

(1937) 08 PAT CK 0045

Patna High Court

Case No: None

Kunjo Chaudhry

APPELLANT

Vs

Emperor

RESPONDENT

Date of Decision: Aug. 24, 1937

Acts Referred:

- Penal Code, 1860 (IPC) - Section 109, 467, 471

Citation: AIR 1938 Patna 99

Hon'ble Judges: Varma, J; Rowland, J

Bench: Full Bench

Judgement

Varma, J.

This is an application on behalf of one Kunjo Chaudhry who has been convicted under Sections 467/109 and 471, Penal Code. He was sentenced to three years" rigorous imprisonment under each of the sections, the sentences to run concurrently, but on appeal it has been reduced to 18 months under each count, and the sentences are to run concurrently.

2. It appears that on 10th Baisakh one Nathu Mandal executed a hand note in favour of the petitioner for Rs. 65-7-0. The case for the prosecution was that in Chait 1337 Nathu Mandal paid Rs. 77-8-0 to the petitioner in full satisfaction of the debt but the petitioner refused to return the hand note because Nathu Mandal refused to pay an additional sum of Rs. 5. On 27th March 1935 the petitioner instituted a suit (No. 208) in the Court of Small Causes at Bhagalpur, on the basis of the hand note in question, and he is alleged to have altered the date of the hand note from 10th Baisakh 1336 to 10th Baisakh 1339 so as to avoid the bar of limitation.

3. The suit was later on dismissed for default and the petitioner took no steps for restoration of the case. On 4th October 1935, Nathu Mandal filed an application before the Small Cause Court Judge, u/s 476, Criminal P.C., asking the Judge to file a complaint against the petitioner for having abetted commission of forgery with

respect to the hand-note in question, and for dishonestly using the hand note as genuine knowing or having reason to believe it to be a forgery. That petition, it now appears, was rejected by the first Court on the ground that the suit in question had been dismissed before the petition was filed. Then there was an appeal to the District Judge, who set aside the order of the Small Cause Court Judge, holding that he had erroneously refused to exercise the jurisdiction vested in him by law, and directed the Small Cause Court Judge to hold a preliminary inquiry to find out if there were sufficient materials to file a complaint against the petitioner. This order was passed on 20th March 1936. The Small Cause Court Judge held an inquiry and filed the complaint on 11th May 1936. In due course the petitioner was committed to the Court of Session for trial, and convicted and sentenced as already stated. The present application is directed against the conviction of the petitioner as the result of the trial.

4. The rule issued by this Court was of a limited character in the following terms:

Let a rule be issued on the District Magistrate of Bhagalpur to show cause why the conviction of the petitioner should not be set aside on the ground that there was no proper sanction for his prosecution inasmuch as the complaint filed by the learned Munsif (Small Cause Court Judge) was after remand by the District Judge who had no power to order such a remand.

5. Mr. Baldeo Sahay, appearing on behalf of the petitioner, urges that Section 476-B, Criminal P.C. empowers the Appellate Court either to

direct the withdrawal of the complaint or, as the case may be, itself make the complaint which the Subordinate Court might have made u/s 476, and if it makes such Complaint the provisions of that section shall apply accordingly.

6. He argues that the complaint made by the Small Cause Court Judge was illegal inasmuch as there is no power given to the Appellate Court to make an order of remand in a case u/s 476. In support of his contention Mr. Baldeo Sahay has cited various decisions. He refers to the Full Bench decision of the Lahore High Court in *Dhanpat Rai v. Balak Ram* A.I.R.1931. Lah. 761 where in answer to the question

Can the Appellate Court order a remand and direct the trial court to make a preliminary inquiry and come to a fresh decision on the question of making or not making a complaint.

it was held that the procedure on appeal u/s 476-B, Criminal P.C. is procedure on an appeal under that Code, and as that Code provides for no remand the Appellate Court cannot make a remand to the trial Court, but the Appellate Court may itself make an inquiry in a case where it comes to the conclusion either that the trial Court has made no preliminary inquiry at all or has made a defective inquiry. That was a case in which the defendant in a suit filed a petition for prosecution of the plaintiff on the ground that a false affidavit had been sworn by the latter. The petition was

rejected, and the defendant appealed to the Senior Subordinate Judge who held that the trial Court had given no notice to the other side and had given the defendant no opportunity of showing the falsity of the affidavit and had summarily dismissed the petition. He held that on the facts of the case a preliminary inquiry was necessary and the want of such inquiry was a material irregularity. He therefore set aside the order of the Court dismissing the petition, and remanded the case for passing a proper order after giving the petitioner an opportunity of establishing the allegations.

