THE

# MADRAS WEEKLY NOTES

## CRIMINAL



## 1947

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# Table of Cases—1947

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## FEDERAL COURT
(On Appeal from the Calcutta High Court)
*December* 11, 1946

SIR PATRICK SPENS, C. J., SIR MD. ZAFRULLA KHAN & H. J. KANIA, JJ.

H. H. B. GILL
v.
THE KING-EMPEROR

*Government of India Act*, 1935, *S.* 270 *(1)*—*Cr.P.C.* (*V of* 1898), *S.* 197—*Retrial ordered — Fresh sanction if necessary — Charge under Ss.* 120*B*/161—*Conviction under Ss.* 120*B*/165, *Penal Code.*

*A complaint was filed alleging that* G *and* L *were parties to a criminal conspiracy to cheat the Government by dishonestly or fraudulently inducing its officers to pay larger sums than would otherwise have become due to* L *in respect of contracts for the supply materials placed with* L *by* G *on behalf of Government and that in pursuance of the conspiracy* L *had on various occasions made payments to* G. *The complaint was accompanied by the consent of the Governor-General under S.* 270 *(1) of the Constitution Act and also the sanction under S.* 197, *Cr.P.C. to the prosecution of* G *for offences punishable under S.* 161 *and S.* 120*B read with S.* 420, *Penal Code. The magistrate framed charges against* G *and* L *under S.* 120*B read with S.* 420 *and a charge against* G *under S.* 161 *and a charge against* L *under S.* 109 *read with S.* 161. *The accused were acquitted of all the charges. On appeal the High Court remanded the case for trial on an amended charge of conspiracy to give and r[illegible] bribes and also on the charges under Ss[illegible] and* 161/109 *as previously framed. On [illegible] retrial the magistrate convicted* G *of an offence under S.* 165 *and* L *of one under Ss.* 165/109 *Penal Code and both* G *and* L *under S.* 120*B read with S.* 165.

Held, *(i) that the consent of the Governor General originally given was a sufficient compliance with S.* 270 *(1) of the Constitution Act for the purposes of the case and no further or fresh consent was necessitated by the order of the High Court whereby the case was remanded for retrial on fresh charges. The institution of the proceedings having been consented to by the Governor General under S.* 270 *(1), the subsequent course of the proceedings would be governed by the relevant provisions of the Code of Criminal Procedure;*

*(ii) further that no consent under S.* 270 (1) *was required for the institution of proceedings in respect of an offence under S.* 120*B read with S.* 161, *inasmuch as an agreement by a public servant to receive illegal gratification and the receipt of such gratification by him cannot be said to be acts done or purporting to be done in the execution of duty;*

*(iii) that the sanction under* S. 197, *Cr.P.C. enabled the magistrate to take cognisance of the offences set out in the sanction and cognisance having properly been taken, the subsequent course of the proceedings would be governed by the Cr.P.C. The mere fact that at the stage of framing charges the magistrate came to the conclusion that charges ought to be framed under S.* 161 *and Ss.* 120*B*/161 *instead of under S.* 161 *and Ss.* 120*B*/420 *would not render the sanction nugatory and invalidate the magistrate's action in taking cognisance of the offences set out in the sanction. It is again immaterial that fresh charges were framed in pursuance of the direction of the High Court;*

*(iv) that the conviction under Ss.* 120*B*/165, *when the charge was in respect of an offence under Ss.* 120*B*/161, *was not illegal and was justified by S.* 238, *Cr.P.C.*

*N. Barwell & Tarachand Mathur* instructed by *Ganpat Rai & B. Banerji* instructed by *Ganpat Rai* for Applts.

*A. K. Basu & N. K. Sen* instructed by *P. K. Bose* for Respt.

JUDGMENT.

ZAFRULLA KHAN J.—This case has had a chequered history.

The facts, so far as they are material at this stage, are these. The appellant Gill is an Army Officer and was between March 1941 and July 1942 Deputy Assistant Director of Contracts and Deputy Controller of Purchase at Calcutta, and in that capacity was responsible for the issue and acceptance of tenders for purchase of materials on behalf of certain Departments of Government,

The appellant Lahiri was a contractor for the supply of such materials.

On 25th February 1943 a complaint was filed by a Deputy Superintendent of Police in the Court of the Chief Presidency Magistrate, Calcutta, alleging that between March 1941 and July 1942, Gill and Lahiri were parties to a criminal conspiracy to cheat the Government of India by dishonestly or fraudulently inducing its officers to pay larger sums of money than would otherwise have become due to Lahiri in respect of contracts for the supply of materials placed with Lahiri's firm by Gill on behalf of Government and that in pursuance of this conspiracy Lahiri had on various occasions made payments to Gill. The complaint was accompanied by the consent of the Governor-General acting in his discretion, under section 270 (1) of the Constitution Act to the institution of criminal proceedings against Gill for offences punishable under section 161 and section 120-B read with section 420 of the Penal Code. There was also exhibited the sanction of the Governor-General in Council under section 197 of the Code of Criminal Procedure to the prosecution of Gill for the same offences. The consent of the Chief Presidency Magistrate under section 196-A (2) of the Code of Criminal Procedure to the initiation of the proceedings was also filed.

On 4th May 1943, the Chief Presidency Magistrate framed a charge against Gill and Lahiri under section 120-B read with section 420 of the Penal Code and a charge against Gill under section 161 of the Penal Code in respect of one particular payment of Rs. 500 and a charge against Lahiri under section 109 read with section 161 of the Penal Code in respect of the same amount of Rs. 500.

The object of the criminal conspiracy which was the subject matter of the first charge was "to cheat the Government of India in the Department of Supply by dishonestly or fraudulently inducing its Financial Officers to pay larger sums of money than due (in respect of specified contracts) by means of false representation regarding.....the rates quoted (by Lahiri's firm) and character and capacity of supply made by them in preference to those of other firms."

On the conclusion of the trial the learned Magistrate found that a conspiracy to cheat Government was not established. With reference to the charges under sections 161 and 161/109 he found that though the payment of the amount set out in the charge was admitted by Gill, there was something to be said for the explanation that he had offered as to the consideration for which the payment had been made to him. On these findings he acquitted both accused on all the charges.

Against the acquittals the Crown carried an appeal to the High Court at Calcutta which was decided on the 8th December 1944. The learned Judges of the High Court agreed with the learned Magistrate that the evidence let in support of the conspiracy charge did not establish that charge but held that the proper charge should have been one of conspiracy to give and receive bribes. They therefore, set aside the order of acquittal and remanded the case to the Chief Presidency Magistrate for trial "on an amended charge of conspiracy to give and receive bribes and also on the charges under sections 161 and 161/109 of the Indial Penal Code as previously framed."

