

would similarly exonerate them in the Sessions Court. It is impossible to resist the conclusion that their retraction on the one point of identification in the Sessions Court is a perjury designed to defeat justice and that the true evidence is that which they gave in the committing Court. In these cases, therefore, I find no difficulty in agreeing with the lower Court as to which are the reliable depositions; and on its conclusion on that point which was a judicial one, that Court was perfectly competent to act. I agree, therefore, that the learned Sessions Judge was amply justified in the circumstances of these cases in accepting as true and using the evidence of identification of assailants given in the committing Court by the eye-witnesses, and cannot accept the argument put forward before us that the conviction based on that evidence is bad or unjustifiable in law.

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KING-
EMPEROR
—
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APPELLATE CRIMINAL.

Before Mr. Justice Odgers and Mr. Justice Hughes.

GOVINDAN NAIR AND OTHERS (ACCUSED), PETITIONERS,

v.

1923,
September
6.

KUTHASERI KUNHI KRISHNAN NAIR (COMPLAINANT),

RESPONDENT.*

*Code of Criminal Procedure (Act V of 1898), section 350—
Evidence recorded by two successive Magistrates—Conviction
by a third Magistrate, if valid.*

A conviction by a Magistrate, acting upon evidence recorded partly by one predecessor and partly by another is valid. Section 350 of the Code of Criminal Procedure (Act V of 1898) applies to the case of a Magistrate acting upon evidence recorded by more than one Magistrate who afterwards ceased to exercise jurisdiction.

* Criminal Revision Case No. 262 of 1922.

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PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898) praying the High Court to revise the judgment, dated 28th September 1922, of C. K. MATHIAH, Personal Assistant First-class Magistrate of Calicut in Criminal Appeal No. 17 of 1922 presented against the judgment of T. A. GOVINDA AYYAR, Second-class Magistrate of Tirur in Calendar Case No. 94 of 1922.

The petitioners were charged with criminal trespass under section 447, Indian Penal Code (Act XLV of 1860) before Mr. Sesha Sastri, Second-class Magistrate of Tirur. He recorded evidence for the prosecution and was afterwards transferred. His successor Mr. Gangadhara Ayyar, who recorded evidence for the defence, was also transferred. Mr. Govinda Ayyar who succeeded him convicted the accused, acting upon the evidence recorded by his two predecessors, and sentenced them to pay a fine of Rs. 130, out of which he awarded a compensation of Rs. 50 to the complainant. On appeal the said conviction and sentence were confirmed. The petitioners preferred this Criminal Revision Petition to the High Court and, for the first time, questioned the jurisdiction of the Magistrate to act upon evidence recorded by two of his predecessors.

T. Krishna Nambissan for the petitioners.—Section 350 of the Code of Criminal Procedure has no application where the evidence was previously recorded by more than one Magistrate. The section contemplates a conviction by a Magistrate upon evidence partly recorded by only one predecessor, and not by more than one. That is why the word “second” is used in proviso (a) to the section. The Code does not provide for more than two Magistrates trying a case.

V. L. Ethiraj for the Public Prosecutor.—The word “second” in the proviso has reference only to a stage where the previous Magistrate ceases to exercise

jurisdiction. "Second" means second or next to the Magistrate who has ceased to exercise jurisdiction.

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T. Richmond and *K. P. Raman Menon* for the respondents.

JUDGMENT.

ODGERS, J.—In this revision case an apparently novel point is raised. A complaint was laid for trespass against the accused on the 10th June 1922, the alleged trespass having occurred on the 3rd June 1922 before a Magistrate called Mr. Sesha Sastri who heard the prosecution evidence and was then transferred. He was succeeded by Mr. Gangadhara Ayyar who heard the defence evidence and was then transferred. Judgment was delivered on the 11th September 1922 by Mr. Govinda Ayyar, Second-class Magistrate. The appeal was heard by the Personal Assistant First-class Magistrate who confirmed the conviction arrived at by Mr. Govinda Ayyar. In this Court the learned vakil for the accused raises the point that section 350 of the Code of Criminal Procedure is confined to two Magistrates, so that the judgment by the third Magistrate, Mr. Govinda Ayyar, is without jurisdiction and the conviction is therefore illegal. The learned vakil quoted cases which however do not apply to the question before us. In *King-Emperor v. Sakharan Pandurang*(1), it was held that section 350 applies only to Magistrates. *Hardwar Singh or Lall v. Khega Ojha*(2), followed in *Queen-Empress v. Basappa*(3), had reference to Honorary Magistrates of which one was not sitting the whole time during which the case was heard. Section 350 runs as follows :—

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"Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an

(1) (1902) I.L.R., 26 Bom., 50.

