

Prosecutor to confine himself to some only of the charges. Section 494 no doubt lays down that the consent of the Court is first to be obtained, but the failure to obtain such consent would amount to a mere irregularity and on the analogy of the principle involved in section 536(2) the second trial cannot be held to be invalid, inasmuch as no objection was taken by the accused to such trial.

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Order varied.

REVISIONAL CRIMINAL.

Before Ross and Kulwant Sahay, JJ.

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v.

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August, 4.

Code of Criminal Procedure, 1898 (Act V of 1898), sections 423(1)(b), 439(4)—conviction altered by appellate court—High Court in revision may re-alter it—Legal Practitioner, duty of.

The petitioner having been charged and convicted of abetting an offence under section 205, Penal Code (false personation for doing any act for the purpose of a suit or prosecution), appealed to the Sessions Judge who was of opinion that upon the facts established the offence did not come within section 205/109 but within section 419 (cheating by personation) and altered the conviction to one under that section.

Held, that the petitioner had not been acquitted of the offence under section 205/109 and, therefore, that section 439(4), Code of Criminal Procedure, was not a bar to the High Court in revision from re-altering the conviction of the petitioner from one under section 419 to one under section 205/109.

* Criminal Revision no. 438 of 1926, from a decision of A. C. Davies, Esq., I.C.S., Sessions Judge of Patna, dated the 18th June, 1926, modifying a decision of Babu R. N. Sahi, Magistrate, First Class, of Patna, dated the 25th May, 1926,

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Per *Kulwant Sahay, J.*—A legal practitioner should not draft and sign a petition of compromise and an affidavit in a case in which he was not engaged from before and in which he knows that other lawyers were engaged, without consulting the latter.

The facts of the case material to this report are stated in the judgment of *Kulwant Sahay, J.*

Nageshwar Prasad, for the applicant.

H. L. Nandkeolyar, Assistant Government Advocate, for the Crown.

KULWANT SAHAY, J.—The petitioner was charged with an offence punishable under section 205/109 of the Indian Penal Code and the Subdivisional Magistrate of Patna convicted him of the offence charged and sentenced him to six months' rigorous imprisonment. On appeal the learned Sessions Judge found that upon the facts established in the case the offence did not come within section 205/109 but under section 419, and he accordingly set aside the conviction under section 205/109 and altered it to one under section 419 maintaining the sentence passed by the learned Magistrate.

The petitioner admits that he is a tout and his occupation is to introduce litigants to lawyers and that as such he introduced two persons, who called themselves *Sital Prasad* and *Bihari Mahto*, to *Mr. X*, an advocate of this Court, with the object of preparing a petition of compromise to be filed in two Miscellaneous Appeals pending in this Court in which one *Ram Narain* was the appellant and *Musammam Pan Kuer* was the respondent. A typed copy of a petition of compromise was handed over to *Mr. X* which was in Roman character and was originally intended to be filed in the Court of the Subordinate Judge, but it was represented to him that as the records of the suits were in the High Court in connection with the two Miscellaneous Appeals the petition of compromise could not be filed in the Subordinate Judge's Court, and the parties were directed to file the petition in

the High Court, and Mr. X was asked to draft a petition of compromise to be filed in the High Court in the above two Miscellaneous Appeals. Mr. X did prepare a petition of compromise and did actually sign the same as Advocate for the appellant and also signed the affidavit which was to be sworn in support of the application as having been prepared in his office. Another lawyer had to be engaged to represent the respondent and Mr. Brij Kishore Prasad a practising Vakil of this Court is alleged to have been engaged on behalf of the respondent and to have signed the affidavit which was to be sworn by the karpardaz for the respondent. The two affidavits had to be sworn and it was necessary that some one should identify the persons who were to swear the affidavits before the Commissioner of Oaths. The prosecution case is that the petitioner Ganpat Lal asked Sardanand, the clerk of Mr. A. K. Gupta, another Vakil of this Court, to identify Sital Prasad as karpardaz for Pan Kuer, and he asked Ram Chander, the clerk of Mr. X, to identify Bihari Mahto who was to swear the affidavit as karpardaz for the appellant Ram Narain. On the assurance of the petitioner that the two individuals who were to swear the affidavits were Sital Prasad and Bihari Mahto the karpardazes of Musammam Pan Kuer and Ram Narain, the two clerks Sardanand and Ram Chander identified those two individuals before the Commissioner of Oaths, and the affidavits were duly sworn. The petition of compromise was then filed before the Registrar of this Court; but subsequently it transpired that the whole affair was a fraud and that no compromise had in fact been effected between the parties to the litigation and that the persons who swore the affidavits were not the real Sital Prasad and the real Bihari Mahto the karpardazes of the parties to the appeals. The matter was enquired into by the Registrar of this Court and it was found that the compromise was not entered into by the parties and that the affidavits had not been sworn by the real Sital Prasad and the real Bihari Mahto, and that the

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signature of Mr. Brij Kishore Prasad on the affidavit was a forgery. Proceedings were then taken under section 476 of the Criminal Procedure Code against the petitioner and the Registrar ultimately lodged a complaint against the present petitioner, and the petitioner was accordingly placed on his trial charged with an offence punishable under section 205/109 of the Indian Penal Code.

Both the Courts below have found that there was a false personation in connection with the affidavits sworn before the Commissioner of Oaths in this Court; that the individuals who swore the affidavits were not the real Sital Prasad and the real Bihari Mahto and that the petitioner, Ganpat Lal, did ask the two clerks, Sardanand and Ram Chander, to identify the two individuals as Sital Prasad and Bihari Mahto, and that on the assurance of the petitioner the said two clerks identified them before the Commissioner of Oaths.

