

exercise their prerogative of remitting the sentence which has been passed.

The same day the Division Bench rejected the petition accordingly.

Petition rejected.

REVISIONAL CRIMINAL.

Before Mr. Justice Nánábhái Haridás and Sir William Wedderburn, Bart., Justice.

QUEEN-EMPRESS *v.* GUSTA'DJI BARJORJI.*

1885.
October 8.

A'bkári—Retrial—Jurisdiction—Acquittal—Bombay Act V of 1878, Sec. 3, Cl. 5, and Sec. 56—Criminal Procedure Code (Act X of 1882), Secs. 1 and 403—Special law.

The jurisdiction conferred by the Code of Criminal Procedure (Act X of 1882) does not affect any special jurisdiction or power conferred by any law in force at the time when the Code came into force.

All offences against the *abkári* law (Bombay Act V of 1878) being cognizable by a Magistrate of the Second Class (section 3, cl. 5, and section 56), a person tried for any such offence by any such Magistrate, and acquitted, is not liable to be tried again for the same offence (section 403), unless the acquittal has been set aside by the High Court on appeal by the Government.

This was an application to the High Court for the exercise of the power of revision under section 439 of the Criminal Procedure Code (Act X of 1882).

On the 27th of May, 1885, two persons were prosecuted, under section 43 (b) of the Bombay *A'bkári* Act V of 1878, before Mr. Soman, Magistrate (Second Class) at Alibág, for transporting five gallons of toddy each, in contravention of section 17 of the Act, —four gallons per head being the maximum allowed by a notification of Government issued under the section. In the course of the trial they stated that they had bought the toddy from the applicant, Gustádji Barjorji, licensed liquor-seller. The Magistrate thereupon summoned him, but acquitted him. The persons prosecuted were convicted by the Second Class Magistrate, and appealed to the First Class Magistrate, Mr. Drew.

* Criminal Application, No. 267 of 1885.

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During the hearing of their appeal it appeared to Mr. Drew that Mr. Soman, Second Class Magistrate, was not empowered, under section 191 (c) of Act X of 1882, to take up cases of his own motion, and that, therefore, the trial and acquittal of Gustádjí Barjorji were alike illegal. Mr. Drew thereupon tried Gustádjí Barjorji for selling more liquor than his license permitted him, *viz.*, 5 gallons instead of 4, and convicting him sentenced him to pay a fine of Rs. 35, or, in default, to suffer ten days' simple imprisonment under section 43 (g) of the Bombay A'bkári Act V of 1878.

Against this conviction and sentence Gustádjí Barjorji applied to the High Court.

Mánicksháh Jehángírsháh Talayárkhán for the applicant.—The conviction by Mr. Drew is illegal. Mr. Soman, who is a Magistrate of the Second Class, had jurisdiction to try all offences under the ábkári law by section 3, clause 5, and section 56 of the Bombay Act V of 1878 quite independently of the Code of Criminal Procedure (Act X of 1882), section 1 of which says: "In absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law now in force." Section 530 (h) of the Code has no application to the present case, as the acquittal by Mr. Soman was by a Court of competent jurisdiction. Such an acquittal cannot be reversed, except by an appeal from Government—*Empress v. Miyádjí Ahmed*⁽¹⁾. Under section 403 of the Code the applicant is entitled to plead his acquittal in bar of the retrial. That acquittal being in force, his subsequent conviction and sentence are illegal.

NA'NA'BHA'I HARIDA'S, J.—Under section 3, clause 5, and section 56 of Bombay Act V of 1878, Mr. Soman, a Magistrate of the Second Class, had jurisdiction to try this offence. He acquitted the applicant, and the order of acquittal, not having been appealed against by Government, is still in force. That being the case, the Magistrate First Class (Mr. Drew) could not retry him for the same offence; disregarding the previous acquittal by a Court of competent

(1) I. L. R., 3 Bom., 150.

jurisdiction, only by reason of a supposed irregularity on the part of such Court. See section 403 of the Criminal Procedure Code (Act X of 1882).

This conviction must, therefore, be set aside, and the fine, if levied, refunded.

Conviction set aside.

REVISIONAL CRIMINAL.

Before Mr. Justice Birdwood and Sir William Wedderburn, Bart., Justice.

QUEEN-EMPRESS v. JAGANNATH BHIKAJI BHA'VE.*

Indian Penal Code (Act XLV of 1860), Sec. 430—Mischief—Water-course

1885.
October 29.

Where upon the evidence it appeared that the complainant was the exclusive owner of a water-course, and that the accused had no sort of right to assert any claim to it, the causing of a diminution of the supply of water by the accused, even though in the assertion of a right, was held to be only an additional wrong, and to constitute mischief within the meaning of section 430 of the Indian Penal Code (Act XLV of 1860).

Rámkrishna Chetti v. Palaniyandi Kudámbar(1) followed.

THIS was a reference, under section 438 of the Code of Criminal Procedure (Act X of 1882), by R. E. Candy, Magistrate of the district of Ratnágiri.

The accused was charged before Mr. K. V. Ghaisas, Magistrate (First Class) at Ratnágiri, with having caused a diminution of water-supply for agricultural purposes by diverting water from a water-course alleged to have been constructed by the complainant, and belonging to him exclusively. The accused contended that the water-course belonged to himself and the complainant jointly, that it ran partly in his (the accused's) land, and that he was entitled to use it for the purpose of watering his own trees.

The Magistrate found that the contention of the accused was wholly groundless, that he had no claim to the water-course, and

* Criminal Reference, No. 146 of 1885.

(1) L. L. R., 1 Mad., 262.