor section instead of on the major section on which the case starts, his action is equivalent to a discharge with regard to the major offence."

I do not know how whether the accused is discharged or not would depend on whether the Magistrate has or has not, applied his mind to the question of charging him with the offence of which he is said to be discharged, or on whether the accused was prosecuted on that charge or not. If I am right in my view that the discharge contemplated under the Code is discharge from the case without regard to the offence, for what offence the accused was prosecuted and whether the Magistrate consciously or unconsciously failed to charge him with the major offence is wholly immaterial. In my judgment, even if the Magistrate writes out a detailed order giving reasons for framing a charge for minor offence and for not framing a charge for the major offence and even if he says that he discharges the accused of the major offence, there is no discharge. Similarly, an accused charged under Section 304A, Penal Code in a case started on a report for prosecution under Section 304, Penal Code is no more discharged than he would have been if the report had been for prosecution under Section 304A, Penal Code. The case of Sultan Ali was a Bench case and the learned Judges followed the case of Krishna Reddi. In Lakshmayya's case, Happell J. distinguished the case of Gandi Appa, 43 Mad, 330 for reasons which, do not appeal to me.

21. Those are the cases in which proceedings against the accused on a minor charge were pending when the question arose whether the Sessions Judge or District Magistrate could order further inquiry, or commitment under Section 436 or 437. Krishna Reddi v. Subbamma, (24 Mad. 136), Khanu v. Emperor, 25 Cr.L.J. 1368 (Sind), In re, K.V.M. Parameswarayya, A.I.R. (36) 1949 Mad. 430, Emperor v. Sukhlal, 56 ALL. 529 and Shambhooram v. Emperor, 37 Cr.L.J. 80 (sind) are cases in which the question arose after the decision of the case by the Magistrate. The view taken in these cases that even after the decision of the case the accused would be deemed to have been discharged of the offence of which he was not charged is contrary to the view taken in Kishan Singh's case, 50 ALL. 722. What would be implied is acquittal and not discharge. The decision in Kishan Singh's case was forestalled by Prinsep and Ameer Ali JJ., in Baijnath v. Gauri Kanta, 20 Cal. 633. That was a prosecution on the charge of Section 395, Penal Code; the Magistrate framed charges under Sections 448 and 380, Penal Code only and ultimately acquitted the accused of both the charges. The learned Judges ruled that Section 436 of the Code did not empower the Sessions Judge to order further inquiry into the charge of Section 385, because the accused was acquitted and not discharged as far as that charge was concerned. In Har Kishore v. Jugul Chunder, 27 Cal. 658 a complaint wag lodged on which the Magistrate convicted the accused under Section 426, Penal Code. The Sessions Judge, acting under Section 436 of the Code, directed further inquiry into the complaint under Section 144, Penal Code. No charge under Section 144 was made at any time against the accused. So a Division Bench held that the order of the Sessions Judge was illegal. The accused was not discharged because he was never tried for any offence except that of mischief. Even if the accused had committed two distinct offences punishable under Sections 426 and 144, Penal Code, he was prosecuted only for the offence of Section 426, Penal Code, and having been convicted of that offence he could not possibly be said to have been discharged.

22. My conclusions are that the applicant was never discharged and that the learned Sessions Judge was not empowered by Section 437 of the Code to order commitment of the applicant. His order dated 7-7-1950 should be set aside, as also the commitment ordered by the learned Magistrate on 26-7-1950. The charge framed under Section 304, Penal Code, by the learned Magistrate should be cancelled and he should be directed to proceed with the applicant's trial on the charge of Section

304A, Penal Code. This order will not affect his powers under Section 347, Criminal P. C. Bind Basni Prasad, J.

23. This reference to the Full Bench was made by a learned single Judge because he found it difficult to accept the law laid down in Abdul Wahid v. Rex, 1950 ALL. L.J. 647. In that ease the complainant alleged that the accused had committed offences under Sections 307 and 325, Penal Code. The Magistrate, however, framed a charge against the accused under Section 323, Penal Code. The complainant filed a revision before the Sessions Judge praying that the Magistrate should be ordered to commit the two accused to the Court of Session for the offence under Section 307, Penal Code. Agreeing with the complainant, learned Sessions Judge ordered under Section 437, Criminal P.C., that the case should be committed to the Court of Session for the trial of the offence under Section 307 read with Section 34, Penal Code. Dayal and Bhargava JJ. held that the mere non-framing of a charge did not amount to an order of discharge so long as the accuse d was on trial with respect to the offences which were charged against him. The Magistrate was free to frame subsequently a charge which he did not consider necessary to frame at an earlier stage of the proceedings. So long as the Magistrate retained the option of framing a charge against the accused it could not be said that the Magistrate had by his non-framing of the charge discharged that accused of the offence which might have been made out against him on the basis of those allegations. I respectfully agree with the view taken in that case. At page 650 learned Judges while discussing Section 333 and other sections of the Code of Criminal Procedure observed :

