

APPELLATE CRIMINAL.

Before Mr. Justice Sundaram Chetti.

NANNIER AND ANOTHER (ACCUSED), PETITIONERS,

1932,
February 4.

v.

DASALIER (COMPLAINANT), RESPONDENT.*

Code of Criminal Procedure (Act V of 1898), ss. 403, 350, 259—Oral charge in a summary trial by a First-class Bench—Subsequent transfer of the case to a Second-class magistrate who had no jurisdiction to try it summarily—Complainant not present on the day of hearing—Discharge of accused under sec. 259—Legal—Subsequent complaint—Entertainable.

A First-class Bench of magistrates took up on its file for summary trial a complaint against the accused, and an oral charge under section 323, Indian Penal Code, was framed against them to which they pleaded "not guilty". The case was transferred to the file of a Second-class Magistrate who had no jurisdiction to try the case summarily. The case was called on for hearing on a day to which it had been posted and the complainant not being present, either in person or by pleader, the magistrate discharged the accused under section 259 of the Code of Criminal Procedure. Subsequently another complaint was presented by the same complainant against the same accused on the same facts. Objection was taken that the order of discharge was really an order of acquittal and under section 403 of the Code of Criminal Procedure the second complaint was incompetent.

Held, that the order of discharge was a valid order under section 259 of the Code of Criminal Procedure and being an order of discharge there was no legal bar to entertaining the subsequent complaint; that the oral charge framed by the First-class Bench Court could not be deemed to be subsisting after the transfer of the case to the Second-class Magistrate; that section 350 of the Code of Criminal Procedure had no application to the trial of the case by the Second-class

* Criminal Revision Case No. 806 of 1931.

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Magistrate who could only hold a complete *de novo* trial subsequent to the transfer of the case to his file.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Magistrate of Salem Town dated 9th October 1931 and made in Calendar Case No. 925 of 1931.

S. Ranganadha Ayyar for petitioners.

Salem Ramaswami Ayyar for respondent.

Public Prosecutor (L. H. Bewes) for the Crown.

JUDGMENT.

The petitioners in this case were accused 1 and 2 in a criminal case before the First-class Bench, Salem, which took up this case on file for summary trial. From the register of summary trials kept by that Bench, it would appear that a charge was framed against the accused under section 323, Indian Penal Code, and explained to the accused to which they pleaded not guilty. This was done on 23rd March 1931. Later on, this case appears to have been transferred to the file of the Second-class Magistrate, Salem, in August 1931. The Second-class Magistrate has no jurisdiction to try this case summarily and there is no doubt that he has to try it in the ordinary way provided for the trial of warrant cases. When the case was so pending before him, it was called on for hearing on 4th September 1931 to which it had been posted. The complainant not being present, either in person or by a pleader, the Magistrate discharged the accused under section 259 of the Code of Criminal Procedure. Subsequently another complaint was presented by the same complainant against the same accused on the same facts. That complaint was entertained by the Second-class Magistrate, Salem.

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But the accused put in a petition before him stating that he had no jurisdiction to entertain this complaint by reason of the disposal of the former complaint which, according to them, amounts to an acquittal under section 403 of the Code of Criminal Procedure. This objection was overruled by the Sub-Magistrate on 9th October 1931 in his order passed on that petition. Against that order the present revision petition has been filed.

There is no doubt that the Second-class Magistrate purported to discharge the accused in the former case and actually discharged them under section 259 of the Code of Criminal Procedure. He would be entitled to do so, if the default of the complainant in appearance when the case was called on for hearing was at any time before the framing of the charge in that case. It is now contended by Mr. Ranganadha Ayyar for the petitioners that, in view of a charge having been framed by the First-class Bench Court, it must be taken that the Second-class Magistrate was entitled to proceed upon the evidence partly recorded by the Bench Court and to continue the case from the stage at which it was before the transfer, by virtue of section 350 of the Code of Criminal Procedure. It is true that by reason of sub-section 3 of this section, even when a case is transferred from one Magistrate to another, the former shall be deemed to cease to exercise jurisdiction therein and to be succeeded by the latter within the meaning of sub-section 1. If section 350, clause 1, is properly applicable to the present case, I should think that the contention of the learned Counsel for the petitioners is well-founded. The decision in *Sriramulu v. Veerasalingam*(1) is doubtless authority for

(1) (1914) I.L.R. 38 Mad. 585.

