

the objection of misjoinder was not taken before the Sessions Judge, it is not open to us to say the conviction is bad. We entirely disagree with this contention. The fact that the charge alleges that the different offences were committed at or about the same time or place does not of course show that the case falls within the provisions of section 235.

The only sense in which the alleged falsification of the account book and the alleged fraudulent destruction and secretion of documents can be said to be "connected together" is that the fact of the first accused being left in charge of the account book and of the documents gave him an opportunity of defrauding the complainant by falsifying the account book and destroying the documents. It is not suggested that the account book was falsified in order to conceal the fact that documents had been destroyed or that documents had been destroyed in order to prevent the particular falsification from being detected.

We are of opinion that the offences charged do not constitute one series of acts so connected together as to form the same transaction. This misjoinder of charges cannot be treated as an irregularity which is curable under section 537 of the Criminal Procedure Code (*Subramania Ayyar v. King-Emperor*(1)).

We set aside the conviction and direct that the second accused be retried.

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## APPELLATE CRIMINAL.

*Before Sir Arnold White, Chief Justice, and Mr. Justice Davies.*

IN THE MATTER OF BYRAVALU NAIDU (COMPLAINANT)\*

1902.  
September 9.

*Criminal Procedure Code—Act V of 1898, ss. 250, 388 (2)—Compensation in respect of vexatious complaint—Sentence of imprisonment on non-production of sureties and on complainant's plea of inability to pay—Legality.*

A Deputy Magistrate, having held that a complaint was vexatious, ordered the complainant to pay compensation under section 250 of the Code of Criminal Procedure. He recorded the following order:—"The complainant is unable

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(1) I.L.R., 25 Mad., 61.

\* Case Referred No. 90 of 1902, for the orders of the High Court under section 438 of the Code of Criminal Procedure, by E. L. Vaughan, District Magistrate of North Arcot, in his letter, dated 13th July 1902, R.C. No. 951, Magisterial of 1902.

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to produce any sureties and pleads inability to pay the compensation. He is awarded 30 days' simple imprisonment." No attempt was made to levy the amount of the compensation:

*Held*, that the order was invalid whether it were passed under section 250 (2) or section 388 (2) of the Code of Criminal Procedure. Where an order to pay compensation has been made under section 250, the Magistrate cannot make an order for imprisonment on the mere intimation by the person who is directed to pay the compensation that he is unable to do so. Under section 388 (2), the issue of a warrant for the levy by distress of the amount awarded as compensation is a condition precedent to the carrying out of the sentence of imprisonment.

**ORDER to pay compensation.** The Deputy Magistrate of Chittoor discharged the accused in a case on his file and, holding the complaint to be vexatious, ordered the complainant to pay Rs. 38 as compensation, under section 250 of the Code of Criminal Procedure. He passed the following order:—"The complainant is unable to produce any sureties and pleads inability to pay the Rs. 38 of the compensation. He is awarded 30 days' simple imprisonment." The case was referred to the High Court for orders, by the District Magistrate, who, while doubting the legality of the Deputy Magistrate's order, suggested that it had apparently been passed under section 388 (2) of the Code of Criminal Procedure. No attempt had been made to levy the sum in the manner provided by section 386 of the Code of Criminal Procedure. The District Magistrate suspended the execution of the sentence of imprisonment, and requested that the unexpired portion of the term should be set aside.

The Court passed the following Order:—

Sir ARNOLD WHITE, C.J.—The order of the Deputy Magistrate is in these terms: "The complainant is unable to produce any sureties and pleads inability to pay the Rs. 38 of the compensation. He is awarded 30 days' simple imprisonment." The question is, is this a legal order?

