RAJAGOPALACHARYULU v. SECRETARY OF STATE. — SADASIVA AYYAR, J.

only to 147/220 of the area belonging to his family. I would declare in this case that the plaintiff is entitled to free irrigation for 147/220 of 3 acres 40 cents. As the plaintiff has grossly exaggerated in his plaint the area he was entitled to irrigate free of water-cess, I would direct him to pay the Secretary of State's costs throughout in this case.

As a result the Second Appeals except Second Appeal No. 1774 of 1911 are dismissed with costs: and the Memorandum of Objections in Second Appeal No. 1563 of 1911 is dismissed without costs.

[Letters Patent Appeals Nos. 111 to 117 and 121 of 1913 were preferred against the decisions in the above cases and their Lordships (WALLIS, C.J., KUMARASWAMI SASTRIYAR and PHILLIPPS, JJ.,) who heard the appeals allowed the plaintiffs in Letters Patent Appeals Nos. 111 to 115 of 1913 to amend their plaints by alleging an implied agreement between the plaintiff and the Government at the time of the Permanent Settlement and granted a decree to the plaintiffs as prayed for the extents found by the District Judge and dismissed Letters Patent Appeals Nos. 116, 117 and 121 of 1913.]

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Miller and Mr. Justice Spencer.

1914, January, 9 and 22.

Re SINNU GOUNDAN AND ANOTHER (ACCUSED IN CALENDAR CASE NO. 612 OF 1913 ON THE FILE OF THE STATIONARY SECOND-CLASS MAGISTRATE OF GINGEE IN THE SOUTH ARCOT DISTRICT).*

Criminal Procedure Code (Act V of 1898), sec. 438—High Court will not interfere with an acquittal in revision where an appeal might have been preferred by Government.

In a case in which the complainant being absent, the Magistrate acquitted the accused under section 247, Criminal Procedure Code, it subsequently

* Referred Case No. 95 of 1913 (Criminal Revision Case No. 673 of 1913).

transpired that the absence of the complainant had been procured by the fraud of the accused who had had him arrested and kept in custody on a false charge. *Re* SINNU GOUNDAN.

No appeal against the acquittal was preferred by Government but the District Magistrate referred the case to the High Court under section 438, Criminal Procedure Code.

Held, that the High Court as a Court of Revision would not, on the District Magistrate's report, set aside an order of acquittal where an appeal lay by Government against such an order.

CASE referred for the orders of the High Court under section 448, Criminal Procedure Code, by M. AZIZ-UD-DIN SAHIB BAHADUR, Khan Bahadur, I.M.S., the District Magistrate of South Arcot, in his letter, dated 12th October 1913.

The facts of the case appear from the judgment of SPENCER, J.

J. C. Adam for the Public Prosecutor for the Crown.

None represented the accused.

MILLER, J.—As the Criminal Procedure Code does not permit a magistrate to review his judgment in the light of evidence subsequently obtained or to readmit to his file a case in which the accused has been acquitted under section 247 owing to the absence of the complainant, even if good reasons be shown for his non-appearance, I should hesitate without further consideration to hold that the Legislature intended to permit this Court in appeal or revision to set aside an acquittal merely on the ground that fresh evidence is available which could not be produced at the trial, or on the ground that a complainant has shown sufficient reason for his failure to appear and prosecute his complaint, before the magistrate in a summons case. But in the present case we must take it that the acquittal of the accused under section 247 was procured by his own trick: he himself is responsible for the complainant's failure to appear. The order was, we may say, obtained by a fraud on the Court and though even in those circumstances the Code does not permit the Court which made the order, to vacate it on proof of the fraud interference by this Court may be a proper exercise of our powers in revision or possibly in appeal, to avoid a miscarriage of justice. MILLER, J.

We have not been referred to any case in England in which *certiorari* has been had to quash an order of acquittal made by an inferior Court for fraud in the person procuring the order. There is a case *R.* v. *Umvin*(1) [referred to in Archbold's

(1) (1839) 7 Dowl., 578.

