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**(1872) 07 CAL CK 0013**

**Calcutta High Court**

**Case No:** Miscellaneous Criminal Case, No. 134 of 1872

The Government of  
Bengal

APPELLANT

Vs

RESPONDENT

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**Date of Decision:** July 28, 1872

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**Judgement**

Kemp, J.

There are three grounds taken by the pleader for the petitioner, Baboo Durga Mohan Das. First, that as the offence of which the petitioner has been convicted was an offence committed before the Magistrate, who has convicted the petitioner under s. 174 of the Criminal Procedure Code, the Magistrate ought to have sent the petitioner to be tried by some other Court. The pleader called our attention to several rulings of this Court, one of which applies to the case before us,--namely, the case of Queen v. Chandra Sekhar Roy 5. B.L.R. Cr.100. The second ground taken is that there is no evidence that the petitioner intentionally omitted to attend the Magistrate's Court. We have read the evidence of several witnesses who depose to the due service of the proclamation, and to the fact that the petitioner and all his family had left the family dwelling house, and reading that evidence, and looking to the surrounding circumstances of the case, we think that it cannot be said that the petitioner's absence did not originate in a desire to evade the process. We think it clear that he was intentionally evading process. The last ground taken is that the sentence, taking the whole of the circumstances into consideration, is excessive. We find, that the petitioner was sentenced on the 26th July 1871, and that he remained in jail up to the 1st December 1871, when he was enlarged on bail according to the orders of this Court. Looking, therefore, to the time that he was in jail; and to the fact that he was acquitted of the original charge of riot and murder, we direct that he be released, setting aside the remaining portion of the sentence not yet expired. On the 27th March 1872, Sarwar Jan, by his pleader, again applied, to the High Court (Kemp and Glover, JJ.) for the restoration of his property which had been confiscated by the Magistrate. He stated in his petition that the Magistrate of Furreedpore had, before sentencing him under s. 174 of the Penal Code, confiscated all his moveable property

under s. 184 of the Criminal Procedure Code; that, after the High Court had remitted the remainder of the sentence passed by the Magistrate, the accused applied to the Magistrate, under s. 185 of the Code of Criminal Procedure, praying to be restored to the possession of his confiscated property, as the same had been released by the High Court; but the Magistrate, being of opinion that the High Court had passed no specific orders regarding it, rejected the application; that the accused next appealed to the Judge of Dacca who directed the application to be made to the Additional Judge of Furreedpore, and that the latter officer, on being applied to, refused to interfere on the ground of want of authority, though he was of opinion that the High Court's order included the release of any property attached by the Magistrate. The petitioner prayed that, as the High Court had already released him "from the unjust sentence passed by the Magistrate," the Court would be further pleased to order the property confiscated to be released.

2. On the same day the Court passed an order directing the Magistrate to "restore all the moveable property of the petitioner which may be under attachment."

3. M. Bell, the Legal Remembrancer, subsequently applied on behalf of the Government to the Court (Kemp and Glover, JJ.), objecting to the order of the 27th March. His prayer was thus worded:--

Your Lordships, without calling upon the Government to show cause against the said Mir. Sarwar Jan's application, directed the Magistrate to restore to the petitioner all the moveable property which was under attachment that your petitioner submits that your Lordships' order did not refer to the property of t said Sarwar Jan which had been declared to be at the disposal of Government, but only to such portion of the said Mir Sarwar Jan's property as was under attachment but should your petitioner be in error in supposing that your Lordships order did not embrace the property which, had been declared to be at the disposal of Government, your petitioner would solicit your Lord ships to cancel your ex parte order of the (27th March, and allow your petitioner to be heard in the case.

4. The Court (Kemp and Glover, JJ.) ordered a notice to be served on Mir Sarwar Jan to show cause why the order of the 27th March 1872 should not be cancelled.