The case then went back to the Chief Presidency Magistrate who on 22nd June, 1945, charged Gill and Lahiri under section 120-B read with section 161 of the Penal Code with being parties to a criminal conspiracy between March 1941 and July 1942 with the object of Lahiri giving and Gill accepting gratifications other than legal remuneration in the matter of Lahiri's contracts as specified, and also framed separate charges against Gill and Lahiri under ss. 161 and 161/109 of the Penal Code respectively with respect to the payment of Rs. 500. The trial proceeded on these charges. In the end the learned Magistrate found that all the payments alleged to have been made by Lahiri to Gill were proved. He disbelieved Gill's explanation with regard to the payment of Rs. 500. He did not think, however, that the evidence warranted the definite [illegible]ion that there was anything improper do[illegible] the sense that Government incurred any [illegible]ss or that Lahiri obtained any contract which he ought not to have obtained. He felt that in that view he would not be justified in convicting the accused under ss. 161 and 120-B/161 and considered it "safer" to convict Gill of an offence under section 165 and Lahiri of one under ss. 165/109 of the Penal Code (presumably in respect of the payment of Rs. 500 though this is left in some doubt in his judgment) and both Gill and Lahiri of the offence of criminal conspiracy

under s. 120-B read with s. 165 of the Code. He sentenced each of them to simple imprisonment for three months and a fine of Rs. 210 under ss. 165 and 165/109 and passed no separate sentence under ss. 120-B/165. His order is dated 13th August 1945.

On appeal to the Calcutta High Court the learned Judges gave the appellants the benefit of doubt with regard to the consideration for the payment of Rs. 500 and set aside the convictions under ss. 165 and 165/109. They also gave them the benefit of doubt with regard to one particular item out of the remaining payments, but held that the rest of the payments were established and that they were without consideration. They consequently upheld the convictions under s. 120-B read with s. 165 and maintained the sentence of imprisonment passed upon each of the appellants but remitted the fines. Their judgment was pronounced on 12th April 1946.

Before the High Court objection was taken on behalf of Gill that his trial was bad for the reason that the consent of the Governor-General under s. 270 (1) of the Constitution Act to the institution of proceedings against him under s. 120-B read with s. 161 had not been given. The High Court repelled the contention holding that the matter was concluded by the judgment of this court in *Huntley's case* [1].

S. 205 (1) of the Constitution Act enjoins upon every High Court the duty to consider in every case whether or not any substantial question of law as to the interpretation of the Constitution Act or any Order in Council made thereunder is involved and of its own motion to give or to withhold a certificate accordingly. The judgment of the High Court in this case is silent as to any such question being involved. It was stated before us that Gill's legal advisers construed the absence of any reference in the judgment of the High Court as a withholding of the certificate. If the learned Judges of the High Court were of the opinion that the constitutional question argued before them was clearly covered by a judgment of this court they might well have taken the view that the question was no longer a substantial one within the meaning of s. 205 (1) and that consequently no certificate should be given. Gill was, therefore, advised to move His Majesty in Council for special leave to appeal against the order of the High Court. This motion was made on 18th July; but the Judicial Committee declined to entertain the motion on the ground that the High Court should have been asked to consider the question whether a substantial question of law as to the interpretation of the Constitution Act was or was not involved in the case. As a consequence, an application was made to the High Court on 12th August for the grant of a certificate under section 205. On 22nd August the learned Judges of the High Court made the following order :—

"A certificate under section 205(1) of the Government of India Act, 1935, is applied for and granted."

An application for a copy of this order was made on 26th August and the copy was supplied on 4th September.

Armed with the certificate Gill and Lahiri lodged their appeals in this Court; the former on 1st October and the latter on 7th October (October 2nd to 6th being Court holidays).

On the face of them the appeals when lodged were barred by time under the relevant Rules of this Court and the appellants, therefore, filed an application praying that the period of limitation may be extended under section 5 of the Limitation Act. At the hearing Counsel for the Crown intimated that he did not desire to press the question of limitation. Having regard to the course of events set out above we were satisfied that the appellants had sufficient cause for not preferring their appeals within the prescribed time. We accordingly admitted the appeals.

The only constitutional question raised before us was that Gill's trial on the charge framed against him under ss. 120-B/161 on 22nd June 1945 was bad for want of the consent of the Governor-General under section 270(1) of the Constitution Act. We are unable to accede to this contention. In our judgment the consent of the Governor-General, dated 28th January, 1943, to the institution of criminal proceedings against Gill "for having committed during the years 1941 and 1942 offences punishable under section 161 and section 120-B read with section 420 of the Indian Penal Code" was a sufficient compliance with the requirements of section 270(1) of the Constitution Act for the purposes of this case and no further or fresh consent was necessitated by the order of the High Court of 8th December, 1944, whereby the case was remanded for retrial on fresh charges. It makes no difference that the Magistrate framed a fresh charge in pursuance of the direction of the High Court,

1. [1944] M.W.N. 430 : Cr. 102 : [1944] F.C.R. 262

The institution of the proceedings having been consented to by the Governor-General under section 270(1) of the Constitution Act, the subsequent course of the proceedings would be governed by the relevant provisions of the Code of Criminal Procedure. The objection in respect of the amended charge is also effectively met by the reason relied upon by the High Court for overruling it, namely, that no consent under section 270 (1) is required for the institution of proceedings in respect of an offence under section 120-B read with section 161 inasmuch as an agreement by a public servant to receive illegal gratification and the receipt of such gratification by him cannot be said to be acts done or purporting to be done in the execution of duty. [See (1944) F.C.R. 262.]

Two other questions were argued before us with our leave. It was urged that Gill's trial was vitiated by want of sanction under section 197 of the Code of Criminal Procedure in respect of an offence under ss. 120-B/161 of the Penal Code. Here too, the contention was that inasmuch as the sanction of the Governor-General under that section was confined to the prosecution of Gill "for having committed during the years 1941 and 1942 offences punishable under section 161 and section 120-B read with section 420 of the Indian Penal Code" it was not adequate to cover a charge under section 120-B read with section 161.

Section 197 lays down that "when any public servant.....is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of" the prescribed authority.

It was urged on behalf of the Crown that no sanction under this section was required as the offence charged against Gill under ss. 120-B/161 was not committed by him while acting or purporting to act in the discharge of his official duty. We consider it unnecessary to enter upon a discussion and determination of that question as in our judgment the sanction of the Governor-General in Council, dated 3rd February 1943, enabled the learned Chief Presidency Magistrate to take cognizance of the offences set out in the sanction and cognizance having properly been taken, the subsequent course of the proceedings would be regulated by the relevant provisions of the Code of Criminal Procedure. The mere fact that at the stage of framing charges against the accused the Magistrate came to the conclusion that on the basis of the evidence recorded, charges ought to be framed under section 161 and section 120-B read with section 161 instead of under section 161 and section 120-B read with section 420, would not render the sanction already granted nugatory and invalidate the Magistrate's action in taking cognizance of the offences set out in the sanction. It is again immaterial that fresh charges were framed in pursuance of the direction of the High Court. We consider therefore that the trial of Gill on the charge under ss. 120-B/161 was not rendered illegal for want of sanction under section 197 of the Code of Criminal Procedure.

