

drawing of lots is an essential ingredient. The word 'drawing,' we think, is used in the section in its physical sense and when the section was enacted in 1870, it seems probable that the only form of lottery envisaged by the Legislature was a lottery run on the usual lines in which the winning numbers are actually drawn out of an urn, box or other receptacle." This being a penal provision must be strictly construed, and I agree with the view taken by the learned Judges in *Emperor v. Mukandi Lal*.⁽¹⁾ It follows, therefore, that the act of the accused in publishing the particulars with which he is charged, does not fall within the terms of section 294A of the Indian Penal Code. I agree, therefore, that the conviction and sentence should be set aside, and the fine, if paid, refunded.

Conviction and sentence set aside.

J. G. R.

⁽¹⁾ (1917) 18 Cr. L. J. 768.

CRIMINAL REVISION

Before Mr. Justice Patkar and Mr. Justice Baker.

SHANKAR TULSIRAM NAVALE (ORIGINAL ACCUSED No. 1), APPLICANT *v.*
KUNDLIK ANYABA YADAW (ORIGINAL COMPLAINANT), OPPONENT.*

1928
August 1

Criminal Procedure Code (Act V of 1898), section 403—Trial for the offence of adultery—Acquittal by a Court without jurisdiction—Subsequent prosecution in a Court of competent jurisdiction—Previous acquittal no bar—Offence of adultery not a continuing offence—Indian Penal Code (Act XLV of 1880), section 497.

When an accused person is tried and acquitted of an offence by a Court having no jurisdiction to try the offence, a subsequent trial for the same offence by a Court of competent jurisdiction is not barred under the provisions of section 403 of the Criminal Procedure Code, 1898.

The offence of "adultery" under section 497 of the Indian Penal Code is not a continuing offence. Every act of sexual intercourse amounts to an offence of adultery.

Queen-Empress v. Emaji,⁽²⁾ relied on.

THIS was a Criminal Revisional application against the order of A. C. Wild, Sessions Judge of Poona.

* Criminal Revision Application No. 145 of 1928.

⁽¹⁾ (1880) Ratanlal's Cri. Cas. 150.

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The accused were first tried in the Court of Bench Magistrates at Poona for the offence of adultery with the complainant's wife and for enticing her away under sections 497 and 498 of the Indian Penal Code. In that case it was alleged that the offences were committed in Nana's Peth in Poona City and in Kamatipura outside the city of Poona. The Bench Magistrates dealt with the offences committed in both the localities and acquitted the accused persons.

After the acquittal, the complainant applied to the District Magistrate to appeal to the High Court through Government. That application was refused. The complainant, therefore, filed a fresh complaint before the District Magistrate for the offence committed in Kamatipura. The accused No. 1 was charged with adultery with the complainant's wife, and accused No. 2, for abetting the offence, under sections 497 and 109 and 497 of the Indian Penal Code.

The complaint was transferred by the District Magistrate to the Court of the Special Magistrate, First Class, Poona. Before the Magistrate, an objection was raised that under section 403 of the Criminal Procedure Code, 1898, a second trial was barred as the accused were already tried for the same offence by the Bench Magistrates and were acquitted. The Magistrate overruled the objection and proceeded to deal with the case.

Accused No. 1 applied to the Sessions Judge at Poona. The application was rejected.

Accused No. 1 applied to the High Court in revision.

K. H. Kelkar, for the applicant.

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

PATKAR, J. :—The question in this case is whether the trial of accused No. 1 for adultery, and accused No. 2 for abetment, is barred by the result of a previous prosecution in which accused No. 1 was acquitted of adultery with the same woman. The previous trial was held in respect of offences under sections 497 and 498, Indian Penal Code, committed in Nana's Peth within the jurisdiction of the Court of the Bench Magistrates. The Bench Magistrates in their judgment state: "The offence under section 497 alleged to have been committed in Kamatipura only remains to be dealt with. This locality is beyond the jurisdiction of the Court." If the acquittal of the accused by the Bench Magistrates be confined to the offence in Nana's Peth, there was no trial of the accused with regard to the charge of adultery in Kamatipura. If, on the other hand, the judgment be read as covering the offence of adultery in Kamatipura, it was obviously a judgment by a Court which had no jurisdiction to try the offence at Kamatipura. The acquittal, therefore, by the Bench Magistrates, was without jurisdiction so far as the offence in Kamatipura is concerned.

It is urged on behalf of the applicant that it was a continuing offence, and under section 182 of the Criminal Procedure Code the Bench Magistrates had jurisdiction. Section 497 of the Indian Penal Code says :—

"Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery. . . ."

It, therefore, follows that every act of sexual intercourse amounts to an offence of adultery, and that if a person has several sexual intercourses with a woman, it cannot be said that the offence is a continuing offence. In *Queen-Empress v. Emaji*⁽¹⁾ it was held that if a man who was convicted of adultery with another man's wife

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continues his adulterous intercourse, he will be liable to a second conviction and punishment for the fresh act, notwithstanding that the woman has not returned to her husband after the conviction of her paramour. Adultery is an infringement of the rights of the husband towards his wife, and when the offender has once been convicted or acquitted of the offence of adultery, which consisted of one sexual intercourse, he cannot with impunity commit another offence of adultery under section 497. We think, therefore, that section 182 of the Criminal Procedure Code has no application to the facts of the present case. The offence in this case is not a continuing offence, nor does it consist of several acts done in different local areas. Here there are distinct offences committed in distinct local areas.

