# REVISIONAL CRIMINAL.

*Before Ross and Kulwant Sahay, J.J.*

SHEIKH MOHAMMAD YASIN

*v.*

KING-EMPEROR.*

1926.

*Jan., 28; Feb., 5.*

*Code of Criminal Procedure, 1898 (Act V of 1898), section 403, scope of—trial without jurisdiction for want of sanction—conviction and sentence set aside—retrial on the same facts, whether barred—jurisdiction, meaning of—complainant, examination of, after notice to show cause, whether affects the commitment.*

Section 403(*1*), Code of Criminal Procedure, 1898, provides that " a person who has once been tried by a *court of competent jurisdiction* for an offence and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, be not liable to be tried again for the same offence, nor on the same facts for any other offence.......................... ". *Held*, that section 403(*1*) does not bar a fresh trial on the same facts when the conviction and sentence are set aside on the ground that the trial court had no jurisdiction to try the offence as, for example, where the trial court has tried an offence without a complaint having been made under section 195 in a case where such a complaint is required by law.

*Emperor* v. *Husain Khan* (1), *Nanakram* v. *Emperor* (2) *Rex* v. *Marsham* (3), *Peter Bradshaw* v. *John Drury* (4) and *Queen* v. *Muthoora Prasad Panday* (5), followed.

*K. Ganapathi Bhatta*, In re. (6), dissented from.

On the 25th October, 1923, the petitioner, Sheikh Mohammad Yasin, lodged an information before the police charging Abdul Wahid and others with offences under sections 148 and 302, Penal Code, his case being that the said accused persons had committed rioting armed with deadly weapons, causing the death of Mohammad Jan, the father of the petitioner. The

* Criminal Revision no. 520 of 1925, against an order, dated the 21st October, 1925, passed by Mr. N. P. Sinha, Magistrate, First Class, Muzaffarpur.

(1) (1917) I. L. R. 39 All. 293.
(2) (1918) 46 Ind. Cas. 716.
(3) (1912) 2 K. B. 362.
(4) (1849) 18 L. J. (M. C.) 189.
(5) (1865) 2 W. R. 10 (Cr.).
(6) (1913) I. L. R. 36 Mad. 308.

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police held an investigation, but before they had submitted their report, on the 5th of November, 1923, the petitioner filed a petition before the Magistrate complaining against the police investigation and praying that the case should be enquired into, and the persons accused by him should be summoned. Thereafter the police submitted their final report to the effect that the case was intentionally false, and they applied for the prosecution of the petitioner under section 211, Penal Code. Notice was issued upon the petitioner to show cause why he should not be prosecuted for instituting a false case. The petitioner filed a petition showing cause in which he asserted that the case was a true one. The Magistrate, however, ordered that the petitioner Yasin should be summoned under section 211 on the basis of the complaint put in by the sub-inspector of police, and he directed that further proceedings in the case which was started on the information of Yasin before the police should be terminated, and that the order to show cause to be served upon Yasin should be cancelled. Yasin thereupon moved the Sessions Judge who made a reference to the High Court (Criminal Reference no. 27 of 1924) which was heard by Adami, J., on the 14th May 1924. Adami, J., held that the petition of Yasin showing cause impugned the inquiry by the police and amounted to a complaint. The Magistrate should have examined Yasin on oath as a complainant, and either called upon him to prove his case or should have dismissed his complaint under section 203, Criminal Procedure Code. He did neither of these. Adami, J., held that, although it would have been proper to dispose of the complaint of Yasin in the first instance, and then entertain the complaint against him under section 211, yet as the complaint had been made, he directed the proceedings upon the complaint of the sub-inspector under section 211 to proceed. Yasin was accordingly committed to the Sessions on a charge under section 211 and convicted by the Assistant Sessions Judge of Muzaffarpur and sentenced to five years' rigorous imprisonment. Against the conviction, Yasin preferred an appeal to the High Court

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which was heard by Bucknill and Ross, J. J. [Reported as *Shaikh Muhammad Yasin* v. *King-Emperor* (1).] Their Lordships in that case held that the petition of Yasin filed on the 5th of November, 1923, must be treated as a complaint before the Magistrate, and that the offence, if any, committed by the petitioner was an offence which was committed in or in relation to a proceeding in court and, consequently, a complaint in writing by the court or by some other court to which it was subordinate was a condition precedent to cognizance being taken of the offence under section 211. They held that by making the complaint to court, the informant, viz. the present petitioner, had withdrawn the information from the category of mere police proceedings and had raised it to the category of a proceeding in court. This necessitated a complaint by the court if the informant was to be proceeded against. Their Lordships were of opinion, therefore, that the proceedings in which the petitioner had been convicted were wholly without jurisdiction because the bar imposed by section 195 had not been removed, and they directed that the conviction be set aside.