Next it was argued that the learned Magistrate was not legally competent to record a conviction under ss. 120-B/165 when the charge was in respect of an offence under section 120-B read with section 161. We do not think this contention has any force. The charge under ss. 120-B/161 was one of conspiracy to give and receive illegal gratifications with the motive that favour shall be shown to the person giving the illegal gratifications in respect of business in which he was concerned and which was about to be transacted by the person receiving the illegal gratifications in his capacity as a public servant. To establish this charge it was necessary to prove (1) that Lahiri and Gill had entered into an agreement in pursuance of which payments were to be made and were in fact made by Lahiri to Gill, (2) that these payments were without lawful consideration, (3) that Gill received the payments knowing that Lahiri was concerned in business which Gill was transacting or was about to transact in his capacity as a public servant, and (4) that the motive for the payments was that Gill should show favour to Lahiri in transacting the busine[illegible] the first three elements were proved [illegible] the motive was not proved, an offence under ss. 120-B/161 would not be brought home to the accused, but they would nevertheless be guilty of an offence under ss. 120-B/165. The evidence did not satisfy the learned Magistrate that favour was actually shown. This did not mean that the illegal gratification was not given and received with the motive that favour should be shown but the learned Magistrate thought that it would not be safe on his finding to convict the appellants of an offence under

ss. 120-B/161. As, however, it was proved to his satisfaction that in pursuance of an agreement entered into between them payments were to be made and had been made by Lahiri to Gill and that Gill had received the amounts without lawful consideration knowing that Lahiri was concerned in business which Gill was transacting or was about to transact in his capacity as a public servant he proceeded to convict them of offences under ss. 120-B/165. In our judgment he was justified by the provisions of section 238 of the Code of Criminal Procedure in adopting this course.

No other question was raised before us.

The appeals are dismissed. The appellants will now surrender to their bails and serve out their sentences.

— *Appeals dismissed.*

Cr. M. P. Nos. 1569, 1578, 1581, 1584, 1587 and 1601 of 1946
*November* 19, 1946

HAPPELL & SHAHAB-UD-DIN, JJ.

KARAMUTHU THIAGARAYAN CHETTIAR & others
v.
EMPEROR

*Defence of India Act* (*XXXV of* 1939), *S.* 1(4) *as amended by Ordinance XII of* 1946—*Cotton Cloth & Yarn Control Order,* 1945—*Prosecution under, after* 1*st October* 1946—*Legality—Government of India Act,* 1935, *S.* 102 (4) *& Sch. IX, S.* 72—*Effect of.*

*A prosecution for contravention of an Order made under the Defence of India Act,* 1939, *instituted before* 30*th September* 1946, *could be continued after that date even though the Defence of India Act and the Rules and the Orders made under it have ceased to be in force from that date.*

*A temporary Act may contain provisions within itself for the consequence that will ensue on its expiration; and hence the provisions of Ordinance XII of* 1946 *adding such a proviso to the Defence of India Act, cannot be regarded as extending the Defence of India Act and the Rules and Orders made under it beyond the date of their expiration.*

*Ordinance XII having been promulgated as an amendment to the Defence of India Act cannot be regarded as a separate Ordinance still in force after the expiry of the Defence of India Act.*

*The provisions of Ordinance XII, particularly those provisions which relate to legal proceedings taken under Orders made under S.* 102 *of the Government of India Act are not* ultra vires *the Governor General by reason of the terms of S.* 102 (4) *of the Government of India Act;*

*Prosecutions instituted under a Law or Order made under S.* 102 *of the Government of India Act are 'things done under the law as well as things done before the expiration of the law' and can be lawfully carried to a conclusion.*

*The powers of the Governor General to make Ordinances are not greater than the power of the Indian Legislature to make laws.*

Petitions praying that in the circumstances stated in the affidavits filed therewith, the High Court will be pleased to issue an order to quash the proceedings in C.C. No. 12 of 1946 on the file of the Court of the Additional District Magistrate of Madura and etc.

*Sir Alladi Krishnaswami Ayyar, K. Subramaniam, Alladi Kuppuswami, V. V. Srinivasa Iyengar, R. Gundappa Rao, T. R. Srinivasan & R. Desikan,* for Petrs.

*Advocate General* (*K. Rajah Iyer*) *& Public Prosecutor* (*V. L. Ethiraj*) for Crown.

ORDER

[HAPPELL, J.]

These are petitions to quash the proceedings instituted against the petitioners for offences alleged to have been committed in contravention of rules and Ordinances made under the Defence of India Act. Sir Alladi Krishnaswami Ayyar appears for the petitioners in Cr.M.P. No. 1569 of 1946 in which the prosecution was instituted under rule 18-B, sub-clause 1 (b) of the Cotton Cloth and Yarn (Control) Order of 1945. The main argument has been addressed to us on this petition. Mr. V. V. Srinivasa Ayyangar appears for the petitioners in the other petitions. They relate to prosecutions under different Orders, but no separate argument has been addressed to us in respect of these petitions and it is admitted that the same considerations will apply to all the petitions. It has seemed to us convenient, therefore, to refer throughout to the Cotton Cloth and Yarn (Control) Order only on the footing that what applies to this order will apply equally to the orders in question in the other petitions. The Cotton Cloth and Yarn (Control) Order was made under sub-rule 2 of rule 81 of the rules made under the Defence of India Act. Section 1 (4) of the Defence of India Act provides that the Act "shall be in force during the continuance of the present war and for a period of six months thereafter". By an Order in Council of the 20th March 1946–the India and Burma (Termination of Emergency) Order, 1946 [1]—the end of the emergency–

1. [1946] M.W.N. Cr. Acts & Rules, page 41

i. e. the war was declared) to be the 1st day of April 1946; and on the 1st day of April 1946 the Governor General by proclamation revoked the proclamation made under Sub-section (1) of Section 102 of the Government of India Act on the 3rd of September 1939. Hence the Defence of India Act and the Rules and Ordinances made under it ceased to be in force from the 30th September 1946. In all the petitions before us the offences alleged were committed and the prosecutions were instituted before the 30th of September 1946. Notwithstanding this, the case for the petitioners is that the prosecutions cannot be continued because, after the expiration of a statute, in the absence of provision to the contrary, no proceedings can be taken on it, and proceedings already commenced *ipso facto* determine.

On the 30th March 1946 the Governor-General promulgated Ordinance No. XII of 1946 [1]. This Ordinance is entitled the "Defence of India (Second Amendment) Ordinance 1946 (1). Section 2(2) of the Ordinance commences "Amendment of Section 1, Act XXXV of 1939.....To sub-section (4) of section 1 of the Defence of India Act, 1939, the following shall be added, namely:— But its expiry under the operation of this sub-section shall not affect the—" and then sustantially repeats in four clauses (a) to (d) the provisions of clauses (b) to (e) of section 6 of the General Clauses Act regarding the effect of the repeal of an enactment. Clause (d) of sub-section (2) of section 2 of the Ordinance provides that the expiry of the Defence of India Act shall not affect

"any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty. forfeiture or punishment as aforesaid;

"and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and such penalty. forfeiture or punishment may be imposed as if this Act had not expired".

If Ordinance XII of 1946 is valid, it is clear that the petitioners have no case and that the proceedings against them can be lawfully continued.