5. The Court have not acquitted the accused of the offence under s. 174 of the Penal Code, of which he was convicted, but have merely remitted the flue and the remainder of the term of imprisonment, holding that the conviction was proper. The property referred to by the accused in his petition of the 27th March, and in the order of this Court of the same date, was not property which, had been attached for the realization of the fine, but property which had been attached under s. 184 of the Criminal Procedure Code previous to the passing of the sentence, at the time when the proclamation was issued, calling upon him to appear and answer to a charge of riot and murder; it had also before the conviction, of the accused been declared to be at the disposal of Government. The property can only be restored in the way indicated in s. 185 of the Code; but the

conviction under s. 174 of the Penal Code having been upheld by this Court, the accused cannot avail himself of the provisions of s. 185. The property is at the disposal of Government, and this Court has no control over it. The order of the 27th March was passed, it would seem, in ignorance of the real facts of the case and is one which clearly this Court had no jurisdiction to make.

6. There is no section of the Act under which the Government can ask for a review of the order of the 27th March. *Queen v. Godai Rout* B.L.R. Sup. Vol decides that there can be no review of an order of this Court in a criminal case. If the order be really without jurisdiction it is void ab initio, and the Magistrate need not obey it.

7. In this case Mr. Bell, the Legal Remembrancer, appeared on behalf of the Government of Bengal, and moved the Court to cancel an order passed on the 27th March 1872, on the ex parte petition of one Sarwar Jan.

8. On the 8th July 1872, notice was issued to Sarwar Jan to appear in person or by pleader.

9. It appears that Sarwar Jan was committed by the Magistrate of Furreedpore to the Sessions to take his trial on a charge of riot with murder. Sarwar Jan was convicted by the Sessions Judge, but, on appeal, was acquitted by this Court.

10. Previous to the apprehension and commitment of Sarwar Jan, he had evaded process,--viz., a warrant,--issued against him, and certain moveable property belonging to him which had been attached, was declared to be at the disposal of the Government under s. 184 of the Code of Criminal Procedure. After the acquittal of Sarwar Jan by this Court, he was put on his trial under s. 174 of the Penal Code, and being convicted, was sentenced to imprisonment for a term of six months and a fine of Rs. 1,000, this being the maximum sentence which can be passed under that section.

11. Sarwar Jan then petitioned this Court, and, on the 22nd December 1871, Kemp and ST. Jackson, JJ., were of opinion "that it could not be said that Sarwar Jan's absence did not originate in a desire to evade process;" but on the last ground of his petition, which contained a prayer for mitigation of punishment, those Judges held that, although they confirmed the conviction, they were of opinion, that, as Sarwar Jan had been then some months in jail, and had been acquitted of the graver charge of riot with murder the remaining portion, of the sentence ought to be remitted. Nothing was said as to the remission of the fine, but, doubtless, it was the intention of the Judges to remit it.

12. Subsequently, on the 27th March 1872, Sarwar Jan presented a petition to this Court, praying that as he had been, as he states, "released by this Court from the unjust sentence passed by the Magistrate," the Court would be pleased to direct the confiscated moveable property to be restored to him. On this petition we passed an order directing the Magistrate to restore all the moveable property of the petitioner which may be under attachment

13. It is clear that the pleader who presented this petition did not place the true circumstances of the case before the Court no mention of the fact that the property in question had been declared to be at the disposal of the Government was made <sup>1</sup>, the petitioner was also incorrect in stating that this Court had "released him from the unjust sentence passed by the Magistrate." What the Court did, was to mitigate the sentence, although they upheld the conviction.

14. It has been argued by the pleader for Sarwar Jan that this Court is not competent to review its order, and the case of Queen v. Godai Raut B. L. R., Sup. Vol. was referred to. In that case it is laid down that a review of judgment will not lie from a sentence or judgment pronounced by the High Court, or by a Division Bench of the High Court, on appeal. Bat in this case our Order was passed without notice to the Magistrate or the Government of Bengal, and the facts of the case were, to say the least, not correctly stated. Being, therefore, of opinion that the property which has been declared to be at the disposal of the Government, of Bengal can only be restored to Sarwar Jan by that Government, and that our order of the 27th March 1872, which, though it refers in terms to the property under attachment, clearly contemplated the property in question, was based upon an error in law caused by a misrepresentation of facts, we cancel it.

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<sup>1</sup> See statement contained in petition, Ante p. 344.