REVISIONAL CRIMINAL.

Before Mr. Justice E. M. Nanavutty

HORI LAL AND OTHERS (ACCUSED-APPLICANTS) *v.* KING-EMPEROR (COMPLAINANT-OPPOSITE PARTY)* 1935 *March*, 22

Criminal Procedure Code (Act V of 1898), section 428—Decree by Assistant Sessions Judge with aid of assessors—Appeal to Sessions Judge—Sessions Judge, whether can take additional evidence.

The power of the Court of Session to have additional evidence recorded under section 428 of the Code are co-extensive with those of the High Court, but only in the case the Court of Session is hearing an appeal from a decision of a Magistrate, and not in a case where the Court of Session is hearing an appeal from a decision of an Assistant Sessions Judge with the aid of assessors. It is only when the appellate Court is a High Court that additional evidence can be taken by a Court of Session when it is directed to do so by the appellate Court. *Emperor* v. *Jaisook* (1), and *Queen Empress* v. *Ram Lal* (2), relied on. *Muhammad Zamir Uddin* v. *King-Emperor* (3), and *Emperor* v. *Laxman Ramshet* (4), distinguished.

Dr. *J. N. Misra* and Mr. *Raghubar Dayal*, for the applicants. The Assistant Government Advocate (Mr. *H. K. Ghose*), for the Crown.

NANAVUTTY, J.:—This is an application for revision under section 439 of the Code of Criminal Procedure against an appellate judgment of the learned Sessions Judge of Hardoi upholding the judgment of the Assistant Sessions Judge of the same place convicting the applicants of offences under sections 147 and 325 of the Indian Penal Code, and sentencing each of them to six months' rigorous imprisonment.

At the outset an interesting question of law was raised on behalf of the applicants by their learned counsel, who has argued that the learned Sessions Judge should not have, while hearing the appeal against the judgment

*Criminal Revision No. 155 of 1934, against the order of Pandit Tika Ram Misra, Sessions Judge of Hardoi, dated the 10th of October, 1934.

(1) (1920) I.L.R., 43 All., 125. (2) (1893) I.L.R., 15 All., 136.
(3) (1918) 3 Pat. L.J., 632. (4) (1929) I.L.R., 53 Bom., 578.

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of the Assistant Sessions Judge of Hardoi, recorded additional evidence as that was not only illegal but was clearly tantamount to giving the prosecution an opportunity to fill up the gaps which had been left in the prosecution evidence for no valid reason.

Nanavutty, J.

The first question for determination in this application for revision is, therefore, whether the learned Sessions Judge of Hardoi was legally authorised to record additional evidence in hearing an appeal from a judgment of an Assistant Sessions Judge who tried the case with the aid of assessors. The learned Assistant Government Advocate has relied upon the provisions of section 428 of the Code of Criminal Procedure in defence of the action of the learned Sessions Judge of Hardoi. Section 428 of the Code runs as follows:

"In dealing with any appeal under this Chapter the appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself or direct it to be taken by a Magistrate, or, when the appellate Court is a High Court, by a Court of Session or by a Magistrate."

It is clear from the very language of section 428 that only when the Court of Session is sitting to hear an appeal from a judgment of a Magistrate has it got power under section 428 of the Code to record additional evidence itself, or direct it to be taken by a Magistrate, and it is only the High Court, which is the appellate Court of the Court of Session, that can, under section 428 of the Code, direct a Court of Session or a Magistrate to record additional evidence in a case pending before it in appeal.

I have heard the learned counsel for the applicants as also the learned Assistant Government Advocate at great length, and have carefully considered the question of law involved in the plea raised on behalf of the applicants, and it seems to me on mature consideration that the action of the learned Sessions Judge of Hardoi in record-

ing additional evidence while deciding this appeal against the judgment of the Assistant Sessions Judge was not legally justified by the provisions of section 428 of the Code of Criminal Procedure.

Nanavutty, J.