Sir Alladi Krishnaswami Ayyar, however, argues that, at any rate in so far as it purports to affect prosecutions instituted under the Cotton Cloth and Yarn (Control) Order of 1945, the Ordinance is *ultra vires* the Governor-General and so not valid. This argument is based on the fact that the subjects to which the Cotton Cloth and Yarn (Control) Order applies are subjects included in the Provincial Legislative List—i.e. List 2 in Schedule VII of the Government of India Act. Section 72 of schedule IX of the Government of India Act confers on the Governor-General the power to make Ordinances in case of emergency, but the section makes no distinction as regards the exercise of the power between subjects included in the Central Legislative List and subjects included in the Provincial Legislative List. The section does, however, state that the power of making ordinances conferred on the Governor-General is subject to the like restrictions as the power of the Indian Legislature to make laws. Now the Indian Legislature has only power to make laws for a province with respect to any of the matters enumerated in the Provincial Legislative list under the provisions of Section 102 of the Government of India Act, and this section restricts or controls the power in two ways. First the power can only be exercised after the Governor-General has declared by Proclamation that a grave emergency exists whereby the security of India is threatened whether by war or internal disturbance; and secondly it is provided that law shall cease to have effect on the expiration of six months after the proclamation has ceased to operate "except as respects things done or omitted to be done before the expiration of the said period". Even though the power of the Governor-General to make ordinances is neither greater nor less than, but co-extensive with, the powers of the Indian Legislature to make laws so that the power of the Governor General to make Ordinances for a province with respect to any matter enumerated in the Provincial Legislative List is the same as that of the Indian Legislature, no difficulty arises as to the form of the Proclamation of emergency required to be made under section 102 sub-section (1) of the Act. The Proclamation of Emergency of 3rd September 1939 was promulgated under section 102 sub-section (1) of the Act. Nor is there any difficulty about the provision that Law made under section 102 shall cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate. The Defence of India Act and so the Cotton Cloth and Yarn (Control) Order made under it have ceased to have effect within the prescribed period. Sir Alladi Krishnaswami was indeed inclined to argue that Ordinance XII of 1946 is in any case *ultra vires* the Governor-General

1. [1946] M.W.N. Cr. Acts & Rules, page 41

because it continues orders made under the Defence of India Act beyond the period permitted by sub-rule 4 of Rule 102 of the Government of India Act. We do not agree. It cannot be disputed that a temporary Act may contain provisions within itself for the consequences that will ensue on its expiration; and, in our opinion, the provisions of Ordinance XII of 1946, which are substantially the same as the statutory provisions which govern all repealed Acts, cannot be regarded as extending the Defence of India Act and the rules and Ordinances made under it beyond the date of their expiration any more than section 6 of the General Clauses Act extends a repealed Act beyond the date of its repeal. Sir Alladi Krishnaswami's principal contention is however, that Ordinance XII of 1946 is *ultra vires* the Governor-General because Parliament has provided for the consequences of the expiration of the Defence of India Act in section 102 of the Government of India Act itself so that no provision with respect to the expiration of the Defence of India Act can be made which cannot be brought within the scope of the words "except as respects things done or omitted to be done before the expiration of the said period." It may be conceded that the provisions which can be made in respect of the termination of orders made under the Defence of India Act and relating to matters enumerated in the Provincial List are controlled by sub-section 4 of section 102 of the Government of India Act; and that being so, the validity of Sir Alladi's contention will depend on the construction of the sub-section. Before however, we deal with this question it will be convenient to refer to two arguments advanced by the learned Advocate-General.

The learned Advocate-General does not accept the construction put on section 102 (4) of the Government of India Act by Sir Alladi Krishnaswami but he argues that in any case the prosecutions in the petitions before us can be lawfully continued because the powers of the Governor General to make ordinances are in fact greater than the power of the Indian Legislature to make Laws and because Ordinance XII of 1946 should be regarded as a separate ordinance which is still in force and did not expire with the Defence of India Act on 30th September 1946. We are unable to accept either of these contentions. With regard to the first contention, in *King Emperor* v. *Benoari Lal Sarma* [2] Lord Simon said "On September 3rd, 1939, the date on which war was proclaimed between His Majesty and Germany, the Governor General acting under Section 102 of the Government of India Act, 1935, had proclaimed that "a grave emergency exists whereby the security of India is threatened by war", and thereupon the Indian Legislature acquired power to make Laws for a Province with respect to any of the matters enumerated in the "Provincial Legislative List" with the result that the Governor-General acting under Section 72 of the 9th schedule, had in case of emergency the same width of legislative power". This is a clear statement by the highest authority in regard to the relative powers of the Governor-General and the Indian Legislature to legislate for provincial subjects in case of emergency, and its force is not diminished by the fact that the question of those powers was not in controversy in the case in which the statement occurs. It may also be pointed out that the India and Burma (Emergency Provision) Act, 1940, treats the powers of the Indian Legislature to make laws and of the Governor-General to make ordinances as coextensive in the absence of express provision to the contrary. Section 1 sub-section 3 of that Act confers on the Governor-General power to make ordinances in respect of certain subjects "notwithstanding the provision of the said section 72 that the power of making Ordinances thereunder is subject to the like restrictions as the powers of the Indian Legislature to make laws". As regards the second contention no doubt an ordinance promulgated by the Governor-General before the 1st of April 1946 is, by virtue of the provisions of the India and Burma (Emergency Provisions) Act, 1940, not restricted to six months but will continue to have effect for the period provided in the Ordinance or, if no period is provided, until the emergency is declared by the Governor-General to have ceased to have effect. The objection to the contention is however, that Ordinance No. XII was not promulgated as an independent Ordinance which should continue to have effect until the emergency was declared to have ceased to exist. It was promulgated as an amendment to sub-section 1 of section 2 of the Defence of India Act, and, in our opinion it was not intended that it should have an existence independent of the other part of the amended sub-sections or the other sec

2. [1943] M.W.N. 46: Cr, 1 P.C.

tions of the Act which ceased to have effect on the 1st October 1946. The intention was, substantially, to apply to the Defence of India Act on its expiration the provisions under section 6 of the General Clauses Act which automatically apply to an act on repeal in the absence of provisions to the contrary.

The vital question is, therefore, whether the provisions of Ordinance XII or at any rate those provisions which relate to legal proceedings taken under Orders made under section 102 of the Government of India Act, for it cannot be disputed that some of the provisions will fall within the scope of the words "things done or omitted to be done", are *ultra vires* the Governor General by reason of the terms of section 102 (4) of the Government of India Act. Sir Alladi Krishnaswami Ayyar asks why Ordinance No. XII should have been promulgated at all if criminal proceedings instituted under an Ordinance made under the Defence of India Act with respect to subjects included in the Provincial Legislative List could be continued after the expiration of the Government of India Act under the terms of section 102 (4) of the Government India Act itself; and why, if it was intented that provision should be made in respect of the expiration of a law made under section 102 (4) similar to the provisions of section 6 of the General Clauses Act or section 38 (1) of the English Interpretation Act, the whole of these provisions should not have been included instead of only the words "things done or omitted to be done". Whether Ordinance No. XII was necessary or unnecessary cannot affect the question of the construction of section 102 (4), but it may be pointed out that the Defence of India Act and the rules made under it cover matters enumerated in the Central as well as the Provincial Legislative List and to matters enumerated in the Central Legislative List section 102 (4) of the Government of India Act will not apply. As regards the second question it seems to us that elaborate provisions with respect to the effect of the expiration of a law made under section 102 would have been out of place. The section gives authority to the Indian Legislature to make laws in respect of Provincial subjects in certain circumstances and the law itself is the place where provision might be expected to be made to govern the effect of its expiration. Moreover section 6 of the General Clauses Act and section 38 (1) of the English Interpretation Act relate to repealed Acts and not to temporary Acts which have expired by efflux of time.

