Present : Mr. Justice Wendt and Mr. Justice Middleton.

1909.
June 24.

RAYAPPU *v.* TODD *et al.*

P. C., Chavakachcheri, 16,077.

"*Criminal case or matter*"—*Order of restoration to immovable property—Final order—Order of vacation—First order* ultra vires—*Criminal Procedure Code, ss. 338 (1), 418, and 419.*

The accused were charged with offences under sections 140, 144, 314, 409, 433, and 434 of the Penal Code. They were acquitted by the Police Magistrate, who ordered that the first accused be put back into possession of the land in respect of which the offences were said to have been committed, on the ground that he had been obliged to quit it by reason of an order made by the Court. Subsequently the complainant's proctor moved that this order be vacated, on the ground that it was made without jurisdiction. The Court after hearing parties vacated the order. The first accused appealed against the latter order.

Held, that the order vacating the previous order was appealable under section 338 (1) of the Criminal Procedure Code.

Held, also, that the first order was made without jurisdiction, and so was properly vacated by the subsequent order.

APPEAL from an order of the Police Magistrate (W. A. Weerakoon, Esq.). The facts sufficiently appear in the judgments.

[1] *(1899) 1 Q. B. 392.*

1909.
June 24.

The appeal came on originally for hearing before Grenier A.J., who referred it to a Bench of two Judges. Accordingly the case came on for argument before Wendt and Middleton JJ.

H. A. Jayewardene, for the first accused, appellant.

Bawa (with him *Wadsworth*), for the complainant, respondent.

Cur. adv. vult.

June 24, 1909. WENDT J.—

The question reserved by Grenier A.J. for the consideration of two Judges is whether the Magistrate's order vacating his earlier order, made under the circumstances to be presently mentioned, is appealable. My brother has also suggested that, in the event of that question being answered in the affirmative, we should also determine the question whether the Magistrate had jurisdiction to make the first order.

The complainant Rayappu charged the appellant, Mr. Todd, and a number of others with having broken the fence of, and entered into, Puthukadu estate and committed offences punishable under sections 140, 144, 314, 409, 433, and 434 of the Penal Code. In his evidence complainant deposed that Mr. Todd with his wife and children and servants were in the estate bungalow, which they had taken possession of on the occasion in question. The Magistrate took non-summary proceedings against the accused (thirteen in number). In the end he discharged all the accused, holding that the entry had been made in the assertion of first accused's *bona fide* claim of title to the estate. In his order of discharge dated March 20, 1909, the Magistrate said: "The accused have now quitted the estate, but this they did not by their own choice, but of necessity. My order requiring first accused to give bail in Rs. 1,000 cash security contributed towards this result. I think, therefore, that it would be but fair that I should see that accused are put back in the estate. I direct the Maniagar to take the accused and go and leave them in the estate, exactly where they were before they were obliged to quit the estate." It appears that on first accused surrendering on February 16, the Magistrate ordered him to find Rs. 1,000 cash security for his enlargement on bail; thereupon his proctor moved that he be released on personal bail. The Magistrate said he would consider this motion if and when first accused quitted the estate. The accused immediately undertook to quit. Next day the Maniagar reported that the accused had quitted the estate with his wife and family, and the Magistrate thereupon released him on personal bail of Rs. 100. On April 3 first accused's proctor moved that the order directing that the accused be put back in the estate be carried into effect, by police assistance if necessary, but complainant's proctor contended that the order was *ultra vires*, and moved that the Court do vacate it, as it was made without jurisdiction. After hearing counsel on both sides the Court held

that the order had been made without jurisdiction, and therefore vacated it, and disallowed the accused's motion of April 3. The first accused appeals, and prays that the order of April 17, vacating that of March 20, be set aside, and the earlier order declared valid and operative.

