Ratilal Bhanji Mithani vs The State Of Maharashtra & Ors on 28 September, 1978

Equivalent citations: 1979 AIR 94, 1979 SCR (1) 993, AIR 1979 SUPREME COURT 94, 1979 CRI LJ 411, (1979) 1 SCR 993, 1973 (3) MAH LR 172, 1979 CRI APP R (SC) 1, 1979 SCC(CRI) 405, (1979) SC CR R 99, 1979 (2) SCC 179, 1979 CRI. L. J. 41, (1979) 1 SCR 993 (SC) (1979) 3 MAHLR 172, (1979) 3 MAHLR 172

Author: Ranjit Singh Sarkaria

Bench: Ranjit Singh Sarkaria, O. Chinnappa Reddy, A.P. Sen

PETITIONER:
RATILAL BHANJI MITHANI

Vs.

RESPONDENT:
THE STATE OF MAHARASHTRA & ORS.

DATE OF JUDGMENT28/09/1978

BENCH:
SARKARIA, RANJIT SINGH
BENCH:
SARKARIA, RANJIT SINGH
REDDY, O. CHINNAPPA (J)
SEN, A.P. (J)

CITATION:
1979 AIR 94 1979 SCR (1) 993
1979 SCC (2) 179

ACT:
Code of Criminal Procedure 1898, (5 of 1898)-Charge framed-Whether Magistrate has power to cancel the charge and discharge the accused.
'Discharge' and 'Acquittal'-Distinct concepts applicable to different stages of proceedings.

HEADNOTE:
The appellant and six others were charged with the offence of entering into criminal conspiracy, with intent to defraud the Government of the duty payable on various

contraband goods, etc. and thereby committing offences under s. 120B I.P.C.. read with 6. 167(81) of the Sea Customs Act 1878 and s. 5 of the Import and Exports Act 1947.

The prosecution alleged that is a result of the criminal conspiracy twenty-four consignments of goods came from abroad and were received in Bombay and it is the case of the prosecution that it has in its possession 10 verladescheins (called as 'mate sheets' or receipts) which give the description of the contraband goods. Out of there 10 verladescheins, 2 relate to consignments of two firms for which the appellant held powers-of-Attorney.

The Trial Magistrate held that 10 out of the 20 Verladescheins were inadmissible either under the Evidence Act or under the Commercial Documents Evidence Act 1939 and that 9 out of the 10 Verledescheins were admissible under s. 10 of the Evidence Act. He also excluded some other letters and correspondence on the ground that they could not be said to have been written in furtherance of the conspiracy .

On the basis of the evidence recorded, the Magistrate framed charges against the appellant and the co-accused.

The prosecution as well as the appellant filed revision applications in the High Court. A single Judge of the High Court held that the Magistrate will have to consider afresh whether the documents, which he had admitted under 6. 32 or s. 10 of the Evidence Act were admissible or not and also consider whether it was necessary to frame additional charges.

After this order, the Additional Chief Presidency Magistrate discharged the accused on the grounds that since no overt act was proved against the appellant and certain other accused no consideration can be inferred as against them.

A Division Bench of the High Court allowed the revision petition filed by the prosecution and held that the Magistrate had no legal power to discharge the accused after framing the charge.

In the appeal to this Court it was contended on behalf of the appellant that in passing the impugned order, the Magistrate was simply acting in consonance with the observations and implied directions contained in the order of the High Court.

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Dismissing the appeal,

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HELD: 1. From the scheme of the provisions contained in ss. 252 to 57 given in Chapter XXI of the Code of Criminal Procedure 1898. it is clear that in a warrant case instituted otherwise on a police report, 'discharge' or 'acquittal of accused are distinct concepts applicable to different stages of the proceedings in the Court. The legal effect and incidents of `discharge' and 'acquittal' are also different. An order of discharge in a warrant case instituted on complaint can be made only after the process

has been issued and before the charge is framed. A discharge without considering the evidence taken is illegal. If a prima facie case is made out the Magistrate must proceed under s. 254 and frame charge against the accused. The trial in a warrant cause starts with the framing of charge; prior to it the proceedings are only an inquiry. After the framing of charges if the accused pleads guilty, the Magistrate is required to proceed with the trial in the manner provided in s. 254 to 258 to a logical end. Once a charge is framed, the Magistrate has no power to cancel the charge and reverse the proceedings to the stage of s. 353 and discharge the accused. [1004 F-G, 1004H 1005 A-B]