We turn, therefore, to an examination of the meaning of the words in section 102 (4) of the Government of India Act that "A law shall cease to have effect on the expiration of a period of six months after the proclamation has ceased to operate except as respects things done or omitted to be done before the expiration of the said Act." In this connection Sir Alladi Krishnaswami has referred us to the case of *Shib Shankar Lal* v. *Soni Ram* [3]. In that case the question arose, among other things, whether an acknowledgment of liability was a thing done in pursuance of an Act of the Legislature within the meaning of section 6 of the General Clauses Act of 1868 and it was held that it was not. This decision was confirmed by the Privy Council in *Soni Ram* v. *Kanhiyalal* [4]. Sir Alladi Krishnaswami argues that an offence committed in contravention of an act is no more a thing done under or in pursuance of the Act than an acknowledgement of liability is a thing done under the Act. The decisions in the Allahabad cases relating to the construction of an Indian statute will not of course apply to the construction of an English Act: but in any case the argument seems to us to assume, without justification, that provisions appearing in section 6 of the General Clauses Act or in section 38 of the English Interpretation Act have been adopted in sub section (4) of section 102 of the Government of India Act. As we are dealing with an English Statute it is the English Interpertation Act of 1889 that must be looked at, and the argument is that the words of the saving clause in subsection 4 of section 102 of the Government of India Act are substantially the same as those contained in the second part of clause (b) of sub-section (2) of section 38 of the Interpretation Act which are that the repeal shall not affect "anything duly done or suffered under any enactment so repealed." Now, as we have already pointed out we are concerned in these cases with an Act and orders made under the Act which have expired and not with an Act and orders which have been repealed. A Statute which is repealed, in the absence of provision to the contrary, becomes as if it had never existed, but in the case of a temporary Statute the restriction imposed and the duration of it

3. [1910] I L.R. 32 All. 33 (43)
4. [1913] M.W.N. 470:I.L.R. 35 All.227 P.C.

provisions after the expiration of the Statute are matters of construction. (Vide Halsbury's Laws of England, 2nd Edition Lord Hailsham Vol. XXXI, p. 513, sec. 668). It might, therefore, be expected that, if it was the intention of Parliament to adopt in respect of an Act and orders which had expired one only of the provisions of section 38 of the Interpretation Act which affect the provisions of repealed Acts while excluding the other provisions, it would have been made clear that this was its intention or that at least the precise words of the second part of clause (b) of sub-section (2) of section 38 of the Interpretation Act would have been employed. The words used in sub-section 4 of section 102 are, however, very different. They are that a law made under section 102, "shall cease to have effect on the expiration of a period of six months after the proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period". In our opinion these words should be construed in their own context and we see no reason why they should be construed with reference to clause (b) of sub-section 2 of section 38 of the Interpretation Act. Once any presumption in favour of a construction with reference to section 38 of the Interpretation Act is removed there seems to us no real difficulty. It would be highly unreasonable to suppose that Parliament intended, while giving power to the Indian Legislature to make laws for Provinces in respect of Provincial subjects in the event of the security of India being threatened by war or internal disturbance, that offences in contravention of such laws should go unpunished unless the punishments had been inflicted before the expiration of the law or that prosecutions instituted should lapse with the expiration of the law; and in our opinion, a construction of sub-section (4) of section 102 according to the ordinary meaning of the words used does not lead to so unreasonable a conclusion. The "things done or omitted to be done" are not stated to be "things done or omitted to be done" "under a law"; they are stated to be things done or omitted to be done before the expiration of the law. As regards these things sub-section 4 provides that the law shall continue to have effect after the period when with respect to other things the law has expired; and it seems to us, on a reasonable construction, that the things done or omitted to be done before the expiration of the period of six months after which the proclamation has ceased to operate are things to which the law applies so that the law will continue to apply after the expiration of the period to things done or omitted to be done to which it applied before the expiration of the period. This construction is in accordance with what may be presumed to have been the intention of Parliament and does no violence to the ordinary meaning of the words used. In this view offences committed before the expiration of the six months' period can be prosecuted after the expiration of the period and proceedings instituted before the expiry of the period can be lawfully prosecuted to a conclusion. As regards prosecution instituted under a law or order made under s. 102 of the Government of India Act indeed, it can hardly be doubted that they are things done under law as well as things done before the expiration of the Law. The particular prosecutions with which we are now concerned could only have been instituted under the several orders under which they purport to have been instituted.

The learned Advocate General argued that, even if the construction put on sub-sec. 4 of s. 102 of the Government of India Act by Sir Alladi Krishnaswami was accepted, the continuation of the prosecution was lawful by reason of the provisions of the India (Central Government and Legislature) Act of 1946 and Or. XVIII and XX made under it. In the view we have taken of the petitions it is unnecessary to consider this contention.

The petitions are dismissed.

A certificate under s. 205 of the Government of India Act is granted in respect of all the petitions.

N.T.R. — *Petitions dismissed*

Cr. R. C. No. 138 of 1945
Cr. R. P. No. 132 of 1945
*April* 27, 1945

HAPPELL, J.

PAVAYAMMAL & another
v.
THE DISTRICT BOARD, SALEM

*Local Boards Act (Mad. Act XIV of* 1920*), ss.* 207 (2) & 223—*Continuing offence—Starting point of limitation in respect of.*

*A District Board was entrusted with the management of a choultry and its endowed property. On the ground that the petitioners had unauthorisedly occupied a portion of the property, the District Board served them with a notice to vacate and then*

*. prosecuted them under s.* 164 (2) *read with s.* 207 (1) *of the Madras Local Boards Act on the ground that they had failed to vacate the land in contravention of the notice served on them. The petitioners were convicted on* 11–3–1944 *but still did not vacate the property and some six months later on* 2–9–1944 *the District Board prosecuted them under s.* 207 (2) *of the Act.*

Held *(1) that the proviso to section* 223, *Local Boards Act did not apply to the case,*

*(2) that the offence committed being a continuing offence, the starting point of limitation for the second complaint was not the date of the conviction but the last day on which the offence was committed.*

*A.I.R.* 1930 *Bom.* 340, not followed.

*If an offence is a continuing offence, the offence goes on being committed every day and the starting point of limitation for a prosecution for a continuing offence will be the last date on which the offence is committed, unless specific provision is made to a contrary effect.*

Petition under ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the court of the Stationary Sub Magistrate of Rasipuram in C. C. No. 1085 of 1944.

*D. Ramaswami Ayyangar*, for Petrs.
*Basheer Ahmed Sayeed*, for Respt.