7. The next case referred to by Mr. Baldeo Bahay is the decision in *Mendi Lal v. Ram Adhin* A.I.R.1935. Oudh 59 in which the decision in *Dhanpat Raj v. Balak Ram* A.I.R.19831.Lah. 761 has been relied upon, and it was held that the order of an Appellate Court remanding the case and directing further inquiry into the alleged commission of the offence u/s 193, I.P.C. was ultra vires and absolutely void. That was also a case in which an application for revision was filed against an order of the Sessions Judge who reversed the order of the Special Magistrate and remanded the case to the Special Magistrate with a direction to make further inquiry u/s 476, Criminal P.C. The next case referred to by the learned advocate is a single Judge decision of the Madras High Court in *Vanni Nainar v. Periaswami Naidu* A.I.R.1928. Mad. 391 where it was held that in an appeal u/s 476-B, Criminal P.C. the Appellate Court has no jurisdiction to take additional evidence for the disposal of the matter coming up before it under the section, whether or not there was any objection to the reception of that evidence; and that, Section 428 of the Code, which empowers the Appellate Court to take evidence, has no application to proceedings u/s 476-B. There a petition was filed by the defendant against the plaintiff u/s 476. The Court refused to file a complaint and the defendant then appealed to the District Court u/s 476-B of the Code.

9. The Appellate Court admitted an affidavit for the disposal of the matter, and relying on the affidavit finally dismissed the application. Against this order a petition was moved before the High Court which after expressing the view above stated, remanded the case to the District Judge for disposal in accordance with law.

10. The next case relied upon is that in [Manir Ahamed Chowdhury Vs. Jogesh Chandra Roy](#), where it was held that in an appeal under Section. 476-B, Criminal P.C., the Appellate Court has no jurisdiction to remand the case directing the Court of first instance to file a complaint, but must do so itself.

11. In this case also, the petitioner approached the High Court after the order of remand was made by the Appellate Court u/s 476-B. The next case referred to [Mahomed Boyetulla Vs. Emperor](#), where it was held that appeals u/s 476-B, Criminal P.C. are subject to all the provisions applicable to criminal appeals as laid down in Section 419 and the following sections, and, it was therefore open to an Appellate Court to dismiss the appeal summarily u/s 421. Their Lordships did not interfere in a case in which the Appellate Court summarily dismissed an appeal against an order

by a lower Court to file a complaint.

12. The learned Advocate General has drawn my attention to various cases in which it has been held that the powers of the Appellate Court mentioned in Section 476-B, Criminal P.C. are not exhaustive. He has referred to the decision in *Nasaruddin Khan v. Emperor* A.I.R.1931. Cal. 98. The point raised in that case was that the District Judge had no jurisdiction what ever to dismiss the appeal of the petitioner without looking into the record and considering the same. It appears that when an application was filed u/s 476-B an advocate appeared on the first date and he was absent on the second date. The District Judge thinking that this was an abandonment of the appeal he dismissed the application. Their Lordships held that that was not a matter in which the High Court could interfere u/s 115, Civil P.C. They held further that the procedure governing such cases is to be sought in the four corners of the Civil Procedure Code, and having come to that conclusion they held that the District Judge was fully competent to dismiss the appeal.

13. In *Baidyanath Giri v. Emperor* A.I.R.1931. Pat. 144 we have a single Judge decision which says "that the provision of Section 421, Criminal P.C., applies to all appeals unless it is specifically provided otherwise. This decision is of importance as indicating that Section 476-B is not exhaustive.

14. The case reported in [Surenbra Nath Maity Vs. Susil Kumar Chakrabarty](#), another decision of the Calcutta High Court which, following its previous decisions, held that the provisions of Section 115, Civil Procedure Code, apply to applications under Sections 476-A and 476-B originating in Civil Courts. Here also, the question was whether the lower Appellate Court could order a remand. It was observed in that case that Section 476-B is not intended to be exhaustive. In this case also, the petitioner moved against the order of the Appellate Court sending back the case on remand for further inquiry.