2. After a charge is framed, the Magistrate has no power under the Code to discharge the accused. He can either acquit or convict the accused unless he decides to proceed under ss. 349 and 562 of the Code of 1898 (which corresponds to sections 325 and 360 of the Code of 1973). Exception where the prosecution must fail for want of a fundamental defect, such as want of sanction, an order of acquittal must be based upon a 'finding of not guilty' turning on the merits of the case and the appreciation of evidence at the conclusion of the trial. [1005 C-D]

3. If after framing charge the Magistrate whimsically, without appraising the evidence and without permitting the prosecution produce all its evidence, 'acquits' the accused, such an acquittal, without trial even if clothed as 'discharge' will be illegal. [1005 E]

4. In the instant case the Magistrate framing charges against the appellant. On the disposal of the revision application be arbitrarily deleted those charges and 'discharged' the accused without examining the remaining prosecution witnesses. [1005 F]

5. Assuming arguendo, the Magistrate's order of discharge was on order of 'acquittal' then also, it was manifestly illegal. It was not passed on merits, but without any trial, with consequent failure of Justice. The High Court has undoubtedly the power to interfere with such a patently illegal order in the exercise of its revisional jurisdiction under s. 439 and direct a retrial. Such retrial will not be barred by the provisions of s. 403 (of the Code of 1898), the earlier proceedings taken by the Magistrate being no trial at all and the order passed therein being neither a valid 'discharge' of the accused nor their acquittal as contemplated by s. 405(1). [1007 F-H]

Mohd. Safi v. State of West Bengal AIR 1966 SC 69 referred to.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 95 of 1 977.

Appeal by Special Leave from the Judgment and order dated 21-1-76 of the Bombay High Court in Criminal Revision Application No. 565 of 1969.

I.N. Shroff and H.S. Parihar for the Appellant. Soli J. Sorabjee, Addl. Sol. Genl (for Respondent No.

2), K.N. Bhat, H.R. Khanna, M.N. Sroff and Girish Chandra for Respondents Nos. 1 and 2.

The Judgment of the Court was delivered by SARKARIA, J.-This appeal by special leave is directed against a judgment, dated January 21, 1976, of the High Court of Judicature at Bombay in Criminal Revision Application No. 565 of 1969, whereby it set aside an order, dated February 26, 1969, of the Chief Presidency Magistrate and directed the latter to restore Case No. 244/C.W. of 1968 against the accused persons, excepting accused No. 7 (who is since dead) for being dealt with in the light of the observations made therein.

The case was originally instituted on April 1, 1961 on the basis of a criminal complaint filed by the Assistant Collector (Customs) in the Court of the Chief Presidency Magistrate, Esplanade, Bombay. It is alleged in the complaint that between August 1957 and March 1960, offences under Section 120-B, I.P.S., read with Section 167(81) of the Sea Customs Act, 1978, and Section 5 of the Imports and Exports Act, 1947, were committed by one Ramlal Laxmidutta Nanda and seven others, including the appellant, who is accused No. 2 in the Trial Court. Ramlal Laxmidutta Nandas was alleged to be the principle culprit. He died on September 15, 1960. As a result of a conspiracy, twenty-four consignments of goods came from abroad and were received in Bombay. The conspiracy was carried out in this manner by steamer, two consignments hearing similar marks would arrive such as M.T.S. M.I.S. marked in triangle. The first consignment would contain the genuine goods and the second consignment would contain less number of cases than the first consignment. The documents would arrive for the first consignment. With the help of the documents for the genuine goods, the Customs examination would be carried out, and then at the time of removing the real consignment, contraband consignment plus one case of the genuine consignment would he removed. Remaining goods of the genuine consignments with their marks tampered, would be left unattended in the docks. Out of the 24 consignments brought into India, the last four were seized by the Customs. The appellant Mithani was not linked with any of those four. But with regard to the remaining 8 out of the twenty consignments the prosecution alleges that it has in its possession 10 Verladescheins (called as 'mate sheets or receipts') which give the description of the contraband goods. Out of these 10 Verladescheins.