Re SINNU GOUNDAN.

MILLER, J.

Criminal Pleadings, 23rd edition, page 132 ; 10 Halsbury's Laws of England, page 197, foot-note] which seems to have been something like the present case and in which *certiorari* was refused but I have not been able to see the report of that decision. But we have the authority of Archbold's Criminal Pleadings (23rd edition, page 292) for saying that a new trial after acquittal in a case of misdemeanour would be granted if the verdict had been obtained by irregularities committed by the defendant himself and though no case is there cited in which a new trial has actually been allowed on these grounds, the authority of Archbold's treatise is so high that it is not unsafe to accept it as correctly stating the principle on which the Court would have acted in England in former days.

In India we have power to revise an order which is improper (section 435 of the Code of Criminal Procedure) and an order, though strictly in accordance with the law as in the present case, may, I think, be said to be improper if it was procured by the fraud or trick of the party asking for it and would not have been made but for that fraud or trick. The order before us is one which but for the accused's deceit would not have been made in the circumstances, and so may be said to be an improper order though the Magistrate's action was strictly correct.

Our powers in appeal are not defined by the Code, further than this, that an appeal may lie on a matter of fact as well as on a matter of law except in a case tried by a jury (section 418). The Code does not expressly state whether these matters are matters appearing upon the record matters, that is, which the inferior Court has or might have determined, or whether we are at liberty to admit an appeal on some extraneous matters which ought to have affected the decision had it been known at the time of the trial but which was not before the inferior Court.

I have not found a case in any of the High Courts which decides the point. In *Queen-Empress* v. *Prag Dat*(1) the learned Judges state as one of the requirements of an appeal that the ground for interference should be apparent on the record but it cannot be said that they were deciding the present point.

But there is nothing in the Code of Criminal Procedure to suggest that so far as the right of appeal is concerned there is

(1) (1898) I.L.R., 20 All., 459 at p. 464.

any difference between the case of an appeal from a conviction and from an acquittal and I should not like to hold that an appeal from a conviction could not be entertained if based on the concealment of a material fact from the Court which conducted the trial. I agree therefore that in this case the Local Government might have directed the filing of an appeal against the acquittal and that being so I agree also that we ought to refuse to interfere on the District Magistrate's report of the case.

The District Magistrate is, no doubt, not the party entitled to appeal from an acquittal, but his report to the High Court is intended to move the Court to act under section 439 of the Criminal Procedure Code that is to act as a Court of Revision and though it is made at the instance of the complainant it contains the District Magistrate's presentation of the case and it seems to me that to entertain proceedings by way of revision on a District Magistrate's report in a case where an appeal would lie from an acquittal is contrary to the spirit if not to the letter of sub-section 5 of section 439 of the Criminal Procedure Code.

SPENCER, J.—In this case the complainant preferred a complaint of mischief under section 426, Indian Penal Code, on June 14th against two individuals, process was issued against them and the complainant was informed of the date of hearing in person. On June 23rd, the date fixed for the trial, the Magistrate acquitted the accused under section 247, Criminal Procedure Code, owing to the complainant not being present in Court when the case was called on. It subsequently transpired that the complainant had been kept out of the way by the action of the accused in getting a constable to arrest him on a false charge of committing nuisance after he had come to Gingee, where the Magistrate's Court was situated (see the judgment in Calendar Case No. 638 of 1913 on the file of the Second-class Magistrate of Gingee). Under these circumstances the District Magistrate has under section 438 referred the case to the High Court for setting aside the order of acquittal and for directing a new trial.

The question for our decision is whether, assuming that the Second-class Magistrate would have exercised his discretion differently by adjourning the hearing to another day had he

Re SINNU GOUNDAN.

SPENCER, J.

been aware of the cause of the complainant's failure to appear, this Court acting as a Court of Revision will set aside the acquittal and order a fresh trial.

