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judgment creditor of the mortgagor had a right to file a suit to redeem the mortgagee, and thus upon payment of the amount due upon the mortgage to render the mortgaged premises liable to his claims.

Cur. Adv. vult.

On the 5th of April, SARGENT, J., ruled that the firm of Ganesh Vináyák were not in possession of the mortgaged premises as trustees for the defendant, and directed the attachment that had been laid upon the mortgaged premises to be raised, and ordered the plaintiff to pay the costs of the summons.

Attorney for the plaintiff: *C. Tyebji.*

Attorneys for the claimants: *Dallas and Lynch.*

March 20.

[CROWN CASES.]

REG. v. NÁTHÁLÁL PITAMBAR.

Certiorari—Conviction on Merits—Error in decision on merits—Jurisdiction of High Court to interfere—Act XIII. of 1856, Section CXI.

Section CXI. of the Police Act (XIII. of 1856) does not give jurisdiction to the High Court, when a case is brought before it on *certiorari*, to enquire whether the Magistrate has come to a correct conclusion as to the guilt or innocence of the prisoner. The object of that section is to limit the objections to a conviction to some substantial meritorious ground, such as want of jurisdiction or the like, and to prevent a conviction from being quashed on a mere error of form or of precedure. But the section does not give the High Court any right to interfere on the ground that the Magistrate has come to a wrong conclusion on the question of the guilt or innocence of the accused person. Though affidavits may be used to show a want of jurisdiction in a Magistrate, even though such affidavits contradict for this purpose the finding of the Magistrate, they cannot be used as affording materials for reviewing the Magistrate's decision on the merits.

ON the 4th day of March 1873, *Mayhew* obtained from green J. a rule nisi calling upon Charles Philip Cooper, Esquire, Second Magistrate of Police for the Town and Island of

Bombay, to show cause why a writ of *certiorari* should not issue for the removal into the High Court of the proceedings taken before him in the matter of a complaint made against Náthálál Pitámber and his conviction thereon.

Náthálál Pitámbar had, on the 20th of February, been convicted by the Second Magistrate of stealing currency notes of the value of Rs. 50, and, for such offence, had been sentenced to two months' rigorous imprisonment.

The affidavits upon which the rule was granted (the substance of which appears from the judgment of the Court) were put in to show: (I)—that the conviction of the prisoner was wrong on the merits, and (II)—that he had not been given an opportunity by the Magistrate of calling witnesses on his behalf.

The Magistrate made his return to the rule by sending up the charge sheet relating to the trial and conviction of the prisoner and the original depositions taken upon the trial. Affidavits were also filed on behalf of the Magistrate to shew that the prisoner had been allowed ample opportunity of calling witnesses on his behalf.

The rule was argued before Green, J., on the 18th March 1873.

The Honourable A. R. Scoble (Advocate General) showed cause against the rule, and contended that it ought to be discharged, as there had been no error in the proceedings, or want of jurisdiction in the Magistrate to try the case, and the Court had no power to enter into the merits of the conviction or to consider whether, upon the evidence, the Magistrate had arrived at a correct or an erroneous conclusion. The jurisdiction exercised by the High Court is the same as that exercised by the Court of Queen's Bench in England, and that Court could not interfere in a case like the present: *R.* v. *Ross* (*a*); Paley on Summary Convictions, p. 4 2.

(*a*) 1 Jur. N. S. 803; 24 L. J. M. C. 500.

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Anstey (with him *Mayhew*), in support of the rule, contended that the jurisdiction of the Court was extended by the 111th section of Act XIII. of 1856, which, by implication, gave the Court power to enter into the merits of a conviction, and that the decisions of the Courts in England in cases of *certiorari* were, therefore, not applicable. He also contended that in the present case there had been no trial, as the witnesses for the prisoner had not been examined. *R.* v. *Grant* (*b*) shows that an error such as this is a ground for quashing a conviction: Paley on summary Convictions, p. 118, 5th Ed.

Cur. adv. vult.

GREEN, J:—In this case a rule has been granted on the application of the prisoner Náthálál Pitámbar, calling upon Charles Philip Cooper, Second Magistrate of Police for Bombay, to show cause why a writ of *certiorari* should not issue to remove into this Court certain proceedings taken before the said Magistrate on the 19th and 20th February last, in the matter of a complaint made against the said Náthálál Pitámbar by one Munilál Keshavlál, and the conviction thereon of him, the said Náthálál Pitámbar. The rule was granted subject to the applicant depositing Rs. 300 as security for any costs awarded to be paid by him, the applicant.

The charge against the prisoner, of which on the 20th February he was convicted by the Magistrate, was of stealing certain currency notes for the amount of Rs. 50, a charge over which the Magistrate had jurisdiction under Sec. 27 of Act XIII. of 1856.

