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April 2.

REVISIONAL CRIMINAL.

Before Mr. Justice Blair.

EMPEROR *v.* GUR NARAIN PRASAD.*

Criminal Procedure Code, sections 195, 198 *and* 423—*Powers of appellate Court—Alteration of finding—Question whether accused is prejudiced by alteration—Act No. XLV of* 1860, *sections* 182 *and* 500.

Held that an appellate Court when it acts under section 423 (1) (*b*) of the Court of Criminal Procedure and "alters the finding, maintaining the sentence," is not bound in respect of such altered finding by such conditions precedent, as, for example, sanction or complaint by the person aggrieved, as would be binding on a Court of first instance.

Hence when in appeal from a conviction under section 182 the appellate Court altered the conviction to one under section 500 of the Indian Penal Code, it was *held* that this was within the competence of the appellate Court, notwithstanding that there was in existence no complaint by the person aggrieved.

Held also that under the circumstances of the case there was not so material a difference between the two offences, both arising out of the same facts, as would necessarily lead to the conclusion that the accused had been prejudiced by the alteration of the finding by the appellate Court.

In this case the applicant, who had in a petition presented by him cast certain reflections upon the conduct and judicial integrity of a Tahsildar Magistrate, was prosecuted under section 182 of the Indian Penal Code on a complaint made by the Tahsildar with the sanction of the Local Government. The Magistrate before whom this complaint came found the charge proved, and accordingly convicted and sentenced Gur Narain Prasad under section 182. Gur Narain Prasad appealed against his conviction and sentence to the Sessions Judge. On this appeal the Sessions Judge came to the conclusion that the facts found did not warrant a conviction under section 182, but that they did disclose the commission by the appellant of the offence, namely, defamation, defined in section 499 of the Indian Penal Code, and altered the conviction to one under section 500 of the Code. Against this order Gur Narain Prasad applied in revision to the High Court, where it was urged, first, that inasmuch as by reason of section 198 of the Code of Criminal Procedure a prosecution for defamation could not be initiated except upon complaint by the person aggrieved, therefore the

* Criminal Revision No. 40 of 1903.

appellate Court had no power, in the absence of such a complaint, to alter the conviction into one under section 500; and, secondly, that even if the appellate Court had such power, there was a substantial difference in the defences which were open to the accused in respect of the two sections, and the accused had been seriously prejudiced in his defence.

Babu *Satya Chandra Mukerji*, for the applicant.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

BLAIR, J.—In this application for revision a point has been raised which I have not heard raised before in this Court. The applicant was put upon his trial for an offence under section 182 of the Penal Code. For the institution of such a charge before the Court of first instance, it is essential that the case, to be made cognizable at all, must be preceded by a complaint or sanction by the public servant concerned, or by some public servant to whom he is subordinate. In this case the charge under section 182 was held by a Magistrate proved, but upon appeal the Sessions Judge did not consider that the conviction under section 182 was justified by the evidence, and he thereupon altered the finding to one under section 500 of the Indian Penal Code. Now for a prosecution in a Court of original jurisdiction under section 500, it is necessary that a complaint should have been made by a person injured. The able argument addressed to me was to the effect that though the initial charge had been made by the complainant, or with the sanction of the public servant interested, there had been no complaint by the person injured by the defamatory statement upon which the Judge in appeal based his conviction under section 500. There is no doubt of the difference between the condition precedent to a prosecution in the one case and in the other. Beyond all doubt the Court of first instance would have been acting outside its jurisdiction if it had entertained the prosecution for defamation without any complaint being made by the injured person.