2 relate to consignments in the name of Suresh Trading Co. and Dee Deepak & Co. From the proprietors of these two firms, the appellant Mithani held Powers of Attorney.

Mithani was arrested and bailed out on May 11, 1960. Between March 1962 and December 1962, the prosecution examined about 200 witnesses before the Magistrate, but had not yet examined any witness in regard to any of the 10 Verladescheins.

The complainant made an application to the trial magistrate, requesting him to get on record a number of documents falling into these categories, viz. (1) Verladescheins (Mate's receipts), (2) the

correspondence that passed between Shaw Wallace & Co. and their principals and agents abroad and also the correspondence that passed between the other shipping agents in Bombay with their principals, and (3) the documents concerning the Company known as C.C.E.I. at Zurich.

By an order, dated August 24, 1962, the Magistrate held that 10 out of the 20 Verladescheins were inadmissible either under the Evidence Act or under the Commercial Documents Evidence Act 1939. By another order, dated December 6, 1962, the Magistrate held that 9 out of the 10 Verladescheins were admissible under Section 10 of the Evidence Act. Some other letters and correspondence were also excluded on the ground that they could not be said to have been written in furtherance of the conspiracy.

On December 12, 1962, the Magistrate found that no other witness for the prosecution was present. He, therefore, passed this order "None of the witnesses are present. The case is very old. There is enough evidence for the purpose of charge and about 200 witnesses are examined. Prosecution may examine all witnesses as they deem proper after the charge. Prosecution closes its case. Accused statement recorded. Adjourned for arguments for charge to 13.12.1962."

The Magistrate then heard the arguments and thereafter on December 21, 1962, on the basis of the evidence already recorded, framed charges against Mithani and his 6 co- accused. Under the first charge, Mithani (accused No. 2) was jointly charged with Accused 1, 3, 4, 5, 6 and 7 with criminal conspiracy between September 1957 and February 1, 1960 or thereabout, with intent to defraud the Government of India of the duty payable on various contraband goods and to evade the prohibition and restrictions imposed relating thereto for acquiring possession of large quantity of contraband goods etc. It was specifically recited in the charge that accused No. 2 was. at the relevant time, partner of Shanti Lal and Chagan Lal & Co., Bombay, and also constituted Attorney of Suresh Trading Co., Dee Deepak & Co., New Delhi, and also of Eastern Trading Corporation, Bombay and had an interest in all these three concerns.

On February 19, 1963, the State filed Criminal Revisions Application No. 107 of 1963 in the High Court against the orders dated August 24, 1962 and December 6, 1962 of the Magistrate, whereby the latter had refused to admit 11 Verladescheins out of 20 in evidence. The State, also, made a grievance against the failure of the Magistrate to frame charges in respect of certain alleged acts of the accused. It was contended that the Magistrate had unduly curtailed the period of conspiracy, while, the evidence brought on the record by the Prosecution showed that this period was longer than what the Magistrate had taken into account.

On July 17, 1964, Mithani, also, filed Criminal Revision No. 574 of 1964 in the High Court, challenging the Magistrate's order, dated December 6, 1962, whereby he had admitted 9 Verladescheins, Bills of Lading, Invoices etc., into evidence. It was further alleged in the Revision Petition: "It ought to have been appreciated that all the Verladescheins, Invoices and Bills of Lading being inadmissible, there is no evidence left on record to make even a prima facie case against the petitioner." The Revision petitioner, inter alia, prayed "that the order of the learned Magistrate dated December 6, 1962, in so far as it is against the petitioner, and the charges framed by the learned Magistrate against the petitioner, be set aside and he be discharged from the case."

Revision Application No. 107 by the State was heard by Mr. Justice H.R. Gokhale (as he then was) on August 19, 1964. It was contended there on behalf of the prosecution that all the Verladescheins were straightway admissible under sub-section (2) of Section 32, Evidence Act. Gokhale, J. Held that since the preliminary condition set out in the prefatory part of Section 32, (Viz., that the persons whose statements are sought to be admitted under Section 32 are such that their attendance cannot be procured without an amount of delay or expense, which under the circumstances of the case, may appear to the Court to be unreasonable, had not been satisfied these Verladescheins (Mates receipts) would not be admissible under Section 32. In view of this, finding the learned Judge felt that "it really does not be come necessary to consider that these Verladescheins were not prepared in the ordinary course of business". The learned Judge was careful enough to caution: "I am not suggesting that for the reasons all these documents are false." Indeed, he conceded that they may be relevant to the facts in issue, and added: "If the prosecution desires to rely upon the evidence of these documents the prosecution certainly will be entitled to prove them or to prove the correctness of the description of the document in the ordinary way without having report to the exception contained in Section 32."