Reference has been made to section 531 of the Criminal Procedure Code in support of the contention that the acquittal by the Bench Magistrates was not without jurisdiction. The legality of the trial by the Bench Magistrates has not come for decision before this Court in appeal or revision. Section 531, therefore, has no application on the question of the jurisdiction of the Bench Magistrates. Similarly, under section 21 of the Civil Procedure Code, "no objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice." Unless there is a failure of justice, such objections cannot be allowed by an appellate or revisional Court, but the Court is not thereby invested with jurisdiction which it does not possess. It, therefore, follows that the Bench Magistrates had no jurisdiction in this case to acquit the accused.

The accused was not a person who had been once tried by a Court of competent jurisdiction for an offence and acquitted of such offence within the meaning of clause (1) of section 403, nor was the Court by which he was first tried competent to try the offence with which he was subsequently charged under clause (4) of section 403. "Jurisdiction" means legal authority to adjudge. It may mean the local jurisdiction of a Court or the legal authority of a Court to do certain things: see *Mohesh Chandra Dass v. Jamiruddin Mollah*.⁽¹⁾ It may mean the power of administering justice according to the means which the law has provided and subject to the limitation imposed by that law upon the judicial authority: *Har Prasad v. Jafar Ali*.⁽²⁾ There may be lack of jurisdiction according to the nature of the offence as prescribed by column 8 of Schedule II of the Criminal Procedure Code. A Court which has jurisdiction to deal generally with the offence and with the offender may not be competent to deal with a particular case on the ground of want of local jurisdiction as laid down by sections 177 to 184 and 188 of the Criminal Procedure Code, or on account of the non-fulfilment of some essential condition such as the absence of necessary sanction under sections 195 to 199 of the Criminal Procedure Code.

It was urged on behalf of the accused, relying on *In re Ganapathi Bhatta*,⁽³⁾ that section 403, clause (4), refers to the character and status of the tribunal when it refers to competency to try an offence. The case turns upon the question whether a sanction under section 195 of the Criminal Procedure Code is a condition of the competency of the tribunal or only a condition precedent for the institution of the proceedings. The view of the Madras High Court in

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⁽¹⁾ (1901) 28 Cal. 324 at p. 329.

⁽²⁾ (1885) 7 All. 345 at p. 350.

⁽³⁾ (1911) 36 Mad. 308.

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In re Ganapathi Bhatta⁽¹⁾ is not accepted by this Court in *In re Samsudin*⁽²⁾ and *Emperor v. Jivram Dankarji*,⁽³⁾ by the Allahabad High Court in *Emperor v. Jiwan*,⁽⁴⁾ and by the Patna High Court in *Sheikh Mohammad Yasin v. King-Emperor*.⁽⁵⁾ It was held in *Emperor v. Jivram Dankarji*⁽⁶⁾ by Batchelor, J., that the grant of sanction is a condition precedent to the Court's jurisdiction to try an offence, and that without such sanction the Court is not competent to undertake the prosecution. Section 537, clause (b), of the Criminal Procedure Code, which was then in force, was also considered in that case, and it was held by Hayward, J., that the Court proceeding with the first charge could not be said to have been a Court of competent jurisdiction to try the second charge by reason of the fact that proceeding illegally with that charge would not necessarily have vitiated the trial by virtue of section 537, clause (b). Similarly, notwithstanding section 531 of the Criminal Procedure Code, the Bench Magistrates in this case could not be said to be a Court of competent jurisdiction if they had no jurisdiction to try the offence in the second case under section 177 of the Criminal Procedure Code. Competency of jurisdiction would, therefore, include competency to try for reasons other than jurisdiction over the offender and the offence. We think, therefore, that the view of the lower Court is correct, and the Bench Magistrates had no jurisdiction to acquit the accused of the offence of adultery committed at Kamatipura outside Poona City.

We therefore discharge the rule.

BAKER, J. :—I agree. The judgment of the learned Bench Magistrates states plainly that the locality of Kamatipura is outside the jurisdiction of the Court, and that only the offence under section 497 of

(1) (1911) 36 Mad. 308.

(2) (1896) 22 Bom. 711.

(3) (1915) 40 Bom. 97.

(4) (1914) 37 All. 107.

(5) (1926) 5 Pat. 452 at p. 459.

(6) (1915) 40 Bom. 97 at p. 102.

the Indian Penal Code alleged to have been committed at Kamatipura remains to be dealt with. The judgment, however, proceeds for several pages more. The Magistrates do not state how they have jurisdiction to deal with the offence at Kamatipura. If they did not intend to deal with that offence, which is not clear from the judgment, then there could not have been any acquittal in respect of that offence, and if the judgment is to be read as dealing with the offence at Kamatipura, then the Magistrates had no jurisdiction to deal with that. The offence in the present case is not a continuing offence under section 182 of the Criminal Procedure Code, a matter which has already been dealt with by my learned brother in his judgment. Section 531 of the Criminal Procedure Code does not apply, in my opinion, to the facts of the present case, as we are not sitting to set aside the order of the Bench Magistrates. In these circumstances it appears that the Bench Magistrates had no jurisdiction, as they themselves admit, to deal with the offence of adultery stated to have taken place at Kamatipura, and, therefore, there has been no acquittal by a Court of competent jurisdiction, and there can be no bar under section 403. The rule must, accordingly, be discharged.

Rule discharged.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Fawcett and Mr. Justice Murphy.

KONDI BIN RAOJI FADTARE (ORIGINAL PLAINTIFF), APPELLANT v. CHUNILAL RUPCHAND MARWADI (ORIGINAL DEFENDANT), RESPONDENT.*

1928
August 2

Arbitration—Suit pending in Saswad Court—Award—Decree in terms of award passed by the First Class Subordinate Judge's Court, Poona—Suit to set aside decree—Allegation of fraud—Parties suppressing facts—Jurisdiction of Court.

The plaintiff executed a sale deed conveying some of his land to defendant. In 1921, defendant filed a suit against the plaintiff for possession of the

*First Appeal No. 434 of 1925.