

APPELLATE CRIMINAL.

Before Mr. Justice Bardswell and Mr. Justice Burn.

THE PUBLIC PROSECUTOR, APPELLANT,

1933,
April 24.

v.

MALAIPATI GURAPPA NAIDU (ACCUSED), RESPONDENT.*

Criminal Procedure Code (Act V of 1898), sec. 380—Powers of a Magistrate under—Not empowered to acquit a convicted person—Difference between ss. 349 and 380.

A Magistrate to whom a criminal case has been referred under the proviso to section 562 (1) of the Code of Criminal Procedure can only dispose of it in the manner provided by section 380. When an accused person comes before a Magistrate under section 380, he can be treated only as a convicted person and the Magistrate acting under that section is not empowered to set aside the conviction already recorded by the referring Magistrate, and acquit him.

There is a clear difference between section 349 and section 380 of the Criminal Procedure Code. When a Magistrate submits proceedings under section 349, he does not convict but merely expresses the opinion that the accused is guilty. The order which a Magistrate is permitted to pass under section 380 can only be such an order as can be passed upon a convicted person.

APPEAL under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (accused) by the Joint Magistrate of Chandragiri in Calendar Case No. 171 of 1932.

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

B. Manavala Chowdri for accused.

Cur. adv. vult.

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The JUDGMENT of the Court was written by BARDSWELL J. and delivered by BURN J.—

The respondent to this appeal was convicted by the Second-class Magistrate of Tiruttani of an offence punishable under section 212, Indian Penal Code, for harbouring a person who had committed theft. That Magistrate, not being empowered to take action under section 562 (1), Criminal Procedure Code, submitted the proceedings to the First-class Subdivisional Magistrate of Chandragiri. The Subdivisional Magistrate without giving notice to anybody found the respondent not guilty and acquitted him. The Government is appealing against this acquittal.

The case has not been argued before us on the merits but merely with reference to the powers of a Magistrate under section 380, Criminal Procedure Code. When a case is referred, as was this case, to a Magistrate under the proviso to section 562 (1), Criminal Procedure Code, the Magistrate to whom it is referred has to dispose of the case in the manner provided by section 380 and under section 380 such Magistrate may pass such sentence or make such order as he might have passed or made if the case had originally been heard by him. What is argued for the respondent is that a Magistrate acting under section 380 has exactly the same powers as has a Magistrate to whom proceedings are submitted under section 349, Criminal Procedure Code. No authority of any High Court has been quoted on this subject but the Judicial Commissioner of Upper Burma has in *Mi Thi Hla v. Mi Kin*(1) held that the same powers can be exercised under section 380 as

(1) (1915) 29 I.C. 663.

under section 349, and has expressed the opinion that it is difficult to suppose that the Legislature intended anything else. The question is, however, not what the Legislature intended or contemplated but what it has in fact enacted. There is a very clear difference between section 349 and section 380. When a Magistrate of the second or third class submits proceedings under section 349 he does not convict but merely expresses the opinion that an accused person is guilty. But when a case is submitted under section 562 a conviction has first of all to be recorded and so when the proceedings reach the Magistrate for disposal under section 380, that Magistrate has to deal with a person who has been convicted and it is not a case of the referring Magistrate having merely recorded the opinion that he ought to be convicted; such opinion as the referring Magistrate expresses being that on the conviction action should be taken under section 562. It is our opinion that when an accused person comes before a Magistrate under section 380, he can be treated only as a convicted person and that it is not permissible for the Magistrate acting under that section to set aside the conviction and to acquit him. Normally a conviction can only be set aside on appeal or on revision. It is pointed out that a sentence of death can be set aside merely on a reference for confirmation but for that there is a special provision in section 376. We think that the order which it is permissible for a Magistrate to pass under section 380 can only be such an order as can be passed upon a convicted person and section 408 provides, it may be noticed, for an appeal both against an order and a sentence passed under

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section 380. It is true that under section 380 the Magistrate may, if he thinks further enquiry of additional evidence on any point to be necessary, make such enquiry or take such evidence himself or direct such enquiry or evidence to be made or taken. It is asked why such powers should be given. It may be for the purpose of satisfying the Magistrate that it really is a case for applying section 562, and possibly such evidence might be taken with a view to seeing whether the conviction was correct. Even so, in our view, section 380 does not allow of a Magistrate who acts under it to set aside a conviction.

Cases in which a Magistrate so acting thinks that the conviction is improper will probably be very few. If in any case he thinks it to be improper we think his proper action will be to refer the matter under the revision sections.

The respondent is an old man of seventy and we have not been asked to send the matter back to the Subdivisional Magistrate for proper disposal, and so we pass no further order on this appeal apart from saying that the Subdivisional Magistrate's action in passing orders without any notice to either side was improper.

K.W.R.