The District Magistrate assumes that, in making this order, the Deputy Magistrate purported to act under the powers conferred by section 388 (2) of the Code of Criminal Procedure. I am not at all sure that, when he made the order, the Deputy Magistrate had in mind the provisions of section 388 (2). It is difficult to say what is meant by the words of the order "the complainant is unable to produce any sureties". These words do not appear to have been used with reference to the provisions of section 388, since the bond referred to in that section may be executed with

or without sureties. Having regard to the terms of the order it seems to me that the Deputy Magistrate was under the impression that, under section 250 of the Code of Criminal Procedure, he could make an order for imprisonment on an intimation by the person directed to pay compensation that he was unable to pay. So far as section 250 is concerned it is clear that the Deputy Magistrate had no jurisdiction to make the order. The words of section 250 (2) are:—"Compensation of which a Magistrate has ordered payment under sub-section (1) shall be recoverable as if it were a fine: Provided that, if *it cannot be recovered*, the imprisonment to be awarded," etc. See, too, the cases (*Ramjeevan Koormi v. Duryacharan Sadhu Khan*(1) and *Parsi Hajra v. Bandhi Dhanuk*(2)).

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The question, however, remains,—can the order be upheld as an order under section 388 (2)? I think not. In my opinion the issue of a warrant for the levy by distress and sale of the amount awarded as compensation is in all cases a condition precedent to the carrying out of the sentence of imprisonment. It seems to me that section 388 (2) clearly contemplates the issue of a warrant, although it empowers the Court to pass sentence of imprisonment, although no attempt to execute the warrant has been made, if the person ordered to pay compensation on being required to execute a bond to appear on the day fixed for the return of the warrant, fails to execute the bond.

The object of section 388 (1) is to enable the Court to give time, not exceeding 15 days, to an offender who has been sentenced to pay a fine. If the fine is not paid within the time so given the Court may direct the sentence of imprisonment to be carried into execution at once. The object of section 388 (2) (which in terms applies to all orders for the payment of money whether by way of fine or compensation) on non-recovery of which imprisonment may be awarded, is to enable the Court to pass sentence of imprisonment without waiting for the return of the warrant, if the person ordered to make the payment fails to execute a bond to appear on the day appointed for the return.

The compensation which the Court is empowered to award under section 250 is not a fine but is in the nature of damages for malicious prosecution, although it is made recoverable in a

(1) I.L.R., 21 Calc., 979.

(2) I.L.R., 28 Calc., 251.

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summary manner as if it were a fine. The governing section is section 250, where the words "if it cannot be recovered" are used, and if section 388 (2) can be construed, and grammatically it certainly can, as not inconsistent with these words, I think it ought to be so construed. In the circumstances of this case I do not think it necessary to order that any further action be taken.

On the facts I agree with the District Magistrate and I think the unexecuted term of the sentence may be set aside.

DAVIES, J.—I agree.

## APPELLATE CRIMINAL.

*Before Mr. Justice Bhashyam Ayyangar.*

RAGHUNATHA PANDARAM (FIRST ACCUSED), PETITIONER,

*v.*

EMPEROR, RESPONDENT.\*

*Criminal Procedure Code—Act V of 1898, s. 528—Order by Sub-Divisional Magistrate transferring case from one Sub-Magistrate to another—Order by District Magistrate cancelling that order and re-transferring the case—Legality.*

A District Magistrate has no power to cancel an order made by a Sub-Divisional Magistrate directing the transfer, under section 528 of the Criminal Procedure Code, of a case from the file of one Sub-Magistrate to that of another Sub-Magistrate, and to direct the re-transfer of the case to the file of the Sub-Magistrate from whom it was transferred.

**PETITION.** A petition was presented by the complainant in Calendar Case No. 78 of 1902, on the file of the Stationary Second-class Magistrate of Tirutturaippundi, to the District Magistrate of Tanjore, requesting that a case which had been transferred by the Sub-Divisional Magistrate of Mannargudi to the file of the Stationary Second-class Magistrate of Mannargudi might be transferred back to the file of the Tirutturaippundi Magistrate. Vakils were heard on behalf of the complainant and the accused, whereupon

\* Criminal Revision No. 267 of 1902, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the proceedings of Francis Du Pré Oldfield, Acting District Magistrate of Tanjore, dated 23rd May 1902, and direct Calendar Case No. 78 of 1902, on the file of the Stationary Second-class Magistrate of Tirutturaippundi to be tried by the Stationary Sub-Magistrate of Mannargudi or by any other Magistrate.