This decision of the High Court was dated the 19th December, 1924. Thereafter, on the 24th of January, 1925, the police inspector made an application before the Sadr Subdivisional Magistrate of Muzaffarpur praying that the petitioner might be re-tried under section 211, Penal Code, in relation to the same offence, after a complaint under section 476, Criminal Procedure Code. Notice was issued on the petitioner to show cause why proceedings should not be taken against him under section 211, Penal Code, and on the 26th February, 1925, the petitioner filed a petition of objection before the Magistrate in which he contended inter alia that the petitioner could not be tried again upon the same facts upon which he had been tried before. The Magistrate, however, examined the petitioner on oath in connection with his original petition of the 5th of November, 1923. The

(1) (1925) I. L. R. 4 Pat. 323.

petitioner examined witnesses in support of his allegation; but on the 21st of April, 1925, the Magistrate found his original complaint to be intentionally false, and eventually on the 14th August, 1925, he made a formal complaint against the petitioner under section 476. The complaint was made over to another Magistrate of the 1st class who committed the petitioner to the Court of Sessions for trial on a charge under section 211, Penal Code, by his order dated the 21st October, 1925.

*S. P. Varma* (with him *Fazl Ali* and *Syed Ali Khan*), for the petitioner: Section 403, Code of Criminal Procedure, is a bar to the present trial. The High Court which acquitted the petitioner, as also the court which held the trial in the first instance, were courts of competent jurisdiction within the meaning of section 403. Sanction under section 195 was only a condition precedent for the institution of the proceeding before the court and want of sanction did not affect the jurisdiction of the court to try the offence charged. Section 403, when it refers to the competency of the tribunal to try an offence, has reference to the status and character of the court and not to the procedure adopted by the court. See *In re K. Ganapathi Bhatta* (1). In the present case the Assistant Sessions Judge was quite competent to try the petitioner on a commitment by a first class magistrate; and if the conviction and sentence are set aside on a pure question of law, the order is nevertheless one of acquittal on merits.

My second submission is that after the acquittal by the High Court the petitioner was not examined as a complainant. His examination on oath was taken after he was called upon to show cause against prosecution. The Crown was not justified in administering an oath to the petitioner after he was made an accused person. Notice should have been served upon him after the dismissal of his complaint.

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(1) (1913) I. L. R. 36 Mad. 308.

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*H. L. Nandkeolyar*, Assistant Government Advocate, for the Crown:—There has been no previous trial by a court of competent jurisdiction. The High Court set aside the conviction because it considered that in effect there had been no trial of the petitioner.

[Ross, J.—There was a trial but on account of some mistake of the prosecution, the conviction could not be sustained.]

I submit not. A trial void ab initio is no trial.

[Ross, J.—But if the accused was in jeopardy when he was convicted, he cannot be retried.]

The *Illustrations* to section 403 are a complete answer on the question of jeopardy, e.g., the mere choosing of a wrong forum does not debar the prosecution from insisting upon a retrial and relying on additional facts in the second trial.

[Ross, J.—In *Rex* v. *Marsham* (1), it was held that the accused was not in peril because he was not legally convicted in the first trial.]

Yes. If the judgment is an order of acquittal on merits, I am out of court, but if, on the other hand, the effect of the judgment is that the bar imposed by section 195 not having been removed, the whole proceeding was vitiated, I submit there can be no bar to a retrial on merits.

[KULWANT SAHAY, J.—Is not an acquittal on a ground of law an acquittal on merits?]

Not necessarily. In the present case, however, there has been no acquittal. An order setting aside a conviction does not amount to one of acquittal. I rely on *Queen* v. *Muthoora Prasad* (2).

[Ross, J.—There the trial court had no jurisdiction to try the particular offence.]

Here also the court had no jurisdiction to try the case without having first removed the bar imposed by section 195. The net result of the decision in *In re*

(1) (1912) 2 K. B. 369. (2) (1865) 2 W. R. 10 (Cr.).

