

Jiban Molla Vs. Emperor

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Court : Kolkata

Decided On : May-12-1933

Reported in : AIR1933Cal551

Appellant : Jiban Molla

Respondent : Emperor

Judgement :

Panckridge, J.

1. The petitioner in this case was arrested in consequence of a search held on 23rd August 1931, in the course of which various explosive substances were discovered. On 4th January 1932, the Local Government by an order in writing made under Section 30, Bengal Emergency Powers Ordinance 1931, directed that he should be tried on charges under the Explosive Substances Act 1908, by Maulvi Abdul Majid, a Magistrate of the First Class invested with the powers of a Special Magistrate, under Section 29 of that Ordinance. The Magistrate-convicted the petitioner under Section 5, Explosive Substances Act, and sentenced him to undergo rigorous imprisonment for three years. On 30th May 1932, the Sessions Judge set aside the conviction and sentence and directed the retrial of the petitioner. The Magistrate retried the case and on 1st October 1932 again convicted the petitioner under Section 5 and imposed a sentence of two years and six months' rigorous imprisonment. The petitioner again appealed to the Sessions

Judge who dismissed his appeal on 15th December 1932. On 20th February 1933, the petitioner obtained this Rule to show cause why his conviction and sentence should not be set aside on the ground that

after the order of retrial the Magistrate had no jurisdiction to try your petitioner as a Special Magistrate under the Bengal Emergency Powers Ordinances of 1931 and 1932.

2. It is pointed out that the 1931 Ordinance having been made and promulgated on 1st December 1931, automatically lapsed on 31st May 1932, that is to say, on the day immediately succeeding the day on which the Sessions Judge directed a retrial. To meet this objection to the legality of the subsequent proceedings the Crown relies on Section 4(1), Bengal Emergency Powers Ordinance 1932, which provides that where before the expiration of the Bengal Emergency Powers Ordinance 1931 an order has been made thereunder for the trial of any person by a Special Magistrate but the trial has not begun, or when at such expiration the trial of any person is proceeding before a Special Magistrate but has not been completed, the offence may be tried or the trial may be completed as the case may be by such Special Magistrate, and such Special Magistrate shall continue to have and to exercise for the purpose of such trial all the powers with which he was invested under the said Ordinance.

3. The petitioner argues that the provisions of Section 4(1) cannot apply to the circumstances of this case as they existed at the time of the expiration of the 1931 Ordinance. It cannot be said that the trial had not begun, nor can it be said that though begun it had not been completed. On the contrary the trial had been begun and had been completed when the Special Magistrate convicted the petitioner for the first time. The petitioner's argument, as we think his counsel was disposed to admit, involves the proposition that the trial and the retrial are distinct and separate proceedings and that the latter can from no point of view be treated as a continuation of the former. If this is correct the expiration of the 1931 Ordinance after the first conviction is not a matter of great importance because the effect of the order of 4th January 1932 was exhausted when the petitioner's trial terminated on his first conviction. Even if the 1931 Ordinance had not expired a fresh order

under Section 30 would have been necessary if it was thought desirable that the retrial should be before a Special Magistrate. Counsel for the petitioner rightly points out that where a surety gives a bond that an accused person shall appear for his trial before a Court of Session, there is no obligation to produce him before the Court for his retrial should a retrial be directed. In our opinion however 'try' and 'trial' have no fixed or universal meaning, but they are words which must be construed with regard to the particular context in which they are used and with regard to the scheme and purpose of the measure concerned.

4. Thus, though generally speaking a trial and an appeal are different proceedings, a Sessions Judge hearing an appeal against a conviction under Section 210,1. P.C., was held to be 'trying' the appellant within the meaning of Section 487, Criminal P.C.: *Madhab Chandra v. Novodeep Chandra* (1889) 16 Cal 121. In *Emperor v. Nirmul Kanta Boy* AIR 1914 Cal 901, Stephen, J., held that where an accused was tried by a second jury under Section 306, Criminal P. C, he was not tried again' within the meaning of Section 403, Criminal P.C. Having regard to the scheme and purpose of the Bengal Emergency Powers Ordinance 1931 we consider that an order for the trial of any person by a Special Magistrate made under Section 30 clothes such Magistrate with jurisdiction to retry the case where an appellate Court directs a retrial by him under Section 423(1)(f), Criminal P.C., and that the trial cannot be said to be completed until the Magistrate has carried out the directions of the appellate Court and finally disposed of the case. This being so we are of opinion that the petitioner's objection to the jurisdiction of the Special Magistrate fails and we discharge the Rule.

Patterson, J.

5. I agree.