FEDERAL HIGH COURT

Hori Ram Singh

Vs

Emperor (Federal)

(Gwyer C.J.)

12.04.1939

JUDGMENT

Gwyer C.J.

1. I have had the opportunity of reading the judgment prepared by my brother Varadachariar and I find myself so completely in agreement with it that I think it unnecessary to deliver a separate judgment of my own. I will only add, since the question of jurisdiction has been mentioned, that I have no doubt that this Court has jurisdiction in criminal as well as civil cases. It would indeed be very surprising if it were otherwise, since it has been in the Criminal Courts that many of the great constitutional questions of the past have been determined; and in my opinion the words "judgment, decree or final order" ought to receive no narrow interpretation. I concur with my brethren in holding that the appeal should be allowed as regards the charge under Section 477-A, I.P.C.and dismissed as regards the charge under Section 409.

Sulaiman J.

2. The facts of this case are fully given in the judgment to be delivered by brother Varadachariar, although no objection had been raised by learned counsel to the maintainability of this appeal, I had expressed a doubt regarding it in the course of the hearing. The question being one of jurisdiction, I feel that I should not ignore it.

Criminal Jurisdiction.

3. The first question is whether a criminal appeal at all lies to the Federal Court. The mere fact that the Federal Court has framed rules for such appeals is not by itself conclusive. The doubt is created by the observations made by their Lordships of the Privy Council in the somewhat analogous case in *Chung Chuok v. The King*[1] In that case the decision turned on the interpretation of Rule 2 of the Order in Council dated 23rd January 1911. Under that Rule an appeal lay as of right from any final judgment of the Court, and at the discretion of the Court from any other judgment Rule 1 defined 'judgment' as including "decree, order, sentence or decision." Their Lordships pointed out that although the word 'sentence' is appropriate to some procedure in criminal law and is chiefly heard in criminal trials, there is a groat difference between a conviction and a sentence and it would be very strange if there were appeal against sentence and not against conviction; the word 'sentence' is a well known word in common law and it is not

applied so as to give the right to appeal in criminal cases. The word 'decision' if it stood alone may embrace matters of both civil and criminal laws but the word is not used alone herR. One cannot take one word out of this Order and say that it may include criminal law; one must look at the whole of the Order in Council. Now Rule 2 (a) certainly referred to civil matters and for purposes of an appeal fixed a value for the subject matter of the suit, and Rule 2(b) began with the words "subject to the pro. visions of these Rules. "Their Lordships thought that the word "other "refers and relates back to the same sort of judgments as those which are referred to in Rule 2(a), that is to say a judgment where the matter in dispute amounts to or involves some claim to property. Other provisions of the order related to subject matters and did not appear to include criminal matters. In particular, there was provision for "stay of execution" which was entirely appropriate in a civil case and was not so appropriate in a criminal case; nor was there any provision made for a man who had been sent to prison. Their Lordships accordingly held that the words were not wide enough to include a criminal judgment.

4. Some of these considerations are applicable to the provisions of the Government of India Act as well. Section 205(1) refers to an appeal from "any judgment, decree or final order." It does not even use the word "decision" much less "sentence ". Judgment, decree or final order taken together are words commonly used in the Code of Civil Procedure where judgment is followed by a decree or final order. The words ' final order "are still more appropriate in a civil case where a clear distinction exists between a final order and an interlocutory order. There is no other provision in this part of the Act which would suggest that criminal cases are included. Indeed, Section 206 specifically speaks of "civil cases." When providing an appeal to His Majesty in Council from the Federal Court the words "decision" and "judgment" are used in Section 208. Section 209(1) again uses the words ' judgment, decree or order" which is substituted for that of the High Court. Sub-section (3) refers to "a stay of execution" and does not refer to granting bail or releasing accused persons from custody. The criminal jurisdiction of the Federal Court is mentioned in Section 210(2), but only as regards punishment of any contempt of Court. On the other hand, it cannot be doubted that the words "judgment and final order" in themselves are certainly wide arid can include a criminal judgment and a criminal order. Although Section 206 is confined to "civil cases" Section 205 has no such restriction. Similarly, the words "judgment or order" in Section 209 are also wide enough. Sub-section (3) can be made applicable to a criminal case before the aceused is actually sent to prison. The realization of fine or sending him to prison or the carrying out of a sentence of whipping or death can certainly be postponed if a stay of execution is ordered. Section 210 refers to all Courts in British India. These may well include not only Civil but also Criminal Courts.

5. The main object of the establishment of the Federal Court is to get decided substantial questions of law as to the interpretation of this Act or any Order in Council made thereunder, so as to introduce uniformity throughout India. Section 270 which contains an indemnity for past acts to Government servants prevents criminal proceedings from being instituted against a Government servant under certain conditions. The question whether the continuance of the criminal proceedings would or would not be contrary to the express provisions of this Section can arise only in a criminal case. If a criminal case in which such a question arises is not allowed to be brought up to the Federal Court at all, the Federal Court can never be called upon to interpret this particular Section. The Privy Council may not grant special leave to appeal unless it be shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done. ***In re Dillet (1887)***

12 A.C. 459 Again in Schedule 7 containing the Legislative lists there may, as is often common, be penalties prescribed in various legislations for breach of conditions laid down therein, the validity of which may be challenged only in a criminal case. The validity of the criminal legislations themselves may be challenged only in Criminal Courts. All such matters would be outside the jurisdiction of the Federal Court if no criminal case is allowed to be brought before it. But there is no inherent right of appeal to a higher tribunal, the right being only a creature of statute. The question is not free from doubt, but I am prepared to assume for the purposes of this case that the words 'judgment or final order' in the Section apply to criminal cases as well. But the further question still remains whether the order of remand was a 'judgment' or 'final order'.

