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Beaumont C. J.

he merely reported that nothing had occurred at this meeting, and took no efforts to enable his successor to proceed with the case. Such conduct is absolutely inexplicable, to my mind, except on the basis that in fact the Rs. 1,000 were recovered and were in the possession of accused No. 1. If that is so, there is no question but that he kept them for himself, and did not account for them. I agree, therefore, that the appeal must be dismissed.

Appeal dismissed.

Y. V. D.

PRIVY COUNCIL.

J.C.*

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April 12

HARI, APPELLANT v. THE KING-EMPEROR, RESPONDENT.

[On Appeal from the Court of the Judicial Commissioner of Sind.]

Criminal Procedure Code (Act V of 1898), sections 423, 526—Transfer of cases.

It is only in exceptional circumstances that an order should be made transferring the trial of a criminal case from a Court in which the trial would be heard before a jury to a Court in which the trial would be heard before a Court without a jury as it is likely to have a serious effect on the rights of the accused who ought to, generally, retain the privilege he enjoyed of trial by jury.

Such an order might reasonably be made where there is no Judge who was not already associated with the trial in the former Court and no other Court in the Province where the trial could be heard with a jury.

APPEAL (No. 17 of 1935) by special leave from part of an order of the Court of the Judicial Commissioner of Sind (July 25, 1934) transferring the re-trial of the appellant from the said Court to the Court of Sessions, Hyderabad.

The facts appear from the judgment of the Judicial Committee.

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Parikh, for the appellant.

Dunne, K.C., and *Wallach*, for the respondent.

April 12

The judgment of their Lordships was delivered by LORD ATKIN. This is an appeal in a criminal case which has undergone some vicissitudes in the Courts in India.

**Present:* Lord Atkin, Lord Macmillan, Lord Wright, Sir Lancelot Sanderson, and Sir Shadi Lal.

The appellant, with six other persons, was tried at Karachi and was convicted of murder. The accused were tried before the Additional Judicial Commissioner of Sind, Mr. Dadiba Mehta and a special jury of nine jurors. After a trial lasting five weeks six of the accused were convicted on different parts of the charges, and sentenced. The seventh was acquitted. The convicted men then appealed to the Court of the Judicial Commissioner and the appellant appeals by special leave to His Majesty in Council. On this appeal questions have arisen, which, in their Lordships' opinion, it is not necessary finally to settle, as to the precise position of the Court of the Judicial Commissioner of Sind in its criminal jurisdiction and in respect of its appellate jurisdiction.

The material sections are the sections of the Bombay Act No. XII of 1866 as amended, which provides, by section 1 :

"There shall be for the Province of Sindh a Court of the Judicial Commissioner of Sindh . . . which shall be the highest Court of Appeal in civil and criminal matters in the said Province, and which shall be the District Court and Court of Session of Karachi. The Court of the Judicial Commissioner shall consist of three or more Judges, one of whom shall be the Judicial Commissioner of Sindh . . . and the others Additional Judicial Commissioners." . . .

By an amending section it was provided :

"The Judicial Commissioner and Additional Judicial Commissioners shall be appointed by the Local Government, by whom alone they shall be liable to be suspended or removed. They shall, within the District and Sessions Division of Karachi, each of them exercise all the jurisdiction and have all the powers of a Judge of a District Court and of a Sessions Judge ; . . . "

The appeal was brought to the Court of the Judicial Commissioner and was quite plainly brought, and accepted by the Court as being brought, under section 410, Criminal Procedure Code, which provides : "Any person convicted on a trial by a Sessions Judge or an Additional Sessions Judge, may appeal to the High Court." The appeal was heard

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before the Judicial Commissioner and one of the Additional Judicial Commissioners. Unfortunately they differed, the Judicial Commissioner being in favour of dismissing the appeal and the Additional Judicial Commissioner being in favour of allowing the appeal.

