CRIMINAL REFERENCE.

Before Khundkar and Sen JJ.

BEJOY KUMAR KUNDU

v.

SITA NATH KUNDU.*

1940

Feb. 1, 2.

Appeal—*Magistrate with second class powers when invested with those of first class before judgment, Effect of—Code of Criminal Procedure (Act V of 1898), ss. 407, 413.*

Under s. 413 of the Code of Criminal Procedure, there is no appeal from a sentence of fine not exceeding fifty rupees passed by a Magistrate who began the trial when he had second class powers only, but was invested with first class powers after the taking of evidence had been concluded but before the arguments were heard.

Banwari Tewari v. *Sheo Balak Rai* (1) and *Queen-Empress* v. *Pershad* (2) followed.

Baramaddi v. *Magarali* (3) dissented from.

In such circumstances the Magistrate was empowered to pass a sentence which a Magistrate with second class powers only could not do.

A right of appeal is a creature of statute and it is for the appellant to show that he has got this right.

CRIMINAL REFERENCE.

The material facts and arguments appear sufficiently from the judgments.

Ajit Kumar Dutt for the accused.

Satindra Nath Mukherjee and *Samarendra Nath Mukherjee* for the complainant.

Lalit Mohan Sanyal for the Crown.

SEN J. This is a Reference made by the Sessions Judge of Faridpur. The facts giving rise to it are as follows :—

The accused Sita Nath Kundu and four others were tried and convicted by Mr. M. C. Mukherji,

*Criminal Reference, No. 202 of 1939, made by A. B. Ganguli, Sessions Judge of Faridpur, dated Nov. 23, 1939.

(1) (1906) 10 C.W.N. ccxliii. (2) (1885) I. L. R. 7 All. 414.
(3) (1931) 36 C.W.N. 302.

1940

Bijay Kumar Kundu v. *Sita Nath Kundu.*

Sen J.

Magistrate, Madaripur, and sentenced to pay a fine of Rs. 20 each. When the trial commenced, Mr. Mukherji was a Magistrate having second class powers. The learned Magistrate heard arguments in this case on July 27, 1939. It is now admitted that before this date but after the evidence had been concluded the learned Magistrate was invested with first class powers. After hearing arguments on July 27, 1939, the learned Magistrate adjourned the case and delivered judgment on July 31, 1939, convicting the accused and passing the aforesaid sentence. It is thus quite clear that on the date on which the sentence was passed, the learned Magistrate was a Magistrate having first class powers. The accused appealed from the decision of the learned Magistrate to the District Magistrate. The appeal was heard by a Deputy Magistrate having appellate powers. He held the opinion that, as the case was heard partly by a second class Magistrate and partly by a first class Magistrate, who had passed the sentence, no appeal lay to him and that, if any appeal lay at all, it would be to the Sessions Judge. In this view, he returned the petition of appeal to the appellants to enable them to file it in the proper Court. The accused then moved the Sessions Judge. The learned Sessions Judge is of opinion that the order of the learned Magistrate should be set aside. He holds the view that by reason of the provisions of s. 407 of the Code of Criminal Procedure the appeal must lie to the District Magistrate and he refers us to the case of *Baramaddi* v. *Magarali* (1). He recommends that the order of the learned Magistrate be set aside and that this Court should direct the appeal to be heard by the District Magistrate.

I am of opinion that this Reference must be rejected. I do not propose to deal at length with the numerous cases which have been placed before us,

(1) (1931) 36 C.W.N. 302.

1940

Bijay Kumar Kundu v. *Sita Nath Kundu.*

Sen J.

inasmuch as I hold the view that s. 413 of the Code of Criminal Procedure is clearly applicable to this case and that it bars any appeal.

The learned advocate appearing in support of the Reference placed an argument before us, which may be summarised as follows:—In his view the hearing of arguments and the passing of judgment do not form part of a trial. The trial according to him ends before the arguments are heard. He then refers us to the wording of s. 407 of the Code of Criminal Procedure which is as follows:—

> Any person convicted on a trial by any Magistrate of the second class may appeal to the District Magistrate.

