REVISIONAL CRIMINAL.

1928
July, 21.

Before Mr. Justice E. M. Nanavutty.

KING-EMPEROR (COMPLAINANT) v. SHIV DAT (ACCUSED).*

Criminal Procedure Code (Act V of 1898), sections 561A and 237—Indian Penal Code, sections 278 and 290—Non-appearance of Counsel through carelessness—Ex-parte order—High Court's power to entertain the application for re-hearing of the matter—Conviction of an accused for a lesser offence than the one charged, legality of.

Where owing to the carelessness of the consel of the accused in not appearing in the court at the time when the case is called on for nearing, his client's case goes unrepresented and an *ex-parte* order is passed, the High Court has jurisdiction under section 561 to entertain an application to re-hear the matter, if, in its discretion, it considers it neessary to do so in order to secure the ends of justice.

Under section 237 of the Code of Criminal Procedure it is open to a Magistrate to convict an accused of a lesser offence than that with which he is charged. Where, therefore, the summons served upon an accused only mentions the offence of making atmosphere noxious to health punishable under section 278 of the Indian Penal Code, with a fine which may extend to Rs. 500 he may be convicted of the offence of committing a public nuisance punishable under section 290 of the Indian Penal Code with a fine of Rs. 200. *Mathra Das* v. *Crown* (1), referred to.

Mr. *K. P. Misra*, for the accused.

The Government Pleader (Mr. *H. K. Ghosh*), for the Crown.

NANAVUTTY, J. :—This is an application presented by Mr. *K. P. Misra*, Bar.-at-Law under section 561A of the Code of Criminal Procedure. I have heard the learned Counsel in support of his application as also the learned Government Pleader on behalf of the Crown.

*Criminal Reference No. 22 of 1928

(1) (1927) A.I.R., Lah., p. 129.

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A preliminary objection has been raised before me by the learned Government Pleader that this Court is not competent to entertain this petition under section 561A in view of the provisions of section 369 of the Code of Criminal Procedure. To rebut this contention the learned Counsel for Shiv Dat accused invites my attention to *Mathra Das* v. *Crown* (1), in which Mr. Justice BROADWAY held that section 561A of the Code of Criminal Procedure is in no way limited or governed by section 369 of the same Code, and that the High Court had power to reconsider the question of sentence when the ends of justice required it. In the present case the learned Counsel for Shiv Dat frankly admits that owing to his own carelessness in not appearing in court at the time when the original reference was called on for hearing, his client's case went unrepresented and an *ex-parte* order was passed. It seems to me that the new provision, 561A of the Code of Criminal Procedure, which has been added to the Code of Criminal Procedure by the Criminal Procedure Amendment Act (No. XVIII of 1923), does authorize the High Court to make any order as may be necessary to secure the ends of justice or to prevent abuse of the process of any court and to give effect to any order under this Code, and that this power has been conferred upon the High Courts in India notwithstanding the limitations contained in section 369 of the Code of Criminal Procedure. I therefore hold that this Court has jurisdiction to entertain the present application if in its discretion it considers it necessary to do so in order to secure the ends of justice.

Nanavutty, J.

Coming now to the merits of the case, I have listened at great length to the arguments of the learned Counsel for Shiv Dat and have carefully perused the all too elaborate order of reference made by the leraned Sessions Judge of Hardoi. It seems to me that the learned Ses-

(1) (1927) A.I.R., Lah., p. 129.

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sions Judge has been too vehement in his wholesale condemnation of the procedure of the learned Joint Magistrate and his order would have gained in force and in dignity if it had been more concise, and had imported less heat in this matter.

Nanavutty, J.

So far as the conviction of the accused Shiv Dat of an offence under section 290 of the Indian Penal Code is concerned I am of opinion that the conviction of the accused is strictly legal and that the procedure of the learned Joint Magistrate is not open to serious objection. The learned Counsel for Shiv Dat invites my attention to a ruling of the late Court of the Judicial Commissioner of Oudh reported in 1 Oudh Weekly Notes, page 495, in which it was held that it is incorrect procedure to convict an accused in a summons case on an admission made by his Counsel without examining the accused or without recording any evidence. So far as that ruling goes, it has really no applicability to the present case. In the present case the accused Shiv Dat was not convicted on any admission made by his Counsel. The procedure adopted by the learned Joint Magistrate in examining the accused at the commencement of the trial in a summons case was perfectly legal. It was on the accused's own admission that he has been convicted and it has nowhere been held that an accused may not in a summons case be convicted on his own plea of guilty. Section 243 of the Code of Criminal Procedure lays down that if the accused admits that he has committed the offence of which he is accused, his admission shall be recorded as nearly as possible in the words used by him, and if he shows no sufficient cause why he should not be convicted the Magistrate may convict accordingly. So the procedure adopted by the learned Joint Magistrate in the present case was in conformity with the provisions of section 243 of the Code of Criminal Procedure. The accused admitted the correctness of the map, exhibit A; he admitted

