

charge in Calendar Case No. 4. Ordinarily such a failure of justice would warrant a retrial of the accused. But the offence took place in October 1910 and the accused has been before the Criminal Courts on three occasions. Under these circumstances, I agree in holding that it is not desirable to direct a retrial.

NAPIER, J.—I concur. I do not however think that the decision of the Privy Council in *Subrahmania Ayyar v. King-Emperor*(1) compels us to hold that in no case can a misjoinder of charges or a failure to try charges separately be an irregularity within the meaning of section 537 of the Code of Criminal Procedure. In the manner in which this case comes before us that section however cannot be relied on, and we have only to apply section 233. The only question that remains is what course we must adopt being satisfied (1) that the accused has been tried illegally, (2) that his acquittal on the merits on two of the charges was wrong and (3) that in the circumstances we do not think that he should be retried on those charges. It seems to me that we must do what the lower Court could have done if its attention had been drawn to the illegality of the trial before judgment, that is, acquit the accused, which in our position, is done by dismissing the appeal.

THE  
PUBLIC  
PROSECUTOR  
V.  
KADURI  
KOYA.

NAPIER, J.

C.M.N.

## APPELLATE CRIMINAL.

*Before Mr. Justice Spencer and Mr. Justice Seshagiri Ayyar.*

N. SUBBAYYA AND ANOTHER (COUNTER-PETITIONERS),  
APPELLANTS,

1915.  
February 8.

v.

P. RAMAYYA (PETITIONER), RESPONDENT.\*

*Criminal Procedure Code (Act V of 1908), ss. 435, 439 and 183—Revision petition to the High Court against an order under section 133—Order of a single Judge of the High Court—Appeal against order, if maintainable—Letters Patent (24 & 25 Vict., cap. 104), cl. 15.*

No appeal lies, under clause 15 of the Letters Patent, against an order of a single Judge of the High Court in a Criminal Revision Petition preferred against

(1) (1902) I.L.R., 25 Mad., 61 (P.C.).

\* Letters Patent Appeal No. 373 of 1914.

SUBBAYYA  
v.  
RAMAYYA. an order of a Magistrate acting under section 133 of the Code of Criminal Procedure.

APPEAL under clause 15 of the Letters Patent against the order of AYLING, J., in *Subbayya v. Ramayya*.\*

The facts appear from the order of the High Court.

*V. Ratna Somanathan* for the appellants.

*B. Somayya* for *R. Narayanamurti* for the respondents.

SPENCER AND  
SESHAGIRI  
AYYAR, JJ.

The following ORDER of the Court was delivered by SPENCER, J.—We are of opinion that no appeal lies in this case against the order passed under section 439 of the Code of Criminal Procedure by a single Judge of this Court.

Orders made under section 133 and connected sections are not excluded from the operation of section 435 and there is no good reason for treating orders passed under this Chapter X which deals with public nuisances and prescribes that the procedure shall be that of a summons case, as not orders passed in a criminal trial within the words of section 15 of the Letters Patent Act.

It is argued on the authority of *Hirananda Ojha v. The Emperor* (1) that cases where the person against whom proceedings are taken can give evidence on his own behalf are cases of a quasi-civil nature; but in proceedings under section 488 persons against whom orders of maintenance are applied for are permitted to tender themselves as witnesses and yet they are styled 'accused'. Assuming that a counter-petitioner in proceedings under Chapter X is a competent witness on his own behalf this fact will not in our opinion render the proceedings any less a criminal trial. We dismiss this appeal.

K.R.

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\* Criminal Revision Case No. 427 of 1914 preferred against the order of Rao Sahib C. BHAKTAVATSULUDU NAYUDU, Sub-Divisional Magistrate, Tenali division, in Miscellaneous Case No. 14 of 1913.

(1) (1905) 9 O.W.N., 933.