As regards the question whether these Verladescheins were admissible under Section 10, the learned Judge held that "before considering this question, it would be wrong to look at these very documents the admissibility of which is in dispute", and that "such a conclusion can be reached from evidence, documentary, oral or circumstantial, but apart from the disputed document itself. It does not appear from the order of the learned Magistrate that there was any independent material from which he had formed the opinion that two or more persons had conspired together to commit an offence." The learned Judge significantly added: "If there is any such material or if the prosecution leads further evidence and if such material is brought on record, the learned Magistrate will, at the appropriate stage, be entitled to take this material into consideration and decide whether these documents can be admitted under Section 10 of the Evidence Act." The learned Judge pointed out that this could include an attempt to take out the goods. In this connection he observed: "If apart from the question of the period during which the conspiracy extended they are not admissible in evidence, because other conditions required to be satisfied under Section 10 are not satisfied, then it is another matter. But I cannot accept his conclusion that they would not be so admissible, because they do not fall within the period of conspiracy." The learned Judge concluded: "I have no doubt that the learned Magistrate will have to consider afresh whether the documents, which he has admitted under Section 32 or Section 10 are admissible or not. In any case, the order which he has made admitting certain documents under Section 10 or Section 32 was an interlocutory order and the learned Magistrate will be entitled to reconsider the position in the light of the observations in this judgment. The learned Magistrate on the light of the view which I have taken, will also consider whether it is necessary to frame additional charges and to pass an appropriate order."

The Revision Application No. 574 of 1964, filed by Mithani, was rejected by a separate order, dated August 21, 1964 on the ground that in the view which the learned Judge had taken in Criminal Revision No. 107 of 1963, it was not necessary to admit this Revision Application. It was, however, observed that the Magistrate will take the observations in that judgment into consideration and consider "whether the interlocutory order, against which the present Revision Application is filed, needs to be reviewed."

The prosecution filed Special Leave Petitions (965 and 966 of 1965) in this Court against the judgment, dated August 19/20, 1964 of Mr. Justice Gokhale, and against the High Court's order refusing to grant certificate of fitness. This Court on January 27, 1966, summarily dismissed both these petitions. The prosecution then made an application to the Magistrate to take some photostat copies of certain documents. The Magistrate granted this application. Accused 1 challenged this order of the Magistrate in the High Court. By its order, dated October 4, 1966, the High Court restricted the time to prosecution by three months for calling the Foreign Witnesses. After expiration of this period, the prosecution on January 11, 1967 filed an application in the High Court for cancellation of Mithani`s bail on the ground that he was tampering with the witnesses and abusing the liberty granted to him. The High Court cancelled Mithani's bail and Mithani surrendered and was committed to jail custody on January 13, 1967. Mithani came by special leave against the order cancelling his bail, to this Court By order dated May 4, 1967, This Court dismissed Mithani's appeal, but restricted the time for examining the German Witnesses cited by the prosecution upto June 26, 1967. Since there was delay in procuring the attendance of German Witnesses within the time granted, Mithani was released on bail by an order dated July 26, 1967 of this Court. Thereafter, the prosecution applied to the Magistrate to proceed with the case without the Foreign Witnesses.

On July 10, 1967, the prosecution applied to the Magistrate for issue of commission for examination of the German Witnesses at Hamburg or Berlin or London. The Magistrate rejected this application by his order dated August 8, 1967. Against the Magistrate's order, the prosecution, again, went in revision to the High Court, which rejected the same by an order in September, 1967. Another revision petition filed in the High Court by the prosecution was dismissed by the High Court (V.S. Desai & Wagle JJ) by an order dated August 9, 1968.

