CRIMINAL REFERENCE.

Before Lort-Williams and Jack JJ.

1935

Mar. 14, 26; April 3.

BHUPATIBHOOSHAN MUKHERJI

v.

AMIYABHOOSHAN MUKHERJI*

Acquittal—Order under section 247, Cr. P. C., if bars further proceedings—"Trial", Meaning of—Code of Criminal Procedure (Act V of 1898), ss. 247, 403.

Per LORT-WILLIAMS J. An acquittal under section 247 of the Code of Criminal Procedure owing to the absence of the complainant in a summons case bars a subsequent trial of the accused for the same offence.

Once a summons has been issued to the accused and section 247 of the Code of Criminal Procedure has come into operation the accused must be deemed to have been tried within the meaning of section 403 of the Code, though the summons may not have been served and the accused may not have appeared.

Kotayya v. *Venkayya* (1), *Sanker Dattatraya Vaze* v. *Dattatraya Sadashiv Tendulkar* (2) and other cases referred to.

The provisions of the Code of Criminal Procedure upon the question of previous acquittal are different from the principles underlying the English doctrine of *autre fois acquit*. The Code makes a clear distinction between "discharge" and "acquittal".

Per JACK J. The rule of English law, regarding the accused to have been tried as well as acquitted in order to bar further proceedings and embodied in section 403 of the Code of Criminal Procedure, is inapplicable to statutory acquittals under sections 494, 247 and 345 of the Code of Criminal Procedure.

Re *Dudekula Lal Sahib* (3) referred to.

An acquittal under section 247 of the Code of Criminal Procedure on a date not fixed for hearing or when the complainant had no notice of the adjourned date is a nullity and does not bar further proceedings. But the order of acquittal should be set aside before the case can proceed.

Achambit Mandal v. *Mahatab Singh* (4) and *Nune Panakalu* v. *Subba Rao* (5) referred to.

*Criminal Reference, No. 205 of 1934, made by A. M. Ahmad, Sessions Judge of Nadia, dated Dec. 4, 1934.

(1) (1917) I.L.R. 40 Mad. 977, footnote.
(2) (1929) I.L.R. 53 Bom. 693.
(3) (1917) I. L. R. 40 Mad. 976.
(4) (1914) I. L. R. 42 Calc. 365.
(5) (1927) I.L.R. 52 Mad. 695.

1935

Bhupatibhooshan Mukherji. v. *Amiyabhooshan Mukherji.*

CRIMINAL REVISION.

The material facts of the case and the arguments in the Reference appear from the judgment.

Subodhchandra Datta and *Upendranath Niyogi* for the accused.

R. Brahmachari and *Bibhootibhooshan Lahiri* for the opposite party.

Cur. adv. vult.

LORT-WILLIAMS J. This is a reference under section 438 of the Code of Criminal Procedure, recommending that the order of the Sub-Divisional Magistrate of Meherpur, summoning the accused upon complaint of an offence under section 426 of the Indian Penal Code, be set aside.

The facts are that, on the 17th May, 1934, the magistrate summoned the accused and two others to appear on the 31st. The accused duly appeared and warrants were issued against the other two. The case was adjourned to the 14th June. On the 5th, the second accused appeared and his case also was adjourned to the 14th. On that day, the third accused had not appeared and the magistrate ordered the case to go on against the other two, and adjourned it to the 29th for evidence on both sides. On that day, the complainant asked for time and the case was adjourned to the 12th July, when witnesses were present on both sides, but both sides asked for time in order to compromise the case which was one between relatives. It was adjourned to the 23rd, when the enquiry officer asked for time and the case was fixed for the 2nd of August. Meanwhile, on the 30th July, a report was received in the absence of the parties showing that the case had been compromised out of court.

On the 2nd of August, the complainant had not appeared at 12 o'clock, and no step had been taken, and the magistrate acquitted the accused under section 247 of the Code of Criminal Procedure. On the following day, the complainant filed a fresh petition of complaint

1935

Bhupatibhooshan Mukherji v. *Amiyabhooshan Mukherji.*

Lort-Williams J.

upon the same facts, saying that he had been present in the court precincts on the previous day, but had not heard the court crier calling the case. Thereupon, the magistrate again summoned the accused who filed an application to quash the order, inasmuch as the previous order of acquittal was, under section 403 of the Code of Criminal Procedure, a bar to further proceedings. The Sessions Judge upheld that contention, and has recommended that the magistrate's order be set aside.