6. In the Indian Code of Civil Procedure judgment is quite separate and distinct from decree. Under Section 2(9) judgment means the statement given by the Judge of the grounds of a decree or order; the judgment is merely the statement of the grounds, but must have been given in a case in which a decree or order exists. If in the expression 'judgment, decree or final order' in a civil case the word 'judgment' were to have the Indian sense, then it will mean the statement of the grounds in a case where either a decree or a final order exists and not in any other case, as appeal from a judgment standing by itself would have no meaning. Appeal from judgment would then indicate appeal from any finding in a case terminated by a decree or a final order. In England under Section 225, Judicature Act, judgment includes decree. In that sense in a civil case the word "decree' in the expression 'judgment, decree or final order' would be superfluous. Indeed, although wider, the operative part of a judgment is almost like an Indian decree. Decree was a term, which, in Equity practice, corresponded to judgment at Common law. Decree is the equivalent to the term judgment in the Queens' Bench Division. A judgment is a decision obtained in an action, and any other decision is an order: per Cotton L. J. in Ex parte Chinery (1884) 12 Q B D 342. The forms of judgment given in the Annual Practice, Appendix D, are exactly like the forms of decrees in the Indian Code, Appendix D. According to the English practice, both judgment and decree can be final or interlocutory according as they do or do not finally determine the rights of the parties and conclusively dispose of the whole matter in dispute. Black in his book on Judgments defined a judgment as the determination or sentence of the law pronounced by a competent Judge or Court as the result of an action or proceeding instituted in such Court affirming that upon the matters submitted for decision a legal duty or liability does or does not exist. An interlocutory judgment is one which determines some preliminary or subordinate point or plea or settles some step, question or default arising in the progress of the cause, but does not adjudicate the ultimate rights of the parties or finally put the case out of Court.

On the other hand the learned author defined an order as the mandate or determination of the Court upon some subsidiary or collateral matter arising in an action, not disposing of the merits but adjudicating a preliminary point by directing soma steps in the proceedings;

7. The word 'judgment' occurs in Clause 10, Letters Patent of the Allahabad High Court and 01. 15, Letters Patent of the Calcutta, Madras and Bombay High Courts, and 'final judgment' in Clause (30)(39) respectively. As they had been drafted in England, the first interpretation put upon the word was more or less in the English; sense, and not that used in the Civil Code. The earliest leading case of Calcutta was Justices of the *Peace for Calcutta v. Oriental Gas Co*[2]. Couch C. J. defined judgment as meaning a decision which affects the merits of the question between the parties by determining some right or' liability. It may neither be preliminary or

interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it leaving other matters to be determined.

8. In *Ebrahim v. Fackrunisa Begam*[3] at page 534 Garth C. J. observed that the word 'judgment' means a judgment or deoree which decides the case one way or the other in its entirety, and that it does not mean a decision or order of an interlocutory character, which merely decides some isolated point,not affecting themerits or result of the entire suit.

9. Although purporting to follow these definitions, the Calcutta High Court gradually widened the scope of its meaning. In the latest Full Bench case in *Brojo Gopal Roy v. Amarchandra*[4] Rankin C.J. observed:

> On the whole, and not without some doubt, I think that the mere circumstance that an order puts in peril the finality of a decision given in the respondent's favour, does not of itself make the order a 'judgment' within the meaning of Clause 15 of the Letters Patent.

10. The learned Chief Justice at page 140 doubted whether the correct technical use of the word 'judgment' in England is a safe guide. The High Courts of Bombay and Patna have purported to accept the definition of Couch C.J. generally. But in Cal. cutta, Bombay and Madras orders in civil revision were regarded as judgments until the Letters Patent were amended in 1919, which made an appeal impossible. The latest Full Bench case of the Madras High Court is 35 Mad l7 where White C.J. held at page 7 that

> if its effeot, whatever its form may be, and whatever may be the language of the application on which it is made, is to put an end to the suit or proceeding so far as the court before which the suit or proceeding is pending is concerned, or its effect, if it is complied, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause.

11. The Lahore High Court appears to have adopted the view of White C.J. In the Full Bench of the Allahabad High Court, 14 All 2268 Edge C.J. at p.228 observed:

12. In my opinion the judgment referred to in Section 10 of the Letters Patent is the express decision of a Judge of the Court which leads up to, and originates, an order or decree.

13. On page 232 the opinion was expressed that orders in civil revision were not judgments and therefore not appealable under "(the Letters. The full Bench case has naturally been followed in subsequent cases. The observation of Lord Sumner in *Sabitri Thakurani v. Savi* [5]that what Clause 15 of the Calcutta Letters Patent expressly provides is an appeal to the High Court's appellate jurisdiction from a decree of the High Court in its original ordinary jurisdiction, was not understood in India as containing a definition of the word 'judgment.' But their Lordships of the Privy Council had occasion to define the word "judgment' in two cases coming from the Bombay High Court. *Tata Iron and Steel Co. Ltd. v. Chief Revenue Authority of Bombay*, *Tata Iron and Steel Co. Ltd. v. Chief Revenue Authority of Bombay*[6] Lord Atkinson relied on (1890) 25 Q B D 465 and pointed out that a final judgment was different from final order as used in Clause 39, Bombay Letters Patent. *Sewek Jeranchod Bhogi Lal v. Dakore Temple Committee*[7] Sir John Edge

laid down that:

14. The term judgment in the Letters Patent of the High Court means in civil cases a decree and not a judgment in the ordinary sense.

15. This observation was attempted to be distinguished, by drawing a distinction perhaps without a difference,in *Ishwari Prasad v. Sheo Tahal Rai* [8]in view of a practice that had grown up to treat certain orders as being judgments. The same view was expressed in the Pull Bench case in *Sital Din v. Anant Ram*[9] where it was also held that judgment includes a final order. Both these cases were decided before knowing the exposition of the meaning of 'final order' by their Lordships of the Privy Council in *Abdur Bahman v. B. K. Gassim & Sons* to be mentioned hereafter. It may also be noted that in *Sewak Jeranohod Bhogi Lal v. Dakore Temple Committee*[10] their Lordships had not said that the term 'final judgment' in Clause 39, Bombay Letters Patent, means final decree in civil oases, but that the term 'judgment' in the Letters Patent of Bombay means in civil cases a decree, and not a judgment in the ordinary sense. In a later case in *Shahzadi Begam v. Alakhnath*[11] a full Bench of the Allahabad High Court of which I was a member at the time, dissented from the opinion of White C.J. expressed in the Madras full Bench, and it was pointed out that:

> The test laid down by the learned Chief Justice of the Madras High Court is put in too wide a language and cannot be aocepted as laying down the correot criterion, and it was further observed that their Lordships' observation in *Sewak Jeranohod Bhogi Lal v. Dakore Temple Committee*[12] made it clear that the word 'judgment' used in the Letters Patent is not to be taken in its widest scope. The Allahabad full Bench at p. 687 declined to accept the contention that:
>
> Every order passed by a single Judge which puts an end to or terminates the proceeding or which has by implication the necessary effect resulting in such a termination is a judgment.

16. Shortly after this Allahabad Pull Bench case came the Pull Bench decision of the Rangoon High Court in *Daya Bhai Jiwan Das v. Murugappa* [13]where at p. 269 the view of White C.J. was dissented from and Page C. J. observed that:

> Judgment means and is a decree in a suit by which the rights of the parties at issue in the suit are determined. A final judgment is a deoree in a suit by whioh all the matters at issue therein are decided. A preliminary or interlocutory judgment is a decree in a suit by which the right to the relief olaimed in the suit is decided, but under whioh further proceedings are necassary before the suit in its entirety can be determined.

