REVISIONAL CRIMINAL

Before S. S. Sandhawalia, J.

ANOKH SINGH,—*Petitioner*

versus

BAGGU,—*Respondent.*

Criminal Revision No. 1153 of 1967

January 6, 1969.

Criminal Procedure Code (Act V of 1898)—Ss. 259, 417 and 439—Warrant case instituted on a complaint—Charge framed against the accused—Complainant absent on date of hearing—Magistrate passing order of acquittal under section 259—Such order—Whether legal—High Court—Whether barred under section 439(5) to set a side at the instance of the complainant.

Held, that an order of acquittal in a warrant case after framing of the charge against the accused merely on the ground of the absence of the complainant is in contravention of section 259 of the Code of Criminal Procedure. The power to act under this section, apart from other conditions, arises only before the framing of the charge. There is no jurisdiction vested in a Magistrate and there is no authority in law for passing an order of acquittal on the non-appearance of the complainant in a warrant case. In fact acquittal by default is unknown to law in a warrant case. A manifestly incorrect order of discharge cannot become an acquittal merely because the Magistrte in patent contravention of the law, chooses to label it as such. Such an order at its highest is no more than a perverse order of discharge passed upon a clear misconstruction and misapprehension of the provisions of secion 259. (Paras 3 and 6)

Held, that the revisional jurisdiction of the High Court is in its real purpose not a mere power but also a duty and this duty cannot be effectively discharged unless the High Court sees to it that the subordinate criminal Courts conduct their proceedings strictly in accordance with the Code of Criminal Procedure. An order of acquittal passed in a complaint case after framing of the charge on the ground of the non-appearance of the complainant cannot be equated with an order of acquittal on merits and is in fact an illegal order of discharge and the High Court is not debarred under section 439(5) of the Code from entertaining and interfering by way of revision. The wide powers of the revisional jurisdiction are not fettered and the Court can even act *suo motu* to set aside a clearly perverse order. (Paras 7 and 8)

Petition under section 435—439 of the Code of Criminal Procedure for revision of the order of Shri Surjit Singh Raikhy, Additional Sessions Judge, Patiala, dated 23rd June, 1967, rejecting the revision against the order of Shri Joginder Singh Sekhon, Chief Judicial Magistrate, Patiala, dated 30th July, 1966.

BALDEV KAPUR, ADVOCATE, for the Petitioner.

M. S. DHILLON, ADVOCATE, FOR ADVOCATE-GENERAL (PUNJAB) AND B. S. KHOJI, FOR B. S. BINDRA, ADVOCATE, for the Respondent.

JUDGMENT

SANDHAWALIA, J.—The point of law which arises for determination in this revision petition may be formulated in the following terms:—

> "Where a Magistrate in a warrant case instituted on a complaint illegally purports to acquit the accused persons under section 259, Criminal Procedure Code, on the ground of the absence of the complainant, is the High Court barred under section 439, Criminal Procedure Code, to set aside such an order at the instance of the complainant."

(2) The facts giving rise to the petition may now be briefly surveyed. Anokh Singh, petitioner filed a complaint under sections 406, 419, 420, Indian Penal Code, against one Baggu, his wife Smt. Kartar Kaur and his son Mitu. After recording the preliminary evidence and on a *prima facie* case having been made out, the respondents were summoned under section 420, Indian Penal Code. Thereafter the evidence was recorded in the presence of the accused-respondents and a charge under section 420, Indian Penal Code, was duly framed. It appears that the evidence of the parties having been concluded the case was fixed for arguments before the learned Magistrate for the 30th of July, 1966. On the said date the petitioner-complainant could not appear and the learned Chief Judicial Magistrate then proceeded to pass the following order:—

> "The complaint has been again taken up at 4.00 p.m. But neither the complainant nor his counsel have turned up so far. It seems that the complainant has no interest in this complaint and he does not want to proceed with the case. Therefore, I have no other alternative but to dismiss the same and I order accordingly. The accused are hereby acquitted. The file be consigned to the record office. Announced."