(2) (1893) I.L.R., 20 Calc., 870.

(3) (1895) I.L.R., 18 Mad., 394.

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enquiry or trial, ceases to exercise jurisdiction therein and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself; or he may resubmit the witnesses and recommence the enquiry or trial." Then follow the provisos.

In the body of the section the words "the Magistrate so succeeding may act on the evidence so recorded by his predecessor" do not seem to restrict that "Magistrate" to the second. The learned *vakil* however relies on proviso (a) which runs "In any trial the accused may, when the second Magistrate commences his proceedings, demand, etc.," and it is on the use of the words "second Magistrate" in the proviso that he found his contention that the "second" has to be restricted to a single occurrence of one Magistrate succeeding another. On consideration, I think, the principle of law clearly is that the judicial officer who hears the evidence shall pronounce the judgment. Owing to circumstances in this country this is often impossible to carry out. Hence the necessity for section 350, Criminal Procedure Code. Now, once the principle is departed from, it appears to me not to matter how often you depart from it. For instance the second Magistrate is authorized to act on the evidence recorded by the first though he has not seen and heard the witnesses. There seems on principle to be no objection, once this is allowed, to a third Magistrate acting on the evidence recorded by the first. Section 350 (a) applies at the time when the succeeding Magistrate begins to exercise jurisdiction, that is, every time another Magistrate takes cognizance of a matter which has been begun or continued by his predecessor. It is thus not incorrect to say that a third

Magistrate may be regarded as the second from the point of view of the succeeding Magistrate No. 2 in whose case section 350 (a) has already been applied when he (No. 2) commenced to take cognizance of the case. So every time a Magistrate takes cognizance of a case the section is applied and is so to speak finished with before there can be any question of its reapplication. Then, when the third Magistrate appears, he is the "second" with regard to No. 2 and that section is again applied to give him cognizance of a matter continued by his predecessor. It may be noted in this case there is no question of a further Magistrate taking evidence. That was done by the first two. The third Magistrate merely delivered the judgment. In principle, I am of opinion, this makes no difference. The preliminary objection thus fails. It may be stated that the accused did not apply for a *de novo* trial, but applied for a *de novo* argument which was granted. The point of jurisdiction was not taken on appeal to the lower Appellate Court.

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" .
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ODGERS, J.

On the merits there is very little to say. The two lower Courts have declared that the property delivered to the complainant did include the property on which the alleged trespass took place. I am not prepared to say sitting in revision that the lower Courts were without jurisdiction in coming to that conclusion.

The Criminal Revision Case must be dismissed.

HUGHES, J.—The accused were found guilty under HUGHES, J. section 447, Indian Penal Code, and the conviction was confirmed on appeal. They have filed this revision petition and the first ground is that the Sub-Magistrate who convicted them had no jurisdiction to convict them on the evidence wholly recorded by his two predecessors without a *de novo* trial.

It is doubtful whether in framing section 350, Criminal Procedure Code, the possibility of a case being dealt

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with by more than two successive Magistrates was contemplated. On principle if a second Magistrate can act on the evidence recorded wholly or partly by his predecessor and partly by himself there seems to be no reason why a third Magistrate should not act on evidence recorded by his predecessors.

However that may be, as this is a petition in revision, the High Court is not bound to interfere since the accused were not prejudiced and there has been no failure of justice. They did not ask for a *de novo* trial and the point was not taken in the appeal.

There is no force in the other grounds urged for revision. I agree that the petition must be dismissed.

D.A.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Devadoss.

BURLA APPANNA AND OTHERS (PETITIONERS),
PETITIONERS—PETITIONERS,

v.

ANALA LATCHAYYA AND OTHERS (COUNTER-
PETITIONERS), RESPONDENT — RESPONDENTS *

Civil Procedure Code (V of 1908), section 115—Order of Board of Revenue dismissing appeal under section 171 of the Madras Estates Land Act—Revision—Madras Estates Land Act (I of 1908), sections 166 (1), 168, 171 and 215—Order of Revenue Officer preparing preliminary Record of Rights—Appeal to Board of Revenue dismissed without hearing appellant or his vakil—Board of Revenue, whether a subordinate Civil Court—Jurisdiction of High Court to revise order of Revenue Board—Order under section 171, whether a proper case for revision by High Court.

Where an appeal, preferred to the Board of Revenue under section 171 of the Madras Estates Land Act against an order of a Revenue Officer passed under section 169 of the Act dismissing an objection petition filed against the preliminary Record of