On December 2, 1968, the prosecution made an application for examining a number of witnesses to establish the preliminary facts for admission of the Verladasheins and other documents under Sections 32(2)(3) and 10 of the Evidence Act and under the Commercial Documents Act. The Magistrate rejected that application by his order dated January 9, 1969.

By an order dated February 26, 1969, the Additional Chief Presidency Magistrate, deleted charges 2 to 9 against Accused 2 (Mithani), 3 and 7, and 'discharged' them. The following extract from the Magistrate's order will be useful to appreciate its true nature:

> "I therefore hold that with regard to overt acts in charges Nos 2 to 9 no charges can be framed against any of the accused and therefore charges Nos. 2 to 9 will stand deleted.
>
> Accused Nos. 2, 3 and 7 are concerned only in some of the charges Nos. 2 to 9. They are not concerned in charges Nos. 10, 11, 12 and 13.
>
> Therefore as no overt act is held proved against them no conspiracy can be inferred as against them and therefore charge No. 1 of conspiracy as against them must go.

> Therefore with regard to accused Nos. 2, 3 and 7 I hold that no case is made out against them and I therefore hold them not guilty u/s 167 r.w. 81 of the Customs Act for contravention of Import & Export Control Act 1947 and 1955 and for conspiracy and order them to be discharged."

Against the Magistrate's order, dated February 26, 1969, the prosecution filed Criminal Revision Application No. 565 of 1969 in the High Court.

By its judgment dated December 16/17, 1969, a Bench of the High Court (consisting of Vaidya and Rege JJ.) allowed Criminal Revision 565 of 1969 mainly on the ground that the Magistrate after framing the charge, had no legal power to discharge the accused persons. It was observed that "the entire complexion of the cases changed on account of the retirement of the Magistrate. The new Magistrate who will hear the matter, will have to find out whether he must alter or vary the charge and for that purpose to issue a fresh process to the two living deleted accused, after taking into consideration the evidence already recorded by the former Magistrate.... and such other evidence he may have to record hereafter." The High Court concluded: "We are setting aside the order of discharge on the ground that it is open to the new Magistrate to frame a charge against the deleted accused on considering the material; and also on the ground that the former Magistrate had no power to discharge the accused after framing the charge." The High Court further observed that, "whatever submissions the accused want to make with regard to not framing the charges are also open to them." At that stage, they did not want and could not consider the evidence before the Magistrate. In the result, the order dated February 26, 1969 of the Magistrate was set aside and the case was restored to the file of the Magistrate, except with regard to the deceased accused No. 7 for being dealt with as early as possible, in accordance with law and in the light of the observations made by the High Court.

Against this order, dated January 21, 1976, of the High Court setting aside the order dated February 26, 1969 of the Magistrate discharging the accused, the accused 2 (Mithani) has come in appeal before us.

The points canvassed by Shri I.N. Shroff, learned counsel for the appellant, may be summarised as under:

> (i) In passing the then impugned order, the Magistrate was simply acting in consonance with the observation and implied directions contained in the judgment, dated August 19/20, 1964, of Mr. Justice H.R. Gokhale in Cr. R.A. No. 107 of 1964. On the contrary, the Bench of the High Court (consisting of Vaidya and Rege JJ) has failed in its duty to uphold the aforesaid judgment af Mr. Justice Gokhale-which judgment had been upheld by this Court while dismissing prosecution's Special Leave Petitions 965 and 966 of 1975.

Mr. Justice. Gokhale-so proceeds the argument-had held "that 10 Verladasheins were inadmissible under Section 32 and/or Section 10 of the Evidence Act." The legal consequence of this finding was that the charges framed by the Magistrate on December 21, 1962, on the basis of the said

Verladescheins, were unsustainable in law and the Magistrate had to examine the matter de novo by ignoring the said charges or by amending, altering the same-as may be justified on the remaining admissible evidence on record

(ii) In reviewing and deleting the charges and discharging the appellant (Mithani) and two other accused, the Magistrate was acting in accordance with the observation of Gokhale J. in Cr. R.A. 574 of 1974, which was to the effect, that it would be open to the Magistrate to consider whether the interlocutory order against which that revision application was filed, needs to be reviewed.