Aggrieved by the above-said order, the petitioner then moved the Court of Session at Patiala by way of revision. The learned Additional Sessions Judge by his order of the 23rd of June, 1967, dismissed the same on the short ground that the revision petition was not entertainable in view of the provisions contained in section 439(5), Criminal Procedure Code, read with section 417(3) Criminal Procedure Code. The view of the learned Additional Sessions Judge is that an appeal was competent against the impugned order under

section 417(3) and as no such appeal was preferred by the complainant, the revision is barred by the provisions of the statute. The petitioner has now come up to this Court against the orders of the two Courts below.

(3) Before I examine the rival contentions advanced on behalf of the parties it deserves notice that it has been admitted that the warrant procedure applied to the trial of the complaint. As such the only provision under which the Magistrate could have passed the impugned order is section 259 of the Code of Criminal Procedure which is in the following terms:—

> "When the proceedings have been instituted upon complaint, and upon any day fixed for the hearing of the case the complainant is absent, and the offence may be lawfully compounded, or is not a cognizable offence, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused."

A plain reading of this provision makes it patent that the impugned order of the learned Magistrate was in direct contravention of section 259, Criminal Procedure Code. The power to act under this section, apart from other conditions, arises only before the framing of the charge. In the present case admittedly the charge had been framed and further the recording of the evidence of both the parties also seems to have been concluded. The learned Magistrate was thus clearly precluded from invoking the provisions of section 259, Criminal Procedure Code. Again this section refers only to the discharge of the accused and does not even remotely warrant an acquittal on the ground of the absence of the complainant. That the impugned order of the learned Magistrate was clearly illegal and incorrect is thus self-evident and indeed the learned counsel for the respondent has not seriously controverted this position. That being so the issue is narrowed down to this that even though the order is manifestly in contravention of the provisions of the statute, would the remedy by way of revision under section 439, be deemed to be barred, if the petition is moved by the complainant as has been done in the present case. The gravamen of Mr. Baldev Kapur's argument on behalf of the petitioner is that in fact and in law the impugned order of the Magistrate is a manifestly illegal order of discharge. It is submitted that the only order envisaged under section 259, Criminal Procedure Code, is one of discharge and the mere use of wrong terminology by

the learned Magistrate cannot possibly convert such an order into one of acquittal. In this context it is strongly urged that the powers of the High Court to act by way of revision are wide and indeed it is its duty to set aside a patently illegal order and the same can be done under section 439, Criminal Procedure Code. In the alternative it has been argued that even if it be conceded for the sake of argument that the petition cannot be entertained under section 439(5), Criminal Procedure Code, due to the fact of its having been moved by the complainant-petitioner, the power of the High Court to act *suo motu* is not taken away and the present case is a fit one for the exercise of such a power. Reliance was placed by Mr. Kapur on *Onkarmal Agarwalla* v. *Tulsinath Gogoi* (1). The facts in that case were identical as the trial there also was under section 420, Indian Penal Code, and the Magistrate after framing a charge adjourned the case for defence evidence. As the complainant was absent on the adjourned date, the Magistrate proceeded to pass the following order:—

"Complainant absent. No steps taken. Accused acquitted."

A reference for setting aside this order was made by the Sessions Judge and the learned Judges of the Division Bench in accepting the reference in their revisional jurisdiction observed as follows:—

"The learned Sessions Judge rightly points out that the learned Magistrate has not found the accused not guilty and he could not, therefore, pass an order of acquittal. The learned Sessions Judge also points out that Mr. T. Ahmed has contravened the provisions of section 367(1), Criminal Procedure Code. No points for determination have been set out in the judgment of acquittal, no reasons have been given for the decision.

"We agree with the learned Sessions Judge, for reasons stated by him, that the order of acquittal passed by the learned Magistrate in this case is one which must be set aside."