That this Court has jurisdiction to remove and quash convictions and sentences of the Police Magistrates and Petty Sessions of this town and island in cases where the Court of Queen's Bench in England would do so in respect of inferior criminal courts of that country, there can be no doubt. The Act itself in Sec. CXI. recognizes the existence of such a jurisdiction, and provides that "no conviction, order, or judgment of any Magistrate, or in Bombay of the Court of Petty Ses-

(*b*) 19 L. J. Q. B. 88.

sions, shall be quashed for error of form or procedure but only on the merits." This section, however, by no means says that a conviction may be quashed where a Magistrate may be considered to have come to a wrong conclusion on the evidence before him. *That* has never been a ground for a writ of *certiorari*. The section is directed to this, that the objection to the conviction must have a substantial meritorious ground, and not be merely an error of form or procedure. Such cases would of course be when the Magistrate has convicted an accused person of a charge which the Magistrate had no jurisdiction to hear and determine, or had awarded a sentence which he had no power to award, or had proceeded in such a manner as to afford ground for saying that the accused person had not had reasonable opportunity of defending himself. There may, of course, be other classes of cases in which an objection to a conviction would be entertained by this Court when it could be said that the accused had merits. But though an accused person may have merits in the general sense of the word and of the most substantial kind, viz., that the Magistrate has come to a wrong conclusion on the question of guilt or innocence, yet that is not a case to which *per se* a remedy can be applied by means of a *certiorari*. The section, in short, says that to quash a conviction there must be merits, not that whenever there are merits in the general sense of the word the conviction will be quashed.

In the present case the prisoner has filed a considerable number of affidavits; some of them to show that he is a man of respectable position and very considerable wealth, and others by persons present on the occasion when the alleged theft was committed, to show that the prisoner was not the guilty person. The only purpose for which these affidavits can be looked at is, in my opinion, as showing that there were persons able and willing to give material and relevant evidence on behalf of the prisoner, who, as a matter of fact were not heard by the Magistrate.

Though affidavits may be used, as appears by *The Queen* v. *Bolton* (*c*), to show a want of jurisdiction in Justices of the

(*c*) 1. Q. B. 66.

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Peace, even though such affidavits contradict for this purpose the finding of the Justices, it is quite clear they cannot be used affording materials for reviewing the Magistrate's decision. Where the charge is such that, if true, it would give the Magistrate jurisdiction, his decision is final.

The only ground on which I consider it possible on the application for the rule that the prisoner had any case, was that he had not had reasonable opportunity of defending himself. The case made by the prisoner in his original affidavit was this—that at the adjourned hearing of the charge, viz., on the 20th February, he attended, with certain witnesses (who, by their affidavits, support the prisoner in this), that he wished the assistance of his pleader, Mr. Nagindás Tulsidás, and informed the Magistrate that such pleader was ill and unable to attend, and that he asked the Magistrate to postpone the further hearing of the charge, but that the Magistrate, after putting a few more questions to the policeman who had found the stolen property, and without asking if the prisoner had any witnesses to call, sentenced him to two months' hard labour in the country jail. It is to be observed that the prisoner does not here allege that he made any application to have his witnesses examined or informed the Magistrate that he had witnesses. The Magistrate and the interpreter of the Girgaum Police Court have made affidavits from which it appears that on the first day, viz., the 19th February, after the examination of three witnesses in support of the charge, the magistrate asked the prisoner what he had to say in his defence, and the prisoner in reply stated that he did not steal the notes, that he (the Magistrate) then asked the prisoner if he had any witnesses, and he replied yes, and two witnesses were examined as to the prisoner's character. That the Magistrate then asked the prisoner if he had any other witnesses and he said no. This statement of what occurred on the first day is not in any way contradicted on the part of the prisoner in his affidavit in reply. The Magistrate states further, that as it appeared from the examination of Nánábhái Lakshmirám, one of the witnesses of the prisoner,