Appellant admits that if a right of appeal exists against the Magistrate's order, it has to be gathered from the terms of section 338 (1) of the Criminal Procedure Code. This section enacts that, subject to the provisions of the last three preceding sections, which deal with appeals against convictions and acquittals, " any person who shall be dissatisfied with any judgment or final order pronounced by any Police Court or District Court in a criminal case or matter to which he is a party may prefer an appeal to the Supreme Court against such judgment for any error in law or in fact." The respondent argued that the order now under appeal was not made in a criminal case or matter, but I am clearly of opinion that it was. It purports to vacate a previous order, which was made by the Magistrate himself in finally disposing of a criminal prosecution, and which was as much " pronounced in a criminal case or matter " as that final order itself. It relates to the possession of property which was concerned in the commission of the offence the Court was inquiring into. I do not think it was the intention of the Legislature to limit appeals strictly to judgments and orders determining prosecutions, such as convictions, acquittals, and discharges. In previous cases in this Court touching the question now under consideration recourse has been had to the interpretation put by the English Courts upon the words " criminal cause or matter " in section 47 of the Judicature Act of 1873. The words there occur not in an enactment granting the right of appeal, as in our section 338, but in an enactment prohibiting appeals. The Court of Appeal regarding itself as " constituted for the hearing of appeals in civil causes and matters ", held that the words " criminal cause or matter " " should receive the widest possible interpretation. The intention was that no appeal should lie in any criminal matter in the widest sense of the term " (*per* Lord Esher, M.R., in *ex parte Woodhall* [1]). Accordingly it was held that no appeal lay from an order to tax costs in a criminal information for libel (*R. v. Steel* [2]) or from refusal of *certiorari* to quash a summary conviction by Justices, *Regina v. Fletcher*.[3] Our Supreme Court is constituted for the " correction of all errors in fact or in law committed by any Police Court " (section 39, Ordinance No. 1 of 1889), and there is therefore not the same reason as actuated the English Court of Appeal to give the widest interpretation to the words limiting the right of appeal. Respondent's counsel relied upon the local case of *Gunasekera v. Jayaratna* [4] and *The King v. Mack*.[5] In the former case the

[1] *20 Q. B. D. 835.*
[2] *2 Q. B. D. 37 ; 46 L. J. M. C. 1.*
[3] *2 Q. B. D. 43 ; 46 L. J. M. C. 4.*
[4] *(1905) 3 Bal. 154.*
[5] *(1905) 3 Bal. 194.*

1909.
June 24.

WENDT J.

appeal was from an order declaring that appellant had forfeited his bond conditioned for the appearance in Court of an accused person to answer the charge against him. Pereira A.J., who pronounced the principal judgment in the case, cited *R. v. Steel* and *Ex parte Woodhall*, but pointed out that they did not avail the appellant, because he was not a "party" to the prosecution in which the order he complained of was made. The same obstacle does not beset the present appellant. In *The King v. Mack* [1] the appeal was against an order under section 419 of the Criminal Procedure Code made by a Police Magistrate, to whom the court of trial had under section 414 delivered certain movable property which had been produced before it at the trial. The appellant was not a party to the prosecution, and the proceeding to which he was a party, viz., that relating to the delivery of the property, was held not to be a criminal case or matter. The present appellant was a party to the criminal case in which the order he appeals against was made.

For the foregoing reasons I think that the appeal lies. The second question reserved for our consideration therefore arises. The only provision of the Criminal Procedure Code which empowers a Magistrate to make order as to the possession of immovable property is section 418, but that power is not exercisable except when a person has been convicted of an offence attended by criminal force and some person has been dispossessed by such force. In the present case there has been no conviction, and the first accused was not dispossessed by force, but quitted the land voluntarily. The Magistrate was therefore right in holding that his order had been made without jurisdiction. I think the appeal should be dismissed.

MIDDLETON J.—

Although I think it probable the order appealed against in this case was not such a final order in a criminal case or matter as the framers of section 338 contemplated when they drafted that section, I agree it was unquestionably made in a criminal matter, and was undoubtedly final in vacating a previous order made, as I hold, subsequently *ultra vires*. If the appeal had been against the order which has been vacated by the Police Magistrate, I have some doubts that such an order could be considered a final and conclusive decision.

I agree also with my brother that the original order made by the Magistrate and vacated by him by the order appealed against was *ultra vires*. It was laid down in *The Attorney-General v. Hotham (Lord)* [2] that where a limited tribunal takes upon itself to exercise a jurisdiction which does not belong to it, its decision amounts to nothing, and does not create any necessity for an appeal.

Appeal dismissed.

[1] *(1905) 3 Bal. 194.*

[2] *Turner and Russell 219; 3 Russell 415.*