17. In view of the observation, made by their Lordships of the Privy Council, thei word 'judgment' cannot now be taken in its widest possible sense so as to include every order which terminates a proceeding pending in a High Court so far as that Court is concerned. In criminal cases the position is still stronger. In England judgment is equivalent to a judgment of con viction or acquittal and is distinct from other orders in a criminal case. This will appear from an examination of paragraphs 260-4 in Vol.9, Halsbury's Laws of England (Hailsham Edition.) In

the Indian Code of Criminal Procedure, judgment is not defined, but various Sections suggest what it means. Sections 404 and 415-A no doubt refer to appeal from judgment or appealable judgment respectively. But under Sections (263)(264), the judgment in a summary trial has to contain the finding and sentence or other final order. Under Section 305, in a jury trial the order of conviction or acquittal in accordance with the opinion of the jury is the judgment. Under Section 309, in a case tried with assessors, the final order which is followed by the sentence, is the judgment Section 367 suggests what the contents of a judgment should be, and what it should comprise of when it be a judgment of conviction and what if it be a judgment of acquittal. Section 370 also requires a record of the offence complained of or proved, the plea of the accused and the final order. As final orders like those under Sections 144 and 145 could not be judgments, a special provision has been made in Section 367(6) that certain orders should be deemed to be a judgment. The Code provides appeals from certain appealable orders, and Section 423 provides appeals from conviction and sentence. Thus, judgment in the Code means a judgment of conviction or acquittal. Even in Madras, in *Emperor v. China Kaliappa Goundan*[14] held that an order of dismissal of a complaint under Section 203 is not a judgment within the meaning of Section 360 and this was the opinion of the majority. This opinion was later followed by another Division Bench of the Madras High Court in *Emperor v. Maheshwara Kondaya*[15] where it was held that an order of discharge is not a judgment, as a judgment is intended to indicate the final order in a trial terminating in either the conviction or acquittal of the accused.

18. Thus, neither under the English nor the lndian law the term 'judgment' in a criminal case includes an interlocutory orders In Section 205(1) of the Act, the word 'judgment' does not occur by itself but is used; in conjunction with final order. When both the terms judgment and final order are used together in one expression, they undoubtedly connote different and distinct meanings, and judgment cannot be interpreted as embracing even interlocutory orders, which would make the category 'final order' wholly superfluous and unnecessary. It is true that in the Federal Court Rules unfortunately the definitions of judgment, decree and order have been borrowed from the Code of Civil Procedure; but that of course is only for the purposes of the Rules and cannot be taken in any way to control the proper meanings to be given to those terms in the Act itself, even if an inconsistency were inevitabl. I am of the opinion that the order of the High Court directing a re hearing of the criminal appeal by the Sessions Court is not a judgment within the meaning of Section 205, Government of India Act.

19. Final order. The next question is whether it is a final order. The order of the High Court is final in the restricted sense that it disposes of the matter pending; before the High Court finally, the case going back to the Sessions Judge. But it is by no means final so far as the case itself is concerned, because the appeal is still before the Sessions Judge and will have to be disposed of on its merits and then only a final order passed. Thus, ordinarily speaking an order sending the case back to the Appellate Court cannot be considered to be a 'final order' within the meaning of Section 205(1) of the Act. The words 'final order' do not occur in the present Criminal Procedure Code. As the same words would apply both to civil and criminal cases, it would not be inappropriate to consider the' meaning of 'final order' as used in the Civil Procedure Code. These words occur in Section 109, Civil Procedure Code where an appeal lies in certain cases from a "decree or final order" passed on appeal by a High Court. Their Lordships have had occasions to consider what is meant by the words "final order." The words "final order" are ordinarily used in contrast with interlocutory order. But in *Rahimbhoy Habibhoy v. C.A. Turner*[16] *All Muzhar Ilusain v. Mt. Bodha Bibi*[17] both of which were under Section 595, Civil P. C. of 1882, their

Lordships laid down that an order even though not final in the ordinary sense would be final if it decides the cardinal point in the case notwithstanding that there might be subsidiary inquiries to make. In the present case there is no doubt that a cardinal point has been decided by the High Court adversely. The accused's objection was as to the legality of the proceedings which went to the root of the matter and which if decided in his favour would result in the dismissal of the complaint outright. If the proceedings were really in contravention of the provisions of Section 270 and were void a initio, the merits of the case should not be gone into at all.

20. But their Lordships have in two more recent cases expressed a somewhat different view. In *Ramchand Manjimal v. Goverdhandas Vishan das Ratanchand*[18] their Lordships following two English decisions,*Salaman v. Warner*[19] and *Bazson v. Altricham Urban Dristrict Council (No.1)*[20] laid down that an order refusing stay of suit under the Arbitration Act was not a final order, as it did not finally dispose of the rights of the parties but left them to be determined by the Courts in the ordinary way. The definition of final order as given in *Salaman v. Warner*[21] was as follows: Lord Esher M.R. observed:

> If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory.

21. Fry L. J. remarked :

> I conceive that an order is "final" only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely I think that an order is "interlocutory" where it cannot be affirmed that in either event the action will be determined.

22. Lopes L.J. said:

> I think that a judgment or order would be final within the meaning of the rules, when, whichever way it went, it would finally determine the rights of the parties.

23. But in *Bazson v. Altricham* [22]Lord Alverstone C.J. held:

> It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties 1 If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order,

24. In (1933) 20 AIR PC 58 Sir George Lowndes distinguished the two earlier cases of their Lordships on the ground that they had been decided under Section 595 of the old Code where the wording was materially different and also because in both special leave had been given, and then laid down that "the test of finality is whether the order finally disposes of the rights of the parties." In *Ramchand Manjimal v. Goverdhandas Vishandas Ratanchand*[23] the Appellate Court in India had been of the opinion that the order had gone to the root of the suit, namely the

jurisdiction of the Court to entertain it and it was for this reason that the order was thought to be final. But their Lordships held that this was not sufficient. The finality must be a finality in relation to the suit. If after the order, the suit is still a live suib, in which the rights have still to be determined, no appeal lies.