(iii) Since the Magistrate had under the Code of Criminal Procedure, no power to delete the charges framed against the appellant and two others, it will be deemed that in tho eye of law those charges still existed when the Magistrate by his order dated February 26, 1969, discharged the accused Mithani and two others. This being the case, this order of "discharge" ought to have been treated as an order of 'acquittal'.

(iv) (a) In revision, the High Court was not competent to set aside this order of 'acquittal' and direct, as it were, a retrial of the accused.

(b) Since the appellant had, in reality, been acquitted by the Magistrate, he could not be retried on the same charges because of the double jeopardy of autrefois acquit.

(v) There has been gross laxity and delay on the part of the prosecution in prosecuting their case and in producing all their evidence, which is nothing short of abuse of the process of the Court. the complaint was filed on April 1, 1961. The order of "discharge" was passed by the Magistrate on`February 26, 1969, and the aforesaid order came up for consideration in revision before the High Court in January 1976. The High Court's order dated January 21, 1976, directing de novo proceedings against the appellant after a lapse of several years would be unjust and unfair, particularly when this delay was attributable to the prosecution which had, indeed, closed its evidence before the framing of the charge and its request to examine the German Witnesses on commission stands declined.

As against this, Shri Soli Sorabji, learned Additional Solicitor General submits that the appellant (Mithani), in fact, had never filed any revision against the order of the Magistrate, framing charges against him and others. It is pointed out that in Cr.R.A. No. 574 of 1964 filed by Mithani on July 17, 1964 in the High Court, the challenge was, in terms, confined to the Magistrate's order, dated December 6, 1962, whereby he had admitted 9 Verladescheins, Bills of Lading, invoices etc. into evidence; and that the order dated December 21, 1962, framing the charges was not specifically challenged. In any case, Gokhale J. had summarily rejected Mithani's Criminal Revision by an order, dated August 21, 1964. According to Shri Sorabji, the further observation in that order of Gokhale J. to the effect that it was open to the Magistrate to consider, "whether the interlocutory order against which the present revision application is filed, needs to be reviewed", was made only in respect of the Magistrate's order dated December 6, 1962 and not the order whereby the charges were framed. It is further submitted that Gokhale J.'s observations and directions in his judgment dated August 19/20, 1964 in Cr.R.A. No. 107 of 1964, could not, by any stretch of imagination, be construed as

authorising the Magistrate to reconsider and delete the charges, and discharge the accused. On the contrary, the learned Judge had directed amendment of the charge so that the period of the conspiracy was not restricted to the period mentioned in the charges. It is further submitted that the Magistrate's order arbitrarily deleting the charges and "discharging" the accused, was patently illegal and the High Court was fully competent and justified to set it aside in the exercise of its revisional powers under Section 439 of the Code.

As regards delay in the proceedings, Shri Sorabji submits, it was mostly due to circumstances beyond the control of the prosecution; that the charge against the appellant was a grave one and the direction given by the High Court to take further proceedings, inter alia, against the appellant was not unjust and unfair.

We are unable to accept any of the contentions advanced by Shri Shroff.

At the outset, let us have a look at the relevant provisions of the Code of Criminal Procedure, 1898, which admittedly governed the pending proceedings in this case. The procedure for trial of warrant cases by Magistrates is given in Chapter XXI of that Code. The present case was instituted on a criminal complaint. Section 252 provides that in such a case, the Magistrate shall proceed to hear the complainant (if any) and take all such evidence, as may be produced, in support of the prosecution. Sub-section (2) of that Section casts a duty on the Magistrate to ascertain the names of persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and to summon all such persons for evidence. Section 253 indicates when and in what circumstances an accused may be discharged: It says:

> "253(1) If, upon taking all the evidence referred to in Section 252, and making such examination (if any) of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.
>
> (2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless."

Section 254 indicates when and in what circumstances a charge should be framed. It reads:

> "254 when such evidence and examination have been taken and made, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try, and which in his opinion could be adequately punished by him, he shall frame in writing a charge against the accused."

Section 255 enjoins that the charge shall then be read over and explained to the accused, and he shall be asked whether he is guilty or has any defence to make. If the accused pleads guilty, the Magistrate shall record that plea, and may convict him thereon.

