

Privy Council Appeal No. 103 of 1945
Bengal Appeal No. 17 of 1944

Kumar Singh Chhajor and others - - - - *Appellants*

v.

The King-Emperor - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM
IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 22ND JULY, 1946

Present at the Hearing

LORD SIMONDS

MR. M. R. JAYAKAR

SIR JOHN BEAUMONT

[*Delivered by SIR JOHN BEAUMONT*]

This is an appeal by special leave from an order of the High Court of Judicature at Fort William in Bengal, made on the 24th August, 1943. By its order the High Court directed that the convictions and sentences passed on the appellants by Mr. S. Chaudhury, acting as a special magistrate under the Special Criminal Courts Ordinance, 1942, be set aside, and that the appellants be retried in the district of Hooghly.

The facts leading up to the appeal can be stated shortly. In January, 1943, the accused were tried on a charge of dacoity under section 395 of the I.P.C. by Mr. Chaudhury acting as such special magistrate as aforesaid. On 19th January, 1943, they were acquitted on the charge under section 395, but were convicted under section 403 of the offence of misappropriation and sentenced to pay a fine of Rs.50 each. Subsequently, the High Court at Calcutta, of its own motion, called for the record of the case, and on the 24th August, 1943, a bench consisting of the Chief Justice, Mr. Justice Khundkar and Mr. Justice Lodge, set aside the convictions and sentences passed upon the appellants and ordered that they be retried in the district of Hooghly. The ground upon which this order was made was that in the view of the High Court there had been improper interference by the executive authority with the course of justice.

The only question upon which their Lordships have heard an argument is as to whether the High Court had jurisdiction to make the order which it did make, and the grounds upon which the order was based do not call for discussion. Their Lordships would, however, observe that if they were satisfied that the order of the High Court was within its competence they would be very slow to interfere with the manner in which the High Court saw fit to exercise its jurisdiction.

Under the Code of Criminal Procedure, a High Court possesses very wide powers of revision over the proceedings of inferior criminal courts and, in a case tried under the Code, there can be no doubt that a High

Court acting under the powers conferred by sections 435 and 439, can send for the record of any proceedings and can set aside a conviction and order a new trial by a court of competent jurisdiction subordinate to such High Court. If this case had been tried under the Code it would have presented no difficulty, but it was, in fact, dealt with under two Ordinances promulgated by the Governor-General under section 72 of Schedule IX of the Government of India Act, 1935, and the provisions of those Ordinances must be considered.

Under the special Criminal Courts Ordinance, 1942 (which is hereinafter referred to as "the Ordinance of 1942") it is provided in section 3 that courts of criminal jurisdiction may be constituted under the Ordinance consisting of:—

- (1) Special Judges;
- (2) Special Magistrates, and
- (3) Summary Courts.

Section 4 provides that a Provincial Government may appoint to be a Special Judge for such area as it may think fit any person who has acted for a period of not less than two years in the exercise of the powers of a Sessions Judge or an Assistant Sessions Judge under the Code of Criminal Procedure. Section 5 deals with the jurisdiction of Special Judges; section 6 deals with their procedure, and section 7 with the sentences which they may impose. Section 8 enables proceedings before a Special Judge in specified cases to be submitted for review by a person nominated in that behalf by the Provincial Government, which person is to be chosen from the judges of the appropriate High Court. Section 9 provides that any Presidency Magistrate or Magistrate of the first class, who has exercised powers as such for a period of not less than two years, may be invested by the Provincial Government with the powers of a Special Magistrate under the Ordinance. Section 10 deals with the jurisdiction of Special Magistrates. Section 11 deals with their procedure, and section 12 with the sentences which they may pass. Section 13 provides that where a Special Magistrate passes a sentence of transportation, or imprisonment for a term exceeding two years, an appeal shall lie to the Special Judge having jurisdiction in the area or, if there is no Special Judge, to the High Court in a Presidency town, and elsewhere to the Court of Session. Subsequent sections deal with Summary Courts and are irrelevant to the present appeal. Section 26 is in the following terms: "Notwithstanding the provisions of the Code, or of any other law for the time being in force, or of anything having the force of law by whatsoever authority made or done, there shall, save as provided in this Ordinance, be no appeal from any order or sentence of a court constituted under this Ordinance and, save as aforesaid, no court shall have authority to revise such order or sentence, or to transfer any case from any such court, or to make any order under section 491 of the Code or have any jurisdiction of any kind in respect of any proceedings of any such court".

