(1929) 04 BOM CK 0013

Bombay High Court

Case No: Criminal Application for Revision No. 40 of 1929

Shankar Dattatraya Vaze		APPELLANT
	Vs	
Dattatraya Sadashiv Tendulkar		RESPONDENT

Date of Decision: April 10, 1929

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 247, 403

Citation: (1929) 31 BOMLR 795 : (1929) ILR (Bom) 693

Hon'ble Judges: Patkar, J; Baker, J

Bench: Division Bench

Judgement

Patkar, J.

In this case the complainant filed a complaint on April 11, 1927, against the accused u/s 102 of the Presidency-Towns Insolvency Act alleging that the accused being an undischarged insolvent had obtained credit from the complainant, Summons was issued but was not served, and on April 28, 1927, the complainant was absent in Court. The accused was also not present. u/s 247 of the Criminal Procedure Code the learned Magistrate acquitted the accused. On April 29, the complainant appeared before the Court and requested the Court to set aside the order on the ground that he was unable to be present in Court on April 28, The application of the complainant was rejected. On May 2, 1928, after nearly a year after the order of acquittal, the complainant filed a fresh complaint before another Magistrate. The learned Magistrate held that the accused having been acquitted u/s 247 of the Criminal Procedure Code, a fresh trial of the accused was barred u/s 403 of the Criminal Procedure Code.

2. On behalf of the complainant it is urged that the order of acquittal passed on April 28 is not a legal order, and that the order of acquittal does not bar the trial of the accused under the fresh complaint. It is urged that though summons was issued, it was not served upon the accused and the trial of the accused had not commenced in the previous proceedings. The wording of Section 247 is against the contention of

the applicant. Section 247 of the Criminal Procedure Code says :

If the summons has been issued on complaint, and upon the day appointed for the appearance of the accuse:, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the heating of the case to some other day.

3. In In Re: S.E. Dubash, where in the absence of the complain-ant the Magistrate struck off the complaint, it was held that the proper order u/s 247 was an order of acquittal. u/s 403 of the Criminal Procedure Code:

a person who has once been tried by a Court of competent jurisdiction 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, nor on the same facts for any other offence for which a different charge from the one made against him might have been made u/s 236, or for which he might have been convicted u/s 237.

It is clear that the previous order of acquittal has remained in force and has not been set aside by any order of a superior Court. The word "tried" in Section 403 does not necessarily mean tried on the merits, The composition of an offence u/s 345 of the Criminal Procedure Code, or a withdrawal of the complaint by the public prosecutor u/s 494 of the Criminal Procedure Code would result in an acquittal of the accused even though the accused is not tried on the merits. Such an acquittal would bar the trial of the accused on the same facts on a subsequent complaint. Under the explanation to Section 403 "the dismissal of a complaint, the stopping of proceedings u/s 249, the discharge of the accused or any entry made upon a charge u/s 273, is not an acquittal for the purposes of this section." The composition of an offence u/s 345, the withdrawal u/s 494, or an acquittal under 8, 247 of the Criminal Procedure Code is not included in the explanation to Section 403 of the Criminal Procedure Code, It is urged, however, on behalf of the applicant that though the word "tried" may not mean trial on the merits, yet the trial must commence before an order of acquittal is passed, and that unless a summons is served in a summons case against the accused the trial cannot be said to have commenced against the accused, We are of opinion that as soon as a Magistrate takes cognizance of an offence and an order for summons is issuedi the proceedings have commenced against the accused, and u/s 247 it is not necessary that the summons should be served, or that the accused should be present in Court before an order of acquittal might be passed in his favour on account of the absence of the complainant. Reliance is placed on the decision in In re Muthia Moopan ILR (1911) Mad. 315 which was a case u/s 107 of the Criminal Procedure Code and was not & cage of an offence in which the accused could be acquitted u/s 247 of the Criminal Procedure Code. In Kotayya v. Venkayya ILR (1917) Mad. 977n on which reliance was placed on behalf of the applicant, it was held that the trial of an accused in a summons case cannot be