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that the point A on the map was the window or the opening of the latrine; that the red dotted line showed the public way; that the measurements shown in the map were correct; and that he committed the nuisance of erecting this latrine as there was no other place where he could have constructed it. I am, therefore, of opinion that the conviction of the appellant under section 290 is not illegal. It was argued before me by the learned Counsel for the accused that the summons served upon Shiv Dat only mentioned an offence under section 278 of the Indian Penal Code and not an offence under section 290 of the Indian Penal Code. Section 278 of the Indian Penal Code is punishable with a fine which may extend to Rs. 500, whereas section 290 is punishable with a fine which may extend only up to Rs. 200. Under section 237 of the Code of Criminal Procedure it was open to the Magistrate to convict the accused of a lesser offence than that with which he had charged him. I, therefore, uphold the conviction of Shiv Dat for an offence under section 290 of the Indian Penal Code. In view, however, of the penitent attitude adopted by Shiv Dat and his frank plea of guilty before the Magistrate, I am of opinion that the fine of Rs. 50 is far too severe. I reduce the sentence to a nominal fine of Rs. 5, and I direct that the balance of the fine if paid be refunded to Shiv Dat.

Nanavutty J.

Coming now to the order under section 143 of the Code of Criminal Procedure I am of opinion that this order cannot be sustained because the accused was not examined in respect of the *purdah* wall used for screening the sweeper from public gaze, and it has not been shown by any evidence on the record, that the wall is an encroachment upon the public road or that it was constructed on land belonging to Shiv Dat himself. The learned Counsel for Shiv Dat informs me that the wall was constructed by Shiv Dat with the full permission of the Town Magistrate upon land belonging to Shiv Dat himself. If the learned Joint Magistrate wants to pro-

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ceed in this matter he should take proceedings under section 133 of the Code of Criminal Procedure and give the accused Shiv Dat an opportunity of showing cause why the wall and the latrine should not be demolished.

Nanavutty, J.

I, therefore, set aside the order of the learned Magistrate as regards the demolition of the screen wall and of the latrine but I maintain the conviction of Shiv Dat for an offence under section 290 of the Indian Penal Code and reduce the sentence from a fine of Rs. 50 to a fine of Rs. 5. To this extent this reference is allowed.

Reference partly allowed.

PRIVY COUNCIL.

P. C. 1928 *November*, 23.

RAJA SHRI PRAKASH SINGH (JUDGMENT-DEBTOR, APPELLANT) *v.* ALLAHABAD BANK, LIMITED, (DECREE-HOLDERS, RESPONDENTS.)*

[On appeal from the Chief Court of Oudh.]

Civil Procedure Code (Act V of 1908) order XXI, rule 2(1)—Limitation Act (IX of 1908) article 181—Execution of decree—Decree-holder certifying payments—"Application"—Certification when execution barred but for payment certified.

Certification to the court under order XXI, rule 2(1) by a decree-holder of payments made to him out of court, even if made in the form of an application, is not an "application" within article 181 of the Limitation Act so as to be barred unless it takes place within three years of the payment certified; nor is there any article which expressly limits the time. Further, certification can take place when execution of the decree is barred but for the payment certified. *Pandurang* v. *Jagya* (1), *Jalim Chand Patwari* v. *Yusuf Chaudhuri* (2) and *Joti Prasad* v. *Srichand* (3), approved.

Judgment of the Chief Court (4) affirmed.

**Present*: Lord PHILLIMORE, Lord ATKIN and Sir LANCELOT SANDERSON.

(1) (1920) I. L. R., 45 Bom., 91.
(2) (1924) I. L. R., 54 Calc., 143.
(3) (1928) 26 A. L. J., 966.
(4) I. L. R. 1 Luck., 482.