15. In *Krishnamachari v. Emperor* A.I.R.1933 Mad 767 it was held that Section 476-B is not exhaustive as to the powers of the Appellate Court in the case of a complaint u/s 476 it has power of remand and also of summary dismissal in such cases. But in this case the ground that was taken at the time of admission that the powers of an Appellate Court u/s 476-B were exhaustive was not pressed at the time of hearing. This application also was made against an order of the Sessions Judge refusing to direct the withdrawal of a complaint preferred by a Magistrate.

16. In *Janardana Rao v. Lakshmi Narasamma* A.I.R.1934. Mad. 52 it was held that the provisions of Chap. 31 can be applied to the hearing of an appeal u/s 476-B. The calling for further evidence is not permissible u/s 428, but a remand for proper disposal is competent under Clauses (c) and (d) of Section 423, and that in an appeal u/s 476-B in a civil proceeding, the Appellate Court has power to remand the matter back to the lower Court for disposal. In the course of the judgment it is said that as Section 476-B does not provide for dismissal of appeals, and as that power is

inherent in all Appellate Courts, it must be held that powers u/s 476-B are not exhaustive.

17. From a review of these cases it is clear that opinion is divided as to whether an Appellate Court u/s 476-B has or has not the power to remand a case to the lower Court for purposes of inquiry. The Lahore and Lucknow High Courts in some of the later decisions hold that the powers u/s 476-B are exhaustive, whereas most of the recent decisions of the Madras High Court are to the effect that the powers are not exhaustive. I would prefer to adopt the Madras High Court view and hold that the Appellate Court can exercise all the powers conferred by the Criminal Procedure Code, except those which are expressly excluded. But the matter does not end here.

18. These are cases in which the petitioner went to the High Court in revision immediately after the order was passed. But in this case the Munsif filed a complaint on 11th May 1936 : it is on that complaint and not on the District Judge's order that the present prosecution started. Assuming the District Judge's order to be a nullity, was there any want of power in the Munsif to file the complaint? It is said he could not do so because he had previously declined to do so. No doubt it is a fundamental principle that a person once acquitted of an offence cannot again be tried for that offence (Section 403, Criminal P.C.). But this is no such case. Dismissal of a complaint or discharge of an accused in a warrant case is no bar to his being thereafter tried on the same facts and Mr. Baldeo Sahay has not been able to show us any provision of law by which the filing of this complaint was barred.

19. Even if there had been a legal defect, no steps were taken against that complaint. No appeal was presented to the District Judge u/s 476-B. In the trial Court, so far as appears, no objection was made. There is nothing in the judgment to indicate that any special objection was raised against the validity of the complaint, nor was that matter agitated in the appeal before the Court of Session. The question is whether the validity of the complaint can now be questioned by the petitioner after his conviction by the trial Court and its confirmation by the lower Appellate Court.

20. In *Jabar Ali v. Emperor* A.I.R.1934. Cal. 203 Rankin, C.J. held that a person who has not appealed against an order resulting in a complaint u/s 476, cannot argue before the Magistrate whether the complaint is a good complaint or made by a proper officer or so forth. It was argued in that case that although there was an appeal against every order made u/s 476, it is open to the person complained against not to exercise his right of appeal at all and to argue before the Magistrate or the Sessions Judge whether the complaint was a good complaint or made by a proper officer. His Lordship observed as follows:

In my opinion this contention cannot be too formally rejected. What the Criminal Procedure Code requires is that certain proceedings shall not "be instituted unless there is a complaint. Whether there is a complaint or there is no complaint, in my

judgment, is a question which can only be agitated in the manner provided.

21. In our own High Court it has been held in *Jugeshwar Singh v. Emperor* A.I.R.1923 Pat. 346 that an objection to initiation of proceedings must be taken at an early stage, and where the case is triable by Sessions, and is initiated on the complaint by a Magistrate u/s 476, once the commitment is made, it is too late for the accused to take an objection against the initiation of the proceedings on the ground of want of jurisdiction in the Magistrate or the person functioning as such, and reliance was placed by their Lordships on the decision in *Jabar Ali v. Emperor* A.I.R.1926. Cal. 203 and on the decision in *Ali Ahmad v. Emperor* A.I.R.1927 Cal. 545.

22. In this view of the matter, this application must be rejected. The petitioner must surrender to his bail to serve out the remainder of his sentence.

Rowland, J.

I agree.