25. In that case the appeal had been allowed by the High Court, the decree of the Subordinate Judge set aside and the suit remanded to the original Court for trial on the merits. It was also pointed out before their Lordships that there was undoubtedly some divergence in the views expressed in the English cases upon which the judgment in *Ramchand Manjimal v. Goverdhandas Vishandas Ratanchand* [24]founds, but their Lordships considered that the rule deducted for guidance under the Code of Civil Procedure was clear and unambiguous and should be decisive in all such cases. If the effect of the order from which it is sought to appeal is not to dispose finally of the rights of the parties, then even though it decides an important and even a vital issue in the ease, it leaves the suit alive and provides for its trial in the ordinary way. As the 'final order' may be either in a civil or criminal case the definition given by their Lordships in the civil case must by analogy be applied to a criminal case as well. In the present case, the appeal has not yet been tried on the merits. It is still to be finally decided by the Sessions Judge whether the accused was or was not guilty of the offences with which he had been charged. The question of want of consent, although vital for the purposes of the proceedings as it went to the root of the matter so far as their continuance is concerned, is after all a preliminary question as to whether the proceedings had been properly instituted or not. The criminal case is still a live case, and the innocence or the guilt of the accused has not been finally determined. The question raised was one of jurisdiction of the Magistrate to entertain the complaint and was therefore analogous to the question of jurisdiction raised in (1933) 20 AIR PC 58. Although the point is certainly a cardinal one, the order of remand cannot be regarded as a final order within the meaning of Section 205(1). The accused may ultimately not be found guilty at all. If the accused is hereafter found guilty by the Sessions Court and convicted and sentenced, he can come to the High Court in revision; and in case the High Court adheres to its view and the revision is dismissed, the order would become final; and from that order he may come to the Federal Court under Section 205(1). But until that stage arrives, he is not in my opinion entitled to appeal from the High Court's order.

26. Section 270 (1). Holding the view that no appeal at all lies at this stage, I would have feared that it would be somewhat awkward for the Sessions Judge if I were to express any definite opinion that consent of the Governor was necessary for either of the two charges in this particular case. If no appeal lies, the order of the High Court must stand and the Sessions Judge is bound to re hear the whole appeal, and yet he may feel embarrassed by any contrary opinion expressed by the Federal Court. But the opinion of the majority is that the appeal should not fail on any such preliminary grounds. Further, a statement of the true legal position may help in applying the legal principles to the facts of the case. I therefore proceed to deal with that question also. It must be conceded that the protection given to public servants under Section 270, which applies both to civil and criminal proceedings, is intended to be real and not merely illusory. The intention seems to be to prevent them from being unnecessarily harassed, and the criminal prosecution, except with the previous consent of the Governor-General or the Governor, is prohibited and proceedings started without such consent declared illegal. Sub-section (1) stands as follows :

> No proceedings civil or criminal shall be instituted against any person in respect of any

act done or purporting to be done in the execution of his duty as a servant of the Grown in India or Burma before the relevant date, except with the consent, in the case of a person who was employed in connexion with the affairs of the Government of India or the affairs of Burma, of the Governor-General in his discretion, and in the case of a person employed in connection with the affairs of a Province of the Governor of that Provinoe in his discretion.

27. The main question for consideration is the interpretation of the words "any act done or purporting to be done in the execution of his duty as a servant. The Act being a recent one, no case turning on the interpretation of Section 270(1), other than the one under appeal, has been brought to our notice. Besides the eases under Section 80, Civil Procedure Code there are a very large number of cases under Section 197, Criminal P.C., showing a considerable conflict of opinion among the Indian High Courts as to the applicability of that Section. The words of that Section are not exactly identical with those in the Section before us. There we have the words "while acting or purporting to act in the discharge of his official duty," which have caused a divergence of opinion on the true significance of the words 'while acting or purporting to act." It is therefore best to focus attention on the words actually used in Section 270(1).

28. Sessions Judge's Opinion. The learned Sessions Judge in an elaborate judgment discussed the legal aspects of the case and also considered certain apparently conflicting rulings, and then came to the conclusion that the previous sanction of the Governor was necessary for both the charges. For want of such sanction he held all the proceedings to be void and 'acquitted' the appellant. The aquittal of the accused was obviously wrong, as that would have prevented further proceeding even after the necessary consent of the Governor had been obtained. If the prosecution is defective for want of proper consent, the proceedings would be void and the complaint would be dismissed. The Sessions Judge took the view that every criminal breach of trust would require a previous consent. This was putting it rather too widely. He should have really considered whether on the fact a as alleged by the prosecution or at any rate as found by the Magistrate, consent was necessary. If not, he would have to go into the merits and ascertain the facts himself, and then again decide whether on the facts so appearing consent was or was not necessary.

29. High Court's View. The High Court in revision took a contrary view, set aside the Sessions Judge's order of acquittal and "returned the record to him for trial on the merits," by which presumably the High Court meant re-hearing of the appeal on the merits. The Bench appear to have taken the view that consent would never foe necessary in case of criminal breach of trust, nor even in the case of falsification of accounts. They apparently thought it unnecessary to consider whether on the facts as found by the Magistrate, which were for re-consideration before the Session Judge, the act had purported to be done in execution of duty so as to make the previous consent necessary. In fact they have said that it does not appear to them even arguable that theft, or embezzlement or breach of trust committed by a servant of the Crown can be said to be done in the execution of his duty as a servant of the Crown.

30. But Section 477-A in express terms covers the case of an officer, who wilfully falsifies accounts which may be his duty to maintain. They have apparently put theft, embezzlement, or breach of trust on exactly the same footing as falsification of accounts, and have not considered the charge of falsifying the accounts separately from that of criminal breach of trust. This is ignoring the significance of the words "purporting to be done" which are no less important. They

have thought that an act done or purporting to be done in the execution of his duty as a servant of the Crown cannot by any stretching of the English language be made to apply to an act which is clearly a dereliction of his duty as such.

31. But if an act has purported to be done in execution of duty, it may be done so, only ostensibly and not really, and if done dishonestly may still be a dereliction of duty. The High Court Bench have taken the view that the Section is clearly meant to apply to an act by a public servant which could be done in good faith, but which possibly might also be done in bad faith...The Section cannot be meant to apply to cases where there could be no doubt that the act alleged must be in bad faith.

