

(1875) 07 AHC CK 0002

Allahabad High Court

Case No: None

Queen

APPELLANT

Vs

Gholam Ismail and
Another

RESPONDENT

Date of Decision: July 2, 1875

Citation: (1875) ILR (All) 1

Hon'ble Judges: Turner, O.C.J.

Bench: Single Bench

Final Decision: Disposed Of

Judgement

Turner, Officiating C.J.

1. In the course of the argument the learned Government Advocate has contended that the Court has no discretion to admit or reject an appeal duly preferred by an officer on behalf of Government, under the provisions of Section 272 ■, Code of Criminal Procedure, and that consequently the order of this Court calling for the record is tantamount to an admission of the appeal. I believe the Court is agreed that the provisions of Section 278 apply equally to appeals presented u/s 272 against judgments of acquittal, as to other appeals. The point is, however, immaterial because whether the Court merely calls for the record, which is the effect of Mr. Justice Oldfield's order in the present case, or whether the appellate Court decides to hear the appeal, the Magistrate has no greater power in the one case than in the other to order the detention of the accused. Whether he has or has not the power in the view I take of Section 297, this Court is not now called upon to determine. For the purpose of the argument it may be assumed the order of detention is illegal, but has this Court the power to interfere with it? If it possesses such power, it is only in virtue of the provisions of Section 297, Code of Criminal Procedure. In England the legality of an order for the detention of a person can be determined by the issue of certain writs. It was at one time doubtful whether this Court possessed the powers of issuing such writs, but that doubt has been set at rest by the 82nd section of the Code, which expressly declares that neither the High Court nor any

Judge of such High Court shall issue any writ of habeas corpus mainprise, de homine replegiando, nor any other writ of the like nature, beyond the Presidency towns. To European British subjects, and to such persons only, the 81st Section of the Code accords the privilege, if they are detained in custody, and consider their detention illegal, of applying to the High Court for relief.

2. The legislature having thus clearly manifested its intention of preventing the summary interference of this Court in cases in which natives of this country might complain of illegal detention, it appears to me that the Court would establish a precedent at variance with the spirit and letter of the law, if it ordered the release of the petitioners without being satisfied that it had power to deal with the case under the provisions of Section 297, Code of Criminal Procedure. Whether a case is called for by itself or reported for orders, or comes to its knowledge, the High Court, as a Court of Revision, has only powers to deal with it under the provisions of that section, and the power of the Court are defined in these terms:--"If it appears to the High Court that there has been a material error in any judicial proceeding of any Court subordinate to it, it shall pass such judgment, sentence or order thereon as it thinks fit." Thus the interference of the High Court under this section is limited to judicial proceedings. Can it be said that the Magistrate's order is such a proceeding within the meaning of that term in the Code? The 4th section of the Code defines it to mean "any proceeding in the course of which evidence is or may be taken, or in which any judgment, sentence or final order is passed on recorded evidence." By the expression "a proceeding in which evidence is or may be taken," I understand "a proceeding in which evidence is or may be legally taken." The Magistrate did not pass any order on recorded evidence, nor was any evidence recorded. Was his proceeding a proceeding in the course of which evidence might be taken? He certainly did not contemplate taking any evidence, and in my judgment he was not competent to take any evidence; he was not holding an enquiry with a view to commitment, nor did he contemplate any such inquiry, nor did he make any commitment except to the custody of the jailor. He did not make an order sending the petitioners for trial to a superior Court, and at the same time give directions for their intermediate custody. He simply gave an order to the jailor to detain them until the result was known of proceedings he believed to be then pending. The Magistrate knew his judicial functions had been fulfilled by the commitment to the Sessions Court. In order to prevent the petitioners from absconding in the event of the appeal being decided against them, he ordered their detention to custody, and he did not contemplate any other proceeding of any kind. It is argued that Mr. Robertson issued the order for the detention of the petitioners under color of his office as Magistrate. That may be, but it does not necessarily follow that his proceeding was therefore a judicial proceeding within the meaning assigned to that term in the Code.

