FULL BENCH.

REVISIONAL CRIMINAL.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Nánábhái Haridás, Mr. Justice Birdwood, and Sir William Wedderburn, Bart., Justice.

1885. *October 5.*

QUEEN-EMPRESS *v.* C. P. FOX.

Revisional power—Review of judgment—High Court—Criminal Procedure Code (Act X of 1882), Secs. 369 and 439.

A Division Bench of the High Court has not, under section 439 of the Code of Criminal Procedure (Act X of 1882), any power to review its judgment pronounced on revision in a criminal case.

Queen-Empress v. *Durgá Charan* (1) followed.

THE accused, C. P. Fox, was convicted by F. L. Charles, Magistrate (First Class), Dhárwár, under section 25 of the Railway Act, IV of 1879, of the offence of negligently omitting, in contravention of No. 8 of the Railway Rules, to carry a lamp on his trolly, thereby causing the death of one Gangárám, and injuring two other men. He was sentenced to pay a fine of Rs. 50, or, in default, to undergo simple imprisonment for one month.

The High Court on a revision of the criminal calendars sent for the record and proceedings of the case, and gave notice to the accused person to show cause why the sentence passed on him should not be enhanced. The accused not having appeared either in person or by pleader, the High Court (NA'NA'BHA'I HARIDA'S and WEDDERBURN, JJ.,) on the 27th of August, 1885, made the following order:—

"We have called for the record and proceedings to consider whether the sentence passed upon the accused is adequate to the offence held proved against him. There is no doubt as to the facts, as the convicting Magistrate observes, and the accused has pleaded guilty. The consequence of his omission was a collision between a material train and the trolly, resulting in the death of one Gangárám, who was on the trolly, and some injury to two other men. He admits that he has been supplied with a copy of

* Criminal Review, No. 200 of 1885.

(1) I. L. R., 7 All., 672.

the rules made by the Railway Company. A copy of those rules is recorded in this case (exhibit 3.) Rule 8 of those rules, which the accused disobeyed, requires that "when a trolly is running at night, a red light should be shown in each direction." This being the rule, it should have been implicitly obeyed. He was bound to carry his lights even though he may have thought that there was no chance of a train being on the line. For this offence a fine of Rs. 50 appears to us quite inadequate; and we consider that some term of imprisonment should be imposed. But, as regards the amount of imprisonment, we take into consideration the fact that the line was still under construction, and not as yet opened for traffic, so that the safety of the general public was not endangered. In the public interest, therefore, a very severe sentence is not required. We, therefore, direct that the accused suffer one month's simple imprisonment, in addition to the fine he has already paid."

Branson, instructed by *F. S. Hore,* on the 10th September, 1885, applied to the Court to review its judgment and reverse the conviction and sentence, on the ground that the rule, which the accused was found to have disobeyed, was one which had not received legal sanction, and was illegal, and that, therefore, both the original and enhanced sentences were equally illegal.

The Court, feeling a doubt as to its power to revise its decision, referred the following question to the Full Bench :—

"Whether a Division Bench of the High Court has, under section 369 or 439 of the Code of Criminal Procedure (X of 1882), or otherwise, power to alter or review its own decision in a criminal case."

Branson and *Inverarity,* instructed by *F. S. Hore,* appeared before the Full Bench.

Branson.—The original conviction is illegal, being founded upon rules not sanctioned by Government, as required by the Act, and, therefore, the enhancement of the sentence is also illegal. The Court has the power of reviewing its own decision. Assuming the original sentence to be illegal, it is manifestly unjust that the Court should first perpetrate an illegality and then confess

1885.

QUEEN-EMPRESS v. C. P. FOX.

its inability to remedy it. The Courts in England can revise their sentences—*King* v. *Waddington*(1); Archibald's Criminal Pleading, 190. The sessions are regarded as one day, and the Court can alter sentence at any time during the Sessions.

I say, under the Codes of 1861 and 1872, the Court had the power of revision over subordinate Courts—section 404 of Act XXV of 1861; section 297 of Act X of 1872. The section of Act X of 1882 which corresponds with these sections, is section 489. A comparison of these provisions shows that the old Codes contemplated only the revision of the proceedings of subordinate Courts; whereas section 439 omits the words "Subordinate Courts" and thus enlarges the High Court's sphere of revision by including the proceedings of its own Judges or Benches. The only limitation to this power is that mentioned in the last clause of section 439, which says: "Nothing in this section applies to an entry made under section 273, or shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction." This contention is strengthened by the provision of section 369, which says: "No Court, other than a High Court, when it has signed its judgment, shall alter or review the same, except as provided in section 395, or to correct a clerical error."

But, I submit, the section also gives power to revise the revisional proceedings. This section gives the High Court the power of revision in cases before the Presidency Magistrates, cases reserved by a Judge of the High Court on the Original Side sitting at sessions, cases called for by it from the lower Courts, and *any other* cases which may come to its knowledge. The section excludes the words which limited the previous jurisdiction to the proceedings of subordinate Courts, and includes a paragraph which is inexplicable, if it was not intended that the revisional power shall apply to the High Court. Neither this section nor section 369 has been rightly construed by Broadhurst, J., in *Queen-Empress* v. *Durgá Charan*(3). The limitation of section 369 to questions reserved by the Judges of the High Court under

(1) 1 East, 143.

(2) I. L. R., 7 All., 672.

1885.