32. So far as Sub-section (1) is concerned, the question of good faith or bad faith cannot strictly arise, for the words used are not only "any act done in the execution of his duty" but also "any act purporting to be done in the execution of his duty." When an act is not done in the execution of his duty, but purports to have been done in the execution of his duty, it may very well be done in bad faith; and even an act which cannot at all be done in good faith may purport to be done in execution of duty if another is made to believe wrongly that it was being done in execution of duty. It is therefore not possible to restrict the applicability of the Section to only such oases where an act could possibly have been done both in good and bad faith. Of course, the question of good or bad faith cannot be gone into at the early stage at which objection may be taken. Making false entries in a register may well be an act purported to be done in execution of duty, which would be an offence, although it can never be done in good faith. It is Sub-section (2) only which introduces the element of good faith, which relieves the Court of its obligation to dismiss the proceedings. But that subsection relates to cases even previously instituted and in which there may not be a defect of want of consent, and is therefore quite distinct and separate, and not merely ancillary to Sub-section (1), as the learned Sessions Judge supposed. Having regard to the ordinary and natural meaning of the words "purporting to be done," it is difficult to say that it necessarily implies "purporting to be done in good faith," for a person who ostensibly acts in execution of his duty still purports so to act, although he may have a dishonest intention.

33. Extent of the protection. Obviously the Section does not mean that the very Act which is the gravamen of the charge and constitutes the offence should be the official duty of the servant of the Crown. Such an inter pretation would involve a contradiction in terms, because an offence can never be an official duty. The words as used in the Section are not "in respect of any official duty" but "in respect of any act done or purporting to be done in the execution of his duty." The two expressions are obviously not identical. The offence should have been committed when an act is done in the execution of duty or when an act purports to be done in the execution of the duty. The reference is obviously to an offence committed in the course of an action, which is taken or purports to be taken in compliance with an official duty, and is in fact connected with it. The test appears to be not that the offence is capable of being committed only by a public servant and not by any one else, but that it is committed by a public servant in an act done or purporting to be done in the execution of his duty. The Section cannot be confined to only such acts as are done by a public servant directly in pursuance of his public office, though in excess of the duty or under a mistaken belief as to the existence of such duty. Nor is it necessary to go to the length of saying that the act constituting the offence should be so inseparably connected with the official duty as to form part and parcel of the same transaction. If the act complained of is an offence, it must necessarily be not an execution of duty, but a dereliction of it. What is necessary is that the

offence must be in respect of an act done or purported to be done in execution of duty that is in the discharge of an official duty. It must purport to be done in the official capacity with which he pretends to be clothed at the time, that is to say under the cloak of an ostensibly official act, though of course, the offence would really amount to a breach of duty. An act cannot purport to be done in execution of duty unless the offender professes to be acting in pursuance of his official duty and means to convey to the mind of another, the impression that he is so acting.

34. The Section is not intended to apply to acts done purely in a private capacity by a public servant. It must have been ostensibly done by him in his official capacity in execution of his duty, which would not necessarily be the case merely because it was done at a time when he held such office, nor even necessarily because he was engaged in his official business at the time. For instance, if a public servant accepts as a reward a bribe in his office while actually engaged in some official work, he is not accepting it even in his official capacity, much less in the execution of any official duty, although it is quite certain that he could never have been able to take the bribe unless he were the official in charge of some official work. He does not even pretend to the person who offers the bribe that he is acting in the discharge of his official duty, but merely uses his official position to obtain the illegal gratification.

35. Procedure. Section 270(1) directs that no proceedings, civil or criminal, shall be instituted etc. The prohibition is against the institution itself and its applicability must, therefore be judged in the first instance at the earliest stage of institution. If the prosecution case as disclosed by the complaint or the police report, as the case may be, shows that the act purported to be done in execution of duty, the proceedings must be dropped. But if the prosecution case does not involve this, the case cannot be thrown out on the preliminary ground of want of consent of the Governor in his discretion. The mere fact that the accused proposes to raise a defence of the act having purported to be done in execution of duty would not in itself be sufficient, otherwise even a frivolous defence would prevent prosecution. The prosecution must be given a chance to prove its case. Of course, if the case as put forward fails, or the defence establishes that the act purported to be done in execution of duty, the proceedings will have to be dropped and the complaint dismissed on that ground.

36. Breach of Trust.Now, dishonest misappropriation or conversion of moveable property to one's use is an offence under Section 403, I.P.C. but if the offender had been entrusted with property or with any dominion over it, the dishonest misappropriation or conversion to his use or dishonest user or disposal becomes a criminal breach of trust under Section 405; and if he had been entrusted with property or dominion over it in his capacity of a public servant, it becomes a criminal breach of trust by a public servant under Section 409. The question whether a criminal breach of trust can be committed while purporting to act in execution of duty is not capable of being, answered hypothetically in the abstract, without any reference to the actual facts of the case. An attempt to answer the question in a generalized way has been responsible for loose language used in some of the cases cited before us. It is possible to conceive of a case where a criminal breach of trust may be committed in conspiracy with other servants and payment of money is dishonestly ordered ostensibly in execution of duty. The question whether the act purported to have been done in execution of duty or not must depend on the special circumstances of each case.

37. The first charge was worded generally that the accused had committed a criminal breach of

trust in respect of certain specified medicines, but no objection appears to have been taken to it, no could this defect be urged seriously in view of the provisions of Section 221(5), Criminal PC If the present case had merely been that medicines were openly removed from the hospital dispensary to the house on some pretence, it might have remained ambiguous whether the act purported to be done in execution of duty or not. But apparently the case as put forward in the compounder Din Mohammad's application submitted with the police report, and also as found proved by the Magistrate at the trial was one of secret misappropriation or conversion to one's user. When a public servant simply embezzles some property entrusted to him and thereby commits a criminal breach of trust under Section 409, he is not doing an act, nor even purports to do an act in execution of his duty; when he commits the act, he does not pretend to act in the official discharge of his duty. A case like that would not ordinarily fall within the scope of Section 270(1).

Falsifying Accounts.

38. But an offence under Section 477-A, I PC is committed if an officer or servant or anyone employed or acting in such capacity, wilfully and with intent to defraud falsifies any book or account. Thus, where it is his duty to maintain a record or a register, and in maintaining that register he makes some entries which are false to his knowledge, he is certainly purporting to act, though not actually acting, in the execution of his duty, because he is making certain entries in the register, knowing them to be false. He is ostensibly professing to be discharging his official duty in maintaining the register, which he is bound to maintain correctly. In making the entries he pretends or purports to act in the execution of his duty; but in point of fact he is acting in direct dereliction of it. It has been argued by the Advocate-General of the Punjab that Section 270(1) refers only to the commission of an act and not to omission. This may not be accurate but even quite apart from this, the falsification of accounts is by no means a mere omission. It is true that some entries are alleged to have been omitted in order to conceal the criminal breach of trust. If an omission were due merely to an honest mistake, it would certainly remain a mere omission; but where the omission of certain items is intentional so that a false balance may be shown and the real surplus may not be disclosed, it is a positive act of falsifying accounts. There is a falsification of the total just as much as that of particular entries that have been omitted. In my opinion the consent of the Governor was necessary for the charge under Section 477-A, though not for that under Section 409, I.P.C.

