APPELLATE CRIMINAL.

1934.

November, 27. December, 3.

Before Agarwala and Varma, JJ.

PEM MAHTON

v.

KING-EMPEROR.*

Criminal Appeal—appeal preferred from jail dismissed—subsequent appeal presented through advocate, whether can be entertained—Criminal Court, whether can review or revise its own order.

When an accused person presented a petition of appeal from the conviction and sentence passed on him, through the officer in charge of the jail in accordance with the provision of section 420 of the Code of Criminal Procedure, 1898, and the appeal was dismissed by the High Court, but later another memorandum of appeal was presented to the court through an advocate and was admitted by the Bench which had dismissed the jail appeal,

Held, (*i*) that the court had no power to entertain an appeal from the conviction and sentence passed on the appellant after the dismissal of the appeal which he had preferred from jail;

(*ii*) that neither the Bench which had admitted the appeal nor the Bench before which it came on for final hearing had power to review or revise the order of dismissal.

Emperor v. *Khiali*(1), *Kunhammad Haji, In re*(2) *Lachmi Singh* v. *Bhusi Singh*(3), *Gaja Chaudhry* v. *Debi Chaudhury*(4), *Nand Kishore Lal* v. *Emperor*(5) and *Kuldip Das* v. *King-Emperor*(6), followed.

Hulai v. *Emperor*(7), not followed.

Emperor v. *Bhawani Dibal*(8), distinguished.

* Criminal Appeal no. 248 of 1934, from an order of Mr. A. N. Chakraverty, Magistrate 1st Class, Giridih, dated the 30th June, 1934.

(1) (1922) I. L. R. 44 All. 759.
(2) (1922) I. L. R. 46 Mad. 382.
(3) (1917) 43 Ind. Cas. 817.
(4) (1923) 72 Ind. Cas. 945.
(5) (1919) 51 Ind. Cas. 271.
(6) (1932) I. L. R. 11 Pat. 697.
(7) (1915) 36 Ind. Cas. 133.
(8) (1906) All. W. N. 303.

Dahu Raut v. *Emperor*(1), *Ramesh Pada Mondal* v. *Kadambini Dassi*(2), *Tadi Soma Naidu*(3) and *Assistant Government Advocate* v. *Upendra Nath Mukherji*(4), referred to.

The facts of the case material to this report are set out in the judgment of Agarwala, J.

Baldeo Sahay, for the appellants.

Assistant Government Advocate, for the Crown.

AGARWALA, J.—The learned Assistant Government Advocate raises a preliminary objection to the hearing of this appeal. The facts necessary to be stated are that the appellants Pem Mahton and Jitan Mahton were charged under section 412 of the Indian Penal Code and tried jointly with one Khublal Turi, who was charged under section 395 in respect of dacoity which took place at village Mohanpur on the 20th March, 1934. The three accused persons were convicted by the 1st Class Magistrate who tried them by an order, dated the 30th of June, 1934, and from these convictions they preferred appeals. At the time when these appeals were presented the appellants were in jail. The petitions of appeal were, therefore, presented through the Officer in charge of the jail in accordance with the provisions of section 420 of the Code of Criminal Procedure. The memoranda of appeal were received in this Court on the 1st of August, 1934, and laid before the learned Judges then constituting the criminal Bench on the 8th. The appeals were dismissed on the 13th. On the 5th of September the present memorandum of appeal on behalf of two of the accused persons, namely, Pem Mahton and Jitan Mahton was presented through an advocate. The office noted on the memorandum of appeal the fact of the dismissal of the appeal

(1) (1933) I. L. R. 61 Cal. 155.
(2) (1927) I. L. R. 55 Cal. 417.
(3) (1923) I. L. R. 47 Mad. 428.
(4) (1931) A. I. R. (Pat.) 81.

