

(1881) 01 CAL CK 0009

Calcutta High Court

Case No: None

The Empress on the
Prosecution of
Jogendronath Bose

APPELLANT

Vs

Thompson

RESPONDENT

Date of Decision: Jan. 5, 1881

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 221
- Telegraph Act, 1885 - Section 22

Citation: (1881) ILR (Cal) 523

Hon'ble Judges: Prinsep, J; Morris, J

Bench: Division Bench

Judgement

Prinsep, J.

On a complaint made before the Presidency Magistrate u/s 22 of the Telegraph Act, a summons was issued on the 4th September last, fixing the 15th for the trial. The complainant and two witnesses (the Telegraph clerk and peon) were then examined ; and, apparently to enable the complainant to prove that he had purchased the goodwill of the firm who were the addressees of the undelivered telegram, the trial was postponed until the 22nd, summonses being granted to procure the attendance of Mr. C. T. Davis, an officer of the High Court, at 1 p.m. of that day.

2. The case was called on towards the commencement of the Presidency Magistrate's sitting, and the complainant being absent "when his name was called six times," the case was dismissed. Within a very short time the complainant appeared, accompanied by Mr. Davis. The Magistrate at once saw the unfortunate result of his precipitate action, and thinking that he could not revive the trial, adopted an alternative course, and directed the complainant to bring a fresh complaint. This was done on the following day ; the accused was again summoned, the trial was held on the 20th October, and on the 25th he was convicted and

sentenced to pay a fine of Rs. 200.

3. The matter has now come before us u/s 147 of the High Courts" Criminal Procedure Act (X of 1875), it being contended that the order of the 22nd September last, dismissing the case, amounted to an acquittal, and that, on the facts found by the Presidency Magistrate, the accused has been wrongly convicted u/s 22 of the Telegraph Act.

4. I observe that the Presidency Magistrates" Act (IV of 1877) practically provides for only one mode of procedure in the trial of offences before a Presidency Magistrate, no distinction being drawn between cases which are appealable to the High Court and those in which the Magistrate"s orders are final, except in the manner of recording evidence (Section 115), the preparation of a charge (Section 116), and in the addition to an order of conviction and sentence which is appealable "of a brief statement of the reasons for the conviction" (Section 126). It seems, therefore, that the sections of the Act which provide for an order dismissing a complaint apply equally to all trials held by a Presidency Magistrate. The exact effect of an order of dismissal is not declared, except in a case dealt with u/s 32,-i.e., when, after examining a complainant, the Magistrate considers that there are "no sufficient grounds for proceedings." In such cases it is expressly provided that the "dismissal of a complaint shall not prevent subsequent proceedings against the person complained against."

5. The Act, however, permits a Magistrate to dismiss a complaint in consequence of the absence of the complainant at the commencement of the proceedings and upon the day appointed "for the appearance of the accused person, or on any day subsequent thereto on which the case may be called on" (Section 118), or on the day to which the hearing may have been adjourned "in order to secure the attendance of witnesses or for any other reason" (Section 124). In both instances it is left to the discretion of the Magistrate either to dismiss the complaint or again to adjourn the hearing. He is to determine whether he should impose upon the complainant the extreme consequences of his neglect to attend, or whether a further adjournment should be granted.

6. Mr. Branson, who supports the rule granted in this case, argues that, as Section 32 provides that an order of dismissal passed under certain circumstances shall be no bar to further proceedings, it must be presumed that it was intended by the Legislature that in all other cases such an order shall have the same effect as an acquittal.

7. On the other hand, Baboo Gurudas Banerjee contends with considerable force, that an order of acquittal can be passed only u/s 126, when in a trial the Magistrate "finds the accused person not guilty ; " that the law declares that it is only when a complaint is withdrawn with the permission of the Magistrate (Section 125) that any other order operates as an acquittal of the accused person, and that this is borne

out by the terms of Section 113.

8. It is to be regretted that the Legislature, having prominently before it the precise terms of Section 221 of the Code of Criminal Procedure, left any doubt regarding the exact effect of an order of dismissal passed by a Presidency Magistrate. However, having carefully considered all that has been said on both sides, the terms of the law, and the inference that may legitimately be drawn from any omissions as already noticed, I am of opinion, that an order of dismissal u/s 124 does not operate as an acquittal of the accused. No inference can in my opinion be properly drawn from the express terms of Section 32 that in all other cases an order of dismissal "shall prevent subsequent proceedings against the persons complained against." The rule that *expressio unius est exclusio alterius* cannot be applied when in subsequent sections the law (Section 126) has provided that an order of acquittal shall be passed "if, in any case tried" by a Magistrate, he finds "the accused person not guilty," with only one exception, i.e., where a case has been withdrawn with the Magistrate's permission (Section 125), and when Section 113, in providing for the plea *autrefois acquit*, declares that it should only be raised when a person has "once been tried for an offence, &c., &c." We have, I observe, no definition of what constitutes a trial such as is conveniently given in the Code of Criminal Procedure, but it seems clear to me that when all the evidence which is required by a Magistrate is, as we have in the case before us, not given, and when the Magistrate dismisses the complaint on account of the absence of the complainant before the time fixed for the recommencement of the hearing and the production of that evidence, it cannot be said that the trial has been completed.