In *Emperor* v. *Nazo alias Ali Nawaz* (2) in a similar situation the Division Bench consisting of Davis, C.J., and Waston, J., in a short order whilst accepting the reference in their revisional jurisdiction observed:—

"As has been pointed out by the learned District Magistrate, this order is wrong in two respects. Section 259, Criminal

(1) A.I.R. 1950 Assam 81.
(2) A.I.R. 1943 Sind 148.

> Procedure Code, does not provide for an acquittal of an accused person in the absence of the complainant but for his discharge, and such order of discharge can only be made at a time before a charge in the case has been framed. In the present case, the charge had been framed, and the absence of the complainant, therefore, could have no effect, and the Magistrate was bound to proceed to dispose of the case on its merits. We must accept the reference and set aside the order made by the Magistrate and return the case to the Magistrate for further disposal from the stage which had been reached when the order of acquittal was made."

Mr. Kapur had also placed reliance on (1) ***Nahar Singh*** v. *The State* (3) and (2) *Ramphal* v. *Emperor* (4) and (3) *Orilal* v. *Kalu* (5) but the observations in these cases do not relate to the question which falls for determination in the present case.

(4) Mr. B. S. Khoji in reply has contended that the authorities relied upon by the petitioner's counsel are prior to the amendment of the Criminal Procedure Code in 1955. It is submitted that it was only by the said amendment and by virtue of section 417(3), Criminal Procedure Code, that a private complainant was granted the right of appeal against acquittal in a case instituted on complaint. It is, therefore, argued that after the incorporation of this provision in the statute a private complainant is entitled to file an appeal against an order of acquittal and thus any revision preferred by him instead would be hit by the provisions of section 439(5), Criminal Procedure Code. Reliance was placed on a Division Bench authority of this Court reported as *Shiv Parshad* v. *Bhagwan Das and another* (6), wherein it was held that in a case instituted on a complaint, an appeal against an order of acquittal therein at the instance of the private complainant is provided by section 417(3) and if no appeal is preferred then section 439(5) is a bar to the complainant having recourse to a revision petition. It is, however, noticeable that in the said case the acquittal was on merits after full consideration and not under section 259, Criminal Procedure Code. Two other authorities relied upon by Mr. Khoji are

(3) A.I.R. 1952 All. 231.
(4) A.I.R. 1914 Oudh 264.
(5) 18 Cr. L.J. 1006.
(6) A.I.R. 1958 Pb. 228.

Single Bench decisions of the Orissa High Court in (1) *The State* v. *Lachman Murty and another* (7) and (2) *Dukhishyam Sahu* v. *Bidyadhar Sahu* (8). *In Lachman Murty's case* (7), the prosecution had been instituted not by way of private complaint but upon a police report. The trying Magistrate had in two cases allowed the offences to be compounded under section 345(1) and acquitted the accused persons. The State of Orissa instead of challenging the acquittal by way of appeal presented two revision petitions against the orders of acquittal. It was held that as the State had omitted to file a regular appeal under section 417 it could not move the High Court through the Sessions Judge to reverse the order of acquittal in the exercise of its revisional jurisdiction under section 439. The provisions of sub-section (5) of section 439 were invoked as a bar and the learned Chief Justice of that Court held that in such a case the High Court would be precluded from acting *suo motu* also. In *Dukhishyam Sahu's case* (8) a similar view that section 439(5) bars a revision where an appeal has not been preferred was expressed by R. K. Das, J. In both the above cases it is noticeable that the acquittal was not under section 250, Criminal Procedure Code. In *Dukhishyam Sahu's case* (8), the learned Judge had further observed as follows :—

> "No doubt in most glaring cases of injustice the High Court has always the inherent power to interfere in revision even at the instance of the private parties against an order of acquittal and in cases where the private party has no right to appeal, he can file revision under section 439, in cases where the Government fails to exercise its right in preferring an appeal against an order of acquittal."

(5) The examination of the above cases discloses that the preponderance of authority is that in cases of acquittal on merits and in accordance with law if the aggrieved party has the right of appeal and omits to exercise the same, the High Court may not entertain a revision at the instance of such a party in view of the provisions of section 439(5), Criminal Procedure Code, but the crucial question in the present case which still requires determination is the true import of the impugned order and whether it could be equated with an order of acquittal on merits and in accordance with law.

