

CROWN CASES  
DECIDED IN THE  
ORIGINAL AND APPELLATE JURISDICTIONS  
OF THE  
HIGH COURT OF BOMBAY.

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REG. v. BHA'SKAR K. KHA'RKAR.

*Penal recognizance to keep the peace—Irregular order by Magistrate—  
Appeal—Reference—Crim. Proc. Code, Secs. 280, 295, 296, 409, 429,  
and 434.*

There is no appeal to the Court of Session from an order made by a Magistrate, under Sec. 409 of the Crim. Proc. Code, requiring a penal recognizance to keep the peace under Sec. 230.

The Court of Session may, however, in such case, under Sec. 434 of the Code, call for and examine the record of the Court below; and, if it shall be of opinion that the order of the Magistrate is contrary to law, refer the proceedings for the orders of the High Court.

There is no provision of the Crim. Proc. Code which makes it lawful for a Court of Session to call for and examine the record of a case tried by a Sub-Magistrate, where no sentence or order has been passed thereon by the *immediately* subordinate Court of the Magistrate.

A conviction of house-trespass by a subordinate Magistrate was reversed, on appeal, by the Magistrate of the District, who, moreover, directed the subordinate Magistrate to take a recognizance bond in the sum of Rs. 50 from the accused, that he would not, for one year, enter the house, and would not commit a breach of the peace :—

*Held* by the High Court that the order directing the recognizance bond to be taken should be set aside, as having been improperly made by the Magistrate in the absence of the accused, and upon the suggestion of his adversary.

*Seemle* the order was also illegal, as not authorized by Sec. 280, or any other section of the Code of Criminal Procedure.

THE record and proceedings in this case were referred for the orders of the Court, under Sec. 434 of the Criminal Procedure Code, by R. H. Pinhey, Session Judge of the Konkan, by whom the following judgment, in which the facts are fully stated, was recorded :—

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"This is a petition against an order of E. P. Down, the Acting District Magistrate of Tháná, dated the 11th of August 1865, whereby the petitioner was required to furnish recognizance, in the sum of Rs. 50, that he would not enter a house, or make a disturbance therein, for the space of one year.

"The consideration of the petition was postponed from time to time, at the request of the petitioner, to enable him to entertain a pleader, on the ground that he had not yet been able to secure the assistance of any pleader in this court, in consequence of his adversary being his brother, Mádhavráv Krishṇa Khárkar, a pleader in the High Court at Bombay and also in this Court. At last the petitioner having secured the assistance of a pleader, the petition was heard and argued on Wednesday, the 3rd of January 1866, and judgment was postponed.

"*Firstly.*—The petitioner appeals against the order of the Magistrate, under Sec. 409 of the Code of Criminal Procedure; and prays that so much of that order as requires him to furnish security may be reversed.

"*Secondly.*—The petitioner prays the Court of Session to refer the Magistrate's proceedings to the High Court, under the provisions of Sec. 434 of the Code, together with the opinion of the Court, that the Magistrate's proceedings were irregular, and his order contrary to law.

"I. I reject the appeal of the petitioner; because I am of opinion that no appeal will lie to the Court of Session, under Sec. 409 of the Code of Criminal Procedure, from the order of the Magistrate complained against. By Sec. 409 an appeal may be preferred to the Court of Session by a person (1) who has been convicted on a trial held by the Magistrate of the District, or by a F. P. Magistrate; or (2) who has been required by such Magistrate, under Sec. 295 or Sec. 296 of the Code of Criminal Procedure, to give security for good behaviour. The petitioner in this case was not convicted by the Magistrate of the District; nor was he required by such Magistrate to give security for good behaviour under

Sec. 295 or Sec. 296. The section of the Code under which the petitioner was required (not to give security, as is erroneously stated at the bar of the Court, but) to give a penal recognizance to keep the peace, is not cited in the Magistrate's order; but it is apparent on the face of the order that the order to give a penal recognizance, whether right or wrong, was made under Sec. 280. From this order there is no appeal to the Court of Session.