ORDER

The Salem District Board was entrusted with the management of a choultry and the property with which the choultry was endowed. On the ground that the petitioners had unauthorisedly occupied a portion of the property attached to the choultry, the District Board served them with a notice to vacate and then prosecuted them under s. 164 (2) read with s. 207 (1) of the Madras Local Boards Act on the ground that they had failed to vacate the land in contravention of the notice served on them. The petitioners were convicted on 11–3–1944 but still did not vacate the property and some six months later on 2–9–44 the District Board prosecuted them under s. 207 sub-sec. 2 of the Act. It appears that there is a civil suit pending between the District Board and the petitioners in regard to the title to the property in question but this suit was filed after the conviction in the first case, and an undertaking, which the Board seems to have given not to evict the petitioners during the pendency of the suit was admittedly given after the accused had been convicted in the case out of which this petition arises. The civil proceedings are therefore not material.

Section 207, sub-section 2 provides that, if a person after conviction continues to contravene the provision of the Act in respect of which he has been convicted or to neglect to comply with the direction or requisition, he shall on conviction be punished for each day after the previous date of conviction during which he continues so to offend, with fine which may extend to the amount mentioned in the fourth column of the schedule. It is not disputed that the petitioners, after their conviction for the contravention of the notice requiring them to vacate, have continued in possession of the property. Section 223 of the Local Boards Act, however, provides that no person shall be tried for any offence against the provisions of the Act unless complaint is made within three months of the commission of the offence. In the present case the complaint was filed nearly six months after the conviction and so more than five months have elapsed, at any rate, from the commencement of the offence. The contention advanced for the petitioners is that the complaint against them is barred by limitation by virtue of the provisions of section 223 of the Act. There is a proviso to section 223 by virtue of which a different period of limitation is prescribed for complaints based on failure to take out a licence or obtain permission under the Act. Such failure is deemed to be a continuing offence "until the expiration of the period, if any, for which the licence or permission is required, and, if no period is specified, complaint may be made at any time within twelve months from the commencement of the offence". It is argued for the District Board—an argument that was accepted by the Magistrate—as against the contention that the complaint was barred by limitation because it was brought more than three months after the conviction, that the present case falls within the scope of the proviso as an encroachment can be validated with the permission of the District Board. On the basis of this contention, it is argued that, as no period is specified for the permission, it was open to the Board to make the complaint any time within 12 months of the commencement of the offence, i. e. the date of the conviction. This contention, in my opinion, has no subtance. The petitioners were prosecuted for failing to vacate the property in spite of the fact that a notice under section 164, sub-sec

tion 2 of the Act had been served on them. There was no question of a prosecution for failure to obtain permission for the encroachment and indeed it is clear no question of permission for the encroachment has ever arisen.

The other argument advanced as against the contention that the complaint was barred by limitation has more substance. As section 207 sub-section (2) provides that a person who continues in occupation after a conviction based on his failure to vacate in response to a notice to do so shall be punished with fine which may extend to the amount mentioned in the appropriate schedule for each day after the previous date of conviction during which he continues to offend by remaining in possession, the offence committed is a continuing offence; and it is argued that the starting point of limitation will not be the date of the conviction but the last day on which the offence is committed. As against this contention, learned counsel for the petitioners has referred me to a decision of the Bombay High Court in *Bechardas* v. *Emperor* [1]. In that case which was under the Bombay City Municipalities Act, one of the questions that arose was whether the starting point of limitation in respect of a continuing offence was the commencement of the offence or whether a fresh cause of action arose every day. The learned Judges held that the starting point was the commencement of the offence, i.e. when the offence was first committed. The decision seems to have been made, as the judgment of Broom-field J. shows, not so much on the basis of principle or authority as on grounds of convenience. In the absence of any clear authority it was thought unreasonable for a local body to be permitted to prosecute for failure to remove a building perhaps years after the offence was committed on the ground that the offence was a continuing offence. With respect I am unable to take this view. Section 223 provides that the complaint must be made within three months of the commission of the offence, and if an offenee is a continuing offence, the offence goes on being committed every day. Inconveniences may arise, but it is not difficult for the Legislature to provide against them. In the case cited by Broomfield J. for in stancein *Welsh & Son* v. *West Ham Corporation* [2] it was provided that a penalty should not be incurred after the expiration of one year from the day when the offence was committed or when the law was broken. Moreover in the proviso to section 223 of the Madras Local Boards Act, fallure to take out a licence or obtain permission under the Act is deemed to be a continuing offence only until the expiration of the period for which the licence or permission is required so that if a period is specified, a complaint would presumably have to be filed within three months of the date of expiration of the licence or permision. If, on the other hand, no period is specified for the licence or permission, it is provided that a complaint may be made at any time within twelve months from the "commencement of the offence". The limitation of the period for which an offence shall be deemed to continue and the use of the words "from the commencement of the offence" instead of "the commission of the offence" indicate that the starting point of limitation for a continuing offence will be the last date on which the offence is committed unless specific provision is made to a contrary effect.

I agree, therefore, with the view taken by the Magistrate that the complaint is not barred by limitation, although for different reasons. As far as the first accused is concerned the petition is dimissed, and the Magistrate will dispose of the case against him in accordance with law. In the petition Crl. R. C. 776 of 1944 against the conviction of both the accused in C. C. No. 2027 of 1943 I allowed the petition of the 2nd accused on the ground that she was not in occupation of the property. That being so, the present complaint cannot be maintained as against her. As far as she is concerned her petition is allowed and she is discharged.

N.T.R.

1. [1930] A.I.R. Bom 340
2. [1900] 1 Q.B. 324

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Cr. R. C. No. 1039 of 1946.
Cr. R. P. No. 994 of 1946
*November* 18, 1946.
Yahya Ali, J.

A. S. Subramanya Ayyar & others in re.

*Penal Code (XLV of* 1860*), section* 216*–A—Offence under—Essentials.*

*When a person charged with the substantive offence of dacoity or robbery has ben acquited of that offence, another person who is said to have intended to screen him from legal punishment in respect of that offence cannot be held guilty of harbouring the alleged offender under section* 216*-A of the Penal Code. When in law no offence of dacoity has been committed by the person to whom shelter was given, there is no question of*

*harbouring him within the meaning of section 216-A.*

*I. L. R.* 14 *Mad*, 400, applied.

*I. L. R.* 52 *Mad*, 73, distinguished.

Petition under sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the order of the Additional First Class Magistrate, Chittoor, dated 25—6—1946 in C.C No. 169 of 1946.

*V. T. Rangaswami Ayyangar & K. Kalyanasundaram* for petrs.

*Public Prosecutor* (*V.L. Ethiraj*) for Crown.

