(1866) 02 CAL CK 0011

Calcutta High Court

Case No: None

The Queen		APPELLANT
	Vs	
Godai Raout		RESPONDENT

Date of Decision: Feb. 15, 1866

Judgement

Sir Barnes Peacock, Kt., C.J.

The Court is clearly of opinion 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, in a criminal case upon appeal. By cl. 38 of the Charter of the High Court, it is ordained (reads). Regulation IX of 1793, s. 73, has been relied upon in support of the argument in favour of a review of judgment. By that section it was enacted that the Nizamut Adawlut should exercise all the powers which were vested in it whilst it was stationed at Moorshedabad, and superintended by the late Naib Nazim, the Nawab Mahomed Reza Khan. It appears to the Court that the proceedings in criminal cases in the High Court are not regulated by the provisions of s. 73, Regulation IX of 1793, even if that section has not been virtually repealed by the Code of Criminal Procedure. When the Letters Patent declared that the proceedings in all criminal cases shall be regulated by Act XXV of 1861, it clearly could not have been intended to vest the High Court with the powers of the Nizamut Adawlut whilst it was stationed at Moorshedabad and superintended by the Nawab Nazim. It is not shown, and it is not likely, that the Nawab Nazim ever granted reviews of judgment. This is an answer to that portion of the argument of the learned Counsel which depends upon s. 73, Regulation IX of 1793.

2. The next argument to be considered is that which depends upon Regulation XIV of 1810. In the course of his able argument, the learned Counsel, Mr. Cochraue, referred to ss. 3 and 4 of that Regulation. But it appears to us that those sections had a very different object from that of conferring a mere power to review a judgment upon the ground of error, as regards either the facts or the law. As we understand Regulation XIV of 1810, it merely allowed the Court to grant a remission or mitigation of punishment, whenever they should be of opinion that a prisoner,

according to the fatwa of the Mahomedan law officers, or according to the Regulations, was declared liable to a more severe punishment than the case warranted. S. 3 says:-- "In all criminal trials before the Court of Nizamut Adawlut (except for crimes against the State, in which cases the proceedings held upon the trials are required, by s. 5, Regulation IV, 1799, and s. 5, Regulation XX, 1803, to be submitted, with the sentence of the Court, for the orders of Government), if the fatwa of the law officers of the Nizamut Adawlut, or the sentence of an assembly of hill chiefs in Zillah Bhoglepore (held under the provisions of Regulation I, 1796), shall declare a prisoner or prisoners liable to a more severe punishment, than on due consideration of the evidence, and all the circumstances of the case may appear to the Court of Nizamut Adawlut to be just; or if a prisoner or prisoners (not charged with a crime against the State), shall, in any case before the Court of Nizamut Adawlut under the provisions of the laws and regulations in force, be liable to a more severe punishment than may appear to the Court equitable, though not specifically declared by the fatwa of the law officers, or sentence of the hill chiefs in Zillah Bhoglepore; it shall be competent to two or more Judges of the Court of Nizamut Adawlut to grant such remission, or mitigation of punishment, as may appear just and proper, according to the evidence and circumstances of the case, and to pass sentence accordingly; provided that in all such cases the Court of Nizamut Adawlut shall record the grounds upon which a remission or mitigation of punishment may be adjudged, under the discretion hereby vested in that Court, and shall communicate the same to the Court of Circuit (or Magistrate of Zillah Bhoglepore) before whom the trial may have been held, with directions to cause the same to be made known, in open Court, to the prisoner or prisoners concerned." That Regulation did not give the lower Courts the power of reviewing their own judgments, on the grounds therein mentioned. The power was conferred upon the Nizamut Adawlut alone. But if this Court has power to review a judgment under the Code of Criminal Procedure, the lower Court must have that power also. S. 4 of the Regulation did not carry the case further than s. 3. It declares that "the powers vested in the Nizamut Adawlut by the preceding section shall be considered applicable to all cases in which that Court" (meaning the Nizamut Adawlut) "may revise a sentence passed by a Court of Circuit, or Zillah or City Magistrate, or assistant to a Magistrate, in pursuance of s. 24, Regulation IX, 1807, or under any other provision in the Regulations. It is also declared applicable to any cases in which the Court of Nizamut Adawlut may see reason to revise a sentence passed by that Court, and to remit any part of the punishment adjudged. But this discretion shall not be exercised without strong and sufficient grounds to be recorded at largo upon the proceedings of the Court." Now the words "by that Court." have been very properly argued to mean the Nizamut Adawlut itself. But, then, the only power of that Court is that given by the 3rd section, vis., the power to grant a remission or mitigation of a sentence where the fatwa of the law officer, or the general laws and regulations in force, declared a prisoner liable to a more severe punishment than, upon a due consideration of the evidence, and all the circumstances of the case,