Joint Trial

39. The last question is whether the whole proceedings should or should not be quashed on account of the joint trial. Under Section 235(1), Criminal PC two offences for one series of acts so connected together as to form the same transaction can be tried at one trial. The offences of criminal breach of trust and falsification of account were so connected. The difficulty is caused by the circumstance that for one of these offences previous consent of the Governor was a condition precedent to the exercise of the Magistrate's jurisdiction. There is no specific provision in the Code to cover the present case exactly. In a case of jury trial, I would have had no hesitation in holding that the whole trial was illegal inasmuch as the accused would have been gravely prejudiced by the production of evidence relating to the offence under Section 477-A for which the Court had no jurisdiction at all to try the accused. But this case was tried by a Magistrate before whom no objection regarding the want of consent appears to have been taken.

Under Section 537, Criminal PC the Appellate Court before altering the order relating to the offence under Section 409 has to be satisfied whether the defect has in fact occasioned a failure of justice, and in determining this, the Court must have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings. As however we are not to go into the merits of the case, it is not practicable to decide now whether there would or would not be a failure of justice if the appeal is re-heard as regards the charge under Section 409,1. PC The Sessions Judge when re-hearing the appeal would be in the best position to decide this for himself.

40. I would accordingly, if. an appeal were to lie, remit the case to the High Court with the declaration that the following order be substituted for the High Court's order; The order of acquittal passed by the Sessions Judge be set aside, all the proceedings, so far as they relate to the charge under Section 477-A, be quashed and the case with regard to that offence dismissed on the sole ground of want of a consent of the Governor, without acquitting the accused of the charge, leaving the door open for a fresh prosecution under Section 477-A if consent of the Governor in his discretion is obtained hereafter; and the appeal be sent back to the Sessions Judge for re-hearing as regards the charge under Section 409, I.P.C. leaving it open to the Sessions Judge to order a re-trial if he comes to the conclusion that the joinder of the two charges has occasioned a failure of justice.

Varadachariar J.

41. This is an appeal against a judgment pronounced by the High Court at Lahore, in the exercise of its criminal appellate jurisdiction; that Court has certified that the case involves a question as to the interpretation of Section 270 (1), Government of India Act, 1935, namely, whether the consent of the Governor of the Province was necessary for the prosecution of the appellant for alleged offences under Sections 409 and 477-A, I.P.C. A question was mooted, in the course of the argument before us, whether Section 205, Government of India Act, 1935, contemplated appeals in criminal cases. The juxtaposition of the words "judgment, decree or final order" is, no doubt, suggestive of civil litigation; but it cannot be said that the word ' judgment' is not comprehensive enough to include a judgment pronounced in a criminal case: see Section 366, Criminal PC and other Sections in that Chapter, and also Clause 41 of the Letters Patent of the Chartered High Courts. Unlike Section 206, Constitution Act, Section 205 is not in terms limited to civil cases; and it is worth noting that Section 210(2) places orders of this Court on the same footing as orders made "by the Highest Court exercising civil or criminal jurisdiction, as the case may be." As no objection has been taken on behalf of the Crown to the maintainability of the appeal, I proceed to deal with the case on the assumption that the appeal was competent.

42. In view of the course of the argument before us, it is necessary to refer in some detail to the nature of the charges against the appellant. He had for many years been a Sub-Assistant Surgeon in the Punjab Provincial Subordinate Medical Service. In March 1937, when he was in charge of the rural hospital at Mithankot, he was suspected of dishonestly removing to his own quarters certain medicines belonging to the hospital. He was at that time under orders of transfer to a new station and was arranging to hand over charge shortly to his successor. Acting on a report sent by the compounder of the hospital to the Secretary of the District Board, a Deputy Superintendent of Police caused a search of his house to be made; and he examined the contents of some of the boxes belonging to the appellant which seemed to have been packed ready to be taken by the

appellant when leaving the station. As the result of this search and of some further investigation, proceedings were instituted in June 1937, before the First Class Magistrate at Dera Ghazi Khan and charges were framed against the appellant under Sections 409 and 477-A. The first charge was that being a public servant and in such capacity entrusted with medicines of the hospital which were the property of the District Board, Dera Ghazi Khan, the accused committed criminal breach of trust in respect of certain medicines (specified in the charge) and thereby committed am offence punishable under Section 409, I.P.C.

43. The second charge was that being a public servant, he wilfully and with intent to defraud omitted to record entries in the stock book of medicines for 1937 relating to certain medicines belonging to the District Board and in his possession and thereby committed an offence punishable under Section 477-A, I.P.C.

44. The appellant denied the charges. He denied that the disputed medicines were recovered from his boxes as alleged by the prosecution. He alleged that they were in: his room, as he was taking steps to complete the preparation of his stock book. As regards the omission to enter certain medicines in the stock book, he pleaded that it was not dishonest but was merely due to: oversight. It does not appear from the judgment of the Magistrate whether the, objection based on the absence of the; Governor's consent to the prosecution was taken before him. On the evidence, the Magistrate found the appellant guilty of both the offences charged and sentenced! him to six months' rigorous imprisonment.; On appeal, the learned Sessions Judge of Dera Ghazi Khan dealt with the objection under Section 270(1) as a preliminary point; and, as he came to the conclusion that the proceedings could not be instituted except with the Governor's consent, he "acquitted" the appellant, holding that the proceedings were without jurisdiction. In this view, he did not deem it necessary to deal with the evidence against the accused. I may observe in passing that the proper order to be passed on this footing was not one of acquittal; but, so far as this appeal is concerned, nothing turns on this matter of form.