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*K. Ganapathi Bhatta* (1) is that the bar of section 195 will be a bar to the Crown and not to the court. I submit that it affects the competency of the court also and is not merely a condition precedent for the institution of the proceedings by the Crown. Section 403 covers a case where the proceeding has been void ab initio. The reasoning adopted in *In re K. Ganapathi Bhatta* (1) is untenable and should not be followed. A contrary view, however, is taken in *Emperor* v. *Hussain Khan* (2). These two decisions are discussed in *Nanakram* v. *Emperor* (3) where the correctness of the Madras decision has been doubted. The view expressed by the Allahabad and Nagpur Courts finds support in the earlier cases of the Calcutta High Court. See *Queen* v. *Muthoora Prasad* (4).

With regard to the second point I submit that the petition of complaint was never directed to be enquired into. The complaint was, as a matter of fact, disposed of before the formal complaint under section 476 had been made against the petitioner. The fact that he was examined on oath after he was called upon to show cause against prosecution will not vitiate the proceeding.

*S. P. Varma* in reply :—In *Emperor* v. *Hussain Khan* (2) no reference was made to *K. Ganapathi Bhatta* (1) and the propriety or otherwise of this decision was not considered. *K. Ganapathi Bhatta* (1) was, however, distinguished in *Nanakram* v. *Emperor* (3) where there was no complaint. The observation must, therefore, be considered as obiter. Section 403 contemplates an acquittal even on a technical point. See *Guggilapu Paddaya of Palakot* (5). An order setting aside a conviction has the effect of setting the accused at liberty which in turn implies acquittal.

S. A. K.

*Cur. adv. vult.*

(1) (1913) I. L. R. 36 Mad. 308. (3) (1918) 46 Ind. Cas. 716.
(2) (1917) I. L. R. 39 All. 293. (4) (1865) 2 W. R. 10 (Cr.).
(5) (1911) I. L. R. 34 Mad. 258.

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KULWANT SAHAY, J. (after stating the facts set out above, proceeded as follows): The petitioner has come up in revision to this Court against this order; and the main ground taken by the learned counsel on his behalf is that the petitioner, having once been tried and acquitted by a court of competent jurisdiction, is not liable to be tried again for the same offence. Reliance has been placed on sub-section 1 of section 403 of the Criminal Procedure Code. It has also been contended that the present proceedings were started against the petitioner before his original complaint had been disposed of and he was called upon to show cause in the present proceedings before the truth or otherwise of his complaint made on the 5th of November, 1923, was enquired into.

The first question depends on the construction of the judgment of this Court in the appeal preferred by the petitioner against his conviction by the Assistant Sessions Judge reported as *Sh. Md. Yasin* v. *King-Emperor* (1). As I have already observed, that conviction was set aside by this Court on the ground that the proceedings were ab initio void and without jurisdiction on account of the bar imposed by section 195 of the Criminal Procedure Code not having been removed. Section 403(1) of that Code provides that

> "a person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, be not liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237."

The question is whether the judgment of this Court in the appeal from the previous trial was an acquittal of the petitioner after his trial by a court of competent jurisdiction as is contended for by the learned counsel for the petitioner. In my opinion, the first trial of the petitioner cannot be said to be a trial by a court of competent jurisdiction so as to bar a second trial. It has been contended that the court which tried the

(1) (1925) I. L. R. 4 Pat. 823.

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petitioner on the first occasion was a court of competent jurisdiction within the meaning of the section, and the conviction was set aside on a point of law which did not affect the jurisdiction of the court which held the trial; and reliance was placed upon a decision of the Madras High Court in *re. K. Ganapathi Bhatta* (1). This decision to a certain extent lends support to the contention of the learned counsel; but in my view the learned Judges put a too narrow construction upon the provisions of section 403(*1*) of the Code. They observed that sub-section (*1*) of section 403 refers to the character and status of the tribunal when it refers to competency to try the offence. The reasoning adopted in that case was that a sanction under section 195, Criminal Procedure Code, was not a condition of the competency of the tribunal, but it was only a condition precedent for the institution of proceedings before the tribunal, and that the want of sanction under section 195 did not in any way affect the jurisdiction of the court to try the accused of the offence charged. In my view the wording of section 403 is very wide and the jurisdiction of the court does not merely refer to the character and status of the court to try the offence, but also refers to want of jurisdiction on other grounds as shown by *Illustrations* (*f*) and (*g*) to the section. I think it covers cases where the trial is held to be without jurisdiction for want of a sanction under section 195 of the Code. This view was taken by the Allahabad High Court in *Emperor* v. *Husain Khan* (2). In that case the accused persons were tried for an offence under section 82 of the Indian Registration Act without the permission required by section 83 of the Act having been obtained. They were convicted by the Magistrate, but the conviction was set aside by the High Court on the ground of want of permission under section 83 of the Act. A second trial was held after obtaining the permission under section 83 and the accused persons were again convicted. It was held by Knox, J., that the second trial was not barred