ORDER

The case brought against the petitioners as gathered from a part of the charge sheet filed in this case is that they committed an offence under section 216-A of the Indian Penal Code. The allegation against them is that, knowing full well that four persons mentioned in the charge sheet had along with others committed dacoity on the night of 11th February 1946 at Tirupati by forcibly removing the cinema amplifier from police custody and that a case of dacoity had been registered against them and that they were wanted in that case, they harboured those four persons from 16th February 1946 to 6th March 1946 with food, shelter and money at Tirupati with the intention of screening them from punishment and to make them evade apprehension in P. R. Case Nos. 4 and 5 of 1946. The four persons mentioned in the charge sheet as the individuals who were harboured by the petitioners were tried along with others for offences under sections 395 and 353 of the Indian Penal Code. The Magistrate who tried them found that there was no evidence on record to justify the case being placed before the jury against any of the accused therein with regard either to the offence of dacoity or the offence of assaulting a public servant and that there were no grounds to commit the accused to take their trial in the Court of Session. He directed the discharge of the accused persons. The result of the discharge is that the four persons cited as P. Ws. 1 to 4 in the charge sheet in the present case and who are stated to have committed dacoity and in respect thereof harboured by the petitioners have been by a judicial order which has become final absolved altogether from any liability in respect of the alleged crime of dacoity.

The qustion raised upon these facts by Mr. Rangaswami Aiyangar on behalf of the petitioners is that in view of the discharge of the four persons, who were stated to have been harboured by the petioners, of the offence of dacoity, the prosecution of the petitioners under Section 216-A of the Indian Penal Code is untenable. Section 216-A reads thus so far as is material to the present case:

"Whoever knowing or having reason to believe that any person have recently committed dacoity harbours them or any of them with the intention of screening them or any of them from punishment shall be punished with rigorous imprisonment for a term which may extend to seven years."

The contention of the learned counsel is that the intention to screen certain persons from punishment in respect of an offence of dacoity actually committed by them is the essential ingredient of Section 216-A and no person can be prosecuted in the absence of a proof of the existence of such intention. When however in law no offence of dacoity has been committed by the person to whom shelter was given there is no question of harbouring them within the meaning of Section 216-A.

The question raised is one of first impression and though there are a number of decisions bearing upon other similar sections of the Indian Penal Code, the nearest decision bearing upon the point under consideration is the case decided by a Bench of this Court in *Queen Empress* v. *Swaminathan* [1]. That case dealt with an offence under Section 214 of the Indian Penal Code of offering gift or restoration of property in consideration of screening an offender. The language employed in Section 214 bears close resemblance to the language of Section 216–A, where also the intention postulated is the intention of screning any person from legal punishment for any offence. Muthuswamy Aiyar and Parker. JJ. held in that case that if the main offender had been acquitted of the offences of house breaking and theft and he was not liable to legal punishment there was no question of Section 214 coming into play in the matter of offering a gift etc. in consideration of screening such a person from legal punishment for that offence. The learned Judges observed:—

"It is contended that it is not necessary that an offence should be actually committed, or that the person charged should be really liable to be punished for such offence. We do not, however, think that it was the intention of the legislature to punish the giving of gratifications, under a delusion that an offence had been committed or that a person was guilty of such an offence. The words 'concealing an offence' and 'screening any person from legal punishment for any offence' appear to us to

1. [1891] 14 Mad 400

presuppose the actual commission of an offence, or the guilt of the person screened from punishment."

A recent decision of this Court decided by a single Judge, Curgenven J. in *Rengaswami Gounder* in re, [2] dealt with a case that arose under Section 216 of the Indian Penal Code. That section deals with harbouring an offender who escaped from custody and whose apprehension has been ordered. The requirements of that section are that an order of apprehension should have been issued and the person who was harbouring knew of the existence of such an order for the apprehension and with that knowledge concealed that person with the intention of preventing him from being apprehended. It would be seen that the language and elements of Section 216 are radically different frome those of Section 216-A. The learned Judge had this particular distinction clearly in his mind in referring to several cases that arose under various sections of the Penal Code, namely Sections 201, 203, 212, 213 and 214. He pointed out that in the case of each of these sections, the nature of the offence rightly construed requires that the person in respect of whom it was committed had himself committed the offence. He also pointed out that the same must be held good with regard to Section 214 of the Indian Penal Code which renders punishable the screening of a person from any offence. He then observed:

'It is clear that no person can be screened from legal punishment for an offence, if he has not rendered himself liable to it by his conduct.'

Having regard to this principle and the clear distinction that exists between the language of those other sections and Section 216 which the learned Judge was considering in that case he was of the opinion that the requirements of section 216 were satisfied if it was shown that there was an order of apprehension in force which the person harbouring knew when harbouring the person and he did that act for the purpose of preventing him from being apprehended. There are decisions of other High Courts on the same lines which it is unnecessary to advert to here. The principle applicable to such cases is to my mind perfectly clear that when a person charged with the substantive offence of dacoity or robbery has been acquitted of that offence, another person who is said to have intended to screen him from legal punishment in respect of that offence cannot be held guilty of harbouring the alleged offender under Section 216-A of the Indian Penal Gode.

The proceedings in C. C. No. 163 of 1946 on the file of the Additional First Class Magistrate against the petitioners are quashed.

N.T.R. — *Petition allowed*

2. [1928] M.W.N. 588 : I.L.R. 52 Mad. 73



Cr. R. C. No. 595 of 1946
Case Ref. No. 25 of 1946

*November* 15, 1946

YAHYA ALI, J.

EMPEROR
v.
MOHAMAD RAHIMULLAH & another

*Criminal Procedure Code (V of* 1898) *Ss.* 489 & 490 — *Irrevocable divorce of wife—If change of circumstance — If maintenance order can be cancelled.*

*An allowance ordered to be paid by a man to his wife for the sole reason that she is his wife ceases to be payable when she ceases to be his wife, whether by death or divorce.*

*There is no valid ground whatever for excluding legal or personal status from the circumstances in which a change would make S.* 489, *Cr.P.C. applicable and for including in them practically nothing but pecuniary circumstances.*

15 *All.* 143, not followed.

*A valid divorce is such a change in the circumstances as is contemplated by S.* 489 *and the alteration in the amount of the order could be a reduction of it to nothing; and that is a consequence of the view that a wife ceases entirely to be entitled to an allowance previously ordered when she is completely and validly divorced.*

*Therefore when a wife whose husband has been ordered to pay her an allowance under S.* 488, *Cr. P. C. is proved to have been completely and validly divorced, a magistrate is not only bound to refuse to enforce the order under S.* 490 *but is also empowered to alter the amount payable under it to nothing under S.* 489, *that is to say, he can set aside the order.*

Case referred for the orders of the High Court under Section 432 of the Criminal Procedure Code by the Chief Presidency Magistrate, Egmore, Madras in his letter dated 3rd July 1946.

*A. Kirmani*, for 1st Respt.
*B. Pocker Amicus curiae*, for 2nd Respt.