Under the powers of section 9 (C) of the Bombay Act the matter was referred by the Judicial Commissioner, as the Judges differed, to a third Judge, and it is provided that the matter shall be decided according to his opinion or reheard by a bench consisting of three Judges and decided according to the opinion of the majority of such Judges.

The learned Additional Judicial Commissioner, Mr. O'Sullivan, to whom the case was referred, came to the conclusion that the trial had been unsatisfactory, that there was a point of law upon which the appellants were entitled to rely as to certain evidence which it is unnecessary now to deal with, and he thereupon came to the conclusion, first of all, that the conviction must be set aside. Then he had the duty to determine what should be done. His powers in that respect were powers under section 423 of the Code. What he had power to do on an appeal from a conviction was to "reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such appellate Court", or "alter the finding", and so forth. What he did was this. He said: There must be a re-trial. Then he said: "I think it is expedient in the interests of justice"—probably he was referring to section 526—"that the re-trial of this case should take place outside Karachi". His grounds were that all of the present four Judges of the Court had been associated with the trial in one form or another. One of them had tried the case, and the other Judge, who was then there, had been the prosecutor in the lower Court and appeared for

the Crown in the appellate Court. The Judicial Commissioner, and the Additional Judicial Commissioner who was then giving judgment, Mr. O'Sullivan, had both dealt with the case on appeal, and he thought that they ought not to take part in the re-trial, and there would be no Judges available to form the bench in the event of the case going up on appeal. This is the form of his order :

" I set aside the convictions and order a re-trial of all the appellants, and I further order, under the provisions of section 526 (*c*) of the Criminal Procedure Code, that the case be transferred for trial to the Sessions Court of Hyderabad, there to be tried by the Sessions Judge or one of the Additional Sessions Judges."

With great respect to the Additional Judicial Commissioner, section 526 has very little to do with this case, because it seems to their Lordships, not necessarily to be exclusively confined to, but to deal with, cases which are not in the High Court where it may appear to the High Court that there ought to be a transfer. Under (*e*), whenever it is made to appear to the High Court " that such an order is expedient for the ends of justice ", it may order " (*ii*) that any particular case or appeal, or class of cases or appeals, be transferred from a criminal Court subordinate to its authority to any other such criminal Court of equal or superior jurisdiction ". That is the provision of section 526 (*e*) (*ii*). That did not apply, because this case had first of all to be got back to some Court for trial. That would appear only to be possible to be done under section 423 (*b*). It is under that section that the Judge had the power to order a re-trial, which it is admitted he had power to do, and he had then to determine to what Court it ought to go. Their Lordships think it must be taken that he had really ordered the case, under section 423 (*b*) " to be re-tried by a Court of competent jurisdiction subordinate to such appellate Court ".

For the purposes of this case it does not appear to their Lordships to be necessary to determine whether, strictly speaking, the Court of the Judicial Commissioner exercising

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criminal jurisdiction as a Court of Session, or one of the Additional Judicial Commissioners exercising jurisdiction as a Court of Session, is a subordinate Court or not, because everybody in this case has agreed that an order for re-trial has properly been made and, if it has properly been made, it can only be made under this section. It is plain that if the power exists under section 423 to order a re-trial, it was competent to the Court to make the order complained of, viz., re-trial, by the Sessions Judge in the District of Hyderabad. That plainly is a Court of competent jurisdiction subordinate to the appellate Court.

In the view that their Lordships take, there is no lack of jurisdiction and no legal objection to the order which in fact directs this case to be heard before the Court of the Sessions Judge at Hyderabad, and the appeal therefore fails upon the suggestion that there was any irregularity in the procedure. For this purpose it must be assumed that there was a right of appeal and that it was competent to make this order ordering the case to be tried before the Court at Hyderabad; but the position was, and is, that, whereas at Karachi the appellant was tried before a jury, and, in their Lordships' view (as is indeed conceded), had a right to be tried at Karachi before a jury, in the Court of the Sessions Judge at Hyderabad he will have no right to be tried with a jury. The Sessions Judge in that District, in pursuance of the provisions in the Code, which authorize the Local Government to direct that some Sessions Judges have power to try by jury and some have power to try with assessors, dependent, no doubt, upon the conditions of a particular district, hears cases without a jury, and the appellant, very naturally, takes the objection that, while it is quite right that there should be a re-trial, it is not right that the re-trial should take place in a Court in which he loses his right to a trial by jury.