QUEEN-EMPRESS v. C. P. FOX.

section 434 is not justified by the words of the Code. It is inconceivable that the Legislature should have intended that the High Court, if satisfied that by an oversight on the part of counsel, or omission on its own part to notice a relevant fact in the proceedings, its judgment has gone wrong and has produced a failure of justice, should not be able to vacate the judgment.

[SARGENT, C.J.—The aggrieved party may invoke the exercise of the prerogative.]

Government can grant a pardon; it cannot reverse a conviction. Besides, cases are conceivable where Government interference would be absolutely impossible. Where the facts are not at all presented, or where they are misrepresented, the Court ought to have the power of revising its own proceedings. Otherwise failure of justice must inevitably result in some cases. The Calcutta Court exercised such power in *The Government of Bengal* v. *Meer Surwar Ján*[1]. It was held by the High Court at Allahabad in the case of *Empress of India* v. *Sarmukh Singh*[2] that the Full Bench of the Court, when determining whether a sentence submitted to it for confirmation should be confirmed or not, was not precluded by the order of the Division Bench from considering whether the accused person had been convicted by a Court of competent jurisdiction. In the case of *Ramessuri Dassee* v. *Doorgádáss Chatterjee*[3], White, J., held that every Court had inherent right to see that its power was not abused, and that it had power to set aside its order in the interests of justice.

[SARGENT, C. J.—That was a civil case.]

Inverarity on the same side.—Section 442 of the Criminal Procedure Code (X of 1882) provides that when a case is revised by the High Court it shall certify its decision or order to the Court below, which shall thereupon make such orders as are conformable to the decision certified. So that the new orders when they come up before the High Court are liable to revision. In the great mass of cases the High Court decides upon limited points on an in-

(1) 18 Calc. W. R., 33 Cr. Rul. (2) I. L. R., 2 All., 218.
(3) I. L. R., 6 Calc., 103.

1885.

QUEEN-EMPRESS v. C. P. FOX.

spection of the papers only. There is generally no appearance of the parties either in person or by pleader; and is it to be supposed that if the Court overlooks a fact—and it does not pretend to go through all the papers—and decides wrongly, that it is debarred from revising its decision?

SARGENT, C. J.—The question which has been referred to the Full Bench is, whether Mr. Justice Nánábhái Haridás and Sir William Wedderburn could review an order which they had already made, as a Court of revision, under section 439 of the Criminal Procedure Code (X of 1882). Before proceeding to consider that section it would be well to consider what was the state of the law before the Act was passed. Now, under Act XXV of 1861, there was no review of any order passed in a criminal matter by the High Court. The decision and reasoning in the Calcutta Full Bench case, *Queen* v. *Godái Raout*(1), have always been regarded as conclusive on that point.

It is not suggested that there is any alteration in the language of Act X of 1872 to lead to a different result.

But it is said that the power is to be inferred from sections 369 and 439 of Act X of 1882, which are amended forms of sections 464 and 297 of Act X of 1872. The reservation of the power of review by section 369 is sufficiently accounted for by supposing it to refer to the power of review given to the High Court by section 434. The exception contained in the last clause of section 439, of an entry made by the Judge presiding at sessions, under section 273, doubtless points to the possibility of there being proceedings of the High Court itself which it can revise under that section. But, however that may be, the section cannot, we think, without express words be made applicable to an order of revision made under the section itself. This view is in agreement with that expressed by the Allahabad High Court in *Queen Empress* v. *Durgá Charan*(2). If an error has been committed in the order which is sought to be reviewed, the proper course will be to apply to the Government, who, if they are convinced that there has been an error, will, no doubt,

(1) 5 Calc. W. R., 61 Cr. Rul. (2) I. L. R., 7 All., 672.

exercise their prerogative of remitting the sentence which has been passed.

The same day the Division Bench rejected the petition accordingly.

Petition rejected.

REVISIONAL CRIMINAL.

Before Mr. Justice Nánábhái Haridás and Sir William Wedderburn, Bart., Justice.

QUEEN-EMPRESS *v.* GUSTA'DJI BARJORJI.*

1885. *October* 8.

A'bkári—Retrial—Jurisdiction—Acquittal—Bombay Act V of 1878, *Sec.* 3, *Cl.* 5, *and Sec.* 56—*Criminal Procedure Code* (*Act X of* 1882), *Secs.* 1 *and* 403—*Special law.*

The jurisdiction conferred by the Code of Criminal Procedure (Act X of 1882) does not affect any special jurisdiction or power conferred by any law in force at the time when the Code came into force.

All offences against the ábkári law (Bombay Act V of 1878) being cognizable by a Magistrate of the Second Class (section 3, cl. 5, and section 56), a person tried for any such offence by any such Magistrate, and acquitted, is not liable to be tried again for the same offence (section 403), unless the acquittal has been set aside by the High Court on appeal by the Government.

THIS was an application to the High Court for the exercise of the power of revision under section 439 of the Criminal Procedure Code (Act X of 1882).

On the 27th of May, 1885, two persons were prosecuted, under section 43 (*b*) of the Bombay A'bkári Act V of 1878, before Mr. Soman, Magistrate (Second Class) at Alibág, for transporting five gallons of toddy each, in contravention of section 17 of the Act,—four gallons per head being the maximum allowed by a notification of Government issued under the section. In the course of the trial they stated that they had bought the toddy from the applicant, Gustádji Barjorji, licensed liquor-seller. The Magistrate thereupon summoned him, but acquitted him. The persons prosecuted were convicted by the Second Class Magistrate, and appealed to the First Class Magistrate, Mr. Drew.

* Criminal Application, No. 267 of 1885.