In *Queen Empress* v. *Ram Lal* (1), it was held by the learned Judges of the Allahabad High Court that, where in a trial for murder conducted with the aid of assessors the Court of Session relied upon a statement by the deceased and the evidence necessary to prove such statement was not recorded until after the close of the trial and the discharge of the assessors, that this procedure of the Sessions Judge amounted to a material irregularity which was not covered by section 537 of the Code of Criminal Procedure. In this ruling a reference was made to section 268 of the Code which provides that all trials before a Court of Session shall be either by jury or with the aid of assessors, and that the evidence recorded by the Sessions Judge after the opinion of the assessors had been recorded and they had been discharged was in fact evidence recorded *coram non judice*. The learned Judges in the course of their judgment made the following observation:

"In only one instance is a Court of Session authorised to record evidence in the absence of jury or assessors and that is when additional evidence is called for by the appellate Court (*vide* section 428, Criminal Procedure Code)."

The appellate Court of the Court of Session is the High Court, and the view taken by the learned Judges of the Allahabad High Court seems to be correct, because sub-section 2 of section 309 makes it quite clear that once the opinion of the assessors has been recorded in cases tried by the Court of Session with the aid of assessors, the Judge has got nothing else to do but to give judgment. This was the view laid down by the learned Chief Justice and Mr. Justice Ryves of the Allahabad High Court in *Emperor* v. *Jaisook* (2). In this

(1) (1893) I.L.R., 15 All., 136. (2) (1920) I.L.R., 43 All., 125.

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case it was held that where a Sessions Judge is trying a case with the aid of assessors, it is the Judge plus the assessors who constitute the Court, and not the Judge alone, and that where a Sessions Judge recorded evidence after the assessors had been discharged, it was held that this was a material irregularity which vitiated the trial and the learned Judges observed that the case of *Queen Empress* v. *Ram Lal* (1), was a distinct authority for the very salutary proposition that evidence must not be taken by a Sessions Judge unless that Sessions Judge has the assessors sitting with him.

It has been argued by the learned Assistant Government Advocate that if it is open to the High Court, as an appellate Court, to direct the Court of Session or a Magistrate to record additional evidence under section 428 of the Code of Criminal Procedure, then it is equally open to the Court of Session as an appellate Court to record additional evidence under section 428 of the said Code. The fallacy in this reasoning lies in the cool assumption that the Court of Session has got the same powers under section 428 of the Code as are vested in the High Court, but a careful perusal of section 428 itself will show that that section contemplates that the Court of Session has got the right to take additional evidence itself or direct it to be taken by a Magistrate when there is an appeal before it from a decision of a Magistrate of the 1st class, but no such power is vested in the Court of Session when the Court of Session hears an appeal from a subordinate Court of Session which has decided the case with the aid of jurors or assessors.

The learned Assistant Government Advocate invited my attention to a ruling reported in *Muhammad Zamir Uddin* v. *King-Emperor* (2), decided by the Patna High Court in which it was held that the High Court had power to direct the Sessions Judge to rehear an appeal after obtaining additional evidence. As I have said above the powers of the High Court are far greater than

(1) (1893) I.L.R., 15 All., 136. (2) (1918) 3 Pat., L.J., 632.

those of the Court of Session hearing an appeal against a decision of an Assistant Sessions Judge. I have also been referred to a ruling of the Bombay High Court reported in *Emperor* v. *Laxman Ramshet* (1). That however was a case decided by a Magistrate and the appeal was heard by the Sessions Judge. The powers of the Court of Session to have additional evidence recorded under section 428 of the Code are co-extensive with those of the High Court, but only in case the Court of Session is hearing an appeal from a decision of a Magistrate, and not in a case where the Court of Session is hearing an appeal from a decision of an Assistant Sessions Judge with the aid of assessors. It is only when the appellate Court is a High Court that additional evidence can be taken by a Court of Session when it is directed to do so by the appellate Court. This is clear from the observation made in *Queen Empress* v. *Ram Lal* (2).

For the reasons given above I am clearly of opinion that the evidence recorded by the learned Sessions Judge in appeal is not legally admissible and the accused-applicants cannot legally be convicted upon that evidence.

The learned counsel for the applicants has further contended that apart from the question of the legality or otherwise of the order of the learned Sessions Judge of Hardoi directing the taking of additional evidence, there were no valid grounds even for recording that evidence. Durjan was a prosecution witness and he was present in Court but was discharged by the learned Government Pleader when the case was being tried in the Court of the Assistant Sessions Judge of Hardoi. It is true that it is the duty of the prosecution to produce before the Court all eye-witnesses of the occurrence, but if the Government Pleader takes upon himself the responsibility of not producing a certain eye-witness, then it is not the duty of the appellate Court to fill up the gap in the prosecution evidence by summoning that

(1) (1929) I.L.R., 53 Bom., 578. (2) (1893) I.L.R., 15 All., 136(137).