3. The learned Counsel for the petitioners cited Moonshee Syud Abdul Kadir Khan v. The Magistrate of Purneah 11 C.L.R. Ap. 8. I need not advert to the doubts expressed by Mr. Justice Pearson during the argument, and felt by me, as to the soundness of the ruling in that case, that Section 297 applies to any interlocutory as well as to a final order, because

I believe we are agreed that the Magistrate's order in the present case was intended to be a final order; but I would point out that the case cited is clearly distinguishable from the case before the Court. In the case cited the orders with which the High Court interfered were passed in proceedings in which evidence might be taken. The Court consequently had before it a judicial proceeding which fell within the definition. It may appear strange that the Court has no power to interfere as a Court of Revision if a Magistrate illegally orders the detention of persons in custody without holding any judicial proceeding, and yet that the Court should be authorized to interfere where the Magistrate has passed such an order in the course of a judicial proceeding; but the legislature may have had in view emergencies in which it would be essential to the preservation of the public peace to debar the interference of this Court, and may have legislated to provide for such emergencies at the risk of some hardship to individuals.

4. For the reasons I have given I would inform the Judge that this Court has no power to set aside the order.

Pearson, J.

5. On the question whether the Magistrate's order directing the two men to be detained in custody pending the appeal in the High Court is a judicial proceeding or not, my opinion is it is not such a proceeding within the terms of the definition contained in Section 4, Act X of 1872.

6. It was not a proceeding in the course of which evidence was or could be taken. The Magistrate did not contemplate any enquiry, nor was he competent to make any enquiry in the case, which had passed out of his jurisdiction and was not before him. The High Court being for this reason unable to interfere with the Magistrate's order under the provisions of Section 297, the case was not one which could properly be reported by the Sessions Judge u/s 296 of the Act; nor could that officer properly admit the men to bail u/s 390 of the same.

7. The order passed by him under the last-mentioned section cannot, however, be set aside as null for want of jurisdiction by the High Court, not being a judicial proceeding within the terms of the definition contained in the law.

Spankie, J.

8. In my opinion, we have the power to set aside the Magistrate's order as illegal.

9. u/s 297 of Act X of 1872 [q. v. supra, I All. 3.] if in any case either (1) called for by itself, or (2) reported for orders, or (3) which comes to its knowledge, it appears to the " Court that there has been a material error in any judicial proceeding of any Court subordinate to it, it shall pass such judgment, sentence or order thereon as it thinks fit.

10. There are thus three ways in which cases of irregularity and material error may come before the Court, but the material error must have occurred in a judicial proceeding.

11. By Section 4 of the Act a judicial proceeding means any proceeding in the course of which evidence is or may be taken, or in which any judgment or final order is passed on recorded evidence.

12. It has been argued, first, that the interference of the Court can only be exercised where the order referred to in Section 297 has been final; and secondly, that the order in the case before us was not made in any proceeding in which any evidence was or might have been taken, or in which any final order was passed on recorded evidence.

13. In order to determine whether or not the Court's interference is limited to those cases only in which a judgment, sentence or (final) order has been passed, it is necessary to consider those sections which lead up to Section 297.

14. Section 293 directs that all subordinate Courts shall send to the High Court such periodical statements or calendars of trials held by such Courts as the High Court prescribes, exhibiting the offences charged, the offences of which the accused persons are convicted, and the sentences or orders passed upon them.

15. u/s 294 [q. v. supra, I All. 4.], and probably upon the examination of any such periodical statements, as well as on any motion directly made to itself, the Court may call for and examine the record of any case tried by any subordinate Court, for the purpose of satisfying itself as to the legality or propriety of any sentence or order passed, and as to the regularity of the proceedings of such Court.

16. Now the language here is explicit enough. The record called for is the record of any case (actually), tried by any Subordinate Court and consequently disposed of, and the High Court is to satisfy itself, (1st) as to the legality, (2ndly) or propriety, and (3rdly) as to the regularity of the proceedings. This section appears to give to the Court supervising power. It is not only to satisfy itself as to the legality or propriety of the sentence or order passed, but as to the regularity of the proceedings in the case. Assuming that it may satisfy itself that there has been material error in any judicial proceeding of the Court, the High Court would be acting rightly in noticing it.

17. Section 295 empowers any Court of Session or Magistrate of the District, at all times, to call for and examine the record of any Court subordinate to such Court or Magistrate, for the purpose of satisfying itself or himself as to the legality of any sentence or order passed, and as to the regularity of the proceedings of such Subordinate Court.