On the 22nd April, 1943, in the case of the *The King-Emperor v. Benoari Lal Sarma*, the High Court of Calcutta held that the provisions of the Ordinance of 1942 were *ultra vires* and that the Special Courts purporting to act under that Ordinance had no jurisdiction. On the 4th June, 1943, this decision was upheld by the Federal Court of India. To complete the history of the case it may be mentioned that on the 6th November, 1944, upon appeal to this Board, the decision of the Federal Court was reversed and it was held that the provisions of the Ordinance of 1942 were *intra vires* and that the Special Courts acting under that Ordinance had jurisdiction. This decision, however, was given after the order of the High Court which is the subject of the present appeal.

On the 5th June, 1943, that is, the day after the delivery of judgment by the Federal Court in Benoari Lal's case, the Governor-General promulgated Ordinance No. XIX of 1943 (which is hereinafter referred to as "the Ordinance of 1943").

Section 1 provides that the Ordinance shall come into force at once. Section 2 repeals the Ordinance of 1942. Section 3 is in the following terms:—“ *Confirmation and continuance, subject to appeal, of sentences.*—

(1) Any sentence passed by a Special Judge, a Special Magistrate or a Summary Court in exercise of jurisdiction conferred or purporting to have been conferred by or under the said Ordinance shall have effect, and subject to the succeeding provisions of this section, shall continue to have effect, as if the trial at which it was passed had been held in accordance with the Code of Criminal Procedure, 1898 (V of 1898), by a Sessions Judge, an Assistant Sessions Judge, or a Magistrate of the first class respectively, exercising competent jurisdiction under the said Code.

(2) Notwithstanding anything contained in any other law, any such sentence as is referred to in sub-section (1) shall, whether or not the proceedings in which the sentence was passed were submitted for review under section 8, and whether or not the sentence was the subject of an appeal under section 13 or section 19, of the said Ordinance, be subject to such rights of appeal as would have accrued, and to such powers of revision as would have been exercisable under the said Code if the sentence had at a trial so held been passed on the date of the commencement of this Ordinance.

(3) Where any such sentence as aforesaid has been altered in the course of review or on appeal under the said Ordinance, the sentence as so altered shall for the purposes of this section be deemed to have been passed by the court which passed the original sentence ”.

Section 4 deals with pending cases and is not material to the present appeal, and section 5 confers a right of indemnity.

The question as to the jurisdiction of the High Court to make the order under appeal was dealt with very shortly by the High Court in a single sentence contained in the judgment of the learned Chief Justice. He said: “ We have our ordinary powers of revision and under the inherent jurisdiction of the court confirmed to us in section 561A of the Criminal Procedure Code we have powers ‘ to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice ’. If there were any doubt as to our jurisdiction to use those powers, here it is set at rest by sections 3 (2) and 4 of the Ordinance No. XIX of 1943 ”.

In their Lordships’ opinion, the suggestion that the High Court possessed inherent jurisdiction to interfere with the order of the Special Magistrate is quite untenable. At the date when the order of the High Court was made the Special Magistrate had been held to have had no jurisdiction. He was not a court inferior to the High Court and indeed was not a court at all, his order was a mere nullity, and no question of revising it could arise. This was pointed out in the opening passages of the judgment of this Board delivered by Lord Simon in *The King-Emperor v. Benoari Lal Sarma and Others* (1945) L.R.72 I.A. 57. The restoration of the jurisdiction of Special Magistrates by the decision of this Board is irrelevant, since by that time the Ordinance of 1942 had been repealed by the Ordinance of 1943, and, apart from this, clause 26 of the former Ordinance took away all powers of revision by the High Court and no court can claim inherent jurisdiction to exercise powers expressly taken away by legislation. In their Lordships’ view, if the High Court possessed any power of revision in the present case, such power must be found in the Ordinance of 1943.