He points out that s. 407 of the Code of Criminal Procedure deals with the case of a person who has been tried by a second class Magistrate and that it does not say anything about the powers of the Magistrate who has convicted the accused or passed the sentence. He argues that if the trial is held by a second class Magistrate, the provisions of the section are at once attracted, even though the sentence be passed by a first class Magistrate. In this case, according to the learned advocate for the accused, the trial was completed by a second class Magistrate, inasmuch as Mr. Mukherji was not invested with first class powers until after the evidence had been closed. He contends, therefore, that an appeal lay before the District Magistrate. In support of this view, he has placed before us the case relied upon by the learned Sessions Judge, to which I have already referred, and also to the case of *Emperor* v. *Maganlall Jhaverchand* (1) and *Emperor* v. *Bakshi Ram* (2).

On behalf of the Crown and the complainant it was argued that a trial does not come to an end until judgment is delivered and it was urged that s. 407 had no application. The question as to when a trial may properly be said to terminate is one of

(1) [1927] A. I. R. (Bom.) 366. (2) I. L. R. [1938] All. 157.

1940

Bijay Kumar Kundu v. *Sita Nath Kundu.*

Sen J.

some nicety, but I do not think that I need enter upon a discussion regarding this question in view of the particular facts of this case and in view of the clear words of s. 413 of the Code of Criminal Procedure. That section is as follows:—

> Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in cases in which a Court of Sessions passes a sentence of imprisonment not exceeding one month only or in which a Court of Sessions or District Magistrate or other Magistrate of the first class passes a sentence of fine not exceeding fifty rupees only.

It is quite obvious from the wording of this section that where a sentence of fine not exceeding rupees fifty is passed by a Magistrate of the first class, no appeal will lie against such a sentence, irrespective of any other provisions in the previous part of the Code. The question, therefore, resolves itself to this: Is this sentence passed by a first class Magistrate? On this point it seems to me there can be no doubt whatsoever. As stated before, the Magistrate, Mr. Mukherji, was invested with first class powers prior to the date on which the sentence was passed. Section 39(*2*) of the Code of Criminal Procedure says that every order whereby powers under the Criminal Procedure Code may be conferred by order of the Local Government shall take effect from the date on which it is communicated to the person so empowered. That being so, there can be no doubt that the first class powers conferred upon Mr. Mukherji took effect from before the date on which sentence was passed. It had already taken effect before July 27, 1939, on which date arguments were heard. There is, therefore, no doubt that the sentence of fine of Rs. 20 was passed by a Magistrate of the first class and s. 413 of the Code of Criminal Procedure explicitly lays down that no appeal lies from a sentence of fine not exceeding Rs. 50 passed by such a Magistrate.

A question was raised as to whether a Magistrate, who had heard a case while he was a Magistrate having second class powers and who was vested with

1940

Bijay Kumar Kundu v. *Sita Nath Kundu.*

Sen J.

first class powers before passing judgment, could pass a sentence which a Magistrate of the second class had not the power to pass. That question was considered and decided by a Full Bench of the Allahabad High Court in the case of *Queen-Empress* v. *Pershad* (1). The majority of the Full Bench held that in such a case the Magistrate could pass a sentence which was within the powers of a Magistrate of the first class and outside the powers of a Magistrate of the second class. The decision was based on the view that the order investing the Magistrate with first class powers having taken effect he has the power to pass any sentence which a first class Magistrate could pass even though he had tried the case partly as a Magistrate of the second class. A similar point was decided by this Court in the case of *Banwari Tewari* v. *Sheo Balak Rai* (2). The Full Bench decision just mentioned was there relied upon and the Court held that where a second class Magistrate was invested with first class powers after he had started the trial and after he had heard a number of witnesses, he could, in passing sentence, rely upon his first class powers and pass a sentence which only a Magistrate of the first class could pass. This Court held further that in such a case no appeal would lie to the District Magistrate and that if the sentence of imprisonment passed by the first class Magistrate did not exceed one month no appeal would lie to the Sessions Judge either. This case is exactly in point and I have no hesitation whatsoever in following it.

The learned advocate for the accused contended that, although the Magistrate was invested with first class powers at the time when he passed sentence, he should be considered as being a Magistrate of the second class inasmuch as he was a Magistrate of the second class so long as the trial had lasted and, inasmuch as he was invested with first

(1) (1885) I. L. R. 7 All. 414. (2) (1906)10 C. W. N. ccxliii.

