offence. This view is in accordance with that taken by the Calcutta High Court in *Chandra Mohan Das Mandal* v. *King-Emperor*.[1] Therefore it seems to me that the contrary view taken by the Sessions Judge that the summary trial was a mere irregularity curable under section 537, Criminal Procedure Code, is not correct. In my opinion the case falls under section 530, clause (*q*), Criminal Procedure Code. Therefore the proceedings of the Magistrate must be held to be void. The convictions of the two petitioners under section 323, Indian Penal Code, are set aside. The amount of fine, namely Rs. 60, if paid, should be refunded to each of the accused; and if it has been paid as compensation to the complainant in accordance with the Magistrate's order under section 545, Criminal Procedure Code, it must be refunded by the complainant. As to whether there should be a re-trial, we do not ourselves think that it is necessary to order a re-trial. But if the complainant renews his complaint, that is a matter which will not be affected by our present order. We do not mean to prejudice any rights he may have in the matter.

MIRZA, J. :—I concur.

Rule made absolute.

R. R.

CRIMINAL REFERENCE

Before Mr. Justice Fawcett and Mr. Justice Mirza.

EMPEROR *v.* AMBAJI DHAKYA KATKARI.*

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Criminal Procedure Code (Act V of 1898), sections 195, 248, 403—Indian Penal Code (Act XLV of 1860), sections 173 and 174—Acquittal of accused on ground that charge was under wrong section—Second acquittal on ground that complaint was by wrong person—Another complaint against accused—Previous acquittal is no bar.

A prosecution instituted against the accused under section 173 of the Indian Penal Code was withdrawn on the ground that it was lodged under a wrong section, and the accused was acquitted under section 248 of the Criminal Procedure Code. A complaint was next filed against the accused under the

*Criminal Reference No. 103 of 1927.

[1] (1921) 27 C. W. N. 148.

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proper section, viz., 174, of the Indian Penal Code, but that too was withdrawn on the ground that the complainant was not entitled to complain in view of section 195 of the Criminal Procedure Code. The Magistrate again acquitted the accused. Ultimately the proper complainant lodged a fresh complaint on the same facts against the accused under section 174 of the Indian Penal Code, and the accused was convicted. On reference to the High Court :—

Held, that the first acquittal of the accused was not a bar to further proceedings by virtue of section 403 (*4*) of the Criminal Procedure Code.

In re Samsudin[1] and *Emperor* v. *Jivram Dankarji*,[2] followed. *In re Ganapathi Bhatta*,[3] dissented from.

The fact that a complaint by a public servant is now substituted for his sanction, before a Court can take cognizance of certain offences, does not render inapplicable the *ratio decidendi* of the Bombay rulings to the effect that the discharge or acquittal of an accused by a Magistrate owing to want of sanction did not bar a subsequent trial of the same accused for the same offence after the requisite sanction had been obtained.

THIS was a reference made by J. R. Hood, District Magistrate of Kolaba.

The charge against the accused was that he had disobeyed the order of the Sub-Inspector of Police by failing to appear before him.

At first a complaint was filed against the accused by the Head Constable under section 173 of the Indian Penal Code. The complaint was withdrawn on the ground that it was lodged under a wrong section; and the Magistrate acquitted the accused under section 248 of the Criminal Procedure Code.

The same Head Constable then lodged another complaint against the accused under section 174 of the Indian Penal Code on the same facts. This complaint was also withdrawn on the ground that the Head Constable was not the proper complainant in view of section 195 of the Criminal Procedure Code. The Magistrate acquitted the accused a second time under section 248 of the Criminal Procedure Code.

Ultimately, the Police Sub-Inspector himself filed a complaint on the same facts under section 174 of the Indian Penal Code against the accused. The accused was convicted and sentenced to pay a fine of Rs. 5.

(1) (1896) 22 Bom. 711. (2) (1915) 40 Bom. 97.
(3) (1911) 36 Mad. 308.

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The District Magistrate referred the case to the High Court as he was of opinion that the first acquittal of the accused acted as a bar to further proceedings by virtue of section 403 of the Criminal Procedure Code.

The reference was heard.

