

## CRIMINAL REVISION.

*Before Panckridge and Patterson J.J.*

1932

Dec. 1<sup>st</sup>.

H. G. BOLTON

v.

EMPEROR.\*

*Revision—Hearing in revision, if a subsequent stage of the case—Code of Criminal Procedure (Act V of 1898), ss. 435, 439, 528B—Andaman and Nicobar Islands Regulation (III of 1876), s. 13(d).*

The hearing in revision cannot be properly described as a subsequent stage of the case.

The High Court is not precluded by virtue of section 528B of the Code of Criminal Procedure from dealing in revision with the case of a European British Subject convicted by the courts of the Andaman and Nicobar Islands, on the ground that he did not claim to be dealt with as a European British subject by the magistrate before whom he was tried.

*Queen-Empress v. Grant* (1), *Harris v. Peal* (2) and *Jeremiah v. Johnson* (3) referred to.

### CRIMINAL REVISION.

The material facts and arguments appear from the judgment of the Court.

*Santoshkumar Basu, Santoshkumar Pal and Parimal Chatterji* for the petitioner.

*Debendranarayan Bhattacharya* for the Crown.

*Revision case No. 613 of 1932.*

PANCKRIDGE AND PATTERSON J.J. A preliminary point of jurisdiction is raised by the Crown in showing cause against the Rule.

\*Criminal Revision, Nos. 613 to 615 of 1932, against the order of J. W. Smyth, Sessions Judge, of Andamans and Nicobar Islands, dated May 6, 1932, confirming the order of L. V. Deane, Magistrate, First Class, of Port Blair, dated May 2, 1932.

(1) (1888) I. L. R. 12 Bom. 561.      (2) (1919) 17 A. L. J. 896.  
(3) (1923) 45 Mad. L. J. 800.

The petitioner states that he is a European British subject. His statement is verified by an affidavit sworn by his brother, and Mr. Bhattacharya agrees that, in the absence of any evidence to contradict it, it must be taken to be correct. He was convicted at Port Blair on May 2nd, 1932, by a first class magistrate of offences punishable under sections 408 and 468 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for a term of 8 months.

1932  
H. G. Bolton  
v.  
Emperor.

On May 6th, 1932, the learned Sessions Judge of the Andaman and Nicobar Islands allowed the petitioner's appeal against his conviction under section 468 and acquitted him on that charge, but dismissed his appeal against his conviction under section 408 and maintained the sentence.

On July 12th, 1932, the petitioner obtained this Rule, calling upon the Chief Commissioner of the Andaman and Nicobar Islands to show cause why the order of the Sessions Court should not be set aside or modified, on the ground that the sentence is too severe.

Learned counsel for the Crown argues that we have no jurisdiction to entertain the petitioner's application.

By section 13, clause (d), of the Andaman and Nicobar Islands Regulation, 1876 (Regulation III of 1876), it was ordered that the functions of the High Court under Chapter XXXII of the Criminal Procedure Code of Reference and Revision should be discharged in respect of proceedings of the court of session by the Governor-General in Council, and in respect of courts subordinate to the court of session by the court of session; but this clause does not apply to proceedings against European British subject or persons jointly charged with European British subjects.

By a notification made in 1878 under section 3 of the Indian High Courts Act, 1865 (28 & 29 Vict. c. 15), it was ordered that this Court should exercise

1932

H. G. Bolton  
v.  
Emperor.

original and appellate jurisdiction and discharge the functions of a High Court in criminal proceedings in the islands against European British subjects.

*Prima facie* we have clearly the power to deal with the petitioner's case by way of revision. Mr. Bhattacharya, however, maintains that, inasmuch as the petitioner did not claim to be dealt with as a European British subject by the magistrate before whom he was tried, he must, by reason of the provisions of section 528B of the Code of Criminal Procedure, be held to have relinquished that right, and cannot assert it before us exercising revisional jurisdiction, which is "a subsequent stage of the case" within the meaning of the section.

