

CRIMINAL REVISION.*Before Sharfuddin and Tawon J.J.*

ACHAMBIT MANDAL

2.

MAHATAB SINGH.*

1914

June 16.

Complainant—Absence of complainant—Case called on by mistake on date, not fixed for hearing—Order of acquittal—Effect of such order—Jurisdiction of Magistrate to proceed with trial thereafter—Criminal Procedure Code (Act V of 1898), s. 247.

An order of acquittal, under s. 247 of the Criminal Procedure Code, passed by mistake on a date not fixed for the hearing of the case, for absence of the complainant, is a mere nullity, and does not debar the Magistrate from proceeding with the trial on the discovery of the error.

H. C. Proceedings, 17 Aug. 1875 (1) followed.

Suresh Chandra Sinha v. Banku Sadhukhan (2) distinguished.

The petitioner, Achambit Mandal, filed a complaint under ss. 147, 323, 379 and 426 of the Penal Code against Mahatab Singh and others, on the 22nd December 1913, before the Sub-divisional Officer of Madhipura. The petitioner was examined and processes were issued against the accused under ss. 426 and 352, of the Penal Code, the hearing of the case having been fixed for the 16th January 1914. It appeared that on the 10th January the case was called on, through a mistake on the part of the *peshkar*, and the complainant being absent, the Magistrate passed the following order "Accused acquitted under s. 247, Cr. P. C." On the 16th the case was called on again when the complainant was present but not the accused, and it was then discovered that an order of acquittal

*Criminal Revision No. 715 of 1914 against the order of J. E. Scott, Sessions Judge of Bhagalpur, dated March 31, 1914.

(1) (1875) 2 Weir 307.

(2) (1905) 2 C. L. J. 622.

1914
 ACHAMBIT
 MANDAL
 v.
 MAHATAB
 SINGH.

had been passed on the previous date, whereupon the Magistrate recorded the following order "The date was obviously for 16th January, and the order of the 10th was wrong. Accused absent, put up on 20th." The case was taken up without objection and heard on various dates, and the accused were convicted on the 9th March under s. 147 of the Penal Code, and sentenced to rigorous imprisonment for one month and a fine of Rs. 20 each, and in default to 15 days' further imprisonment.

The accused thereupon appealed to the Sessions Judge of Bhagalpur, who acquitted them by his order, dated 31st March 1914, which was as follows:—

The learned Subdivisional Officer, by his order of acquittal, dated 10th January 1914, debarred himself from trying the case. The case of *Suresh Chandra Sinha v. Banku Salukhan* (1) is exactly parallel, the whole of the trial was, therefore, illegal as no superior Court was moved to revive the case. I set aside the conviction and sentence, and order the accused to be acquitted.

The petitioner thereafter moved the High Court and obtained a Rule on the District Magistrate and the accused to set aside the orders of the Magistrate, dated the 10th January and of the Judge on appeal, on the ground mentioned in the judgment of the High Court.

Mr. K. N. Chaudhuri (with him *Babu Dwijendra Nath Mukerjee*), for the petitioner. The order of the 10th was a nullity, and the Magistrate was not debarred from treating it as such and proceeding with the trial when the complainant appeared on the date fixed for the hearing: see *H. C. Proceedings, 17th Aug. 1875* (2). The accused, besides, took no objection on appearance.

Babu Manmatha Nath Mukerjee, for the opposite party. The Court ought not to interfere with the

(1) (1905) 2 C. L. J. 622.

(2) (1875) 2 Weir 307.

acquittal, having regard especially to the terms of the Magistrate's judgment of conviction.

SHARFUDDIN AND TEUNON JJ. The petitioner in this case obtained a Rule from this Court calling upon the District Magistrate of Bhagalpur and also on the opposite party to show cause why the order of the Magistrate, dated the 10th January 1914, and the order of the Sessions Judge dated the 31st March 1914, should not be set aside and such other order made as to this Court may seem fit on the ground that the order of the Magistrate, dated the 10th January 1914, was so irregular as to amount to no trial at all.