(6) The procedure for the trial of warrant cases is laid out in sections 251 to 259 contained in Chapter 21 of the Code of Criminal

(7) A.I.R. 1958 Orissa 204.
(8) A I.R. 1966 Orissa 45.

Procedure. It is well settled that the provisions of the Criminal Procedure Code, are exhaustive on the subject for which specific provision has been made therein. The only provision which provides for an acquittal in a warrant case is section 258(1) which is in the following terms:—

> "If in any case under this Chapter in which a charge has been framed the Magistrate finds the accused not guilty, he shall record an order of acquittal."

This has always been construed as an acquittal on a consideration of the merits of the case (admittedly there has been no consideration of merits in the present one). The Legislature has under certain conditions provided for an acquittal for the non-appearance of the complainant in summons cases only under section 247, Criminal Procedure Code. Clearly by design no such provision exists in Chapter 21 and the policy behind this is patent in so far as that the legislature never intended that there should be an acquittal for mere non-prosecution in serious criminal cases. Acquittal by default is thus unknown to law in a warrant case. In *Har Kishan Das* v. *Emperor* (9) considering an identical question Bannet, J., has observed as follows:—

> "If no charge-sheet had been framed and the complainant had been absent, as this offence under section 420, Indian Penal Code, is one which may be lawfully compounded with the permission of the Court under section 345(2), then section 259 would have applied and the Magistrate might in his discretion have discharged the accused. But there is no section which empowers a Magistrate to act in such a manner after charge-sheet has been framed in the trial of a warrant case."

Again in *Parsa* v. *Mst. Parsini* (10) Passey, J., in construing the provisions of sections 259, 258 and 257 of the Criminal Procedure Code observed as follows:—

> "I have already held in another case that the term 'dismissed for default' is unknown to the Code of Criminal Procedure, that no criminal case can be dismissed for default of appearance of any party or witness and that Magistrates should not indulge in that slip-shod method of disposing of cases.

(9) A.I.R. 1937 All. 127.
(10) A.I.R. 1954 Pepsu 80.

The trial Magistrate has committed another blunder in making an order of discharge after the accused had been charged. The proper order in that case should have been one of acquittal if otherwise justified, and in making an order of acquittal, the merits of the case, as they stood on the date of the order, should have been considered and discussed. The Magistrate did not at all apply his mind to the merits."

It, therefore, follows that there is no jurisdiction vested in a Magistrate and there is no authority in law for passing an order of acquittal on the non-appearance of the complainant in a warrant case. In fact such an order is unknown to the Criminal Procedure Code. I am, therefore, of the view that the impugned order cannot be treated as an order of acquittal even though it purports to be so. A manifestly incorrect order of discharge cannot become an acquittal merely because the Magistrate in patent contravention of the law chooses to label it as such. As has been well settled the substance is greater than the form and the impugned order at its highest is no more than a perverse order of discharge passed upon a clear misconstruction and misapprehension of the provisions of section 259 and thus amenable to the revisional jurisdiction of this Court. This view is supported by the observations of H. R. Krishnan, J., in *Kanhaiyalal* v. *Bhanwarilal and another* (11). In that case two accused persons were on trial on charges under sections 323 and 324, Indian Penal Code. The hearing had been completed and the date had been fixed for argument. On the adjourned date the complainant was absent and whilst refusing a prayer for adjournment the Court proceeded to acquit the accused purporting to act under section 347, Criminal Procedure Code. The aggrieved complainant thereupon filed an application seeking leave to move an appeal against the order of acquittal under section 417(3) of the Code of Criminal Procedure. It was held that the Magistrate had no jurisdiction to acquit as one of the charges was under section 324 and the case was a warrant case and further that the adjournment had not been granted for a hearing but the case had been put up for arguments, in other words, to enable the respective lawyers, if they chose, to explain the evidence and the circumstances brought on record. On these facts it was held that the order of the Magistrate could not be deemed to be an order of acquittal and no appeal against it would lie. It was observed as follows:—

"I find, therefore, that the Magistrate's order under section 247, Criminal Procedure Code, is really one without jurisdiction

(11) A.I.R. 1958 M.P. 379.