As has been said, there is no legal objection that can be taken to the order that was made; but their Lordships

entertain the view that an order of this kind, which directs that a case which has originally been heard before a jury should be re-heard before a Court without a jury, is an order that ought not to be made unless it is justified by exceptional circumstances. There is jurisdiction to make it, but it is obvious that it has, and is likely to have, a very serious effect upon the rights of the accused, and his privilege which he has previously enjoyed of trial by a jury he ought in general to retain.

The order in this case when it was originally made appears to their Lordships to be an order which could reasonably have been made for the reasons given by the learned Additional Judicial Commissioner, namely, that it would have been difficult, it would have been, in fact, impossible, to have found a Judge of that Court who was not already associated with the case. The order as made is a lawful order and one which would not ordinarily be interfered with by this Board in the exercise of its jurisdiction in criminal appeals ; but, on the other hand, their Lordships entertain a very strong opinion that, if those circumstances have ceased to exist, as it is said that they have ceased to exist, so that there is now available a Judge of the Judicial Commissioner's Court who is in no way committed to the case, and who has not expressed an opinion about it, it would be proper that, if application were made for a transfer from the Court to which it has now been assigned, namely, the Sessions Judge at Hyderabad, back to the Court of the Judicial Commissioner, that application ought to receive the very serious consideration, and favourable consideration, if possible, of the Court to whom the application is made. That power is quite plainly given under section 526 (*c*) (*ii*) or (*iii*) ; it does not matter which, because that again may involve the question as to whether the Sessions Court sitting at Karachi is subordinate or whether it is not subordinate, which their Lordships do not find it necessary to decide.

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Mr. Dunne, appearing for the Crown, has told their Lordships perfectly fairly that, on such an application being made, he appreciates the constraining force of the consideration that would be put before the Court by the appellant, and he thinks—he has not, of course, any power to bind the Court—that that is an application which, after the expression of their Lordships' view, is not very likely to be refused.

Their Lordships think that that is the most effective way of dealing with this case, and they must leave it in that position. The result is that, with that intimation of opinion, they consider that this appeal must be dismissed, and they will humbly advise His Majesty accordingly.

There will, of course, be no order as to costs.

Solicitors for appellant: Messrs. *T. L. Wilson & Co.*

Solicitor for respondent: *Solicitor, India Office.*

A. M. T.

APPELLATE CIVIL.

Before Mr. Justice Rangnekar.

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GOPAL BHAURAO JAPE (ORIGINAL PLAINTIFF), APPELLANT *v.* SHREE JAGANNATH PANDIT WASUDEORAO PANDIT MAHARAJ AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Indian Limitation Act (IX of 1908), sections 2, 28, Schedule I, Articles 44 and 91—Undue influence, a question of fact—Defence of undue influence—Defendant not precluded from setting up the defence though a suit for setting aside the instrument would be barred—Counterclaim in mofussil Courts.

The question whether an instrument is obtained from a person by undue influence or misrepresentation is a question of fact.

Satgur Prasad v. *Har Narain Das*, [1] followed.

The lands in suit were leased to the plaintiff by defendant No. 1 by a registered lease dated July 8, 1922, for a period of 25 years. On March 12, 1927, a suit was filed by the plaintiff for an injunction restraining defendant No. 1 from interfering with his possession and in the alternative for possession of the lands if defendant No. 1

*Second Appeal No. 404 of 1931.

[1] (1932) L. R. 59 I. A. 147: 34 Bom. L. R. 771, P. C.