

## APPELLATE CRIMINAL.

*Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Field.*

IN THE MATTER OF THE PETITION OF MOHAMED ESHAK.

CHUNDRO MARWARI *v.* MOHAMED ESHAK.\*

1880  
Nov. 29.

*Appeal—Jurisdiction—Time from which an Order of Appointment dates.*

An Assistant Magistrate convicted an accused on the 12th August, and by an order of even date, such Magistrate was invested with power to act as a Magistrate of the 1st class, although the fact, that he had been so invested with full powers, was not communicated to him until the 23rd idem. The accused appealed to the District Magistrate and was acquitted. On motion made to the High Court to set aside the acquittal, on the ground that, after the date of the order of the Lieutenant-Governor investing the Assistant Magistrate with further powers, no appeal lay to the District Magistrate,—*held*, that even supposing the Lieutenant-Governor's order conferred first class powers upon the Assistant Magistrate from the moment it was made, it must be shown before the District Magistrate's decision could be set aside, that the order of the Lieutenant-Governor was signed before the conviction.

*Quere.*—Whether an order investing a Magistrate with 1st class powers, is of any force, or amounts to an authority to exercise such powers, until the order has been officially communicated to the Magistrate?

In this case the accused, Chundro Marwari, was charged with criminal breach of trust under s. 408 of the Penal Code; and the Assistant Magistrate found him guilty, and sentenced him, on the 12th of August 1880, to four months' rigorous imprisonment.

The accused appealed to the Magistrate, who held, that he had not acted in such a manner as to bring him under the criminal law, and released him from imprisonment.

The prosecutor then applied to the High Court to have the District Magistrate's judgment set aside, on the ground that on the very day (the 12th August 1880) on which the accused was convicted by the Assistant Magistrate, the latter was, by an order of the Lieutenant-Governor, made a first class Magistrate, and consequently that the District Magistrate had no jurisdiction to entertain an appeal from his decision. It appeared from a letter from the Magistrate of Burdwan to the Registrar of the

\* Criminal Motion, No. 280 of 1880, against the order of C. C. Stevens, Esq., Officiating Magistrate of Burdwan, dated the 24th August 1880.

High Court, that the Assistant Magistrate had been invested by Government with full powers to act as a Magistrate of the first class; but that the letter informing the Magistrate of Burdwan of the fact, was not received until the 21st of August, and was not communicated to the Assistant Magistrate until the 23rd. A rule was granted calling on the accused to show cause why the order made on appeal should not be set aside.

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Mr. *M. P. Gasper* (with him *Baboo Amarendronath Chatterjee*) for the accused.

Mr. *H. E. Mendies* in support of the rule.

The opinion of the Court (*GARTH, C. J., and FIELD, J.*) was delivered by

*GARTH, C. J.*—In this case one Mohamed Eshak applied to this Court to send for the papers in a case in which one Chundro Marwari has been acquitted by the District Magistrate, for the purpose of having the Magistrate's judgment set aside.

Chundro Marwari was convicted on the 12th of August last by Mr. Caspersz, who was the Assistant Magistrate, of criminal breach of trust, upon the prosecution of Mohamed Eshak, who was his employer. An appeal was preferred to the District Magistrate, who, after hearing the case, reversed the conviction and acquitted the prisoner.

We were asked to set aside this judgment of the District Magistrate, upon the ground that, on the very day on which Chundro Marwari was convicted by Mr. Caspersz, Mr. Caspersz was, by an order of the Lieutenant-Governor, made a first class Magistrate, and consequently that the District Magistrate had no jurisdiction to entertain an appeal from his decision.

But having now ascertained the true state of the case, I think that there is nothing in this objection. In the first place I have great doubt, whether the mere order of the Lieutenant-Governor, that a Magistrate shall be vested with first class powers, is of any force, or amounts to an authority to the Magistrate to exercise those powers until the order of the Lieutenant-Governor has been officially communicated to him—until in fact he

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knows officially what the order of the Lieutenant-Governor is; and as the order, which was made on the 12th of August, could not have been received by Mr. Caspersz until after that day, there is no reason whatever why his decision of the 12th of August should not have been made the subject of appeal to the District Magistrate.

But even supposing that the order of the Lieutenant-Governor conferred upon the Magistrate first class powers from the moment when it was made, it does not appear that in this case the order, making Mr. Caspersz a first class Magistrate, was signed before the conviction. It may well be, that the conviction took place in the early part of the day, and that the order, making Mr. Caspersz a first class Magistrate, was made afterwards, and unless we are satisfied that the District Magistrate had no power to hear the case upon appeal, I think it clear that we ought not to interfere.

But then it is said that, as the case is now before us, we ought to set aside the judgment of the District Magistrate, if we find that it is erroneous in point of law. I confess, I entertain some doubt as to what our powers may be in that respect; but assuming that we had the power, I certainly should be unwilling, under the circumstances of this case, to set aside a judgment of acquittal. These cases of criminal breach of trust often involve very nice questions; and I think that the materials before the Magistrate may well have justified him in holding that, having regard to the confidential relation which existed between the prosecutor and the prisoner, the acts committed by the latter might make him answerable to his master civilly, but not criminally. That being so, I am of opinion, that we ought not to interfere, and that the rule must be discharged.

*Rule discharged.*