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that Nagindás Tulsidás had been engaged as pleader for him (the prisoner) in a case pending on the appellate side of the High Court, he (the Magistrate) asked the prisoner if he would like to call Nagindás, and that after some consideration the prisoner said he would like to call him on his behalf, that he (the Magistrate) thereupon remanded the case to the next day and released the prisoner on bail, and that the prisoner neither sought to examine more witnesses nor indeed applied for the remand so granted. The Magistrate further states that on the 20th February the case was called on and he asked the prisoner if Nagindás was present, when he said "No; he is sick;" and in answer to a further question in this behalf, that he (the prisoner) had not taken out a witness summons for Nagindás. The Magistrate further states that the prisoner did not ask him to remand the case for the attendance of Nagindás, nor did he tell him (the Magistrate) that he had retained Nagindás for his defence or that he wished Nagindás to attend in his professional capacity; and that nothing whatever was said to alter his (the Magistrate's) impression that Nagindás was only to be called as a witness to character; that the prisoner did not, nor did any one on his behalf, inform him (the Magistrate), nor did he (the Magistrate) know that the prisoner wished to call any other witness or witnesses or that he had any other witness or witnesses in attendance other than those called by him on the previous day. The affidavit of Vámanráv Balvant, the interpreter, supports the statement of the Magistrate, and in particular that on the 20th February the accused did not say a word about his intention that Nagindás should appear for him as his vakeel or that he wished to call witnesses, and that he (the deponent) did not know that he had taken out any witnesses' summons. In reply the prisoner makes an affidavit stating that he did speak in Court on the 20th *March* last (a mistake, I suppose, for February) to the effect denied in paragraph 5 of Mr. Cooper's affidavit, and that he spoke in Gujarathi and did not understand English. It appears to me quite clear that the prisoner did not at any

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rate make the Magistrate understand that he either had engaged or wished to have the assistance of Mr. Nagindás Tulsidás in the capacity of vakil, or that on the adjourned hearing he made the Magistrate understand (if indeed he spoke at all to that effect) that he had witnesses present and wished to have them examined. On the first day the Magistrate had asked the prisoner if he had any more witnesses beyond the two already examined on his behalf, to which the prisoner answered no. The case was remanded, as appears, at the instance of the Magistrate himself, for the examination, as a witness, of Mr. Nagindás, and as the prisoner did not profess to have even served him with a summons and as Mr. Nagindás was not in attendance, I cannot see any ground whatever on which the conduct of the Magistrate can be impeached. The proper course, no doubt, is for a Magistrate to give the accused an opportunity of producing his witnesses and evidence by formally calling on him to do so. This opportunity had been given on the first day, and though it does not appear that on the second day the question was repeated, I cannot consider that under the circumstances of the case and having regard to what had taken place on the first day, there was any omission of duty on the part of the Magistrate. As, therefore, no ground of any illegality or irregularity of procedure on the part of the Magistrate has been established, and as there is no question that the Magistrate had jurisdiction to deal with the charge, I must discharge the rule and order that the costs of showing cause against it be paid out of the deposit.

It is possible, no doubt, that the prisoner may have been wholly innocent of the charge of which he has been convicted, and there is a certain amount of improbability that he should have been guilty of stealing such a sum as Rs. 50, if he be a man of the position and substantial wealth deposed to in the affidavits filed in support of this application. But his only remedy is to apply in the proper quarter (if so advised) for a remission of his sentence. I do not feel that it is within my province on this application (and having regard also to the cir-

cumstance that I did not hear the witnesses who *were* examined) to do more than intimate my opinion, that if the evidence now placed before this Court had been before the Magistrate and believed by him, he might not improbably have dismissed the charge; but on the evidence before him I cannot see any ground for considering that this conclusion was an improper one, and his proceedings, as I have already said, were, in my opinion, regular and according to law. I should suggest to the prisoner that he should furnish the Magistrate with office copies of the affidavits used on this application and request him to consider the same with a view to making any representation he may feel justified in doing to the local Government as to the remission of the sentence.

Attorneys for the prisoner: *Chalk* and *Turner*.
For the Crown: *C. Peile*, Acting Government Solicitor.

TO the same effect was the decision of BAYLEY, J., in the case of *R.* v. *Sakharam Anatoba and Sitaram Jagannath*, who had been convicted by John Connon, Esquire, senior Magistrate of Bombay, on the 16th of October 1872, of the offence of criminal breach of trust.

BAYLEY, J., in giving judgment on the 30th of November 1872, after refering to Sec. 111 of Act XIII. of 1856 and the cases of *The Queen* v. *The Justices of Cheshire* 11 Add. & Ell. 139; *The Queen* v. *Bolton*, 1 Q. B 63; *Thompson* v *Ingham*, 14 Q. B. 710, 718; *Barber* v. *The Nottingham and Grantham Railway Company*, 33 L. J. C P. 194: *The Queen* v. *Dayman*, 7 Ell. & B. 672; *Reg.* v. *John Connon*, 6 Bom. H. C. Rep. Cr. Ca. 27; and an unreported case of *The Queen* v. *Jan Muhammad*, heard by SAUSSE, C. J. and ARNOULD, J. decided that upon a writ of *certiorari* he had no jurisdiction to enter into the merits of the case or to consider whether or not upon the evidence the magistrate had come to a correct conclusion and dismissed the rule *nisi* with costs.