The competence of the Magistrate to proceed under section 107 of the Criminal Procedure Code against persons not in possession must depend upon whether as against those persons the conditions specified in the section have been established.

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FULL BENCH.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, Mr. Justice Woodroffe, Mr. Justice Mookerjee, Mr. Justice Carnduff and Mr. Justice D. Chatterjee.

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v.

MANGAL KHANDU.*

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Sept. 6.

Compensation—Appellate Court, power of—Criminal Procedure Code (V of 1898), s. 250—Consequential or incidental order.

An Appellate Court has no power to order compensation under section 250 of the Criminal Procedure Code.

The Reference to Full Bench by Stephen and Carnduff JJ. was in the following terms :—

"The petitioner before us lodged a complaint under sections 379 and 379/114 of the Indian Penal Code against three persons, who were convicted before a Deputy Magistrate. On appeal to a Joint Magistrate the convictions were set aside, and the Appellate Court found the case entirely false and called on the petitioner to show cause why he should not pay Rs. 25 as compensation to each of the appellants under section 250 of the Criminal Procedure Code. No cause being shown, the order to pay compensation was made absolute. A motion to set aside this order was rejected by the District Magistrate. We have issued a Rule to show cause why the order for compensation should not be set aside on the ground that the Court had no jurisdiction to make an order on appeal granting compensation.

"The question we wish to refer is,—'Has an Appellate Court power to order compensation under section 250 of the Criminal Procedure Code ?

* Reference to a Full Bench in Criminal Revision No. 1433 of 1909.

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"The question turns on the construction of sections 250 and 423 of the Code. The former, as far as it is relevant, runs as follows :—

'If in any case instituted by complaint . . . or upon information given to a police-officer or to a Magistrate, a person is accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits the accused and is satisfied that the accusation against him was frivolous or vexatious, the Magistrate may, in his discretion, . . . direct the complainant to pay compensation to the accused.'

But, before making such direction 'the Magistrate' is to '(*a*) record and consider any objection which the complainant may urge;' and (*b*) if he 'directs' 'compensation' 'state in writing, in his order of discharge or acquittal, his reasons for awarding'; and by sub-section (*3*), a complainant who has been ordered by a Magistrate of the second or third class to pay compensation, may appeal from that order as if he had been convicted on a trial held by such Magistrate. On the terms of this section there can be no doubt that the only person who has power to award compensation under it is the Magistrate by whom the case is heard. But it is contended that this power is conferred on the Appellate Court by section 423(*1*) (*d*) of the Code. This section enables an Appellate Court to take certain steps in cases of (*a*) acquittals, (*b*) convictions, and (*c*) other orders, and (*d*) to 'make any amendment or any consequential or incidental order that may be just or proper.' The question is whether the order of the Appellate Court in this case is 'consequential,' as it is not suggested that it is 'incidental,' a term which seems to exclude any final order. It has been held by the High Court of Allahabad that it is not consequential [see *Balli Pande* v. *Chitian* (1)] and, by this Court, in the recently reported case, *Kari Singh* v. *Tufani Dhanuk* (2), that it is. The difference of opinion depends largely on first impression, as the only authority referred to in either Court is a passage in Sir Henry Prinsep's edition of the Criminal Procedure Code in a note to section 250, at page 250 of the 13th Ed., which seems to us, as we gather that it did to Stanley C. J., to be carefully framed so as to raise the question, but not to express any opinion as to its proper answer. Under these circumstances and looking at sections 250 and 423 only, we agree rather with the Allahabad decision than with that of this Court. Primarily we should suppose a *consequential* order to be an order that is the necessary consequence of the Court's decision, as an order that an appellant whose conviction is set aside should be discharged from his bail bond, or that any part of a fine imposed on him should be repaid ; and we incline to suppose that an order which depends on the consideration of a question that has not been previously considered is not within the terms of

(1) (1906) I. L. R. 28 All. 625. (2) (1909) 14 C. W. N. 212.

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section 423. We are the more inclined to take this view on consideration of section 106 (*3*), which is referred to by the Judges in this Court in the case above cited as an example of the policy of the present Code of enlarging the powers of the Appellate Court. That enactment expressly enables the Appellate Court to bind a person down under section 106. This seems to show that an order to this effect is not a *consequential* order under section 423; and a power to bind down seems to be very much on the same footing as a power to avoid compensation to an accused person.

" It has been argued before us that if the Appellate Court has power to award compensation under section 250, the person against whom such order is made loses some of the safeguards provided by that section. In the first place, it is said that the provisions of section 250 (*1*) (*a*) would not apply to the Appellate Court, so that that Court could not be obliged to record or consider objections which the complainant might have been in a position to argue against the making of the order. In the second place, if payment of compensation is directed by a second or third class Magistrate, the complainant cannot, if he cares to appeal, be made to pay compensation unless there are two decisions against him; whereas, if compensation is directed in the first instance by an Appellate Court, there is only one. Neither of these arguments seems to us to carry any weight. On the other hand, in the present case, it is no doubt inconvenient to borrow a phrase from Stanley C. J., that, where one tribunal has found a charge to be proved beyond all responsible doubt, another should find it to be not only false, but frivolous and vexatious.

" We regard the matter, however, as one of the first impressions, subject to the views expressed in the two decisions we have mentioned, and the indication given in section 106 (*3*) of the meaning to be attached to the word 'consequential' in section 423.

" We, therefore, refer the above-mentioned question to a Full Bench of this Court. If the answer is 'Yes' the Rule in this case will be discharged. If it is 'No', the Rule will be made absolute, the order set aside and any money paid under the order and in the hands of Lower Court must be refunded."