1940

Bijay Kumar Kundu v. *Sita Nath Kundu.*

Sen J.

class powers after the termination of the trial. He pointed out that in the two cases mentioned above, the Magistrate was invested with first class powers before the termination of the trial. I am unable to accept this argument. The undisputed facts are that Mr. Mukherji was a Magistrate of the first class some days before he passed the order of fine. I cannot, by resorting to a fiction, hold that he was a Magistrate of the second class on that day.

The learned advocate next said that we would be taking away a valuable right, namely, the right of appeal from the accused if we held that s. 407 of the Criminal Procedure Code did not apply. He argued that for all practical purposes his clients had been tried by a Magistrate of the second class and that it was by pure accident that the Magistrate was invested with first class powers before passing sentence. He contended that this accidental circumstance should not be allowed to operate to the detriment of his client's valuable right of appeal. I do not think that there is much substance in this argument. The right of appeal is a creature of statute and it is necessary for an appellant to show that he has got this statutory right. The wording of s. 404 of the Code of Criminal Procedure makes this quite clear. It says :—

> No appeal shall lie from any judgment or order of criminal Court except as provided for by this Code or by any other law for the time being in force.

It cannot be said that any right has been taken away from the accused. It is for them to show that they were invested with the right of appeal by virtue of some provision in the Code of Criminal Procedure or by any other law. In my opinion, they have not been able to show that they have any such right. On the contrary, s. 413 of the Code of Criminal Procedure expressly negatives the existence of such right. The section and the two decisions last adverted to were apparently not brought to the notice

1940

Bijay Kumar Kundu v. *Sita Nath Kundu.*

Sen J.

of the Judge who decided the case of *Baramaddi* v. *Magarali* (1). With very great respect to the learned Judge who decided that case, I have to dissent from that decision in view of what I consider to be the explicit provision in s. 413 of the Code of Criminal Procedure barring any appeal in the circumstances which have occurred.

I hold, therefore, that the accused have no right of appeal. This Reference must be rejected.

The learned advocate on behalf of the accused stated that we should direct the learned Sessions Judge to deal with the motion before him on the merits. I think this is a reasonable request and I direct that the learned Sessions Judge do deal with the motion before him on the merits and pass orders thereon according to law.

KHUNDKAR J. I agree and desire to add a few words.

The opening words of s. 413 of the Code of Criminal Procedure "notwithstanding anything "hereinbefore contained" indicate that this section enacts what is in the nature of an exception to provisions relating to certain appeals contained in earlier section of the Code. In my judgment, it, therefore, follows that, in considering the kind of case which falls clearly within the language of s. 413 of the Code of Criminal Procedure, it would not be permissible to go back to the language of any of the earlier sections for guidance in the matter. As has been pointed out in the judgment just delivered by my learned brother, the case of *Queen-Empress* v. *Pershad* (2), which was followed by the case of *Banwari Tewari* v. *Sheo Balak Rai* (3), has made it abundantly plain that where a trial is commenced before a second class Magistrate and where before the sentence is pronounced by him, he becomes invested with the powers of a first class Magistrate, the

(1) (1931) 36 C.W.N. 302. (2) (1885) I. L. R. 7 All. 414.
(3) (1906) 10 C.W.N. ccxliii.

1940

Bijay Kumar Kundu
v.
Sita Nath Kundu.

Khundkar J.

Magistrate is competent to pass a sentence in excess of what may be passed by a Magistrate of the second class. From this rule, it follows, by necessary implication that, in a situation such as this, at the time when the Magistrate is passing sentence, he cannot be regarded as a Magistrate of any other class but the first class. The language of s. 413 in so far as it is material for the purpose of the case, which we are considering, is significant, for it is as follows:—

> There shall be no appeal by a convicted person in cases in which a District Magistrate or other Magistrate of the first class passes a sentence of fine not exceeding fifty rupees only.

I do not think it is possible to say that the present case is not a case in which a sentence was passed by a Magistrate of the first class.

Reference rejected.

A. C. R. C.