Section 3 of that Ordinance uses the expression “ sentence passed ” by a Special Judge or Special Magistrate and does not mention “ conviction ”. It has been argued by the Crown that the word “ sentence ” is used in the Ordinance of 1943 in the wider sense as meaning the judgment or decision of the court; on the other hand, the appellants contend that the word is used in the narrower sense of the pronouncement of the punishment imposed by the court. They rely on certain sections of the Code of

Criminal Procedure, e.g. sections 401, 412 and 413, where the word is plainly used in the narrower sense. On the other hand, the Crown relies on sections 405 and 415 where the word is used in a wider sense. Their Lordships do not doubt that the word "sentence" used in relation to the decision of a Criminal Court may bear the wider or narrower meaning according to the context, but the primary meaning of "sentence passed", the expression used in the Ordinance of 1943, is "punishment imposed". The passing of sentence in a criminal trial is a distinct step which follows conviction; it is often postponed to a later date and may be based on further evidence relevant to sentence but irrelevant to guilt. In determining whether the expression is used in the Ordinance of 1943 in other than its primary sense it is necessary to notice the circumstances in which that Ordinance came to be promulgated. At that time, that is to say, in June, 1943, the Governor-General was faced with the situation that many persons had been convicted by officials duly qualified as judges and magistrates experienced in the administration of the Criminal Law, but who had been held by the Federal Court to be without jurisdiction in these particular cases. It may be assumed that the Governor-General would desire to treat the decision of the Federal Court with all respect and that, wide as his powers may be in cases of emergency of legislation by Ordinance under section 72 of Schedule IX of the Government of India Act, 1935, he would be unwilling to promulgate an Ordinance brusquely setting at naught the decision of the Federal Court. On the other hand, as the authority responsible for the safety of India in a very dangerous period, he may well have felt that it would endanger public safety to release all persons who had been convicted and sentenced under the Ordinance. It was in that situation that the Ordinance of 1943 was promulgated, and it is in relation to that situation that it must be construed. Section 2 repealed the Ordinance of 1942 and thereby accepted the result of the decision of the Federal Court whatever might be the fate of a possible appeal against such decision. Section 3 (1) so far as material for the present purpose provides in effect that any sentence passed by a Special Magistrate under the Ordinance of 1942 shall have effect, and continue to have effect, as if the trial at which it was passed had been held in accordance with the Code of Criminal Procedure by a magistrate of the first class exercising competent jurisdiction under the said Code. It is very noticeable that it is the sentence passed which is to be treated as having been lawfully passed under the Code, and nothing is said about the conviction recorded. Conviction of a criminal offence may have serious consequences, apart from the punishment directly imposed for such offence. It may, for example, disqualify a person from holding office, or may affect his status in society. It would require clear language to establish that any legislative authority intended to provide that convictions held to have been illegal by the highest judicial tribunal in the country should, nevertheless, be treated as legal by legislative enactment. Their Lordships can find nothing in the language of section 3 (1) of the Ordinance of 1943 to suggest that the Governor-General intended to do more than to render valid the punishment, imposed by the special courts, leaving the validity of the convictions to rest on judicial decision. Sub-section (2) of section 3 mitigates the rigour of sub-section (1) by providing that any sentence referred to in sub-section (1) shall be subject to such rights of appeal as would have accrued, and to such powers of revision as would have been exercisable under the Code if the sentence at the trial so held had been passed on the date of the commencement of the Ordinance. Sub-section (2) seems to be a necessary corollary to sub-section (1). Sentences rendered valid by sub-section (1) by treating them as having been lawfully imposed under the Code are to be subject to the same rights in appeal and revision as they would have been subject to if actually so imposed. But it is clear both from the opening reference to "any such sentence as is referred to in sub-section (1)" and from its plain intent that the subject-matter of sub-section (2) is the same as that of sub-section (1) and if sub-section (1) is confined to punishments imposed, sub-section (2) is similarly limited. This view of the meaning of the Ordinance of 1943 is in agreement with that taken by a Full Bench of the Bombay High Court in *Kantilal Mangaldas v. King-Emperor* (I.L.R. (1944) Bom. 142) and in disagreement

with the view of a Full Bench of the Chief Court of Sind in *Vishindas Lachmandas v. King-Emperor* (A.I.R. (31) 1944 Sind 1). In their Lordships' opinion the High Court of Calcutta had power in revision to review the sentences passed upon the appellants, to enhance them or to reduce them, but it had no power to set the convictions aside or to direct a re-trial.

Their Lordships will therefore humbly advise His Majesty that this appeal be allowed and that the order of the High Court made on the 24th August, 1943, be set aside.

In the Privy Council

KUMAR SINGH CHHAJOR AND OTHERS

v.

THE KING-EMPEROR

DELIVERED BY SIR JOHN BEAUMONT

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