Section 247 of the Code of Criminal Procedure provides that—

> If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the magistrate shall, *notwithstanding anything thereinbefore contained*, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day.

This section does not contain any bar to a second trial. Such bar (if any) depends upon section 403 of the Code of Criminal Procedure. That section provides *inter alia* that a person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence.

The explanation provides that the dismissal of complaint, the stopping of proceedings under section 249, the discharge of the accused or any entry made upon a charge under section 273, is not an acquittal for the purpose of this section.

It is to be observed that section 247 is not mentioned in this explanation and the maxim *expressio unius est exclusio alterius* should apply. Moreover, in the Code of 1872, "trial" was defined to mean "the proceedings "taken in court after a charge has been drawn up, and "includes the punishment of the offender". But section 460 thereof, corresponding to section 403 of the present Code, contained no "explanation" as in the present Code, and, in the latter, "trial" has not been defined. Obviously, a summons case may be a trial,

1935

Bhupati-bhooshan Mukherji v. *Amiya-bhooshan Mukherji.*

Lort-Williams J.

though no formal charge may have been framed: section 242 of the Code of Criminal Procedure. Moreover, in sub-sections (*2*) and (*4*) of section 403 the word "tried" does not appear, though it is obvious that they are intended to refer to such persons as are mentioned in the first sub-section, namely, persons who had been tried and acquitted or convicted.

In the case of *Kotayya* v. *Venkayya* (1) Ayling and Napier JJ. decided that, since the word "tried" has been inserted in section 403, due weight must be given to it, and it cannot be treated merely as surplusage. They held further that the trial of a summons case cannot be said to begin until the particulars of the offence are stated to the accused under section 242 of the Code of Criminal Procedure.

I agree with those learned Judges that due weight must be given to the word "tried", but I do not agree that the trial of a summons case cannot be said to begin until the particulars of the offence are stated to the accused under the section referred to. As was said by Rankin C. J., in the case of *Sudheendrakumar Ray* v. *Emperor* (2) :—

> It is very difficult to say at what stage—apart from the very earliest stage—trial does begin before a magistrate. There is some ground for arguing that the moment the magistrate takes cognizance of the offence the trial commences. On the other hand, people may argue that, in a warrant case, not until the charge is framed, can the trial be said to have begun.

In the case of *Gomer Sirda* v. *Queen-Empress* (3) Maclean C. J. held that "trial" meant the proceeding which commences when the case is called on with the magistrate on the bench, the accused in the dock, and the representatives of the prosecution and for the defence, if the accused be defended, are present in court for the hearing of the case. In the present case the magistrate, this accused, and the complainant, were all present in court on the first day, namely 31st May.

In the case of *Shanker Dattatraya Vaze* v. *Dattatraya Sadashiv Tendulkar* (4), all the decisions

(1) (1917) I. L. R. 40 Mad. 977, footnote.
(2) 1932) I. L. R. 60 Calc. 643, 649-50.
(3) (1898) I. L. R. 25 Calc. 863.
(4) (1929) I. L. R. 53 Bom. 693.

upon the present point were ably reviewed by Patkar J., and Baker J. observed that section 247, does not refer to the day upon which the accused appears but to the day appointed for the appearance of the accused, showing that it is not necessary even that the accused should appear in order to attract the provisions of the section.

In *Sukum Ram Koch* v. *Krishna Deb Sarma* (1), Mukerji J. said that he was clearly of opinion that the word "tried" used in section 403 does not necessarily import a decision of the case on the merits, but only refers to the nature of the proceedings that were had or in other words, means that the proceedings in which the acquittal was passed were in the nature of a trial.

I find myself in complete agreement with these decisions. The provisions of the Code of Criminal Procedure upon the question of previous acquittal are, in my opinion, different from the principles underlying the English doctrine of *autrefois acquit*. Chapter XX of the Code deals with the procedure on the trial of summons cases by magistrates. Section 242 provides that when the accused appears or is brought before the magistrate, the particulars of the offence, of which he is accused, shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted but it shall not be necessary to frame a formal charge. Section 243 provides that, if the accused admits that he has committed the offence of which he is accused, his admission shall be recorded as nearly as possible in the words used by him, and if he shows no sufficient cause why he should not be convicted, the magistrate may convict him accordingly. Sections 244 and 245 provide the procedure when no such admission is made or when the magistrate does not convict under section 243.