Upon the materials before him when the order under section 247 was passed the Magistrate's procedure was strictly proper and in accordance with law. This section declares that the Magistrate shall acquit the accused unless for some reason he thinks proper to adjourn the hearing of the case to some other day. Such an acquittal after the accused has appeared and answered to the charge will operate as a bar to his being again tried for the same offence as he is a person "tried" by a Court within the meaning and for the purposes of section 403, Criminal Procedure Code—*Suraiya Sastri* v. *Venkata Rao*(1). The Magistrate has no power to revive the proceedings, as there is no provision in the Code of Criminal Procedure resembling Order 9, rule 4 of the Civil Procedure Code, by which a case can be restored to file by the Court which dismissed it; nor can the District Magistrate order a rehearing [*Narayanasami Ayyar* v. *Janaki Ammal*(2), *Rangasami* v. *Narasimhulu*(3) and *Empress* v. *Hardeo Singh*(4)].

Coming next to a consideration of what are the powers of the High Court in such a matter, I think there can be hardly any doubt that if this matter came up for determination in a Court governed entirely by English law the answer to the question whether the acquittal could be interfered with would be in the negative.

In English Courts the maxim of *Nemo bis vexari debet* is given full scope. It has been repeatedly held in England that if an accused person has been once tried and acquitted upon the merits by a Court of competent jurisdiction so as to have been put in peril of conviction he cannot again be tried upon the same charge but if charged he can successfully plead *autrefois acquit*. It is true that in *Regina* v. *Scaife*(5), a new trial was ordered in a case where one of the accused indicted for felony procured the absence of a witness whose evidence taken before a Magistrate was read against himself and others jointly tried with him.

(1) (1886) 2 Weir's Cr. R., 457. (2) (1881) 2 Weir's Cr. R., 308.
(3) (1885) I.L.R., 7 Mad., 213. (4) (1891) 11 A.W.N., 120.
(5) (1851) 17 Q.B., 238; s.c., 117 E.R., 1271.

But *Regina* v. *Scaife*(1) was dissented from in later cases *Reg.* v. *Bertrand*(2) and *R.* v. *Murphy*(3). In England the Courts have resolutely set their face against granting new trials after acquittals for murder and felony on the ground of misreception of evidence, misdirection or that the verdict was against evidence and the same principle has been extended to misdemeanours also. See *Reg.* v. *Duncan*(4). It has been further held that acquittals and dismissals cannot be quashed by *certiorari* even though the justices who tried the cases were disqualified by interest or bias—*R.* v. *Galway Justices*(5) and *R.* v. *Antrim Justices*(6). The latest case on the point is *Rex* v. *Simpson*(7) in which the doctrine has been stretched to the length of holding that a dismissal of information could not be disturbed even though one of the five justices who acquitted the accused was disqualified and though the Court might be said to that extent not to be a competent tribunal.

In India however matters stand upon a different footing. Here appeals against orders of acquittal are allowed by section 417, Criminal Procedure Code, a provision of law which is quite alien to the principles upon which English Courts administer the law against criminals. We have also section 403 which prohibits a second trial for the same offence provided that the conviction or acquittal at the first trial remains in force. If the conviction or acquittal is set aside by a Court of competent jurisdiction, it follows that the accused cannot successfully plead the original decision in bar of further proceedings.

The safeguard of the subject consists in the fact that no appeal against an acquittal will be except at the instance of Government and that Government only exercise this power in cases in which there has been in their opinion a substantial failure of justice.

It appears *prima facie* that there was a failure of justice in the present case if the complainant was prevented from presenting his complaint and obtaining the redress that the criminal law allows, owing to a circumstance beyond his control, namely his wrongful arrest and detention on a false charge, a fact which the

(1) (1851) 17 Q.B., 238; s.c., 117 E.R., 1271. (2) (1867) L.R., 1 P.C.C., 520.
(3) (1869) L.R., 2 P.C.C., 535. (4) (1881) 7 Q.B.D., 198.
(5) (1906) 2 W.R., 499. (6) (1895) 2 Ir. R., 603.
(7) K.B.D., Oct. 23, 1913, reported in the Law Journal of Nov. 8 at p. 646; s.c. (1914) (Q.B.) 1 K.B.D., 66; s.c., 136 L.T., 10.

