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There is a further application for a monthly allowance for the maintenance of the lunatic. We are not in a position to deal with that finally now and we direct the learned District Judge to dispose of it. The appellant will get his costs throughout, including the cost of privately printing the records, from the estate, and the respondent will bear her own costs.

K.W.R.

APPELLATE CRIMINAL.

Before Mr. Justice Pakenham Walsh.

1934, August 28.

NARAYANASWAMI VANNIAR (FIRST ACCUSED), PETITIONER,

v.

KARUMBAYIRAM PERIYARI (COMPLAINANT), RESPONDENT.*

Criminal Procedure Code (Act V of 1898), sec. 403—Re-trial on same charge after acquittal owing to want of jurisdiction in trying Magistrate—Previous trial no bar to re-trial—Madras Village Courts Act (I of 1889), sec. 76 (8).

When the conviction and sentence passed upon an accused are set aside on the ground that the trying Magistrate had no jurisdiction, the order of the appellate Court setting aside the conviction is no obstacle to the accused being re-tried on the same charge.

The petitioner and others were accused before a Village Panchayat Court and convicted of an offence. A revision petition was filed under section 76 (8) of the Madras Village Courts Act (I of 1889), and the conviction and sentence were set aside on the ground that the Bench had no legal existence at the time, and hence no jurisdiction. Subsequently an identical complaint on the same facts was filed before the same

* Criminal Revision Case No. 97 of 1934.

Panchayat Court, and the accused contended that, under section 403 of the Criminal Procedure Code (Act V of 1898), a new trial on the same facts was barred. The Court held there was no bar, and against this a revision petition was filed.

Held, that the original trial was a nullity having been held by persons who had no power to try the case; and that there was nothing in law to prevent the institution of fresh proceedings against the accused in a Court of competent jurisdiction.

Abdul Ghani v. *Emperor*, (1902) I.L.R. 29 Calc. 412, and *Liakat Hossein* v. *The Emperor*, (1907) 12 C.W.N. 246, followed.

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 Second-class Magistrate of Kodavasal, dated 23rd January 1934, and made in Calendar Case No. 8 of 1934.

M. S. Venkatarama Ayyar for *R. Srinivasa Ayyar* for the petitioner.

P. Krishnamachari for the complainant.

K. Venkataraghavachari for *Public Prosecutor* (*L. H. Bewes*) for the Crown.

Cur. adv. vult.

ORDER.

The petitioner and others were accused before the Village Panchayat Court, Narayanamangalam, Tanjore District, and convicted of an offence. A revision petition was filed in the Court of the Joint Magistrate, Negapatam, in Criminal Miscellaneous Petition No. 43 of 1932 under section 76 (8) of the Madras Village Courts Act. The Court found that the Bench had no legal existence at the time and hence no jurisdiction. It set aside the conviction and directed the fines paid to be refunded. On the same facts an identical complaint was filed before the same Panchayat Court in Calendar Case No. 2 of 1932. The petitioner put in a petition to the Sub-Magistrate, Kodavasal, to stop further proceedings

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and discharge the accused on the ground that section 403, Criminal Procedure Code, barred a new trial on the same facts with regard to the same occurrence.

The Court held there was no bar and against this order the present revision petition is filed. The argument for the petitioner is that under section 423 (*b*), Criminal Procedure Code, if a Court does not order a re-trial it amounts to an acquittal. The learned Advocate for the petitioner admits that the appellate sections of the Code are not applicable to proceedings under the Panchayat Courts Act—the only section of the Criminal Procedure Code that is made applicable being section 403—and that the order of the Joint Magistrate must be held to have been under the powers of revision conferred by section 76 (8) of the Village Courts Act. But he argues that a revisional jurisdiction is in its essence appellate, and quotes *Chappan* v. *Moidin Kutti*(1), (this case was with reference to section 622 of the Civil Procedure Code of 1882 corresponding to section 115 of the Civil Procedure Code of 1908). He also quotes *In the matter of the Petition of Dijahur Dutt*(2), where it was held that a Magistrate had no power to remand a criminal case to a subordinate Magistrate for re-trial after the case had once been dismissed. He also quotes a recent decision by BURN J. in *Chinna Similan* v. *Peria Similan*(3), that in the case of an appeal from an order other than an order of acquittal or conviction the appellate Court has no jurisdiction to order a *de novo* trial but can only alter or reverse such order and direct the trial Magistrate to write a proper

(1) (1898) I.L.R. 22 Mad. 68 (F.B.). (2) (1879) I.L.R. 4 Calc. 647.
(3) 1933 M.W.N. 224.

judgment. That case appears to me to have no relevancy whatsoever because the present is a case of setting aside a conviction, and the petitioner's own argument is that, though the appellate sections of the Code are not applicable, the revisional power is the same as the appellate power, and if so, clearly the Joint Magistrate had power on petitioner's own argument to order a re-trial if he had wished to do so.

For the Crown it is argued that the original trial was a nullity having been held by persons who had no power to do so and fell under section 530 (*p*), Criminal Procedure Code. Therefore the Joint Magistrate had no power to order a re-trial, there having been no trial. For this position there is the direct authority of *Abdul Ghani* v. *Emperor* (1) and *Liakat Hossein* v. *The Emperor*(2). In the first of these cases it was held that where a Magistrate who had no jurisdiction had convicted for an offence triable exclusively by a Court of Session, and where the Sessions Judge on appeal had merely discharged the accused, there was nothing in law to prevent a Court of competent jurisdiction from instituting fresh proceedings against the accused and committing him. It was further held that inasmuch as section 423, Criminal Procedure Code, contemplates an order for a re-trial by a Court of competent jurisdiction, and the trial had been set aside owing to the Magistrate having had no jurisdiction to hold it, no trial had in fact taken place, so that the Sessions Judge could not possibly have ordered a re-trial.

In the second case it was held that it is not necessarily the duty of the High Court to order a

(1) (1902) I.L.R. 29 Calc. 412. (2) (1907) 12 C.W.N. 246.

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re-trial of a person whose conviction is set aside on account of an illegality in his trial and that when the conviction and sentence passed upon an accused is set aside by the High Court on the ground that the Magistrate who tried the accused had no jurisdiction to do so, the order of the High Court setting aside the conviction and sentence is no obstacle to the accused being re-tried on the same charge at the instance of the prosecution. These cases are exactly in point and no authority *contra* has been quoted to me.

As the petition must fail on this ground I will only just mention two other arguments raised for the Crown.

The first was that in any case the revisional jurisdiction given to the Joint Magistrate under section 76 (8) of the Act is no greater than that which he has under section 439, Criminal Procedure Code, and that as the latter section does not empower him to order re-trial he could not in any case have done so. But section 76 (8) clearly gives him a power of setting aside an order of conviction which he has not got under section 439 of the Criminal Procedure Code, so that it cannot be argued that he has not got the further power, incidental to that, of ordering a re-trial. The other argument was that he had not even the power to set aside the conviction because want of jurisdiction does not fall among the reasons mentioned in section 76 (8) of the Act justifying his interference. "Want of jurisdiction" is certainly, in my opinion, legal "misconduct" within the meaning of the section.

The petition must be dismissed.

K.W.R.