Section 256 provides that if the accused refuses to plead or docs not plead, or claims to be tried, he shall be required to state at the next hearing whether he wishes to cross-examine any of the witnesses for the prosecution whose evidence has been taken, and if he says he so wants to cross-examine, the witnesses named by him shall be recalled and he will be allowed to further cross-examine them. "The evidence of any remaining witnesses for the prosecution shall next be taken" and thereafter the accused shall be called upon to enter upon and produce his defence.

Section 257 is not material. Section 258(1) provides that if in any case "in which a charge has been framed the Magistrate finds the accused not guilty, he shall record an order of acquittal. Sub section (2) requires, where in any case under this chapter the Magistrate does not proceed in accordance with the provisions of Section 349 or Section 562, he shall, if he finds the accused guilty, pass sentence on him in accordance with law.

From the scheme of the provisions noticed above, it is clear that in a warrant case instituted otherwise on a police report, 'discharge' or 'acquittal' of accused are distinct concepts applicable to different stages of the proceedings in Court. The legal effect and incidents of 'discharge' and 'acquittal' are also different. An order of discharge in a warrant case instituted on complaint, can be made only after the process has been issued and before the charge is framed. Section 253(1) shows that as a general rule there an be no order of discharge unless the evidence of all the prosecution witnesses has been taken and he considers for reasons to be recorded, in the light of the evidence that no case has been made out. Sub-section (2) which authorises the Magistrate to discharge the accused at any previous stage of the case if he considers the charge to be groundless, is an exception to that rule. A discharge without considering the evidence taken is illegal. If a prima facie case is made out the Magistrate must proceed under Section 254 and frame charge against the accused. Section 254 shows that a charge, can be framed if after taking evidence or at any previous stage, the Magistrate, thinks that there is ground for presuming that the accused has committed an offence triable as a warrant case. Once a charge is framed, the Magistrate has no power under section 227 or any other provision of the Code to cancel the charge, and reverse the proceedings to the stage of Section 353 and discharge the accused. The trial in a warrant case starts with the framing of charge; prior to it, the proceedings are only an inquiry. After the framing of charges if the accused pleads not guilty, the Magistrate is required to proceed with the trial in the manner provided in section 254 to 258, to a logical end. Once a charge is framed in a warrant case, instituted either on complaint or a police report, the Magistrate has no power under the Code to discharge the accused, and thereafter, he can either acquit or convict the accused unless he decides to proceed under Section 349 and 562 of the Code of 1892 (which correspond to Sections 325 and 360 of the Code of 1973).

Excepting where the prosecution must fail for want of a fundamental defect, such as want of sanction, an order of acquittal must be based upon a 'finding of not guilty' turning on the merits of the case and the appreciation of evidence at the conclusion of the trial.

If after framing charges the Magistrate whimsically, without appraising the evidence and without permitting the prosecution to produce all its evidence, 'discharges' the accused, such an acquittal, without trial, even if clothed as 'discharge', will be illegal. This is precisely what has happened in the instant case. Here, the Magistrate, by his order dated December 12, 1962 framed charges against

Mithani and two others. Subsequently, when on the disposal of the Revision applications by Gokhale, J. the records were received back, he arbitrarily deleted those charges and discharged the accused, without examining the "remaining witnesses" of the prosecution which he had in the order of framing charges, said, "will be examined after the charge".

It is not correct as has been contended on behalf of Mithani, that in adopting this course the Magistrate was only acting in accordance with the observations/directions of Gokhale J. in the judgments disposing of Criminal Revisions 107/63 and 514 of 1964. A perusal of Gokhale, J's orders in these two Revision Applications-material portions of which have been quoted earlier-will show that there is nothing in those orders which expressly or by implication required the Magistrate to delete the charges and 'discharge' or acquit the accused.

On the contrary, the learned High Court Judge (Gokhale J.) had accepted the Revision filed by the prosecution and directed the Magistrate to amend the charges in so far as they appear to restrict the period of conspiracy to the one between the dates mentioned in the charges. Gokhale J. had further directed the Magistrate to consider the circumstantial and other evidence of the prosecution with a view to frame additional charges as claimed by the prosecution.