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witness. The learned counsel for the applicants also complains that a very improper use of the police diaries has been made in this case by the learned Sessions Judge sitting in appeal against the decision of the learned Assistant Sessions Judge. There is a sub-stratum of truth in this complaint also but I need not enlarge upon it, as in my opinion the appeal should have been heard and decided only upon the evidence recorded by the Assistant Sessions Judge in the presence of the assessors.

Nanavutty, J.

In the circumstances of this case, I must therefore allow this revision, set aside the judgment of the learned Sessions Judge of Hardoi, dated the 10th of October, 1934, and direct that the appeal of the applicants filed in the Court of the learned Sessions Judge of Hardoi against the judgment of the learned Assistant Sessions Judge of that place be heard *de novo* and decided only upon the evidence which was before the Assistant Sessions Judge and the assessors when the judgment was pronounced by the trial Court.

I have been asked by the learned counsel for the applicants to have the hearing of the appeal transferred to the Court of another Sessions Judge who has not formed any opinion as to the guilt or innocence of his clients. It seems to me that, in the circumstances of this case, this is a very proper request, although it is opposed by the learned Assistant Government Advocate, who has contended that such a procedure would cast an undeserved reflection upon the learned Sessions Judge of Hardoi. In my opinion the learned Sessions Judge of Hardoi would himself be the first to request that he might be relieved of the duty of deciding this appeal afresh, when once he has formed an opinion as to the guilt of the accused upon the additional evidence recorded by him. I therefore transfer the hearing of the appeal of the accused-applicants from the Court of the Sessions Judge of Hardoi to the Court of the Sessions Judge of Lucknow and I direct that the learned Sessions Judge of Lucknow should himself decide the appeal of

the applicants upon the evidence that was recorded by the learned Assistant Sessions Judge in the presence of the assessors.

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APPELLATE CIVIL

Before Mr. Justice E. M. Nanavutty

SHANKER PRASAD (PLAINTIFF-APPELLANT) *v.* SHEO NARAIN (DEFENDANT-RESPONDENT)*

1935
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Limitation Act (IX of 1908), section 9 and Schedule I, Article 23—Malicious prosecution—Criminal prosecution ending in acquittal—Revision against acquittal order dismissed—Suit for compensation for malicious prosecution—Limitation, starting point of—Revision, whether stops running of time.

Under Article 23 of the Limitation Act the limitation for filing a suit for compensation for malicious prosecution is one year from the date of the acquittal in a criminal prosecution. When once time has begun to run the fact that an application for revision against the order of acquittal is filed would not lead a fresh period of limitation, for bringing the suit for damages, to begin to accrue from the date of the dismissal of the application for revision. *Madan Mohan Singh* v. *Ram Sundar Singh* (1), *Tangutri Sriramulu* v. *K. Viresalingam Garu* (2), *Purshottam Vithaldas Shet* v. *Ravji Hari Athavale* (3), and *Narayya* v. *Seshayya* (4), referred to.

Mr. *L. S. Misra*, for the appellant.

Mr. *P. N. Chowdhri*, for the respondent.

NANAVUTTY, J.:—This is a plaintiffs' appeal from an appellate judgment and decree of the Court of the Additional Subordinate Judge of Unao, dated the 28th of February, 1933, confirming the judgment and decree passed by the Munsif of Purwa, in Unao, dated the 30th of August, 1932.

The facts out of which this appeal arises are briefly as follows:

*Second Civil Appeal No. 178 of 1933, against the decree of Pandit Krishna Nand Pandey, Additional Subordinate Judge of Unao, dated the 28th of February, 1933, confirming the decree of Babu Girish Chandra, Munsif of Purwa at Unao, dated the 30th of August, 1932.

(1) (1930) I.L.R., 52 All., 553. (2) (1919) 57 I.C., 635.
(3) (1928) I.L.R., 47 Bom., 28. (4) (1899) I.L.R., 23 Mad., 24.