Mr. Basu argues that what the section means is that, unless the claim has been made, a European British subject cannot at a subsequent stage of the case challenge the legality of a previous stage at which the claim might have been made on the ground that he was not at such previous stage dealt with as a European British subject. There is nothing, it is contended, to prevent a European British subject making the claim at any stage of the case and being dealt with as such from that stage.

We are not prepared to go to this length since the argument appears to us to leave out of account the words "shall be held to have relinquished his 'right'".

We are more impressed with the submission that when this Court calls for the record under section 435 and thereafter proceeds to exercise its powers of revision under section 439, the proceedings cannot properly be said to be a subsequent stage of the case.

On this point the decisions are conflicting. In *Queen-Empress v. Grant* (1) the Bombay High Court held that when the accused had not claimed to be dealt with as a European British subject before the Sadar Court in Sind, the Bombay High Court had no power by virtue of section 4 (1) of the Code to enhance in revision the sentence passed on him.

(1) (1888) I L. R. 12 Bom. 561.

On the other hand, in *Harris v. Peal* (1) Walsh J. held that an application in revision was not a subsequent stage of the same case within the meaning of section 454 of the Code of 1898.

1932  
H. G. Bolton  
v.  
Emperor.

In *Jeremiah v. Johnson* (2), Krishnan J. preferred to follow the Bombay decision.

We have come to the conclusion that the better opinion is that of Walsh J.

Section 439 confers no rights on a person convicted either by a trial court or a lower appellate court to invoke the revisional jurisdiction of the High Court. The exercise of that jurisdiction is, subject to the limitations imposed by the section, purely discretionary. The High Court can and often does exercise the jurisdiction of its own motion without an application having been made to it. In these circumstances, the hearing in revision cannot, we think, be properly described as a subsequent stage of the case. We think that, if the language of section 528B is ambiguous, a construction favourable to accused and convicted persons should be adopted, as the section purports to curtail privileges conferred by other provisions in the Code.

For these reasons we hold that we have jurisdiction to revise the orders made by the magistrate and the sessions judge.

With regard to the merits, the petitioner was a ship's clerk employed in S.S. "Sajahan". In the course of his employment he was entrusted with various sums of money. In the case with which we are at present concerned, he was charged with having misappropriated Rs. 100-1 anna, which had come into his possession on account of messing charges paid by passengers. In another case he was charged with misappropriation of Rs. 215, which had come into his possession as passage money collected from passengers on board. In the third case, he was charged with misappropriation of Rs. 501, which had

(1) (1919) 17 A. L. J. 896.

(2) (1923) 45 Mad. L. J. 800.

1932

H. G. Bolton  
v.  
Emperor.

come into his possession as the price of wine supplied to passengers. He was convicted in all the three cases and a sentence of eight months' rigorous imprisonment was imposed on him in each case—the sentences to run consecutively—making a total term of two years' rigorous imprisonment. His offence was undoubtedly a serious one, and it was aggravated by the fact that he suppressed correspondence from the owners of the ship and made false entries in the books of account which it was his duty to keep. At the same time this was his first offence, and this much should be said to his credit, that he made a more or less clean breast of the matter and did not, as people in the same situation often do, endeavour to throw the blame on a fellow servant.

In the circumstances, we think that the ends of justice will be met if we reduce his sentence in this case to one of six months' rigorous imprisonment and make a similar order in the other two cases. This will have the effect of reducing the total term of his imprisonment from two years to 18 months.

In Revision Case No. 614 of 1932 we reduce the sentence of imprisonment from eight months' rigorous imprisonment to six months' rigorous imprisonment for the reasons set out in our judgment in Revision Case No. 613 of 1932.

In Revision Case No. 615 of 1932, we reduce the sentence of imprisonment from eight months' rigorous imprisonment to six months' rigorous imprisonment for the reasons set out in our judgment in Revision Case No. 613 of 1932.

*Sentence reduced.*

A. C. R. C.