Babu Karunamoy Bose, for the petitioner. The question is whether section 423 covers section 250. The order with which the Appellate Court is directly concerned is the guilt or otherwise of the accused. In this case there was really a fresh judicial proceeding in the appellate stage. In the absence of clause (*3*) in section 106, section 423 (*d*) would not suffice to confer

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such wide powers to the Appellate Court. Even in section 106. whatever the Appellate Court may do, it cannot but be on facts that must be before it. There can be nothing in the nature of a fresh investigation into new matters. Any order under section 106 must be therefore *in consequence* of the conviction. But in this case the Appellate Court did proceed on matters not before it.

When the Original Court and the Appellate Court are of different opinion as regards an alleged offence, the complainant should not be called on to pay compensation in such cases.

On the question as to what is "incidental" order, I submit that the function of the Appellate Court is limited to consider what has been done by the lower Court. Taking then the instance of section 522, we find only "Court." Court may mean *appellate* or *original* Court. In section 250, the word used is "Magistrate." In section 544 also the word "Court" only is used. Here is a case of "consequential" order. Section 562 is another instance where "Court" only is used. Section 423 is an elaborate section and gives various powers in detail.

Kari Singh v. *Tufani Dhamuk* (1) is against me. All the previous rulings are in my favour. The difficulty has arisen since the introduction of clause (*d*) in section 423. The sole question is whether section 250 comes under that. The very fact of conviction gives rise to the conclusion that the complaint was not frivolous or vexatious. In such a case no fresh proceeding is necessary. It would be a *consequential* order.

The Appellate Court's power is to undo things done by the lower Court wrongly and not to start new proceedings there: see Judicature Act, 57 and 58

(1) (1909) 14 C. W. N 212.

Vict., c. 16, s. 2., cl. (*2*), and Blake-Odger's Common Law.

Clause (*d*) of section 423 was enacted to fit in with section 106, clause (*3*), and that 106 (*3*) may not be inconsistent with section 423 (*d*).

[CHATTERJEE J. Was the procedure in section 250 followed in this case?]

No. The party was not called on to show cause.

Cur. adv. vult.

The judgment of the Court (JENKINS C.J., WOODROFFE, MOOKERJEE, CARNDUFF and D. CHATTERJEE, JJ.) was as follows:—

The question referred to the Full Bench is whether an Appellate Court can order compensation such as is contemplated by section 250 of the Code of Criminal Procedure, 1898.

Section 250, being confined by its terms to the Courts of Magistrates trying cases in the first instance, does not confer the requisite power. But it is suggested that clause (*d*) of section 423 (*1*) does.

Section 423 (*1*), which defines the powers of an Appellate Court in disposing of an appeal, begins by setting forth those powers in precise terms, and concludes with clause (*d*), which enables it to "make any consequential or incidental order that may be just or proper."

Now, in a Criminal Court, this phrase cannot be construed so liberally as to embrace any and every ancillary order which is capable of being described as "consequential or incidental." Otherwise an Appellate Court, affirming, for instance, a conviction of kidnapping a woman, might add, and enforce, a direction that the offender should pay her, by way of maintenance, a monthly allowance. This can hardly be.

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It would seem, therefore, that "consequential or incidental" orders within the purview of the provision, must fall under one or other of two heads.

First, there are orders which follow as a matter of course, being the necessary complements to the main order passed without which the latter would be incomplete or ineffective. Such are directions as to the refund of fines realised from acquitted appellants, or, on the reversal of acquittals, as to the restoration of compensation paid under section 250; and for these no separate authority is needed.

Secondly, there are orders which, though ancillary in character, require more than the support of a Criminal Court's inherent jurisdiction, and could not be passed without express authority.

An order mulcting a complainant to compensate an accused for having been frivolously or vexatiously charged seems to fall under the second head. It does not necessarily follow or arise out of an order of discharge or acquittal, and it is not, *per se*, an order "consequential or incidental" thereto. For the issue primarily before the Court is whether the accused has been proved to be guilty or not, and the question whether the complaint against him was merely frivolous or vexatious is another matter importing fresh considerations. The making of an award for compensation would, consequently, seem to need express authority, and an order therefor is not "consequential or incidental" to an order of discharge or acquittal, unless the discharging or acquitting Court has, *aliunde*, power to make it. In an original Court it is, by virtue of section 250, "consequential or incidential" to an order of discharge or acquittal made there; but it is not *quoad* a like order passed on appeal.

If this be so, then the clause can be relied upon only if it be sufficient to extend to an Appellate Court,

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to be exercised by it, *mutatis mutandis*, the special power given to an original Magisterial Court alone by section 250. But it falls short of this, and, so far as appears, it never occurred to the learned Judges who decided *Harichand* v. *Fakir Sadrudin* (1) that it could be appealed to in this connection. It does not, like section 2 of the Supreme Court of Judicature (Jurisdiction) Act, 1894 (57 and 58 Vict., clause 16), or o. XLI, r. 33, of the Code of Civil Procedure, 1908, invest an Appellate Court with authority "to make any order which ought to have been given or made" by the Court below; nor does it, like section 107 of the latter, confer upon Appellate Courts "the same powers" as Courts of original jurisdiction. It does not amplify the powers of Appellate Courts: but what it does is to modify the exhaustive character which, without it, section 423 (*1*) would apparently have, and so to prevent any conflict between its special provisions and the general provisions of, *e.g.*, section 517 or section 522.

And, as the exercise of the power in question by an Appellate Court would involve such an extreme measure of contempt for the judgment of the inferior Court concerned, that it could but seldom be used with propriety, it can readily be understood why the Legislature should not have thought it worthwhile if, indeed, it did not think it actually inexpedient, to extend it to such a Court.

For these reasons, the majority of the Full Bench are of opinion that the answer to the question referred should be in the negative.

(1) (1901) 3 Bom. L. R. 841.

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