18. Here the Sessions Judge, as the judicial head of the district, has conferred upon him large powers to supervise the proceedings of the officers subordinate to him, and the Magistrate of the District has the same power as regards those directly subordinate to himself; and both the Court of Session and the Magistrate of the District, when they do

exercise this power, are to satisfy themselves as to the legality of any sentence or order passed, and as to the regularity of the proceedings of the Subordinate Courts. But though the words "sentence or order passed" may, at the first glance, appear to be the sentence or final order passed referred to in Section 294, yet on closely considering the language of the section a wider supervision seems at least not to be forbidden. The interference may be exercised at all times. It has been argued that this may mean that the Court of Session is not to wait until it has an opportunity of examining the statements, nor the Magistrate to wait until he has seen the outturn of the work for the month; but that he may call for any case, whenever he pleases, for the purpose of examining it, either as to the sentence or order passed, or the regularity of the proceedings. This doubtless is so, but the words may have another meaning as well, when the other words "call for and examine the record" are read with them.

19. Section 294 is clearly directed to cases absolutely tried and disposed of, and the words "record of any case tried" are used. But this is not so in Section 295, the words there used being "at all times call for and examine the record," not of any case tried, but of any Court; and as those words were not in the former Act, I regard them as having been deliberately used for a deliberate purpose. u/s 434 * of Act XXV of 1861, the Sessions Court and Magistrate had power to call for and examine the record of any Court immediately subordinate to such Court or Magistrate for the same purpose that a Court of Session or Magistrate may do so now. The words that have been added appear to me to give the Court of Session a larger power, and that extends beyond interference limited to cases which have been tried and disposed of. It is not only the record of any case that has been tried that may be examined, but it is "the record of any Court," and it may be called up not only when the case has been disposed of, but "at all times," and when, at least so I think, the record may not have been completed, but may be in course of formation, before a case has been actually disposed of, and whilst it is under trial. It is not only the legality of the sentence or final order that may be looked at, but also the legality of any order that may be in any sense final as it affects the person under trial though it may not be the final order disposing of the case. In fact the legality and regularity of the proceeding's are to be looked at, whilst a case may be pending so that they may be checked before it is too late, or before injustice has been suffered for which it may be difficult to obtain redress.

20. It cannot be denied, I believe, that this Court has been in the practice of calling up cases before they have been actually disposed of. We have the authority of a learned Judge of the Presidency Court that there "the Court has, since, the date when the new Criminal Procedure Code came into force, been almost daily, I may say, acting upon the general power of revision, which hitherto has been supposed to be conveyed by this first clause. ■ And if it has power by this clause, as it seems to me clear that it has, to call up to itself proceedings while they are in the condition of the preliminary stage of investigation, for the purpose of correction and of giving proper directions for the conduct of the investigation, it must be incidental to that power that the Court should be able to

suspend proceedings, for it would be a manifest absurdity to my mind that the Court should be empowered by the legislature to call up the record and the proceedings in a ease for the purpose of looking at them, revising them, correcting material errors, and putting them upon a proper footing of investigation, but yet that the Court should have no power to stay the proceedings of the subordinate Court which require to be set right."

21. So far then I am not alone in thinking that the "order" need not necessarily be the final order disposing of the case. I have already pointed out that when the Court itself calls for any case u/s 294, it is, in my opinion, the record of any case that has been actually tried and disposed of. But when the Session Court or the Magistrate, when exercising the power conferred by Section 295, has been satisfied either that some order in any case, either final or in some sense final as to its effects on a party under trial, is illegal, or that some material error has occurred in the proceedings, the Court of Session or Magistrate may report the proceedings. The words, to be sure, used in the section refer to the "judgment or order as being contrary to law," to the punishment as being "too severe or inadequate;" but the course to be followed is that the proceedings may be reported for the orders of the High Court. The order may have been illegal, the judgment may have been based upon no evidence or in defiance of all evidence, and the proceedings may have been irregular from beginning to end, or materially so in fact. Though the section does not expressly say that, if the Court of Session is satisfied that the proceedings have been irregular, it is to report them, it may be inferred from the fact that, u/s 295 [q.v. supra, I All. 9.], it is part of the duty of a Court of Session to satisfy itself of the regularity of proceedings in the Courts below, and from the fact that, in a case reported for orders to the High Court u/s 297, a material error is to be noticed, the Court of Session may bring any irregularity before this Court by reporting the proceedings for orders.

22. The case now before us has come up to this Court on the report of the Court of Session, and, under the first clause of Section 297 [q.v. supra, I All. 2.], "if it appears to the High Court that there has been a material error in any judicial proceeding of any Court subordinate to it, it shall pass such judgment, sentence or order thereon as it thinks fit."