might appear to the Court equitable or just. These sections have been altogether repealed by the repealing Act XVII of 1862, and, therefore, no longer exist. But it has been argued by the learned Counsel that there has been one uninterrupted series of authorities, for fifty-two years, to show that the Nizamut Adawlut exercised the power of review under the general powers of the Court. No doubt, when this Regulation existed, the Court had the power to revise sentences for the purpose of mitigating them. But a practice, even for fifty-two years under a particular law, does not show that a right existed independently of that law, or continues to exist after it has been repealed. The sections above referred to did not confer a power upon the Criminal Courts of reviewing their own judgment, upon the ground of their having come to an erroneous conclusion upon the evidence given before the lower Courts, or of their having committed a mistake on a point of law.

3. The Code of Criminal Procedure does not contain any section expressly authorizing a review of judgment in a criminal case after the judgment has been recorded. The Code of Criminal Procedure was passed after the Code of Civil Procedure. The latter contains a section expressly authorizing a review of judgment, but the former contains no corresponding section. From this it may reasonably be inferred that the Legislature did not intend to confer in criminal cases a power similar to that which they had given in civil cases.

4. There were certainly one or two cases cited in which the Nizamut Adawlut did grant a review, not simply under the Regulation of 1810, but generally upon the merits of the case. The cases, however, were not so numerous as to show that there was a uniform uninterrupted practice of granting reviews upon the general merits of the case. There are only three or four cases to which our attention has been called. One of the Circular Orders of the Nizamut Adawlut was referred to by the learned Counsel. The one of 9th May 1861 has also been brought to our notice. The learned Counsel contends that the ruling in that Circular Order is not correct, inasmuch as it was opposed to the principles of Regulation XIV of 1810. The Circular Orders are certainly not authorities binding on the Court. But they are useful for the purpose of showing what was the opinion of the Court as to whether there had been an uninterrupted practice or series of authorities on a particular subject. In the Circular Order of 9th May, 1861, the Sudder Court (Messrs. Raikes, Trevor, Loch, and Steer) declared that the power vested in the Court by s. 4, Regulation XIV of 1810, was "a power of revision with a view of a remission of part of the punishment, and did not extend to the granting a review of judgment or rehearing a whole case, which might eventually end in a sentence opposed to that originally passed." The Circular Order goes on to say that "it is questionable whether the power exists under Regulation law; and should a case come to the notice of the Court in which the sentence originally passed appears erroneous, and the prisoner entitled to acquittal, the proper course, it seems to the Court, would be to report the case to Government, in order that a pardon might be granted to the prisoner."

5. It appears, therefore, that, as late as May 1861, there was a Circular Order of the Sudder Court, stating that the power vested in the Court by virtue of Regulation XIV of 1810 did not allow a review of judgment generally upon the merits, but merely for the purpose of remitting a portion of the punishment when it was considered too severe. Surely that is not (as it was contended in the argument,) contrary to Regulation XIV of 1810. It is clearly in accordance with the words of ss. 3 and 4 of that Regulation.

6. But a further question remains to be considered, viz., whether even supposing the Sudder Court did, before the passing of Act XXV of 1861, allow a review, was the same power of granting reviews in criminal cases continued to the High Court by the Charter, of which cl. 38, which has already been read, directs that its proceedings in criminal cases shall be regulated by the last mentioned Act, XXV of 1861?

