

## Mardan And Ors. vs Rex on 1 March, 1950

**Equivalent citations: AIR1950ALL478**

ORDER

Agarwala, J.

1. This is an application in revision by Mardan and others who have been convicted Under Section 379, Penal Code and sentenced to three months' rigorous imprisonment and a fine of Rs. 26/- each by an order of the learned Sessions Judge hearing an appeal against an order of a learned Magistrate. The learned Magistrate had originally sentenced the applicants to six months' rigorous imprisonment and a fine of Rs. 100/-. This sentence was reduced in appeal, as stated above.

2. The point raised by learned counsel is a very short one. While the case was pending before the Magistrate, an application for transfer of the case was made by the applicants to the District Magistrate on 24th March 1949. The proceedings were, however, not stayed during the hearing of this transfer application. On 1st April 1949, the defence produced its evidence before the Magistrate, the prosecution evidence having already been taken before the transfer application had been made. On 4th April the District Magistrate passed an order that the case be transferred to another Court. This order, however, does not appear to have been communicated to the Magistrate or even to the parties concerned, with the result that on 8th April, arguments were addressed in the case and judgment was reserved. On 24th April judgment was delivered convicting the applicants. Then it was discovered that on 4th April the District Magistrate had already passed an order for transfer. The applicants went up in appeal to the Sessions Judge and raised this point before him. He, however, did not accept the contention and maintained the conviction of the applicants modifying the sentence, as stated already.

3. In this revision it has been urged that since the District Magistrate had passed an order for the transfer of the case from the Court of the trying Magistrate to the Court of another Magistrate, the Magistrate concerned had ceased to have jurisdiction in the case and could not proceed to hear arguments and deliver judgment. I think this contention is sound. Under Section 350 (3), Criminal P. C.:

"When a case is transferred under the provisions of this Code from one Magistrate to another, the former shall be deemed to cease to exercise jurisdiction therein, and to be succeeded by the latter within the meaning of Sub-section (1)."

Although this sub-section purports to define the expression 'cease to exercise jurisdiction' as used in Sub section (1) and confines itself to that subsection, nevertheless it embodies a principle which is of universal application. The jurisdiction of a Court continues so long as it is not taken away. When a superior Court transfers a case from one Court to another, that jurisdiction undoubtedly ceases. The

question is whether it takes effect on the date when the order of transfer is communicated to the former Court or on the date when the order for transfer is passed. The language of Sub-section (3) of Section 350 suggests that the cessation comes into existence when the order of transfer is passed. The words are "when a case is transferred under the provisions of this Code."

4. This brings us to Section 528, Criminal P. C. Sub-section (2) of Section 528 provides :

"Any Chief Presidency Magistrate, District Magistrate or Sub-Divisional Magistrate may withdraw any case from, or recall any case which he has made over to, any Magistrate subordinate to him, and may inquire into or try such case himself, or refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same."

The withdrawal of a case or the recall of a case is made by an order. Once the order is pronounced, the order is complete and must have its legal effect. The communication of the order and the actual withdrawal of the record from the file of the Magistrate where the case is pending are merely ministerial acts. They may be performed with great delay. But the mere delay in performing them would not authorise the Magistrate before whom the case was pending to proceed with the case and to decide it in spite of the order of withdrawal. The contrary view would lead to various complications.

5. In my judgment, an order of transfer takes effect as soon as it is pronounced. The Magistrate in the present case had no jurisdiction to go on with the case after the order of transfer had been passed on 4th April 1949. It has been urged that after 4th April the applicants themselves addressed arguments in the case. That was, in the first place, due to ignorance of the order of transfer and would not affect the applicants' rights. But even if they knew of the order of transfer and addressed arguments or took any other steps, their action would not confer jurisdiction upon the Court, because it is well-settled that even the consent of parties does not confer jurisdiction. It is clear, therefore, that the order of the learned Magistrate convicting the applicants was without jurisdiction.

6. In this connection, I am reminded of a Full Bench decision of this Court in *Parsotam Saran v. Barhma Nand*, 50 ALL. 41 : (A. I. R. (14) 1927 ALL. 401), in which it was held that the passing of an order by an appellate Court that a certain sale which was being held in execution of a decree by a lower Court be stayed did not amount automatically on the passing of the order itself to a withdrawal of the jurisdiction from the lower Court and that, therefore, when a sale was held after the order was passed, but before it was communicated to that Court, and the purchaser was a third person and not the decree-holder himself, the validity of the sale was not affected. This case rests entirely on different considerations. The reasoning that appealed to the Full Bench in that case was that an order of stay implied that it was to be communicated before it could be fully given effect to. I do not consider that this case covers the present matter.

7. The next question is whether I should remand the case for retrial. I have been informed that the applicants have already been in jail for about 25 days. They have already been harassed in several

Courts. The matter appears to be a petty one. In the circumstances, I do not consider that it will be in the interest of justice to order a retrial.

8. I, therefore, quash the order of the Magistrate convicting the applicants. They are on bail and they need not surrender. The fine, if realised, shall be refunded to them.