EMPEROR v. CHINNA PAYAN

that the appellant had denied his plea of guilty in the lower Court. In view of the ruling in *Mohideen Abdul Kadir* v. *Emperor*(1) I consider that the conviction should be set aside and a retrial ordered.

The Public Prosecutor appeared in support of the reference.

ORDER.—There is no doubt that this case ought to have been tried as a warrant case and not as a summons case. If it had been tried as a warrant case, it would have been the duty of the Magistrate under section 252 of the Code of Criminal Procedure to take such evidence as might be produced in support of the prosecution; and the accused could not have been called upon to plead until after a charge had been framed and read and explained to him (section 255).

The Magistrate appears to have convicted the accused under section 243, on an admission made by the accused, without taking any evidence and without framing a formal charge. It seems to me this is something more than an irregularity, and that the accused may possibly have been prejudiced by the procedure adopted by the Magistrate.

The conviction must be set aside. As the accused has served his term of sentence, there is no object in ordering a new trial.

APPELLATE CRIMINAL.

Before Mr. Justice Subrahmania Ayyar.

1906. January 31.

VYTHIANADA TAMBIRAN (PETITIONER), PETITIONER,

v.

MAYANDI CHETTY (COUNTER-PETITIONER), RESPONDENT.*

Criminal Procedure Code—Act V of 1898, s. 148 (3)—Award of costs may be made within a reasonable time after disposal of the main question.

An award of costs under section 148 (3) of the Code of Criminal Procedure should, in the usual course, be contemporaneous with the decision of the main question. Where, however, circumstances require the postponement of the award of costs, it should be made within a reasonable time after the disposal of the principal subject of the proceeding, in the presence of both parties.

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(1) I. L. R., 27 Mad., 238.

*Criminal Revision Case No. 355 of 1905, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of C. G. Mackay, Esq., Head Assistant Magistrate of Chingleput, in Miscellaneous Case No. 33 of 1905.

VYTHIA-NADA TAMBIRAN v. MAYANDI CHETTY.

In Miscellaneous Case No. 33 of 1905, the Head Assistant Magistrate of Chingleput passed orders under section 145 of the Code of Criminal Procedure declaring the counter-petitioner to be in possession of the disputed lands. This order was passed on the 30th June 1905, and on the 3rd July 1905, the counter-petitioner applied for the award of his costs. The petitioner objected and the Magistrate, after hearing both parties, passed an order on the 7th July 1905, awarding costs to the counter-petitioner under section 148 of the Code of Criminal Procedure. Petitioner moved the High Court to revise the order under sections 435 and 439 of the Code of Criminal Procedure.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for the petitioner.

P. R. Sundara Ayyar for respondent.

ORDER.—The facts of the case are these: The Magistrate passed the order under section 145 of the Criminal Procedure Code as to possession in favour of the counter-petitioner on the 30th June. On the 3rd July the counter-petitioner applied for costs. The petitioner accepted notice and objected to any order being passed in the matter. On the 7th idem the Magistrate passed the order now sought to be revised directing the petitioner to pay Rs. 250 as costs to the counter-petitioner. Mr. Ramachandra Ayyar contends that the order was passed without jurisdiction as it was not passed at the time the matter of possession was decided. I cannot accept the construction suggested by Mr. Ramachandra Ayyar that section 148 (3) which empowers a Magistrate to award costs in proceedings under chapter XII of the Code of Criminal Procedure permits him in a case like this to award costs only simultaneously with the decision as to possession. The word 'passing' which follows the term 'Magistrate' in the said provision as I understand it, means no more than that the Magistrate who may award costs, is the officer holding the proceeding under the chapter or his successor entitled to discharge his functions in connection with the matter. Even if this would be going too far, and the right construction were that the award of costs should be made by the same Magistrate that deals with the main question in the proceeding, the order here cannot be held to be void or illegal as such in fact was the case here. The view as to the section thus taken by me is not only not opposed to the cases of

Queen-Empress v. *Tomijuddi*(1), *Giridhar Chatterjee* v. *Eradullah Naskar*(2), and *Binoda Sundari Chowdhurani* v. *Kali Kristo Pal Chowdhary*(3), to which my attention has been drawn but is more or less supported by them. It is scarcely necessary to add that though I hold the circumstance that the award of costs is not made at the very time the substantial question in the proceeding is disposed of, does not necessarily render the award invalid, I should not be understood as implying that the length of the interval is immaterial. In the usual course the award should almost invariably be contemporaneous with the decision as to the main question. A different course should be pursued only when the circumstances of the case really require the postponement of the disposal of the question of costs and no order in the matter should be passed except within a reasonable time after the disposal of the principal subject of the proceeding and in the presence of both the parties. Upon the facts of this case no objection on the score of long delay exists and in the view of the section I take, it is not open to me to go into the question as to whether the amount awarded is proper. I dismiss the petition.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice.

IN THE MATTER OF KUPPAMMALL (COMPLAINANT), PETITIONER.* 1906 May 16.

Criminal Procedure Code—Act V of 1898, *ss.* 517-523 *Sections not applicable where there was no trial and no evidence recorded.*

When a person charged before the Magistrate with criminal breach of trust in respect of certain jewels died before trial and before any evidence was recorded and the alleged owner of the jewels, which were recovered by the Police from the pledgees and sent to the Magistrate along with the charge sheet, applied to be put in possession of them under sections 517 and 523 of the Code of Criminal Procedure after enquiry as to their ownership :

Held, that section 517 of the Code of Criminal Procedure did not apply to the case.

Held further, that as there was no evidence or finding about ownership, section 523 of the Code of Criminal Procedure did not apply and that the

(1) I.L.R. 24 Calc., 757. (2) I.L.R. 22 Calc., 385.
(3) I.L.R. 22 Cal. 387.

* Criminal Revision Case No. 239 of 1906, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of F. D. Bird., Esq., Presidency Magistrate, Georgetown, in Calendar Case No. 11317 of 1906, dated 2nd May 1906.