The facts of the case are these. On the 22nd December 1913, a complaint was made by the petitioner against a certain number of persons. The date for the hearing as fixed by the Magistrate was the 16th January 1914. But it so happened that through some mistake or oversight on the part of the Magistrate's *peshkar* the case was called on for hearing on the 10th of January, *i.e.*, six days before the date actually fixed for hearing. Of course on that date the complainant was absent. The Magistrate thereupon passed an order acquitting the accused under section 247 of the Code of Criminal Procedure. On the 16th of January, the case was again called on, and then the mistake that was made on the 10th January was discovered for the first time. The trying Magistrate ignored the order of acquittal passed on the 10th January, and went on with the case. The case was taken up from time to time from the 16th January to the 9th March, witnesses were examined, arguments on both sides heard. On the 9th of March 1914, the Magistrate convicted the accused and sentenced them each to one month's rigorous imprisonment and to pay a fine of Rs. 20 each. Thereupon, the accused preferred an

1914

ACHAMBIT
MANDAL

v.

MAHATAB
SINGH.

1914
 ACHAMBIT
 MANDAL
 2.
 MAHATAB
 SINGH.

appeal to the Sessions Court. The learned Sessions Judge, on the 31st March, passed the following order: "The learned Sub-Divisional Officer by his order of acquittal, dated the 10th January 1914, debarred himself from trying the accused. The reported case of *Suresh Chandra Sinha v. Banku Sadhukhan* (1) is exactly parallel. The whole of the trial was, therefore, illegal, as no superior Court was moved to revive the case. I set aside the conviction and sentence and order that the accused be acquitted. The fine, if paid, will be refunded to appellant."

On the above facts, the first question that arises is whether the order of acquittal passed by the Sub-Divisional Officer, professedly under section 247 of the Criminal Procedure Code, on the 10th January 1914, was a legal order or a mere nullity. If it was a mere nullity then the trying Magistrate could ignore that order, and ignoring that order could go on with the case which was fixed originally for the 16th and which was also called on for hearing on the 16th when the parties were present. As a matter of fact the trying Magistrate ignoring that order went on with the case, recorded evidence, heard the arguments and then convicted the accused on the 9th March. If it was a nullity then the order of the learned Sessions Judge, dated the 31st March 1914, cannot stand, because the learned Sessions Judge seems to be of opinion that, so long as the order of acquittal passed by the Sub-Divisional Magistrate on the 10th January is not set aside, it is a bar against the re-opening of the case by the Sub-Divisional Magistrate.

There is a case reported, *H. C. Proceedings, 17 Aug. 1875* (2), the facts of which are similar to the facts of the present case. The reported case was fixed for hearing on the 17th August on which date both the

(1) (1905) 2 C. L. J. 622.

(2) (1875) 2 Weir 307.

1914
 ———
 ACHAMBIT
 MANDAL
 v.
 MAHATAB
 SINGH.

parties failed to appear. The Magistrate being at the time on circuit postponed the case on his own motion for the 18th, 19th and 20th August without any intimation being given to the parties. The parties having failed to appear on either of these days the Magistrate on the 20th August dismissed the complaint for default on the part of the complainant. On the 9th December following, the District Magistrate directed the Magistrate who dismissed the complaint to restore the case to the file and dispose of it in due course. The matter went up to the Madras High Court. It appeared to that High Court that the proceedings of the trying Magistrate were so substantially irregular as to amount to no trial at all, and it was held that in this view the dismissal of the complaint could not be held to operate as an acquittal. This is a clear authority on the point that an order passed on a date which was not fixed for the hearing and on which date the complainant was necessarily absent, is no order at all. If it is a nullity, the trying Magistrate had jurisdiction to go on with the case and to come to the finding which he did. The Sessions Judge relies upon the case of *Suresh Chandra Sinha v. Banku Sadhukhan*(1). The facts of that case are quite different from the facts of the present case. In this reported case the complainant was absent on the date fixed for the hearing and the Magistrate acquitted the accused under section 247 of the Criminal Procedure Code. He strictly followed the law. In such a case the order cannot be treated as a nullity. This being our view, we are of opinion that the order of the learned Sessions Judge, dated the 31st March 1914, should be set aside, and we set it aside accordingly, and direct that the appeal be re-heard on the merits.

E. H. M.

Rule absolute.

(1) (1905) 2 C. L. J. 622.