said to being until the particulars of the offence are stated to the Daitatbaya accused u/s 242 of the Criminal Procedure Code. The view in Kotayya v. Venkayya has been dissented from by the Madras High Court in Re Dudekula Lal Sahib ILR (1917) Mad. 976 where it was held that the withdrawal of a case by the public prosecutor u/s 494 followed by the acquittal of the accused was sufficient to bar the further trial of the accused for the same offence, and that though the accused was not tried on the merits the withdrawal of the prosecution by the public prosecutor after the summons was issued but before it was served on the accused was sufficient to bar the subsequent trial of the accused. In Guggilap v. Paddaya of Palakot ILR (1910) Mad. 253 it was held that when a case was disposed of u/s 247 of the Criminal Procedure Code, the complainant and accused both being absent, the order u/s 247 operated as a bar to further proceedings. The accused who was, however, served with process in that case was held entitled to the benefit of an acquittal u/s 247. In Kiran Sarhar v. Emperor (1923) Cri. L.J. 815 it was held by the Patna High Court that the important matter for an order u/s 247 of the Criminal Procedure Code is the presence or absence of the complainant, that it is not necessary that the accused must be present or must have been summoned to the Court, and that the order u/s 247 is a final order of acquittal which operates as a bar u/s 403 of the Code to the trial of the accused for the same offence. To the same effect is the decision of the Calcutta High Court in Nityananda Koer v. Bahhahari Misra (1923) Cri L.J. 716 where it was held that an order of acquittal passed u/s 247 of the Criminal Procedure Code, so long as it is not set aside by a competent Court is a bar to the fresh proceedings in respect of the same offence. To the same effect is the decision of the Allahabad High Court in Emperor v. Dulla ILR (1922) All. 58. In Ram Mahato v. Emperor (1921) Cri. L.J. 331 it was held that the provision contained in Section 403 of the Criminal Procedure Code is imperative and bars a second trial on a person who has once been acquitted on the same charge, that the section does not make any distinction between acquittals after trial and acquittals under Sections 247, 345 and 494, of the Code, and that so long as an order of acquittal u/s 247 stands, Section 403 bars a second trial on the same charge, no matter whether, the order'' of acquittal is good or bad, legal or illegal. The intention; of the Legislature is-quite clear for it appears from Section 205 of Act X of 1872 that the Magistrate could only dismiss the complaint under the Criminal Procedure Code of 1872 whereas under the Code of 1882 and the subsequent Codes the Magistrate was empowered to acquit the accused. The statutory acquittal was intended to operate as a final bar to further proceedings. The order of acquittal in this case has remained in force and has not been set aside. On these grounds we think that the order of acquittal passed by the Magistrate on April 28 bars a fresh trial of the accused on the same facts under Article 403.

4. On these grounds we discharge the rule.

Baker, J.

5. I agree. The balance of authorities is in favour of the view we have taken. The Madras High Court had at one time expressed a different view, but ultimately the view taken by Abdur Rahim J. in Guggilapu Paddaya of Palakot ILR (1910) Mad. 253 has been accepted in He Dudekula Lal Sahib ILR (1917) Mad. 976. The learned Chief Justice in dealing with the question has pointed out that the English rule of recording decisions on the merits has not been adopted by the Indian legislature which has provided for certain statutory acquittals. It is obvious in view of these particular sections, namely, Sections 247, 345, and 494, that the word "trial"or"tried" in Section 403 cannot mean a trial in the ordinary sense of the word, that is, a decision on the merits, because each of these sections provides for an acquittal even when no evidence whatever has been recorded against the accused. I can find no reason why and how the definition of "tried" does not exist in the section we should insert it in the Code. Section 247 says:

If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused...

6. It is to be noticed that it does not say "upon the day on which the accused appears" but only "the day appointed for'' the appearance of the accused", and if it had been intended that the '' appearance of the accused to answer the charge was necessary, there is no reason why the legislature should not have said so, I would, therefore, with respect agree with the view taken by the Madras High Court in Be Dudekula Lal Sahib.

7. There is another point in this case. This order of acquittal was passed long ago and no proceedings by way of revision were taken by the complainant in order to get it set aside, and any such application for revision of that order would now be rejected as out of time. But the complainant tried to do by a side way what he could not do directly and filed a fresh complaint on the same facts. I do not think that this should be encouraged and that is an additional reason for rejecting the application. But on the law as it stands I am quite clear in my mind that the order of acquittal passed by the Magistrate under Article 247, although the accused had not been served with a summons, is a good order and such an acquittal operates as a bar to any such trial on the same facts.

8. I agree, therefore, that the rule should be discharged.