1936

RUDRAGOUDA RACHANGOUDA v. EMPEROR

Broomfield J.

I think the language of section 197 of the Criminal Procedure Code was intended to apply to such express provisions as to removability as we find in section 26 (*1*) and not to indirect powers such as it is suggested the Commissioner may possess. There is in fact an obvious correspondence between the language of section 197 and that of section 26 (*1*) of the Local Boards Act. The Commissioner could not remove the accused *qua* President. He could only remove him, if at all *qua* member. But he has been prosecuted *qua* President. The argument of the learned Government Pleader would render the provisions of section 26 (*1*) practically superfluous in the case of the Taluka Local Board. I agree, therefore, that sanction was necessary to the trial of accused No. 1 on the charge of forgery at any rate, and that no sanction having been obtained the whole trial must be considered to be invalid.

Convictions and sentences set aside.

J. G. R.

APPELLATE CRIMINAL.

Before Mr. Justice Broomfield and Mr. Justice Sen.

EMPEROR *v.* SHAH JAMNADAS NATHJI AND ANOTHER (ORIGINAL ACCUSED NOS. 6 AND 8).*

1936
October 8

Criminal Procedure Code (Act V of 1898), section 439, sub-section (5)—Conviction against several accused persons—Appeal preferred by some of the accused—Conviction held illegal—Accused failing to appeal applying in revision to Sessions Judge—Reference—High Court—Application in revision not maintainable—High Court can set aside conviction under general powers of superintendence—Government of India Act (5 & 6 Geo. V. c. 101), section 107—Prevention of Gambling Act (Bom. Act IV of 1887), sections 4, 5, 6 and 7.

Eleven persons were charged under sections 4 and 5 of the Prevention of Gambling Act, 1887. Out of them nine were convicted. Seven of those convicted appealed to the Honorary First Class Magistrate with appellate powers and were acquitted on the ground that the warrant issued under section 6 of the Act, was issued by an officer

*Criminal Reference No. 109 of 1936.

1936

EMPEROR v. SHAH JAMNADAS

not empowered to issue it and therefore the presumption arising under section 7 of the Act, did not arise. The two accused who had not appealed then made an application in revision to the Sessions Judge who made a reference to the High Court under section 438 of the Criminal Procedure Code, 1898, as in his opinion no revision lay under section 439, sub-section (*5*), of the Criminal Procedure Code.

Held, that the two accused who could have appealed having failed to do so their application in revision could not be entertained under section *439*, sub section (*5*), of the Criminal Procedure Code, 1898.

Held, further, that the case being one where the conviction was wrong it could be set aside by the High Court in exercise of the general powers of superintendence granted to it under section 107 of the Government of India Act.

Balkrisna Hari Phansalkar v. *Emperor*[1] and *In re Gurunath Narayan*,[2] referred to

REFERENCE made by D. V. Vyas, Sessions Judge, Kaira, at Nadiad.

The reference was made by the Sessions Judge of Kaira, at Nadiad, requesting a ruling from the High Court as to the proper interpretation of section 439, sub-section (*5*), of the Criminal Procedure Code, 1898.

The facts leading to the reference are fully stated in the judgment of Sen J.

C. K. Shah, for the accused.

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

SEN J. This is a reference by the Sessions Judge of Kaira recommending that the conviction of accused Nos. 6 and 8 in a case tried by the Second Class Magistrate, Anand, under sections 4 and 5 of the Prevention of Gambling Act, IV of 1887, being illegal may be set aside. In this case there were originally eleven accused persons. Out of them accused No. 3 was examined as an approver witness and accused Nos. 1, 2, 4, 5, 6, 8, 9, 10 and 11 were convicted. Accused Nos. 1, 2, 4, 5, 9, 10 and 11 appealed to the Honorary First Class Magistrate with appellate powers and were acquitted. Thereafter accused Nos. 6 and 8 made an application in revision to the Sessions Judge who has made

[1] (1932) 57 Bom. 93. [2] (1924) 26 Bom. L. R. 719.

the present reference. The learned Public Prosecutor, Nadiad, opposed this application on the ground that as the applicants had not appealed, no proceedings by way of revision could be entertained at their instance under section 439 (5) of the Criminal Procedure Code. The learned Sessions Judge has thus stated his grounds for making the present reference :

"The learned Public Prosecutor concedes that if this matter had come to my notice otherwise than through the present application, I could have referred it to the Honourable High Court and recommended the setting aside of the learned trial Magistrate's order. Indeed if we construe section 439 (5) of the Code of Criminal Procedure too literally, the position would be that I could dismiss the present application and then having come to know of this matter could address a letter to the Honourable High Court under section 438 of the Code of Criminal Procedure and recommend the quashing of the learned trial Magistrate's order. There would be hardly any propriety in that sort of procedure, and that being so, in the interests of justice, I submit these papers to the Honourable High Court."

On a perusal of the appellate Court's judgment it seems to us beyond doubt that the conviction of the accused by the Second Class Magistrate was legally wrong. The question that has been put by the Sessions Judge is, however, whether it is possible to entertain in revision any proceedings at the instance of such accused persons as have not appealed. On this point it seems to us that the language of sub-section (5) of section 439 is abundantly clear. It does not seem to us that those words are capable of more than one interpretation, viz., that where the party in question has not appealed, no application made by him in revision can be entertained by the Court. We must, therefore, hold that the present application made by accused Nos. 6 and 8 ought to have been rejected.