But section 247 provides that if the summons has been issued on complaint, and upon the day appointed

(1) (1928) 33 C. W. N. 260.

1935

Bhupatibhooshan Mukherji v. *Amiyabhooshan Mukherji.*

Lort-Williams J.

for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the magistrate shall, notwithstanding anything thereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day. This section, therefore, overrides the previous provisions of the chapter, and, in my opinion, these sections and section 403 must be read together. The result of doing so is to show that the intention of the legislature was that the procedure under section 247 should be deemed to be a trial within the meaning of section 403.

The magistrate ought to have stated the particulars of the offence to the accused under section 242 when he first appeared on the 31st May, and to have proceeded as laid down in that and the following sections. If he had done so, no argument could have been raised that the accused was never on trial. But his omission to do so makes no difference to the point under discussion, when once section 247 has become applicable. That section applies if a summons has been issued on complaint and the complainant does not appear upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, and applies notwithstanding anything thereinbefore contained. What is thereinbefore contained becomes no longer of any importance or relevance, and if the magistrate decides to acquit the accused, then, in my opinion, he must be deemed to have been tried within the meaning of section 403, though the summons may not have been served and the accused may not have appeared. A clear distinction is drawn in the Code between "discharge" and "acquittal," as will be seen by reference to section 494, to the explanation to section 403 and to other sections. In my opinion, the trial in a summons case commences when the magistrate takes cognizance under section 190, which comes under the heading "conditions requisite for initiation of proceedings"

The result is that the Reference must be accepted and the order set aside.

JACK J. I agree with this view of the effect of an acquittal under section 247 of the Code of Criminal Procedure. It was already laid down in the case of *Sukum Ram Koch* v. *Krishna Deb Sarma* (1), and has been adopted in the Bombay, Madras and Allahabad High Courts in the cases already referred to by my learned brother.

It is possible that one reason for omitting the definition of "trial" contained in the Code of 1882 from subsequent Codes was because it would not fit in with the meaning of the word as used in section 403 of the Code of Criminal Procedure. On the other hand, instead of straining the meaning of the word "trial in section 403 to make it include merely taking cognizance, it would seem simpler to adopt the view taken by Sir John Wallis C. J. in the case of *Re Dudekula Lal Sahib* (2) that the rule of English law, requiring the accused to have been tried as well as acquitted in order to bar further proceedings, and embodied in section 403 of the present Code is inapplicable to the statutory acquittals introduced into the Code in sections 494, 247 and 345, Code of Criminal Procedure, which are intended to bar further proceedings whether the accused can be said to have been tried or not. As he points out, it was only in the Code of 1882 that, on non-appearance of the complainant, the magistrate might acquit the accused, unless he chose to adjourn. Up to that time he could merely dismiss the complaint. In spite of the objection to treating anything in the language of the Code as mere surplusage, it seems to me that, on the present interpretation of the law, section 403, clause (*1*) might have read simply "a person "who has since been acquitted or convicted by a court "of competent jurisdiction of an offence shall, while "such conviction or acquittal remains in force, not be "liable to be tried again for the same offence, *etc.*".

(1) (1928) 33 C. W. N. 260. (2) (1917) I. L. R. 40 Mad. 976.

1935

Bhupati-bhooshan Mukherji v. *Amiya-bhooshan Mukherji.*

Jack J.

This is confirmed by the wording of clauses (2) and (4) of section 403. In prescribing the ways in which orders of acquittal can be set aside, while assuming that orders of discharge need not be set aside and in differentiating generally between the terms "discharge" and "acquittal," the Code makes it clear, apart from section 403, that ordinarily an order of acquittal bars the trial of an accused for an offence of which he has been acquitted.

The only cases in which there may still be some doubt as to the effect of an acquittal is where the accused is acquitted owing to the absence of the complainant on a date not fixed for hearing. It has been held that in these circumstances the order of acquittal is a nullity, and the case can proceed as though it had not been passed [*Achambit Mandal* v. *Mahatab Singh* (1)]. It has also been held that where the complainant had no notice of an adjourned date and was therefore necessarily absent, an order of acquittal was not valid. *Nune Panakalu* v. *Subba Rao* (2). In such cases, however, the order of acquittal should be set aside before the case can proceed.

Reference accepted.

A. C. R. C.

(1) (1914) I. L. R. 42 Calc. 365. (2) (1927) I. L. R. 52 Mad. 695.