23. It has been argued that the order to be passed must be one of the nature referred to in the clauses succeeding the first clause of Section 297. These clauses are certainly directed to cases where there is a record, or a final order has been passed. But I am not prepared to admit that they limit the construction to be put upon the first clause. We have to deal with the legality or propriety of the sentence or the order, and with the regularity of the proceedings. The subsequent clauses provide for what is to be done in particular cases, and where the accused person has been improperly discharged. When this has been the case, the order is certainly not a final order in a case tried. There has been no trial, and the Court can order a person so discharged to be tried, or to be committed for trial, not, it will be observed, to be re-tried. So where the facts show that the prisoner ought to be convicted of an offence other than that of which he was convicted, the Court shall pass sentence for the offence of which he ought to have been convicted. Again, a material error in the charge that has misled and prejudiced the person accused shall lead

to the annulment of the conviction, and a remand to the subordinate Court on an amended charge. I need not repeat all the clauses. It is enough for my purpose to say that they "provide particular remedies for particular cases and circumstances. In some it is optional to adopt the course laid down, as in the case where a person has been convicted of an offence not triable by the Magistrate who has convicted the accused person. In other cases the course to be followed is imperative. These clauses providing a special course to be followed in special cases cannot, I think, be said to control Clause 1, which gives the High Court a general power of revision, and makes it obligatory on the Court to notice any material error in any judicial proceeding by passing such judgment, sentence or order relative to that judicial proceeding, as it shall think fit. It is not, it will be seen, bound to pass any particular judgment, sentence, or order, but it must notice the material error, though it may do so as it thinks fit.

24. We now come to a more difficult part of the case. Was or was not the material error reported to this Court by the Court of Session an error in any judicial proceeding? I have already given the definition of the words a "judicial proceeding," namely, any proceeding in the course of which evidence is or may be taken, or in which any judgment, sentence, or final order is passed on recorded evidence.

25. The prisoners released by order of the Sessions Judge were recaptured, as far as I am to judge from the record, for there is one, by order of the District Superintendent of Police. The officer who arrested them reports his having done so, and forwards the men to the Magistrate, whereupon the Magistrate, acting judicially, as appears from the heading to his proceeding, commits them to jail as persons implicated in a charge of murder, whose case was pending in appeal before the High Court, and he orders that they shall be detained in jail until the appeal has been disposed of. There was a formal warrant of commitment to jail drawn up in the form C, Schedule ii of Act X of 1872, and signed by the Magistrate, such as prescribed by Section 303 * The warrant used is that which is used when a Magistrate acts u/s 196 ■ of the Code, when the evidence given before a Magistrate justifies his sending the accused person to take his trial for an offence triable exclusively by the Court of Session or High Court, or which he thinks ought to be tried by such Court. The Magistrate has subsequently explained that he acted u/s 92 of the Act, and also with a view to secure the attendance of the prisoners, when the High Court should have disposed of, and passed orders on, the appeal. The order passed by the Magistrate was after he had received notice of the appeal to be served on the accused. I am aware that there is great doubt whether the appeal to this Court can be said to have been actually admitted. But the Magistrate, when he received notice that the appeal had been admitted and would be heard on a certain day, had every reason to assume that the appeal had been properly admitted, and therefore the consideration whether it had or had not been actually admitted does not affect the question now before us.

26. With regard to Section 92, under which the Magistrate acted, it may be at once admitted that the section refers to those cases in which a Police officer may, without

orders from a Magistrate and without a warrant, arrest any person. It may be conceded that the Magistrate could not have been acting under that section, which relates to primary arrest and not to a commitment to prison to await trial, or pending investigation and trial. But we have the Magistrate's assurance that he was acting under the Code, and this is apparent from his proceeding and commitment of the parties to the jail, that he believed himself to be acting judicially. It is not in my opinion a matter of any consequence, whether he followed this or that course under the Code, or how absurd or extravagant the course he adopted may have been. If it has been an illegal one, and if his order has been illegal, we are bound, assuming that it was made in a judicial proceeding, to annul it or to pass such order on his material error as we may deem fit.