Gokhale J's judgment in Cr.R.A. 107 shows that the learned Judge did not hold that the verladesheins or the other documents in question tendered by the prosecution, were not relevant at all, under any provision of the Evidence Act. All that was held by him was that before these documents could be admitted under Section 32(2) or Section 10 of the Evidence Act, some preliminary facts had to be established by the prosecution. For instance, one of the conditions precedent for the admissibility of a previous statement of a party under Section 32(2) is that the attendance of the witness who made that statement, could not be procured without an amount of delay and expense which in the circumstances of the case, appeared to the Court to be unreasonable. Similarly, With regard to the invocation of Section 10, Evidence Act, it was observed that before the documents concerned could be admitted under Section 10, Evidence Act, prima facie proof, aliunde should be given about the existence of the conspiracy. On the contrary, Gokhale J. clearly held that the documents, in question, were relevant to the facts in issue, but they had to be proved in any of the ways recognised by the Evidence Act, Gokhale J. never quashed the charges already framed by the Magistrate. It is true that the prosecution in its Special Leave Petitions 965 and 966 contended that the observations made by Gokhale J. with regard to the admissibility of Verladasheins and other documents are of "far reaching importance and are likely to prejudice the prosecution" and will affect the future course of the proceedings adversely to the prosecution. However, apart from these Verladasheins there was other circumstantial and oral evidence on the record and more evidence was yet to be produced by the prosecution after the charge. The prosecution were doing their best to secure the evidence of German witnesses in Europe. They want to produce other evidence also, apart from the Verladasheins, to show a prima facie case of conspiracy so that in accordance with the guidelines laid down in Gokhale J's judgment, they could make out a case for the admissibility of the Verladasheins under Section 10, Evidence Act.

A perusal of the copy of the Revision Application No 574/64 filed by Mithani in the High Court, will show that the only order specifically challenged therein was one dated December 6, 1962 whereby

the Magistrate had held that 9 Verladasheins were admissible under Section 10, Evidence Act, although, incidentally, it was mentioned that the charges framed as a consequence of the impugned order dated December 6, 1962, should also be quashed. Even so, Mithani's Revision Application (No. 574/64) was summarily rejected by the learned Judge with the observation that the Magistrate could, in the light of the observations in the Judgment in Cr.Rev. A. 107 of 1963, "consider, whether the interlocutory order against which the present Revision Application is filed needs to be reviewed." The crucial part of the observation is that which has been underlined. It shows that this observation has reference only to the order dated December 6, 1962 whereby the Magistrate had held 9 Verladasheins admissible under Section

10. In this observation, the word "order" is used in singular. It shows that the learned Judge, also, construed the Revision-petition of Mithani as one directed against the Magistrate's order dated December 6, 1962, only. Only that order of the Magistrate has been exhaustively considered in the Revision Application 107 of 1964.

It is thus manifest that in abruptly deleting the charges and 'discharging' the accused, the Magistrate was acting neither in accordance with the observation or directions of Gokhale J., nor in accordance with law.

Equally meritless, albeit ingenious is the argument that since the Magistrate had no legal power to delete the charge the order of 'discharge' must be construed as an order of "acquittal" so that the High Court could not interfere with it in revision and direct a retrial. Assuming arguendo, the Magistrate's order of discharge was an order of 'acquittal', then also, it does not alter the fact that this 'acquittal' was manifestly illegal. It was not passed on merits, but without any trial, with consequent failure of justice. The High Court has undoubtedly the power to interfere with such a patently illegal order of acquittal in the exercise of its revisional jurisdiction under Section 439, and direct a retrial. The High Court's order under appeal, directing to Magistrate to take de novo proceedings against the accused was not barred by the provisions of Section 403, (of the Code of 1898), the earlier proceedings taken by the Magistrate being no trial at all and the order passed therein being neither a valid "discharge" of the accused nor their acquittal as contemplated by Section 405(1). The Magistrate's order (to use the words of Mudholkar J. in Mohd Safi v. State of West Bengal was merely "an order putting a stop to these pro-

ceedings" since the proceedings, ended with that order. The other contentions of the appellant, have been stated only to be rejected.

For all the reasons aforesaid, we have no hesitation in upholding the High Court's order under appeal, and in dismissing the appeal. Since the case is very old, the Magistrate shall proceed with the case with utmost despatch, if feasible, by holding day to day hearings within six months from today.

N.V.K. Appeal dismissed.