45. The Crown appealed to the High Court at Lahore against the order of acquittal; and a Division Bench (Sir Douglas Young C.J. and Blacker J.) set aside the order; and returned the records to the Sessions Court, for disposal of the appeal on the merits. The learned Judges do not seem to have felt any hesitation at that time in holding that Section 270(1) could not apply to the case. It does not appear whether, at the hearing of the appeal, their attention was drawn to the conflicting rulings under Section 197, Criminal P. C. When the appellant applied for a certificate under Section 205, Constitution Act, the attention of the High Court seems to have been drawn to some of these decisions and the learned Judges granted the certificate, with the observation that it might be possible to found on them an argument that the consent of the Governor was necessary in a case like the present. The appellant, who appeared in person before us, invited us to deal with the whole case on the evidence; but, in the absence of special reasons, we saw no justification for doing so. He next contended that as his own plea was to the effect that he did not act dishonestly and, whatever he did, he did only in the performance of his duty, the case must be held to fall within the terms of Section 270(1). I cannot accede to this argument. As the consent of the Governor, provided for in that Section, is a condition precedent to the institution of proceedings against a public servant, the necessity for such consent cannot be made to depend upon the case which the accused or the defendant may put forward after the proceedings had been instituted, but must be determined with reference to the nature of the allegations made against the public servant, in the suit or criminal proceeding. If these allegations cannot be held

to relate to "any act done or purporting to be done in the execution of his duty" by the defendant or the accused "as a servant of the Grown," the consent of the authorities would, prima facie, not be necessary for the institution of the proceedings. If, in the course of the trial, all that could be proved should be found to relate only to what he did or purported to do "in the execution of his duty," the proceedings would fail on the merits, unless the Court was satisfied that the acts complained of were not done in good faith: Section 270(2). Even otherwise, the proceedings would fail for want of the consent of the Governor, if the evidence established only official acts. As the Appellate Court has not pronounced any opinion on the evidence, we are not in a position to say whether on the facts proved, the proceedings could be held to fail on either of the above grounds.

46. At this stage, we have only to see whether the case alleged against the appellant or sought to be proved against him relates to acts done or purporting to be done by him "in the execution of his duty. The appellant pressed us to hold that, even judged by the above test, the charges framed against him, including the one under Section 409,I.P.C. did not clearly exclude the possibility of the acts complained of being acts done in his official capacity. He also urged that the charge under Section 409 was vague and, without further investigation, it could not be determined whether it related to an official act or not. I find myself unable to accept these arguments, so far as the charge under Section 409 is concerned. Read in the light of Section 221, Criminal P.C., the charge must be taken to allege that the appellant dishonestly misappropriated or converted to his own use property which had been entrusted to him in his official character. It is not clear from the record whether the proceedings in this case were initiated by a complaint or by a police report; but taking into account all the materials which appear to have been collected before the proceedings were instituted, I am of the opinion that so far as the charge under Section 409 was concerned, the acts in respect of which he was intended to be prosecuted could not be regarded as acts done or purported to be done in execution of his duty.

47. The learned Judges have dealt with both the charges, i.e. the one under Section 409 and the other under Section 477-A, as on the same footing; it however seems to me necessary to draw a distinction, for the present purpose, between the charge under Section 409 and the charge under Section 477-A. Though a reference to the capacity of the accused as a public servant is involved both in the charge under Section 409 and in the charge under Section 477-A, there is an important difference between the two cases, when one comes to deal with the act complained of. In the first, the official capacity is material only in connexion with the "entrustment" and does not necessarily enter into the later act of misappropriation or conversion, which is the act complained of. In the charge under Section 477-A, the official capacity is involved in the very act complained of as amounting to a crime, because the gravamen of the charge is that the accused acted fraudulently in the discharge of his official duty. The consent of the Governor would thus be prima facie necessary for the institution of proceedings against the appellant under Section 477-A. The learned Advocate-General of the Punjab sought to found an argument on the fact that the appellant is in the present case charged not with an act, in the sense of making a fraudulent entry in the course of his official duty, but with an omission to make an entry which it was his duty to make. I do not think that anything can be made to turn on this distinction. Apart from the principle that, for the purposes of the criminal law, acts and illegal omissions stand very much on the same footing, the conduct of the appellant in maintaining the accounts which life was his duty to keep, has to be dealt with as a whole and the particular omission cannot of itself be treated as an offence except as a step in the appellant's conduct in relation to the maintenance of the register

which it was his duty correctly to maintain.

48. It only remains to deal with the arguments urged on the one side or the other as to the test to be applied in determining whether or not the act complained of is one "purporting to be done in execution of his duty" as a public servant. I would observe at the outset that the question is substantially one of fact, to be determined with reference to the act complained of and the attendant circumstances; it seems neither useful nor desirable to paraphrase the language of the Section in attempting to lay down hard and fast tests. For instance it was said in *Abdul Hadi Mussalman v. D.P. Mishra* [25]"we are not concerned with the act itself so much as the capacity in which the act is performed." An observation of that kind does not seem to be very helpful and may even prove misleading. Again, expressions like "cloak of office" and "professed exercise of office" may correctly fit in with certain cases, but they may not always be appropriate to describe or delimit the scope of the Section. The question does not seem to have arisen for decision under Section 270(1), Constitution Act; we were accordingly referred by way of analogy to a number of rulings under Section 197, Criminal PC and one or two decisions under Section 80, Civil Procedure Code The judgment in 26. *Bai Mahal Panday v. Maung Po Sein* [26]dealt with a provision corresponding to Sub-section (2) of Section 270 and throws no light on the present question.

49. The reported decisions on the application of Section 197, Criminal PC are not by any means uniform. In most of them, the actual conclusion will probably be found to be unexceptionable, in view of the facts of each case; but, in some, the test has been laid down in terms which it is difficult to accept as exhaustive or correct. Much the same may be said even of decisions pronounced in England, on the language of similar statutory provisions:in *Booth v. Olive*[27] It does not seem to me necessary to review in detail the decisions given under Section 197, Criminal PC which may roughly be classified as falling into three groups, so far as they attempted to state something in the nature of a test. In one group of cases, it is insisted that there must be something in the nature of the act complained of that attaches it to the official character of the person doing it: of I.C. 648,28 50 Mad 754,29 AIR 1929 Cal 724,80 AIR 1935 Rang 26331 and AIR 1939 Bom 63. In another group, more stress has been laid on the circumstance that the official character or status of the accused gave him the opportunity to commit the offence. It seems to me that the first is the correct view. In the third group of cases, stress is laid almost exclusively on the fact that it was at a time when the accused was engaged in his official duty that the alleged offence was said to have been committed: *Gangaraju v. Venki*[28] quoting from Mitra's Commentary on the Criminal Procedure Code. The use of the expression "while acting" etc. in Section 197, Criminal PC (particularly its introduction by way of amendment in 1923) has been held to lend some support to this view. "While I do not wish to ignore the significance of the time factor, it does not seem to me right to make it the test. To take an illustration suggested in the course of the argument, if a medical officer, while on duty in the hospital, is alleged to have committed rape on one of the patients or to have stolen a jewel from the patient's person, it is difficult to believe that it was the intention of the Legislature that he could not be prosecuted for such offences except with the previous sanction of the Local Government.