9. Some remarks have been made regarding the inconvenience which would arise if an accused person, after the dismissal of the complaint, was again required to attend to answer it; but it appears to me that, on the renewal of the complaint, the Magistrate can, before he grants a process, consider u/s 32 whether there is any sufficient ground for proceeding, and unless the complainant can satisfy the Magistrate that by reason of the offence complained of being of a serious character, and that the original complaint should not have been dismissed, the Magistrate would be fully justified in declaring that there was "no sufficient ground for proceeding" and in summarily dismissing the complaint.

10. Under these circumstances I am of opinion that there was no legal impediment to the institution of fresh proceedings by the presentation of a fresh complaint, and that, therefore, the objection taken before us should be disallowed. I trust, however, that the injustice which has resulted from the precipitate order, of the Magistrate dismissing the complaint will be a sufficient warning to him to exercise the discretion given to him by the law sparingly. In the present instance it was an unjust order, not only because the case had been fixed for trial at a later hour, but because the attendance of the complainant does not appear to have been necessary in order to proceed with the hearing. The serious nature of the offence, it being punishable

with imprisonment for two years as well as fine, should also have made the Magistrate hesitate before he terminated the proceedings in so summary a manner, instead of at least allowing it to be called on at a later hour.

11. As regards the legality of the conviction of the accused person on the facts found by the Magistrate, I see no valid ground of objection. I am, therefore, of opinion that the rule should be discharged.

Morris, J.

12. It is much to be regretted that the Legislature have not declared what is the effect of an order of dismissal u/s 124 of Act IV of 1877. As has been pointed out, the case under consideration before the Presidency Magistrate was one which, under the Code of Criminal Procedure, would be called a warrant case. There had been already one hearing in the presence of the accused, and evidence had been taken. A second hearing was fixed for the 22nd September, but though the accused appeared on that date, the complainant did not appear, and so, under the discretion allowed him by the section, the Magistrate dismissed the complaint. It would have been satisfactory had the law made it perfectly clear that in such a case, in spite of the accused appearing twice to hear, and if necessary to answer to, the complaint made against him, and in spite of that complaint being dismissed, he is liable at any future time to fresh proceedings being taken against him on the same subject of complaint. In Section 32, which deals with a complaint being dismissed upon its presentation after the examination of the complainant, a special provision is inserted that such "dismissal shall not prevent subsequent proceedings against, the person complained against." And in cases under chap, viii, that is of inquiry by the Magistrate into cases triable by the High Court, express provision is made in the event of the absence of the complainant after examination of witnesses in the presence of the accused. The Act declares (Section 87) that the absence of the complainant, except when the offence may be lawfully compounded, shall not be deemed sufficient for a discharge, and a discharge is described as "not equivalent to an acquittal, and no bar to the revival of a prosecution for the same offence."

13. In a case of lesser gravity under chap, x, triable by the Magistrate himself, when the circumstances are precisely similar,-that is when the accused has appeared and witnesses have been examined, but the complainant has absented himself,-the words of the section (124) are, the "Magistrate may dismiss the complaint." It might reasonably, therefore, be thought that a distinction is purposely drawn by the Legislature between the order to dismiss and the order to discharge, and that the former carries finality with it, whereas the latter does not. At the same time, whatever may have been the real intention of the Legislature in making this distinction of terms, and in the absence of any qualifying provision to the term "dismiss" in Section 124, I am unable to disregard the other considerations which have been pointed out by my learned colleague. The succeeding section (125) deals with the case of a withdrawal of a complaint of a certain description, and contains

an express provision that the withdrawal under this section of a complaint shall operate as an acquittal of the accused person. The question naturally suggests itself why, if the Legislature intended a dismissal u/s 124 to operate as an acquittal, it did not make an express provision to that effect, as in the case of a withdrawal under the subsequent section. Again, Section 126 prescribes,- "If the Magistrate in any case tried under this chapter finds the accused person not guilty, he shall record an order of acquittal. If the accused person is convicted, the Magistrate shall pass sentence upon him.

14. In the particular case before us the Magistrate, on the 22nd September, came to no finding at all, and recorded no order of acquittal or conviction. Having regard to the language of Section 119, I understand the trial of the case to have commenced on the occasion of the first appearance of the accused,-that is, the date fixed for the hearing, and it was not brought to its legitimate conclusion because of the absence of the complainant-a circumstance which is specially contemplated and provided for in Section 124. When, therefore, these sections (124 and 126) are looked at in conjunction with Section 113, which prescribes that a person who has once been tried for an offence and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, the conclusion seems to be, that unless the antecedent trial has resulted in a conviction or acquittal, there is nothing in the law which prevents a person being tried again for the same offence. Consequently, an order of dismissal is not a bar to the revival of fresh proceedings.

15. On the merits I agree in thinking that there is no ground in law for disturbing the decision of the Magistrate. There is evidence which goes to show that the accused Thompson did not act "in good faith",-that is, with due care and attention,-in retaining and keeping the telegraph message, which on the face of it was addressed to a rival firm.