It is under section 423 of the Code of Criminal Procedure that an appellate Court has power to alter the finding, and there are no words limiting its right to such an alteration or

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prescribing any preliminaries to its taking cognizance of an offence other than that for which the Court of original jurisdiction had convicted. Having regard to the general powers of the Court of appeal, which enable the Court in its discretion either to reverse the finding or sentence, to order a prisoner to be re-tried by a competent Court, or to make such alterations in the finding as to it seems proper, and are subject only to the limitation that no sentence should be enhanced without the person convicted having an opportunity of showing cause, I do not think the Legislature contemplated the imposition upon the appellate Court of the restrictions imposed by it upon the Court of original jurisdiction.

I have also been invited to consider whether the person convicted may not have suffered substantial injury and difficulty in defending himself from the variation in the prosecution of the section under which he was originally convicted and the section under which the appellate Court found him guilty. It was argued that whereas in a trial for an offence under section 182 it was necessary to prove that the statements made were false, and must have been known to be false by the person making them, and that the *onus* in that case lay upon the prosecution, yet in a prosecution under section 500, though the words might be *primâ facie* defamatory, a conviction could not take place if the accused was able to show that in that specific case the words were not intended to be used in their ordinary sense.

I have bestowed much consideration upon the facts of this case, and I must confess it seems to me there is no substantial difference in respect to the *onus* of proof. In each case the prosecution has to establish its case, and in the case of defamation their case was clearly to establish that words likely to injure the character of the person aggrieved were spoken, and it would be open to the accused to show circumstances under which the words might fairly be interpreted in a different sense. In a prosecution under section 182 the facts to be proved by the prosecution are a guilty knowledge or belief on the part of the accused, and it would be open to him to show that the fact from which the inference was drawn was mistaken or

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erroneous. Had I been able to see that the accused had suffered any injury, or had been put face to face with any difficulty in defending himself, I would have sent the case down for re-trial. Failing, however, to perceive any such disadvantage or difficulty, I find the conviction was a conviction had according to law and ought not to be disturbed.

Let the papers be returned.

Before Mr. Justice Banerji.

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April 3.

MAHADEO KUNWAR AND OTHERS *v.* BISU.*

Criminal Procedure Code, sections 145 (5) *and* 435 (3)—*Order of Magistrate on dispute as to possession of immovable property—Revision—Jurisdiction of High Court.*

The order to which finality is given under sections 145 (5) and 435 (3) of the Code of Criminal Procedure must be an order which not only purports to be, but is in reality, an order under section 145, and has been passed with jurisdiction. Where the Court has exceeded its jurisdiction in making the order, it is null and void, and the High Court in the exercise of its revisional powers is competent to interfere with it. *Hurbullubh Narain Singh* v. *Luchmeswar Prosad Singh* (1), *In re Pandurang Govind* (2) and *Agra Bank* v. *Leishman* (3) referred to.

Where a Magistrate under circumstances which would apparently have justified his taking action under section 145 of the Code of Criminal Procedure, took action in fact under section 107, and having passed an order seemingly under section 118, added, as it were, as an appendix to this order:—"Bisu Ahir put in possession under section 145, Code of Criminal Procedure"—it was *held* that this order, passed without any of the procedure prescribed by section 145 being adopted, was more than an irregularity, and was an order passed without jurisdiction and liable to revision by the High Court. *Mohesh Sowar* v. *Narain Bag* (4) and *Sakor Dusadh* v. *Ram Pargash Singh* (5) referred to.

THE facts of this case were as follows:—

The parties to the present proceeding, Mahadeo Kunwar and others, and Bisu Ahir had a dispute about the possession of a certain quantity of land. The existence of this dispute, and the likelihood of its leading to a breach of the peace were brought to the notice of the Joint Magistrate of Ballia. The Magistrate, instead of proceeding under section 145 of the Code of Criminal Procedure, took action under section 107 of

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* Criminal Reference No. 59 of 1903.

(1) (1898) I. L. R., 26 Calc., 188.
(2) (1900) I. L. R., 24 Bom., 527.
(3) (1894) I. L. R., 18 Mad., 41.
(4) (1900) I. L. R., 27 Calc., 981.
(5) (1902) 7 C. W. N., 174.