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presented from the jail. At the time when this appeal was presented, the criminal Bench consisted of the same learned Judges who had dismissed the appeals from jail. Their Lordships, however, on the 6th of September, directed notice to be issued and that the appeal would be heard. The contention of the learned Assistant Government Advocate is that in view of the dismissal of the appeals from jail the present appeal is incompetent. The right of appeal from the convictions in the present case is conferred by section 408, clause (*b*), the case having been tried by a Magistrate specially empowered by section 30, and one of the accused, namely, Khublal Turi, having been sentenced to six years' rigorous imprisonment. Section 419 prescribes the manner in which an appeal is to be presented, viz. by a petition in writing presented by the appellant or his pleader. If the appellant is in jail, section 420 permits him to present his petition to the Officer in charge of the jail who is required to forward it to the proper appellate court. Section 421 empowers the appellate court after perusal of the petition to dismiss the appeal summarily. In the case, however, of an appeal presented by an appellant in person or through a pleader, the proviso to the 1st clause of section 421 requires that the appellant or his pleader should be afforded a reasonable opportunity of being heard in support of the appeal before it is dismissed. This proviso is expressly limited to an appeal presented by the appellant in person or through a pleader and it does not apply to an appeal presented under section 420 through the Officer in charge of the jail in which the appellant is confined. The Code does not confer more than one right of appeal to any accused person from a conviction and sentence passed on him nor does the Code or the Letters Patent of this Court permit an appeal in a criminal matter from an order of one or more Judges of the Court to other Judges of the Court. By presenting the petition from jail the appellants preferred the appeal which was open to

them and that appeal was finally disposed of by the order of the 13th of August. No other appeal lies from the convictions recorded by the trial court or from the order of this Court dismissing the appeal presented from jail. That this appeal is incompetent is, therefore, quite clear from the provisions of the Code already referred to. The matter, however, has also been recently considered by a Division Bench of the Allahabad High Court in the case of *Emperor* v. *Khiali*(1). In that case two persons who had been convicted by an Additional Sessions Judge presented appeals through the Officer in charge of the jail in which they were serving their sentences. The petitions of appeal reached the High Court on the 15th of April, 1922. They were laid before a single Judge of the Court on the 20th of April and were dismissed by him on the 21st of April. On the 1st of May a petition of appeal was presented through counsel. The office reported that the appellants had already presented an appeal from jail which had been dismissed. Counsel then presented another petition on the 8th of May. The learned Judge before whom this petition was laid, directed it to be laid before a Bench of two Judges for consideration. Eventually it came before the learned Chief Justice and Mr. Justice Piggott. Their Lordships distinguished an earlier decision in *Emperor* v. *Bhawani Dihal*(2) in which a petition of appeal was presented to the Session Court through Counsel while another petition by the same appellants presented from jail was already pending disposal in the Session Court. The Sessions Judge, overlooking the fact that an appeal had been presented through counsel, dismissed the appeal from jail summarily and then proceeded to dismiss the appeal presented through counsel without affording him an opportunity of appearing in support of it. The High Court held that this procedure was illegal and, having set aside the order of the Sessions Judge dismissing

(1) (1922) I. L. R. 44 All. 759.
(2) (1906) All. W. N. 303.

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by that learned Judge of his previous order and re-opening of the case on its merits. It appears that the learned Judge who admitted the subsequent appeal was not conscious of the fact that he had previously dismissed an appeal from jail by the same appellant. Oldfield and Devadoss, JJ. decided that the High Court had no power to review the first Judge's order dismissing the appeal from jail. In *Nand Kishore Lal* v. *Emperor*(1) Coutts, J. in this Court held that the High Court has no power to review its own judgment pronounced in criminal revision but in *Assistant Government Advocate* v. *Upendra Nath Mukerji*(2) Dhavle, J. reviewed an ex parte interlocutory order passed by himself in chambers. In *Kuldip Das* v. *King-Emperor*(3) the Bench to which an appeal was presented recorded the following order:

> "This appeal is dismissed except as to the question of sentence on which only it will be heard."