7. Whether those cases were correct or not, is not material; even supposing that they were correct, and that the Sudder Court had the power to grant reviews for the purpose of reconsidering their judgments pronounced in appeal, it appears to us that power no longer exists, for the High Court was required by cl. 38 of its Charter to regulate its proceedings in criminal cases by Act XXV of 1861. Now the next question is, does Act XXV of 1861 contain any express or implied power to this Court to review its judgment in criminal cases? We have already pointed out that, notwithstanding there is an express clause in the CPC providing for cases in which reviews of judgment may be allowed, the Code of Criminal Procedure is wholly silent upon the point; and, therefore, if the power is given by the Act, it is simply by inference from certain sections, and those are the sections to which the learned Counsel has alluded. First, he has referred to s. 404. That section contains the following enactment: "The Sudder Court may, on the report of a Court of Session, or of a Magistrate, or whenever it thinks fit, call for the record of any criminal trial, or the record of any judicial proceeding of a Criminal Court, other than a criminal trial, in any Court within its jurisdiction, in which it shall appear to it that there has been error in the decision on a point of law, or that a point of law should be considered by the Sudder Court, and may determine any point of law arising out of the case, and thereupon pass such order as to the Sudder Court shall seem right." That is, that in those cases where an appeal is not expressly given by law, the Sudder Court may, of its own authority, or on the report of a Court of Session or of a Magistrate, call for the record of any criminal case for the purpose of setting the judgment right upon any point of law. But that does not apply to setting a judgment right upon questions of fact; whereas, if the learned Counsel is right in his contention, the Court has the power of altering, upon review, not only a judgment of a subordinate Court, but also its own judgments, upon a matter of fact as well as upon a matter of law. S. 405 was also referred to. It says, "it shall be lawful for the Sudder Court to call for and examine the record of any case tried by any Court of Session 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. If it appear to the Sudder Court that the sentence passed is too severe, the Sudder Court may pass any mitigated sentence warranted by law. If the Sudder Court shall be of opinion that the sentence or order is contrary to law, the Sudder Court shall reverse the sentence or order and pass such judgment, sentence, or order as to the Court shall seem right, or, if it deem necessary, may order a new trial." The Court has two jurisdictions firstly, as a Court of Revision to set right matters of law, even though there may be no appeal; and, secondly, as a Court of Appeal, where an appeal is properly preferred before it. S. 405 applies to the Court as a Court of Revision. There is another section (439) which deals with cases whether brought before the Court as a Court of Revision, or brought before the Court as a Court of Appeal. That section enacts:-- "No trial held in any Criminal Court shall be set aside, and no judgment passed by any Criminal Court shall be reversed, either on appeal, or otherwise, for any irregularity in the proceedings of the trial, unless such irregularity have occasioned a failure of justice." It is contended that the words "or otherwise" show that it is intended that the Court should have the power of reviewing its own judgment. But the section is not an affirmative one, giving jurisdictions but a negative one, directing that a judgment shall not be set right, unless the grounds are such as show that a failure of justice has been occasioned. It appears to us, therefore, that none of the sections which have been cited show impliedly that it was the intention of the Legislature to give to the High Court a power of reviewing its own judgments after they have been duly recorded. We do not mean to say that, if, before a judgment has been recorded, the attention of the Court be called to any matter, showing that there is an error or mistake in the judgment pronounced, the Court has not the power of correcting such error or mistake; nor do we mean to say that the Court has not power to correct clerical errors in its judgments after they are recorded. But we are speaking of cases where the judgment has been recorded, and the Court is called upon to grant a review of its judgment, for the purpose of showing that it ought to have come to a different conclusion, either upon the facts or upon the law. The learned Counsel has pointed out that the consequences would be monstrous if this power of review were not given. But the same argument would apply to trials in the Courts of England. Suppose a jury should find a party guilty, there would be no appeal or writ of error, nor could the prisoner tender a bill of exceptions. The only mode of remedying the evil would be by appealing to the mercy of the Crown. So in the present case, if it should be discovered that the Court has come to a wrong conclusion, either upon a matter of fact or upon a matter of law, the case may be brought to the notice of the Executive Government, either for the purpose of mitigating the sentence, or of pardoning the offender, as the case may require. There would be no end to cases of this kind, if, after the Court has duly recorded its judgment, the matter is to be reopened on the ground that the Court has come to an erroneous conclusion. In civil cases, if an erroneous judgment could not be set right upon a review, there would be no one to appeal to for relief except the opposite party; but in criminal cases the Executive Government can always grant

relief where an error has been committed. It appears to us that it was the intention of the Legislature that the Court should not exercise the power of reviewing its own judgments in criminal cases. In civil cases, where such a power was intended to be given, it was conferred by express words in the Code of Civil Procedure. We understand that, since the High Court has been in existence, there has been one case of a review by a Division Bench; but that case was never argued, and one of the Judges who granted the review (Kemp, J.) when he declared that he did not wish to prevent the case from being reheard, expressly stated that he had doubts as to the power of granting a review. That, therefore, is no precedent even if it were, it does not preclude the Court from considering the question in Full Bench.