(1) (1913) I. L. R. 36 Mad. 308. (2) (1917) I. L. R. 39 All. 293.

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by section 403 of the Criminal Procedure Code, it being held that the court which had tried the case in the first instance was not a court of competent jurisdiction to hold the trial owing to the absence of the sanction under section 83 of the Act. The same view was taken in *Nanakram* v. *Emperor* (1). A similar view was taken in *Rex* v. *Marsham* (2), in *Peter Bradshaw* v. *John Drury* (3) and by the Calcutta High Court in *Queen* v. *Muthoora Pershad Pandey* (4). It is further to be observed that this Court did not make an order of acquittal upon the appeal in the previous conviction but merely directed that the conviction should be set aside. There was no trial of the accused on the merits by this Court, and the conviction was set aside on the ground of want of jurisdiction in the court to try the petitioner. I am, therefore, of opinion that section 403(*1*) does not operate as a bar to the second trial of the petitioner in the present case.

The second ground taken was that the proceedings were initiated against the petitioner before the disposal of his original complaint of the 5th of November, 1923. In my opinion there is no substance in this objection either. This Court did not direct an inquiry into the complaint of the petitioner Yasin. As a matter of fact, the magistrate did examine the petitioner and dismiss his complaint although after the initiation of the inquiry, but the dismissal was before the making of the complaint under section 476. The commitment of the petitioner, therefore, to the Court of Session cannot be quashed.

It has been contended on behalf of the petitioner that the matter is too stale and that the petitioner has already been sufficiently harassed, and a fresh prosecution of the petitioner for the same offence should not be allowed to proceed. It is no doubt true that the complaint was made by the petitioner so long ago as November 1923, and he has been subjected to a good

(1) (1918) 46 Ind. Cas. 716.
(2) (1912) 2 K. B. 362.
(3) (1849) 18 L. J. (M. C.) 189.
(4) (1865) 2 W. R. (Cr.) 10.

deal of harassment on account of the previous prosecution, and it is for the Crown to consider whether the case is a fit one in which the proceedings should be allowed to go on, or whether it is proper to drop the proceedings. It is not competent for us to quash the proceedings on the ground that the original complaint made by the petitioner was more than two years ago.

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In the result this application must be dismissed.

ROSS, J.—I agree.

*Application dismissed.*

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## PRIVY COUNCIL.*

SOURENDRA MOHAN SINHA

*v.*

HARI PRASAD SINHA.

1926.

*Feb., 16.*

*Order-in-Council—Execution—Successful party not lodging Order—Power of other party to obtain execution—Petition to vary Order-in-Council—Code of Civil Procedure,* 1908 *(Act V of* 1908), *Order XLV, rule* 15(*1*).

Upon cross-appeals to the Privy Council an Order was passed reducing the sum for which the defendants were liable under the decree appealed from, and extending the time within which, under that decree, they were to pay a large sum into court until the expiry of eight months from the receipt of the Order by the High Court. The Order was issued to the defendants, as the party successful, but they failed to lodge it with the High Court. The plaintiffs petitioned for a variation of the Order so as to enable them to execute that part of the decree which was in their favour and was affirmed.

*Held*, that the Order-in-Council having been passed, a variation of its terms could be advised only in exceptional circumstances, and that having regard to the plaintiffs' power under Order XLV, rule 15(*1*), to obtain execution by a petition to the High Court accompanied by a certified copy of the Order, no variation could be advised.

It is the duty of the party to an appeal to whom the Order-in-Council made therein is issued to lodge it forthwith with the court appealed from.

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* PRESENT:—Viscount Dunedin, Lord Blanesbury and Sir John Edge.