Upon the facts found there can be no doubt that an offence punishable under section 205 had been committed and that the petitioner did abet the commission of that offence. It is contended on behalf of the petitioner that like the two clerks who identified the two individuals, he was himself deceived and that he did not know that those two individuals were not the real Sital Prasad and the real Bihari Mahto. The Courts below have considered the circumstances of the case and have come to the finding that the petitioner knew that those two individuals were not the real Sital Prasad and the real Bihari Mahto and that knowing this he did ask the clerks to identify them before the Commissioner of Oaths. Mr. X who drafted the petition of compromise and did actually sign the petition of compromise and the affidavits as having been prepared in his office was not a counsel in the appeals from before. The appeals had been filed by a different lawyer and Mr. X had nothing to do with the appeals before the petitioner took the two individuals to him and asked him to draft the

petition of compromise. The fact that the petitioner did not take those two individuals to the lawyers who were engaged in the appeals from before is significant; and it is certainly regrettable that a counsel of the position of Mr. X should draft and sign a petition of compromise and an affidavit in a case in which he was not engaged from before and in which he must have known that other lawyers were engaged, on certain individuals being introduced to him by a tout (1) and without a Vakalatnama from the party concerned. However, the findings are that the petitioner did know that the two individuals were not the real karpardazes of the parties.

It is contended on behalf of the petitioner that the learned Sessions Judge has relied upon the statement of the petitioner before the Registrar of this Court made in connection with the proceedings under section 476 of the Criminal Procedure Code, and that this statement was not evidence in the case. In my opinion the whole proceeding under section 476 being before the Court, it was open to the learned Sessions Judge to refer to the statement of the petitioner made in the course of the proceeding.

It is next contended that the conviction of the petitioner under section 205/109 having been set aside and the petitioner having been acquitted of the offence under that section, the learned Sessions Judge was wrong in law in convicting the petitioner under

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(1) Mr. X subsequently moved for deletion from the judgment of the words "on certain individuals being introduced to him as a tout". The Court passed the following order: This is an application on behalf of Mr. X praying that certain passages quoted in the application should be expunged from the judgment of the Criminal Revision Case no. 438 of 1926. Objection is taken to the passage contained in paragraph 2 of the petition. I can only say that I never intended to convey any impression that Mr. X knew that Ganpat Lal was a tout and that he received instructions from Ganpat Lal knowing him to be a tout. We only expressed our regret that he should have accepted the brief simply for the purpose of filing a petition of compromise in a case in which other lawyers had been engaged from before without any reference to those lawyers and from a person who subsequently turned out to be a tout on his own admission although this was not known to Mr. X at the time.

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section 419 Penal Code. I am of opinion that it was open to the learned Sessions Judge under the provisions of section 423(1)(b), Criminal Procedure Code, to alter the finding of the Magistrate from an offence under section 205/109 to one under section 419, Penal Code, while maintaining the sentence passed by the learned Magistrate. The learned Sessions Judge no doubt used the expression that the conviction of the petitioner under section 205/109, Penal Code, " must be set aside "; but that does not amount to an acquittal of the petitioner. In the very next sentence he expressly states that the point for consideration for him was whether he should alter the finding and convict the petitioner of an offence punishable under any other section of the Indian Penal Code. The facts found were not upset by the learned Sessions Judge. He agreed with the Magistrate as regards his findings upon the evidence and the only question for consideration before him then was whether upon those findings the petitioner was punishable under section 205/109 or any other section of the Indian Penal Code. He came to the conclusion that the facts found did not constitute an offence under section 205/109 but one under section 419 and he accordingly altered the finding upon the facts as found by the learned Magistrate and convicted the petitioner under section 419 maintaining the sentence passed by the Magistrate. I am, however, of opinion that the facts found did constitute an offence under section 205/109. There was a false personation and an admission or statement was made by the two individuals who swore the affidavits in an assumed character and the presentation of the petition before the Registrar did constitute an act in a suit and, therefore, all the ingredients necessary to constitute an offence punishable under section 205 were established. The learned Sessions Judge was of opinion that the false personation was not in respect of some act in a suit: it was in his opinion

" no doubt in respect of an act for the purposes of a suit, but it could not be said to have been in a suit."

I confess I am unable to follow the reasoning of the learned Judge. The presentation of the petition of compromise before the Registrar was clearly an act in a suit and the affidavits were sworn for the purpose of being presented in the appeals pending in this Court and purported to be an act in the suit. I am, therefore, of opinion that the original conviction of the petitioner under section 205/109 was correct, and it was not necessary for the learned Sessions Judge to alter the finding and to convert the conviction from one under section 205/109 to one under section 419. I therefore hold that the petitioner was rightly convicted by the trying Magistrate under section 205/109.

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It is contended that this Court cannot in revision convert a finding of acquittal into one of conviction, and reliance has been placed upon section 439(4) of the Criminal Procedure Code. It is clear that this contention has no substance. There was no acquittal by the learned Sessions Judge of the offence under section 205/109, Penal Code. The learned Sessions Judge, as I have already observed, did not acquit the petitioner but he merely altered the finding of the Magistrate, and such alteration had not the effect of acquittal of the accused of the offence under section 205/109, Penal Code. Clause (4) of section 439 of the Criminal Procedure Code, therefore, does not prevent this Court from re-altering the conviction of the petitioner from one under section 419 to one under section 205/109, Penal Code.

The result is that the conviction of the petitioner is altered to one under section 205/109 and the sentence of six months' rigorous imprisonment is maintained. The offence is a serious one and the sentence passed is not severe.

Ross, J.—I agree.

Order varied.