
(1872) 08 CAL CK 0001

Calcutta High Court

Case No: None

Cargill and Another

APPELLANT

Vs

Angelo and Another

RESPONDENT

Date of Decision: Aug. 24, 1872

Judgement

Sir Richard Couch, Kt., C.J.

In this case, which was referred to this Court under s. 434 of the Code of Criminal Procedure by the Judge of the 24-Pergunnas, the Magistrate had proceeded under s. 308 of the Code of Criminal Procedure, and had made an order which the Sessions Judge says he is of opinion was in excess of his Jurisdiction, and ought to be quashed s. 308 gives power to the Magistrate, whenever he considers that there is any unlawful obstruction or nuisance which should be removed from (sic) thoroughfare, to make an order calling upon the person causing the obstruction or nuisance to remove it, or to show cause to the contrary. In this case, cause was shown by the persons upon whom the order was made, Messrs Angelo Brothers, and the Magistrate entered upon the enquiry. Now, when cause is shown, it is the duty of the Magistrate to, and he must, enquire whether there is a throughfare within the meaning of the section, and whether there is an obstruction. It cannot be said that, in entering upon that inquiry, he is not acting within his jurisdiction. If, in the course of the enquiry, he decides any point of law erroneously, the case may be taken up by this Court under s. 404 of the Code of Criminal Procedure; but if there is evidence before him, and he decides upon it, although his decision upon the evidence may be an erroneous one, yet if there is no error in law, the case does not come within s. 404: nor is an erroneous decision upon the evidence an excess of jurisdiction which would enable this Court to interfere under its general power of super intendence. With reference to what is an excess of jurisdiction in cases of this kind, or a want of jurisdiction, the language of Lord Den-man, in a leading case upon questions of this description, may be usefully quoted. It is in the case of *The Queen v. Bolton* 1 Q.B., 66. There an order had been made by Magistrates under an Act of parliament, which gave power to them in certain cases to make orders for giving up possession of land to the church-wardens and overseers of a parish, and the case being brought before the Court

of Queen's Bench by a certiorari, Lord Denman, in his judgment, having stated that there were two points made, first, that the proceedings all being regular upon the face of them, and disclosing a case within the jurisdiction of the Magistrates, the Court could not look at affidavits for the purpose of impeaching their decision; and the second that, even if the affidavits were looked at, the case would be found to be one of (sic) evidence in which there was much to support the conclusion to which the Magistrates had come, says:-

The first of these is a point of much importance, because of very general application; but the principle on which it turns is very simple the difficulty is always found in applying it. The case to be supposed is one like the present, in which the Legislature has trusted the original, it may be (as here) the final, jurisdiction on the merits to the Magistrates below; in which this Court has no jurisdiction as to the merits either originally or on appeal. All that we can then do, when their decision is complained of, is to see that the case was one within their jurisdiction, and that their proceedings on the face of them are regular and according to law. Even if their decision should upon the merits be (sic) or unjust, on these grounds we cannot reverse it." And then, in the subsequent paragraph, with regard to the objection of want of jurisdiction, he says: --"But where a charge has been well laid before a Magistrate, on its face bringing itself within his jurisdiction, he is bound to commence the enquiry: in so doing he undoubtedly acts within his jurisdiction; but in the course of the enquiry, evidence being offered for and against the charge, the proper, or it may be the irresistible, (sic) to be drawn, may be that the offence has not been committed, and so, that the case in one sense was not within the Jurisdiction. Now to receive affidavits for the purpose of showing this is clearly in effect to show that the Magistrate's decision was wrong if he affirms the charge, and not to show that he acted without jurisdiction: for they would admit that, in every stage of the enquiry up to the conclusion, he could not but have proceeded, and that if he had come to a different conclusion, his judgment of acquittal would have been a binding judgment, and barred another proceeding for the same offence. Upon principle, therefore, affidavits cannot be received under such circumstances. The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature; it is determinable on the commencement, not at the conclusion, of the enquiry: and affidavits, to be receivable, must be directed to what appears at the former stage, and not to the facts disclosed in the progress of the enquiry.

2. Here, if the Magistrate has come to a wrong conclusion upon the evidence, it does not affect his jurisdiction. He had jurisdiction to enquire, and if there was, as, in this case, evidence before him, he cannot be said to have exceeded his jurisdiction, although his conclusion may not be the conclusion that ought, in the opinion of the Sessions Judge, or of us, to be drawn from the evidence. The Magistrate had to decide whether there was a thoroughfare, and whether there was an obstruction: it was not necessary to determine what is meant by thoroughfare, whether a public way along which all persons have a right to pass and re-pass, or a way along which only some persons have a right to pass and re-pass. In either case; there was evidence upon which the Magistrate might find that

there was a thoroughfare. There was evidence, especially what Mr. Lowe referred to, viz., the statements of the parties themselves, that it was a public thoroughfare, and there certainly was abundant evidence that it was a way which was need by a considerable number of persons. The Magistrate, therefore, had evidence before him; and, there has not been in this case, either an erroneous decision upon a point of law, or an acting without jurisdiction or in excess of jurisdiction. The proceeding must be returned: the Court makes no order under s. 404.

¹ S. 308.--"Whenever the Magistrate of a district or of a division of a district may consider that any unlawful obstruction or (sic) should be re-moved from any throughfare or public place, or that any trade or occupation, by reason of its being injurious to the health or comfort of the community should be suppressed, or should be re-moved to a different place, or that the construction of any building the disposal of any combustible substance, as likely to occasion conflagration, should be prevented, or that any building is in such a state of weakness that it is likely to fall, and thereby came injury to persons passing by, and that its removal in con-sequence is necessary, or that any tank or well adjacent to any public through-fare should be fenced in such a manner as to prevent danger arising to the public, he may issue an order to the person causing such obstruction or (sic) or carrying on such trade or occupation, or being the owner or in possession of, or having control over, such building, substance, tank, or well as aforesaid, calling on such person, within a time to be fixed in the order, to remove such obstruction or nuisance, or to suppress or remove such trade or occupation, or to stop the construction of, or to remove such building, or to alter the disposal of such substance, or to fence such tank or well (as the case may be), or to appear before each Magistrate within the time mentioned in the order, and show cause why such order should not be enforced."