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the position that a second Magistrate who succeeds the first Magistrate and takes up a part-heard criminal case for trial under section 350 of the Code of Criminal Procedure cannot ignore the charge framed by his predecessor. If in the present case also we could hold that the Second-class Magistrate cannot ignore the charge framed by the Bench Court and can act upon the evidence taken by the Bench Court under section 350, clause 1 of the Code of Criminal Procedure, then it may be held that the order passed on 4th September 1931 is not one coming under section 259 of the Code of Criminal Procedure as an order of discharge. In the view taken by a single Judge of the Allahabad High Court in *Emperor v. Nazir Husain*(1) such an order may even be deemed to be an order of acquittal with an implied finding that the accused are not guilty. So far there is no difficulty. But we are confronted with another position which gives a different turn to the view contended for by the petitioners' learned Counsel. As I have already remarked, the former case was triable by the First-class Bench Court under its summary powers, whereas the Second-class Magistrate has no such jurisdiction. Under section 263 of the Code, the Bench Court need not record the evidence of witnesses or frame a formal charge. From the records it would appear that the Bench Court did not even reduce to writing the evidence of the witnesses examined by it and no charge in writing was framed. It seems that the charge was orally framed and explained to the accused. The facts being like these, is it possible to apply section 350 of the Code of Criminal Procedure to the present case? By extending that section, the result would be rather

(1) (1930) I.L.R. 53 All. 39.

anomalous. The Second-class Magistrate who has no jurisdiction to try this case summarily should be taken to have the power to act upon the evidence heard by the Bench Court at the summary trial and the charge framed by that Court in the exercise of its summary powers, and continue the trial of the case from that stage and take the rest of the evidence in the ordinary way in which it has to be taken in a regular trial. Such a state of affairs can never be allowed to exist, and, if any authority is necessary, reference may be made to the decision of the Calcutta High Court in *Gosta Behary Posu v. Baistam Das Dewra*(1), wherein the learned Judges have said that even when the same Magistrate has got power to try a case summarily and in the regular manner, he cannot adopt one procedure up to a certain stage of the case and adopt a different procedure after that stage in the same case. A conviction in such a case was held to be illegal. *A fortiori*, in the present case, if the Second-class Magistrate could act upon the evidence taken and the charge framed in the Bench Court and proceed to try the case in the regular manner, the trial itself would be illegal and the proceedings would have to be quashed. If the Second-class Magistrate should adopt the evidence taken by the Bench Court at the summary trial, he is virtually trying the offender summarily within the meaning of section 530, clause (g) of the Code. It does not make much difference whether the Second-class Magistrate tries an accused person summarily or acts upon the evidence recorded by a Court under the summary powers. That being so, it is impossible to hold that the former case, after its transfer from the Bench Court to the Second-class Magistrate's file,

(1) (1922) 26 C.W.N. 831.

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could be tried except by means of a complete *de novo* trial.

Section 350 of the Code has no application to the trial by the Second-class Magistrate subsequent to the transfer of the case to his file. The oral charge framed by the Bench Court cannot be deemed to be subsisting after the transfer of the case to the Second-class Magistrate, and therefore his order of discharge passed on 4th September 1931 was a valid order under section 259 of the Code of Criminal Procedure. That order being an order of discharge, there is no legal bar to entertaining the present complaint. The Sub-Magistrate may have taken the special circumstances into consideration when entertaining the second complaint.

In view of the reasons stated by me, I am constrained to dismiss this revision petition.

K.N.G.