Apart from the specific ground of the present reference, however, the learned advocate who has appeared for accused Nos. 6 and 8 has raised the question whether it is not open to us, in view of the definite finding of the learned Sessions Judge that the conviction of these accused persons is legally

1936

EMPEROR v. SHAH JAMNADAS

Sen J.

wrong, to give any relief to them. This case is peculiar in this respect that the majority of the accused convicted by the trial Court preferred appeals which were decided in their favour and that for some reason or other only these two accused persons did not appeal. If there had been no such appeal, there would have been no question of examining whether any relief apart from the provisions of the Criminal Procedure Code could be given to them. Even if the learned Sessions Judge had moved this Court under section 438 of the Criminal Procedure Code it is very doubtful whether such reference would have been entertained. The judgment, however, of the appellate Court clearly shows that the warrant issued under section 6 of the Prevention of Gambling Act was issued by an officer not empowered to issue it, that therefore the presumption arising under section 7 of the Act did not arise, that the approver's evidence was unreliable and that thus there was no sufficient evidence against the accused. This is thus an obvious case of illegal or wrong conviction.

The powers of this Court of superintendence under section 107 of the Government of India Act were examined in *Balkrishna Hari Phansalkar* v. *Emperor*[1] and it was held (p. 110) :—

"Under section 107 the High Court has superintendence over all Courts for the time being subject to its appellate jurisdiction. It is not disputed that rights of superintendence include not only superintendence on administrative points, but superintendence on the judicial side too, and that under its power of superintendence the High Court can correct any error in a judgment of a Court subject to its appellate jurisdiction."

It is obvious that the powers of superintendence under this section of the Government of India Act are not ordinarily meant to be exercised where no power of revision or interference exists under the Code of Criminal Procedure

[1] (1932) 57 Bom. 93.

and that such power ought to be exercised only in rare cases where an obvious miscarriage of justice cannot be otherwise prevented. It is clear that such powers are not intended to be invoked in order to get round any of the express provisions of the Criminal Procedure Code. It seems to us, however, that this being a case of wrong conviction on the face of it, it is desirable in this case to use the power of superintendence in judicial matters which vests in this Court under section 107 of the Government of India Act. In the exercise of such power, therefore, we would set aside the conviction and sentence and direct that the fine, if paid, should be refunded.

The learned advocate for accused Nos. 6 and 8 also invited us to use our powers under section 561A of the Criminal Procedure Code. He contended that the terms of this section were wide enough to enable us to correct the illegality and set aside the conviction. Our atttention has been invited to *In re Gurunath Narayan*,[1] the first part of the head-note of which runs thus :

"The Court will not pass any orders under section 561A of the Criminal Procedure Code which would conflict with any of the provisions of the Code."

This part of the head-note appears to be based on the following remarks in the judgment (p. 720) :—

"We do not think that we could make any order which would conflict with the provisions of section 89, Criminal Procedure Code, in the exercise of our inherent powers to which a reference has been made."

This was a case in which an application was made to the Court under section 89 of the Criminal Procedure Code beyond the period of limitation prescribed in that section and the application was dismissed on the ground of lapse of time. It was held by Shah Ag. C. J. that this order appeared to be correct, and it seems that in this case there was no obvious illegality that required to be corrected. It does not

[1] (1924) 26 Bom. L. R. 719.

1936

EMPEROR v. SHAH JAMNADAS

Sen J.

seem to us that the sentence quoted above was intended to lay down a general proposition that the provisions of section 561A of the Criminal Procedure Code could not be used for passing any orders conflicting with any other provisions of the Code. As, however, we have already decided to act under the general powers of superintendence granted by section 107 of the Government of India Act, it is not necessary to decide this specific point. The order, therefore, will be as proposed above.

Order accordingly.

J. G. R.

ORIGINAL CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Kania.

1936
October 13

LILADHAR CHATURBHUJ (ORIGINAL DEFENDANT), APPELLANT *v.* HARILAL JETHABHAI (ORIGINAL PLAINTIFF), RESPONDENT.*

Negligence—Motor car—Injury to plaintiff—Proof of ownership of car—Presumption as to driver of car being servant of owner.

In an action to recover damages caused by the negligent driving of a motor car, where it is proved that at the time of the accident the car belonged to the defendant, a presumption arises that the person who drove the car was either the defendant, his servant or agent. It is open to the defendant to displace that presumption by proving that at the material time the car was not under his control.

Joyce v. *Capel*,[1] *Hibbs* v. *Ross*,[2] and *Barnard* v. *Sully*,[3] followed.

A SUIT to recover damages for injury caused to plaintiff by the negligent driving of a motor car.

The plaintiff who was a minor about thirteen years old was a student attending the Goculdas Tejpal High School at Bombay. The defendant was the owner of a number of motor cars including car No. Y 6936. The defendant plied these as taxis without a license.

*O. C. J. Appeal No. 19 of 1936; Suit No. 602 of 1931.

(1) (1838) 8 Car. & P. 370. (2) (1866) L. R. 1 Q. B. 534.

(3) (1931) 47 T. L. R. 557.