27. There is certainly no evidence of witnesses recorded in the proceeding which followed the capture of the men released by the Sessions Judge. There is however the report of the police officer, and the proceeding of the District Superintendent of Police, and the Magistrate notifies his own knowledge of the fact that they were implicated in a charge of murder, in which, as he believed, there was ample evidence on record to justify their conviction, and he appears to have regarded this evidence as guaranteeing the order of detention. He probably regarded the men as still in the position of accused persons committed for trial, for he had received notice of appeal, and therefore may have thought that the case was still open and that the Judge's order would not be regarded as a final order in the case, which had still to be heard and determined on the merits by the Court of appeal. With those considerations before him, and having regard to what was before him, I am not prepared to say this order may not be viewed as one coming within the definition of a judicial proceeding. It is true of course that the case of murder was no longer before him, and that in that case he could have passed no orders. But, in my opinion, his taking up the charge against the men sent to him in custody by the District Superintendent of Police should be looked upon as the initiation of a new case against them, and as being the commencement of a judicial proceeding (for a judicial proceeding need not necessarily be a criminal trial), and one too in which evidence might have been taken : as, for instance, one or more of the arrested persons might have denied that he was the person released by the Sessions Judge, and the Magistrate might have, under those circumstances, examined witnesses to prove that he or they were the same men as those who had been committed and released. I admit that the Magistrate's proceedings do not disclose any intention of calling any witnesses. But if he admits that he was acting judicially, and as is the case, it would only have been when he was acting judicially as a Court of enquiry that he could commit the accused to jail, to await the result of pending proceedings, and it appears that he considered that there was some evidence before him that the accused were guilty of murder, I am of opinion that we must regard his proceeding as a judicial proceeding, however inapplicable that evidence may be, or however wrong his course may have been. The error he committed in recommitting to jail one who had been released by the Sessions Judge was a material error. He had no power to make the order, which was final as far as they were concerned, as regards the matter before him, as to whether they should or should not be detained in custody

pending the determination of the appeal. But having made it, on some show of evidence, on the report of the District Superintendent and from matters within his own knowledge, and under the supposition that he was acting judicially, I think that we have jurisdiction to deal with the order under Clause 1, Section 297 [q.v. supra, I All. 3.] of Act X of 1872, and I would annul it.

Oldfield, J.

28. This case has been referred u/s 296 [q.v. supra, I All. 2.], Act X, of 1872, by the Sessions Judge for the orders of this Court. It appears the petitioners were committed by the Magistrate to the Sessions on charges of murder, were tried and acquitted, and an application of appeal was then presented to this Court, u/s 272 [q.v. supra, I All. 5.], which now awaits disposal. After this application had been presented and before the appeal had been allowed, the Magistrate, upon the petitioners being brought up before him by the Police, issued his warrant to the jailor that they be kept in custody until decision of the case in appeal.

29. The Magistrate's order is no doubt illegal. It is argued that this Court cannot interfere under its powers of revision u/s 297, Act X of 1872, on the ground that they do not extend to revise interlocutory orders, and that they are confined to errors in judicial proceedings, which is not the nature of the proceedings of the Magistrate in this case.

30. In my view the argument fails, and this is a case which falls within the scope of the Court's revising powers u/s 297.

31. There is nothing in Section 297 which excludes interference in interlocutory orders, assuming the order in this case to be one. The words of the section are plain:- "If, in any case, it appears to the High Court that there has been a material error in any judicial proceeding of any Court subordinate to it, it shall pass such judgment, sentence, or order thereon as it thinks fit. "

32. These terms are wide, and to construe them, as it is argued they should be construed, is to import restrictions which I think we have no right to do; moreover, the present reference comes from the Judge, who acts u/s 295, which in its terms does not restrict revision to orders in cases finally tried and disposed of.

33. I think also the Magistrate's proceedings must be held to be judicial. A judicial proceeding is defined to be "any proceeding in the course of which evidence is or may be taken, or in which any judgment, sentence or final order is passed on recorded evidence."

34. The Magistrate's explanation shows that in the present case he looked on the petitioners as persons still suspected of offences whom the Police might arrest u/s 92, Act X of 1872, and on their being arrested he treated them as still charged with murder, and committed them to prison on that charge, on a warrant in regular form. He seems to me to have considered himself acting judicially, under his powers as Magistrate, and though the

except upon appeal by parties concerned, duly made according to the provisions of section XXX of this Act.]

■[In the matter of Moonshee Syud Abdool Kadir Khan 11 C.L.R. Ap. 8.]

*[Section 303:--Every warrant for the commitment of a person to custody shall be in writing and signed and sealed by the Judge or Magistrate who issues it, and shall be directed to some jailor or other person having authority to receive and keep prisoners. The form of such warrant shall be in the form (C. or D, as the case may be) prescribed in the second schedule to this Act, or to the like effect.]

■[Section 196:--When evidence has been given before a Magistrate which appears to show that an offence which is triable exclusively by the High Court, or which, in the opinion of the Magistrate, ought to be tried by such Court, the accused shall be sent for trial by such Magistrate before the Court of Session or High Court.]