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“II. I am of opinion, however, that the petitioner has shown such irregularity in the Magistrate's procedure, and such illegality in the Magistrate's order, as require that I should refer the case for the orders of the High Court, under Sec. 434 of the Code of Criminal Procedure.

“In order to the more clear understanding of the reasons on which my opinion is based, I must state, briefly, the nature of the proceedings that preceded the Magistrate's order, as well as the exact form in which that order is drawn out.

“The two brothers, Mádhavráv and the petitioner Bháskaráv, occupied one house up to some time in March last. The elder brother, Mádhavráv, says that the house is his own sole property; and that he allowed his younger brother to live with him, because he was his brother. About March last the brothers quarrelled, and the elder, Mádhavráv, turned the petitioner out of the house. After this both brothers complained to the First Class Sub-Magistrate at Tháná, Ráv Báhádur Náráyan Rávji. Mádhavráv complained against the petitioner for having committed house trespass, an offence punishable under Sec. 448; and the petitioner complained against Mádhavráv for having committed wrongful restraint, an offence punishable under Sec. 341 of the Penal Code. The complaint of the petitioner against Mádhavráv was dismissed; but the petitioner was convicted of house trespass, and sentenced to pay a fine of Rs. 2. The petitioner appealed to the Magistrate of the District, who reversed the conviction and sentence recorded by the First Class Sub-Magistrate; and proceeded to pass the order, to which the petitioner objects.

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“ Before stating the precise nature of this order, I must notice that, although the proceedings held on the complaint of Mádhavráv are before the Court, I have been obliged to take the statement of the petitioner’s pleader regarding the proceedings instituted by his client (a statement the correctness of which is not impugned by the Government prosecutor, who appears to support the Magistrate’s order), because from an order of the Magistrate presented to this Court it appears that the Magistrate refused to give the petitioner copies of his case ; and the law does not allow the Court of Session to call for the record and proceedings in a case tried by a Sub-Magistrate.

“ I now proceed to quote the Magistrate’s order *verbatim*—first noticing that the order is preceded by the single word रद्द (cancelled) in pencil.

[Here follows copy of the order in Maráthí.]

“ The literal translation of which is as follows :—

“ “ Ordered—The conviction is reversed. The amount of the fine is to be repaid and an answer written to petitioner.

“ “ To Ráv Báhádur, First Class Sub-Magistrate of the Sáshtí Talúká. After recording the papers, make a report. 11 August 1865.

“ “ *Postscript*.—Restore the amount of the fine. The same date. *Postscript*.—Take a recognizance bond in the sum of Rs. 50 from the accused, that he will not, for one year, enter the house and will not commit a breach of the peace. The same date.

(Signed) E. P. DOWN.’

“ The objections taken to the Magistrate’s order by the petitioner’s pleader are :—(1) As petitioner was not convicted before the Magistrate, and no such recommendation was made by the Sub-Magistrate, the order to give a recognizance was not according to the provisions of Sec. 280 of the Code of Criminal Procedure. (2) As the order of the Magistrate, and his reasons for making it, were not written by the Magistrate in English, but by the Magistrate’s kárkún in Maráthí alone, the order is illegal under Sec. 429 of the Code. (3) As the house in which the petitioner and his brother

lived was their joint property, and the Magistrate upset the Sub-Magistrate's conviction, the Magistrate was not competent to call on the petitioner to give a recognizance. (4) The order of the Magistrate on appeal was worse than the order appealed against. (5) The Magistrate's order was added to in the absence of the petitioner, and after the final order, as it originally stood, had been made known to the petitioner. (6) The words 'not to enter the house' are beyond the Magistrate's competence, and as both the brothers were complainants, the Magistrate should have taken recognizance from both, if from either.