50. Two reported decisions, one in *Ganapathy Goundan v. King Emperor*[29] under Section 197, Criminal PC and the other in *Dakehina Ranjan v. Omar Ghand*[30] Civil Procedure Code may be referred to as instructive, since in each of them two acts were complained of and, notwithstanding "the apparent connexion between the acts in the sense of relation in time or

opportunity, the Court held that one of the acts was an official act but not the other. In the Madras case, a village Magistrate held in confinement certain persons who were suspected to have committed a murder, and also tortured them in order to extort a confession from them. He was charged for committing offences under Section 330, 343 and 348, I.P.C. Wallace J. held that sanction to prosecute him under Section 343 and 348 was required under Section 197, Criminal PC but not for prosecuting him under Section 330. In the Calcutta case,85 a trader sued a police officer for recovery of two sums of money, namely ₹ 50 being damages for wrongful arrest, and ₹ 75 being the amount alleged to have been extorted by the police officer from the plaintiff. As regards the second head of Claim, the learned Judges were of opinion 'that no notice under Section 80, Civil Procedure Code was necessary, as "nobody could suppose that he was purporting to act in his official capacity in demanding and obtaining the sum of ₹ 75."

51. Should it however be assumed that the true import of Section 197, Criminal PC was that stated in the passage from Mitraquoted in 52 Mad 602,33 I must observe that, in that view, that Section cannot be treated as bearing a true analogy to Section 270(1), Constitution Act. The(latter Section does not use the expression "while acting" etc., but makes it clear that the act complained of should have been done or should purport to have been done in execution of official duty it does not even say "in the course of such duty." There are, in my opinion, strong reasons against placing an unduly wide interpretation on this provision. It was no doubt, intended to afford a measure of protection to public servants; but it was not part of the normal protection of such servants. That it was meant to provide for an exceptional situation is shown by the fact that it relates only to acts done at a particular, juncture, namely before the commencement of Part 3 of the Act. Section 270 (1) applies not only to criminal proceedings, like Section 197, Criminal PC but also to the institution, of civil proceedings. In the initiation of criminal proceedings, the protection of public interest is the main concern, and it may well be left to the Local Government to determine the question of the expediency of a prosecution from that point of view. But when a citizen seeks a civil remedy against a public servant, the Legislature must be presumed to have been very cautious in depriving the aggrieved citizens of redress in a Court of law and any restrictions on such a remedy imposed in the interest of the public servant should not be lightly extended so as unduly to restrict the remedy of the citizen. I am accordingly of the opinion that the consent prescribed, by Section 270(1) of the Act was not required, for the institution of proceedings against the appellant under Section 409, I.P.C. I must however state, with due respect to the learned Judges of the High Court, that in one or two places in the judgment under appeal, their observations are much too widely worded. For instance, in one place they observe that the Section cannot be meant to apply to cases where there could be no doubt that the acqt alleged must be in bad faith.

52. If this observation was intended to relate to Sub-section (1) of Section 270, it obviously cannot be correct; because the question of good faith or bad faith is expected to be decided by the Court after trial and, according to Sub-section (2), the proceedings will be dismissed by the Court, unless it is satisfied that the acts complained of were not done in good faith. It does not seem to me right to introduce the question of good faith or bad faith at the stage to which Sub-section (1) of the Section relates. I may, in this connexion refer to two decisions under Section 80, Civil Procedure Code whose language is almost identical, with that of Sub-section (1) of Section 270. In 41 Mad 792,36 a Full Bench of the Madras High Court held that the notice required by that Section must be given even to a public officer who had acted mala fide in the

discharge of his duty. Sir John Wallis. quoted Baron Parke's observation in *Kirby v. Simpson* [31]to the effect that a person may act maliciously and yet in the execution of his office. Sadasiva Iyer J. stated (on p, 811) that "the question of the good faith on the bad faith of the public officer...is irrelevant" at that stage. The Madras decision was followed by the Calcutta High Court in 50 Cal 992.

53. Again, towards the conclusion of the judgment under appeal, the learned Judges observe that the words "act done or purporting to be done in the execution of his duty" cannot by any stretch of the English language be made to apply to an act which is clearly a dereliction of his duty. The word "dereliction" may reasonably include negligence in discharging a duty. But, it seems to me that an act is not less one done or purporting to be done in execution of a duty because the officer concerned does it negligently. In my opinion, the order of the High Court should be modified by quashing the proceedings against the appellant so far as the charge under Section 477-A, Penal Code, is concerned and directing the Sessions Court to deal with the appeal only so far as it relates to the charge under Section 409. I agree with my learned brother that it must be left open to the Sessions Judge to consider whether it is necessary to order a retrial on the ground of possible failure of justice or prejudice to the accused by reason of the joint trial of the two charges.

54. The case will be remitted to the High Court with a declaration that the following order ought to be substituted for the order of the High Court dated 20th October 1938: "That the case be sent back to the Sessions Judge for hearing on the merits as regards the charge under Section 409, Penal Code, that the order of acquittal passed by the Sessions Judge be set aside, and that the proceedings under Section 477-A of the Code be quashed for want of jurisdiction, the consent of the Governor not having been obtained."

55. It will be open to His Excellency, after considering the facts of the case, to give his consent to a fresh prosecution under Section 477-A, if he should think fit; and it will be equally open to the Sessions Judge to order a trial if he is satisfied that the joinder of a charge which the Court had no jurisdiction to hear has prejudiced the accused person in his defence and thereby occasioned a failure of justice. There will be no order as to costs.

Cases Referred.

1(1930) 17 AIR PC 291
2(1872) 17 Suth W R 364 at pp. 370-72
3(1878) 4 Cal 531
4(1929) 16 AIR Cal 214 at p. 144
5(1921) 8 AIR PC 80 at p. 82
6(1923) 10 AIR PC 148
7(1925) 12 AIR PC 155
8(1926) 13 AIR All 669
9(1933) 20 AIR All 262
10(1925) 12 AIR PC 155
11(1935) 22 AIR All 620 at p. 685
12(1925) 12 AIR PC 155
13(1935) 22 AIR Rang 267
14(1906) 29 Mad 126
15(1908) 31 Mad 543 at page 545
16 (1891) 15 Bom 155 and 17
17(1895) 17 All 112

18(1920) 7 AIR PC 86
19(1891) 1 Q B 734
20 (1903) 1 K B 547
21(1891) 1 Q B 734
22Urban District Council (No.1) (1903) 1 K B 547
23(1920) 7 AIR PC 86
24(1920) 7 AIR PC 86
25(1935) 22 AIR Nag 52
26(1938) 25 AIR Rang 189
27(1851) 10 C.B. 827
28(1929) 16 AIR Mad 659 at p. 605,
29(1932) 19 AIR Mad 21434
30(1924) 11 AIR Cal 145
31(1854) 10 Ex 358