RE SINNU GOUNDAN.

SPENCER, J.

Court which tried the case of nuisance found to be true. But this was a circumstance which was not in evidence at the time when the Court passed the order of acquittal under section 247, Criminal Procedure Code, on the complaint of mischief. Of course he may have his remedy in an action in tort for malicious arrest against the constable or against the accused if he instigated the constable or he may proceed criminally against them, if so advised for offences under sections 211 and 341, Indian Penal Code; but he will still have a grievance that his complaint of mischief has not been heard.

Now there is nothing in the language of section 417, Criminal Procedure Code, to limit appeals against acquittals to cases in which Courts have owing to some error of law or misappreciation of evidence come to a wrong decision on the evidence before them.

It has been held that the Legislature has allowed by this section an appeal by the Local Government in the widest terms and without any limitation whatever [see *Empress of India* v. *Judoanath Gangoaly*(1)], and that there is no distinction in the Code between the right of appeal against an acquittal and the right of appeal against a conviction, both being governed by the same rules and being subject to the same limitations. See *The Queen Empress* v. *Bibhuti Bhusan Bit*(2) and *Queen-Empress* v. *Prag Dat*(3) and *King-Emperor* v. *Chattar Singh*(4).

Section 428, Criminal Procedure Code, allows additional evidence to be admitted in appeals against acquittal as well as in appeals against convictions, although cases in which this power is exercised will naturally be rare.

I would therefore be prepared to set aside the order of acquittal in this case and order a retrial if the matter had come before the Court by way of appeal presented by the Local Government under section 417.

But in revision it has always been regarded as a sound rule of practice not to interfere when there is no error in law or on the face of the record [*Emperor* v. *Sakharam*(5), *Keshab Chunder Roy* v. *Akhil Metey*(6) also *Emperor* v. *Mirth Das Newalram*(7)]

(1) (1877) I.L.R., 2 Calc., 273.
(2) (1892) I.L.R., 17 Calc., 485.
(3) (1898) I.L.R., 20 All., 459.
(4) (1904) 39 Punjab Record, 15 (Cr.).
(5) (1902) 4 Bom. L.R., 686.
(6) (1895) I.L.R., 22 Calc., 998.
(7) (1913) 1 Cr.L.R., 15.

and not to interfere in cases of acquittal in which Government might have applied under section 417 Criminal Procedure Code, but has not done so, see *In the matter of Aurokiam*(1), also *Thandavan* v. *Perianna*(2), *Emperor* v. *Madar Bakhsh*(3) and *Empress* v. *Miyaji Ahmed*(4). In the former respect the Courts in India conform to the practice of the English Courts when dealing with merits of *certiorari* and the now obsolete merits of error; for the latter practice there is now the authority of clause 5 of section 439, Criminal Procedure Code.

Empress v. *Hardeo Singh*(5), STRAIGHT, J., acting in revision, ordered a new trial upon a reference by the Sessions Judge when the accused had been acquitted under section 247 on a complaint of mischief and assault owing to the complainant's absence through fever, but this is the only reported instance that I have been able to discover of a High Court in exercise of their revisional powers setting aside an order of acquittal upon facts not before the Court that tried the case. Even that instance was prior to the introduction of clause 5 of section 439 by Act V of 1898.

I therefore consider that our proper course is to refuse to interfere with the acquittal on the District Magistrate's reference.

J.C.A.

---

(1) (1878) I.L.R., 2 Mad., 38.
(2) (1891) I.L.R., 14 Mad., 363.
(3) (1903) I.L.R., 25 All., 128.
(4) (1879) I.L.R., 3 Bom., 150.
(5) (1891) 11 A.W.N., 120.