"The first objection taken by the petitioner's pleader appears to me a good one. By Sec. 280 of the Code of Criminal Procedure, when a person is convicted, before a Court of Session, or a District Magistrate, or a F. P. Magistrate, of rioting, assault, or other breach of the peace, or with abetting the same, or with assembling armed men, or taking other unlawful measures with the evident intention of committing the same, such Court or Magistrate may then require a penal recognizance, for keeping the peace, from the person so convicted; and by the latter part of the same section, when a person is convicted of any such offence before a Sub-Magistrate, the Magistrate of the District may, on the report of the Sub-Magistrate, require such recognizance to be given. In the present case the petitioner was neither charged with, nor convicted of, any of the offences mentioned in Sec. 280; the petitioner was not convicted before the Court of Session, or a F. P. Magistrate; the Sub-Magistrate, before whom the petitioner was convicted, did not recommend the Magistrate to order that a penal recognizance should be taken from him; and the conviction, recorded against the petitioner, was reversed by the Magistrate, on appeal. I am of opinion, therefore, on the first ground urged by the petitioner's pleader, that the orders of the High Court must be solicited.

"The second objection, that the Magistrate's order is illegal, because neither it, nor the reasons for making it, are written in the English language as required by Sec. 429 of

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the Code of Criminal Procedure, is also, in my opinion, a good objection; but it is not one which I should have felt called on to report for the orders of the High Court, as it is not one affecting the merits of the case. The third objection is also a good one. It is in fact included in the first.

“ The fourth objection requires no comment. The Magistrate did not on appeal enhance the sentence of the lower court; but he reversed the conviction, and passed an order, which I think was in itself illegal. It is of course in a certain sense true, that the petitioner was better off before his appeal than after it resulted in his favour; for it were better for him to pay Rs. 2 fine, than to bind himself not to enter his house for a year. But this consideration is not one of which I need take further notice in disposing of the present petition.

“ The fifth objection is rather a remarkable one, when taken in consideration with the wording of the Magistrate’s order, and the pencil note above it. The allegation of the petitioner’s pleader is, that, when his appeal was tried by the Magistrate, the only order given was one simply reversing the conviction recorded by the Sub-Magistrate; and that the order to which the petitioner objects was made, afterwards, by the Magistrate, in the absence of the petitioner. There are *prima facie* grounds for believing this assertion to be true, because the word written in pencil would appear to represent the order received by the kárkún from the Magistrate at the time the appeal was disposed of; while that part of the order to which petitioner objects is not contained in the copy of the Magistrate’s order given by the Magistrate to the petitioner filed in this court, and is in fact tacked on to the Magistrate’s original order in the shape of a second *postscript*. I do not, however, see any necessity for my inquiring further, and certainly when and under what circumstances the second *postscript* was written, as I am of opinion that the order therein contained is itself illegal.

“ The sixth objection is also in my opinion a good one. Supposing, for argument’s sake, that, although after the Magistrate reversed the conviction recorded by the Sub-

Magistrate, he was competent to require a penal recognizance from the petitioner for keeping the peace, under the provisions of Sec. 280 of the Code, I am of opinion that the words in the Magistrate's order which required the petitioner *not to enter the house* were *ultra vires*.

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“For the reasons given above I refer all the proceedings now before the Court of Sessions for the orders of H. M.'s High Court of Judicature at Bombay, under the provisions of Sec. 434 of the Code of Criminal Procedure.”

The case came on for final disposal this day before SAUSSE, C.J., and TUCKER, J.

PER CURIAM :—The Court set aside so much of the order made by the Acting Magistrate of the District on the 11th of August 1865 as directs the First Class Subordinate Magistrate to take a recognizance bond in the sum of Rs. 50 from Bháskar Krishna, that he would not for one year enter the house in the proceedings mentioned, and would not commit a breach of the peace; such order having been improperly made, upon the application of one party, and in the absence of the other party.

The Registrar is directed to inform the Magistrate that the Chief Justice and Judges desire to call his serious attention to the very great neglect of duty which has been exhibited by him in these proceedings, in making an order against one party in the absence of that party, and upon the suggestion of his opponent. Such conduct strikes at the very root of the administration of justice; and the Chief Justice and Judges hope that no similar instance of dereliction of duty on the part of this Magistrate may come under their observation, as in that case they will feel bound to bring the conduct of the Magistrate to the special notice of the Government of Bombay.

The Chief Justice and Judges also desire to call the Magistrate's attention to Sec. 429 of the Code of Criminal Procedure, and to his omission to comply with its provisions.

*Order set aside.*