> "This again makes it clear that when the accused is discharged all proceedings terminate against him. ....
>
> Lastly Section 494, Criminal P.C., provides for the discharge of an accused when any public prosecutor withdraws from the prosecution of any person. This section provided a complete discharge and the termination of the entice proceedings against the accused, till this section was amended in 1923. The amended section provides that a Public Prosecutor may, with the consent of the Court, withdraw from the prosecution of any person either generally or in respect of one or more of the offences for which he is tried, and upon such withdrawal, if it is made before the charge has been framed, the accused shall be discharged in respect of such offence or offences. Even now it means a complete termination of the proceedings with respect to the particular offence or offences which have been withdrawn by the public prosecutor. ....
>
> The provisions of Section 437, Criminal P.C., also appear to contemplate a discharge of an accused either with respect to the entire proceedings against him or with respect to any particular offence but out of the several offences which were alleged against him."

24. Earlier at p. 649 learned Judges observed :

> "An order of discharge is really an order by which a Court puts an end to the proceedings against the accused with respect to any particular offence, which means with respect to such acts or things which are punishable and for which the punishment of the accused is sought in the cage. Such an order of discharge can result in the termination of the entire proceedings against the accused when the Court does not proceed against the accused with respect to any offence and can also arise when the Court decides to proceed against the accused with respect to certain offences and not with respect to others. But before an order can really amount to an order of discharge it is essential that with respect to certain offences the entire proceedings against the accused do come to an end."

25. It is clear from the above that where a person is accused of only one offence his discharge will bring about a complete termination of the proceedings against him. But if he is accused of several distinct offences, each independent of the other, then it is possible that he may be discharged of one or more of such offences and may be proceeded with in respect of the rest. There would be then a termination of proceedings so far as they relate to the offences of which he is discharged, but no termination in respect of the others. In such a case there can be no addition to the charge under Section 227 of the Code in respect of the offences of which he has been discharged. Once a Magistrate has discharged a person of an offence, he becomes functus officio in regard to it. Where a person is accused by the complainant for a major offence and the Court frames a charge for a minor offence, as in the present case, it does not amount to a discharge because the case is proceeding against him on the same facts. I agree that the learned Sessions Judge was not competent to entertain the revision. This revision should, therefore, be allowed.

Malik, C.J.

26. I have read the judgments of my learned brothers Bind Basni Prasad and Desai, JJ., and agree that a mere non-framing of a charge by Magistrate does not necessarily mean the discharge of the accused so long as the Magistrate can under Sections 226 to 230, Criminal P.C. frame the charge which he had not considered necessary to frame at the earlier stage. Where a person is accused of only one offence his discharge should bring about a complete termination of the proceedings against him. The question of being called upon to frame separate charges for distinct offences has not arisen in this case. And any observations on the point will be obiter. I need, therefore, only say that I am doubtful whether the result is different if the accused is said to have committed distinct offences each independent of the other. In such a case also the mere non-framing of a charge with respect to one distinct offence should not necessarily amount to an implied discharge as even in that case the Magistrate can frame a fresh charge in the course of the proceedings if he considers it necessary as is clear from Sections 227 to 230 of the Code. Once a Magistrate has discharged a person he becomes functus officio and he cannot review his order though if the proceedings are restarted on a fresh complaint, he may decide to frame a charge which in the previous proceedings he had refused to do I agree that the learned Sessions Judge was, therefore, not competent to entertain the revision. I would, however, make it clear that if at any stage it appears to the Magistrate that a charge under Section 304, Penal Code, should be framed and that the accused should be committed to the Court of Session, the order passed by us does not in any way fetter his discretion under Section 347,

Criminal P. C. By the Court

27. The revision is allowed The order of the learned Additional Sessions Judge dated 7th July 1950, cancelling the charge framed by the learned Magistrate, directing him to frame a charge under Section 304, Indian Penal Code, and committing the case to the Court of Session is set aside. The commitment order dated 26th July 1950, passed by the learned Magistrate and the charge under Section 304 Indian Penal Code framed by him are also cancelled He may proceed with the trial of the accused under Section 304A, Indian Penal Code, but if in the course of the trial it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session then he is at liberty under Section 347, Criminal P.C. to commit the accused.