P. B. Shingne, Government Pleader, for the Crown.

No appearance for the accused.

FAWCETT, J. :—In this case as well as in the two connected references, the accused was first of all prosecuted for an offence under section 173, Indian Penal Code. But that complaint was withdrawn by the complainant Head Constable under instructions from his superiors because it was lodged under a wrong section, viz., 173 instead of 174, Indian Penal Code. The Magistrate, therefore, acquitted the accused under section 248, Criminal Procedure Code. Subsequently the same Head Constable lodged a complaint against the accused under section 174, Indian Penal Code, upon the same facts. That case, however, was also withdrawn on the ground that the Head Constable was not a proper complainant in view of section 195, Criminal Procedure Code, which requires that a complaint of an offence under section 174, Indian Penal Code, must be made by the public servant concerned or some superior officer. The public servant concerned in this case was the Police Sub-Inspector and not the Head Constable. The Magistrate, therefore, acquitted all the three accused the second time under section 248, Criminal Procedure Code. Ultimately the Police Sub-Inspector himself lodged three separate complaints upon the same facts against the three accused under section 174, Indian Penal Code, and they were separately tried and convicted and sentenced to pay a fine of Rs. 5 each.

The District Magistrate is of opinion that the conviction is wrong, inasmuch as the first acquittal of

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the accused under section 173, Indian Penal Code, acts as a bar to further proceedings by virtue of section 403, Criminal Procedure Code. He is of opinion that both the second and third trials were illegal. In support of his view he quotes certain notes below section 403 at page 849 of Sohoni's Criminal Procedure Code. I have referred to those notes, and they cite decisions under which a person is said to be "tried" within the meaning of section 403, although the case against him is dismissed owing to non-appearance of the complainant, or although the case has been withdrawn, or for other similar reasons he has been discharged or acquitted without an ordinary trial. The question, however, still remains whether sub-section (4) of section 403, Criminal Procedure Code, does not apply in the present case. This sub-section says:

"A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged."

Formerly section 195, Criminal Procedure Code, required a "sanction" in order to enable a Magistrate to take cognizance of certain offences and it was held by this Court that, if a Magistrate discharged or acquitted the accused owing to want of such sanction, that trial did not bar a subsequent trial of the same accused for the same offence after the requisite sanction has been obtained (cf. *In re Samsudin*[1] and *Emperor* v. *Jivram Dankarji*[2]). A similar view was taken by the Allahabad High Court in *Emperor* v. *Jiwan*.[3] On the other hand, the Madras High Court has held that this sub-section (4) refers to the character and status of the tribunal when it refers to competency to try an offence, and that a sanction under section 195, Criminal Procedure Code, was not a

(1) (1896) 22 Bom. 711. (2) (1915) 40 Bom. 97.
(3) (1914) 37 All. 107.

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condition of such competency but only a condition precedent for the institution of proceedings: *In re Ganapathi Bhatta.*[1] In that case reference is made to illustrations (*f*) and (*g*) as showing that the words "was not competent to try" mean "had not jurisdiction to try." But, with respect, I do not think that the illustrations can justifiably be held to control the wide words of the section "not competent to try," and that the mere fact that the illustrations are confined to instances where the first tribunal has not the necessary powers to try a particular offence, does not show that the words "not competent to try" are confined to cases of that kind. Moreover, if they mean "had not jurisdiction to try," it seems to me that those words are sufficient to cover a case where the Court cannot take cognizance of a case because of the provisions of section 195, Criminal Procedure Code. That goes to the root of jurisdiction. Therefore, I can see no sufficient reason why we should not follow the previous rulings of this Court that I have mentioned in preference to the view taken by the Madras High Court. The fact that a complaint by a public servant is now substituted for his "sanction" makes no difference to the *ratio decidendi.*

Accordingly, I do not think that the District Magistrate's view is correct, and the learned Government Pleader in arguing the case rightly drew our attention to the Bombay and other rulings that go against it. Accordingly, we see no sufficient reason to interfere with the convictions and sentences. The record should be returned to the District Magistrate with this intimation.

MIRZA, J. :—I concur.

Answer accordingly.

R. R.

[1] (1911) 36 Mad. 308.