It was subsequently held by the same Division Bench that it was not open to the same or another Bench to go behind the order of dismissal. In a later case, *T'edi Soma Naidu*(4) two persons who had been convicted of forgery and whose convictions and sentences had been confirmed by the Sessions Judge on appeal, applied to the High Court in revision to set aside the convictions and sentences on the ground that the Magistrate by whom they had been passed had no jurisdiction to try the case. The application was admitted by Devadoss, J. and came up for hearing before Krishnan, J. on the 27th of September, 1923. One of the applicants appeared through a vakil who stated that he had no instructions and the other applicant did not appear at all in person or by a pleader. Krishnan, J. confirmed the convictions and enhanced the sentences. Later, on the 25th of October, Krishnan, J. vacated his previous order apparently

(1) (1919) 51 Ind. Cas. 271.
(2) (1931) A. I. R. (Pat.) 81.
(3) (1932) I. L. R. 11 Pat. 697.
(4) (1923) I. L. R. 47 Mad. 428.

on the ground that the applicants had had no opportunity of showing cause against enhancement of their sentences, and, therefore, that his order of the 27th of September was without jurisdiction. The learned Judge accordingly directed the case to be reheard on the question of enhancement. The case came up before Waller, J. who directed it to be laid before a Division Bench. It then came before Odgers and Wallace, JJ. when the Public Prosecutor argued that Krishnan, J. had no power to vacate his order of the 27th of September. Their Lordships observed that "the judgment of the High Court in a criminal matter as soon as it is signed, is final and the Court becomes *functus officio* as soon as that is done and thereafter there is no power to revise or alter that decision". But their Lordships went on to hold that an order to the prejudice of an accused passed without affording him an opportunity of being heard as, for instance, as happened in the case before their Lordships, where a case was by mistake posted in the list on a day anterior to that fixed in the notice to the accused, is null and void ab initio as being one passed without jurisdiction. Their Lordships stated at page 434 of the report, "We are in no way reviewing or revising any order of Krishnan, J. but simply deciding that there was no previous valid adjudication to bar a hearing on the merits". In the case before us at persent, the order of the Bench dismissing the appeal from jail on the 13th of August, 1934, was proper and valid in law and cannot be treated as a nullity. A suggestion was made that the subsequent order of the same Bench admitting the present appeal when presented through an advocate on the 6th of September should be regarded as an order reviewing the order of dismissal. I am not prepared to hold that the Bench which admitted the appeal on the 6th of September intended to assume a jurisdiction which it did not possess. The view I take of that order is that it admitted the appeal subject to any objection which might be taken to its hearing. It is not necessary in the present case to go as far as Lort-Williams and McNair, JJ. in the

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recent case of *Dahu Raui* v. *Emperor*(1) where their Lordships held, dissenting from the case of *Tadi Soma Naidu*(2) and the decision of their own Court in *Ramesh Pada Mondal* v. *Kadambini Dassi*(3) that "criminal Bench of the High Court, when it has signed its judgment, has no power to alter or review it, *even if it may be without jurisdiction*, except to correct a clerical error". In my view, therefore, this Court has no power to entertain an appeal from the conviction and sentence passed on the appellants after the dismissal of the appeal which they preferred from jail, and neither this Bench nor the Bench which admitted the appeal has power to review or revise the order of dismissal. The appeal must, therefore, be dismissed.

VARMA, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Wort and Varma, JJ.

1934.

December, 7, 10.

SURAJMAL MARWARI

v.

HURO RAI.*

Sontal Parganas Settlement Regulation, 1872 (*Regulation III of* 1872), *section* 6, *applicability of—rule, whether applies to interest to be awarded on the decretal amount—Code of Civil Procedure*, 1908 (*Act V of* 1908), *section* 34—*court, discretion of.*

Section 6 of the Sontal Parganas Settlement Regulation, 1872, relating to interest, applies only to the interest to be decreed under the bond and does not limit the powers of a court under section 34 of the Code of Civil Procedure, 1908, to award interest on the decretal amount until realization.

* Appeal from Original Decree no. 229 of 1930, from a decision of Rai Bahadur Amarendra Nath Das, Deputy Magistrate-Subordinate Judge of Deoghar, dated the 30th of June, 1930.

(1) (1933) I. L. R. 61 Cal. 155.
(2) (1923) I. L. R. 47 Mad. 428.
(3) (1927) I. L. R. 55 Cal. 417.