The present application is dismissed as this is not a case for appeal. It is open to the complainant to file a proper application in revision in the manner provided in the Criminal Procedure Code."

(7) The ancillary question that remains for consideration is that even assuming the bar of section 439 applies, whether the High Court cannot set aside the order whilst acting *suo motu*. An identical question was also considered in *State of Mysore* v. *Md. Jalal and another* (12) where after consideration of the authorities A. Narayana Pai, J., was of the view that the High Court would not be debarred from acting under section 439, Criminal Procedure Code. In this authority the view of the Orissa High Court in *Lachman Murty's case* (7) on which reliance was placed by Mr. Khoji was also exhaustively examined and dissented from and on examination of the ratio therein it was observed as follows:—

"If the High Court could act in revision at the instance of a party, who is not directly interested, it is little difficult to accept the proposition that the moment the party directly interested brings the matter to the notice of the High Court, the High Court loses all power of exercising its revisional jurisdiction.

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It will, therefore, be a startling proposition that the High Court should be disabled from discharging this very necessary duty simply because a party who could and should have appealed makes the mistake of filing a revision."

The learned Judge had also placed reliance on the following observations of Mukerji, J., in the Full Bench authority reported as *Shailabala Devi* v. *Emperor* (13)—

"In this particular case before us, the Crown Counsel has admitted that the conviction is illegal. It would then be the duty of the Court to interfere, it being immaterial—it being absolutely immaterial for the purpose who gives the information on which the Court is to act."

Adverting to the power under section 439, Criminal Procedure Code,

(12) A.I.R. 1959 Mysore 54.

(13) A.I.R. 1933 All. 678.

it was rightly observed that the revisional jurisdiction of the High Court is in its real purpose not a mere power, but also a duty and this duty cannot be effectively discharged unless the High Court sees to it that the subordinate criminal Courts conduct their proceedings strictly in accordance with the Code of Criminal Procedure.

(8) I would, therefore, hold that the impugned order in the present revision cannot be equated with an order of acquittal on merits and is in fact an illegal order of discharge and the High Court is not debarred under section 439 (5), Criminal Procedure Code, from entertaining and interfering by way of revision in the present case. I am further of the view that in any case the wide powers of the revisional jurisdiction are not fettered and the Court can act *suo motu* to set aside a clearly perverse order like the present one.

(9) This revision is, therefore, allowed and the impugned order is set aside and the case is remanded back to the Magistrate for trial in conformity with the relevant provisions of the Criminal Procedure Code from the stage of the dismissal of the complaint. The parties are directed to appear before the trial Court on 27th January, 1969.

R.N.M.

CIVIL MISCELLANEOUS

Before R. S. Narula and R. S. Sarkaria, JJ.

BEANT SINGH BATH,—*Petitioner*

versus

THE UNION OF INDIA AND OTHERS,—*Respondents.*

Civil Writ No. 2914 of 1968

January 15, 1969

Punjab Reorganisation Act (XXXI of 1966)—Sections 82(2) and 82(4)—Exercise of powers under—Central Government—Whether required to act in a judicial manner—Such powers—Whether purely administrative—Allocation of Government employees to different successor States—Personal hearing to the employees concerned before decision of their final allocation—Whether necessary—Section 82(1), (2) and (4)—Whether ultra vires *Article 14, Constitution of India—Section 82(4)—Expression "services"—Whether includes service in the making—Punjab Forest Subordinate Service (Executive Section) Rules (1944)—Rules 2(j), 11 and 15—Persons selected for training and still under training on the appointed day of reorganisation—Such trainees— Whether "serving in connection with the affairs of existing State of Punjab"—Central Government—Whether duty bound to integrate them in one of the successor States.*