ORDER

This is a reference by the Chief Presidency Magistrate under Section 432 of the Code of Criminal Procedure made in the following circumstances. Kurshid Begum filed an application under Section 488 of the Code of Criminal Procedure against her husband Mohamed Rahimulla for maintenance in M. P. No. 221 of 1945. Maintenance was awarded. On 5th January 1946 Mohamed Rahimulla filed M. P. No. 6 of 1946 alleging that he had divorced his wife and praying for the cancellation of the order of maintenance made in M. P. No. 221 of 1945 on the ground that she had ceased to be his wife. As it was admitted by Mohamed Rahimulla before the Court that he had not paid the amount of maintenance for the period of Iddat, his application for the cancellation of the order of maintenance was rejected. Against the order of rejection Mohamed Rahimulla filed Criminal Revision Petition No. 193 of 1946 (Cr. R. C. No. 199 of 1946) in this court which was dismissed by Kuppuswami Aiyar, J. In dismissing the application the learned Judge followed the decision of this court in *Mohamad Anser Saheb* v. *Zubeida Bee* [1], where it was laid down that divorce effects not a change in circumstances but a change in the status. After dismissal of the Criminal Revision Petition here, Muhamad Rahimulla paid Kurshid Begum the amount of maintenance for the period of Iddat and communicated to her in writing the fact of his having divorced her irrevocably in conformity with the requirements of the Mohamedan Law. Based upon these averments, he filed a fresh application M. P. No. 332 of 1946 in the court of the Chief Presidency Magistrate, contending that the divorce had become irrevocable, that Kurshid Begum had ceased to be his wife and that therefore the order of maintenance passed in M. P. No. 221 of 1945 should be cancelled. The learned Chief Presidency Magistrate in dealing with this application felt confronted with a difficulty arising out of the order of this Court in the Criminal Revision Petition. Rahimulla had, according to his averments, absolutely divorced his wife, so that the relationship of husband and wife between them had ceased effectively. He had paid the maintenance for the period of Iddat and had conformed to all the requirements of the personal law applicable to the parties and had also duly communicated the fact of the divorce to his wife. But the order of this Court in Crl. R. C. No. 199 of 1946 decided by Kuppuswami Aiyar J. had, according to the magistrate, indicated that it was not a case in which the magistrate could pass an order of cancellation under Section 488 of the Code of Criminal Procedure, since the divorce had not effected a change in the circumstances within the meaning of Section 489. The Chief Presidency Magistrate has therefore referred to this Court the question of law arising in the matter with particular reference to the ruling given in the Criminal Revision Petition. As Kurshid Begum was not represented, I appointed Mr. B. Pocker as *amicus curiae* and he has given me valuable assistance.

It is assumed for the purpose of this reference that there is a valid and irrevocable divorce in force between the parties which has been communicated to the wife in the manner required under the law and that the maintenance for the period of Iddat after the date of the divorce was duly paid. These are facts which the magistrate will have to find upon the evidence before giving effect to the decision on the question of law raised by him.

The question that arises for consideration is whether when a valid and irrevocable divorce has been given by a Mohamedan husband to his wife in conformity with the Mohamedan law and he has also paid the Iddat maintenance, he is still bound to continue to pay the maintenance awarded to his wife under Section 488 of the Code of Criminal Procedure when the marriage is not subsisting between them; in other words when the marital tie has been completely and effectively severed, whether the divorced wife can still claim maintenance on the ground that the divorce does not operate as a change in circumstances within the meaning of Section 489 but is in the nature of a change in status. The answer to this question is straight and simple. The foundation upon which Section 488 and Section 489 of the Criminal Procedure Code rest, so far as granting of maintenance by the husband to the wife is concerned, is that the relation-

1. [1933] M.W.N. 734: Cr. 121

ship of husband and wife subsists between them. When that relationship is lawfully dissolved and there is no marital tie whatsoever substising in fact or in law between them, it is hard to see either in reason or upon any canon of justice or even upon the language of sections 488 and 489 how the husband can be directed to continue to maintain his divorced wife.

The proposition that an allowance ordered to be paid by a man to his wife for the sole reason that she is his wife ceased to be payable when she ceases to be his wife whether by death or divorce is, as remarked by the Nagpur High Court in a decision that I shall presently refer to, not even open to discussion. In regard to that position all the High Courts in India are agreed, the only dissentient being Knox, J. who was in a minority in the Full Bench ruling of the Allahabad High Court in *Shah Abu Ilyas* v. *Ulfat Bibi* [2]. The further proposition that the allowance given to a wife should continue to be paid until the termination of Iddat is included in the proposition that it ceases on her divorce. It is no more than saying that it ceases when the divorce is complete and not before. The only doubt that was raised at one time in the Allahabad High Court was whether the allowance having been once granted under section 488 of the Criminal Procedure Code by the magistrate, he could make any change in it either by way of increasing or decreasing it or discontinuing it except under the conditions mentioned either in sub-sections (4) and (5) of section 488 or in section 489. In sub-section (4) a wife is not entitled to receive an allowance from her husband if she is living in adultery, or if without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent. Under sub-section (5) if it is proved by the husband after such an order has been passed that she is living in adultery or that without sufficient reason she refuses to live with him or that they are living separately by mutual consent, the magistrate shall cancel the order. None of these provisions applies to the present case. Section 489 provides that on proof of a change in the circumstances of any person receiving under section 488 a monthly allowance or of any person ordered to pay the allowance to his wife the magistrate may make such alteration in it as he thinks fit subject to the provision that if he increases the allowance, it should not exceed the maximum of Rs. 100 a month. We are not concerned with sub-section (2) of that section. Section 490 is the provision for the enforcement of the order of maintenance. In *In the matter of the petition of Din Muhammad* [3], Mahmood J. while construing the provisions in the then Code corresponding to the present Section 489 held that the alteration in the allowance contemplated therein only refers to a power to alter the amount and not to a total discontinuance thereof. In taking this view, the learned Judge was following the ruling in *Abdur Raheman* v. *Sakhina* [4] which was a decision under the Presidency Magistrates' Act of Bengal. The learned Judge, however, for other reasons that I shall presently describe held that in the case of a divorce by a Muhammadan husband of his wife, the magistrate may refuse to enforce the order under section 490. The view of Mahamood J. was followed by a Full Bench of the same High Court in *Shah Abu Ilayas* v. *Ulfat Bibi* [2], where Aikman J. who delivered the leading judgment, adopted the reasoning of Mahmood J. and said :

"The 'change in circumstances' referred to in Section 489 is a change in the pecuniary or other circumstances of the party paying or receiving the allowance which would justify an increase or decrease of the amount of the monthly payment originally fixed, and not a change in the status of the parties which would entail the stoppage of the allowance."

These dicta would appear to be the basis of the two decisions of Burn J. in *Muhammad Anser Sahib* v. *Zubeida Bee* [1] and of Kuppuswami Aiyar J in *Mohamed Rahimulla* v. *Khurshid Begum* [5]. It might however be noted that this restricted view of the interpretation of the expression "change in the circumstances" in Section 489 has not been adopted in any other Court. The entire position has been exhaustively reviewed by Halifax A.J.C. in *Emperor* v. *Sheikh Dawd* [6] where the learned Judge after referring to the decision of the High Court of Calcutta in *Nepoor Aurut* v. *Jurai* [7] and of the Chief Court of the Punjab in *Mt. Baji* v. *Nawab Khan* [8] pointed out that there was no valid ground whatever for excluding legal or personal status from the circumstances in which a change would make Section 489 applicable and for including in them practically nothing

2. [1897] 19 All. 50
3. [1883] 5 All. 226
4. [1880] 5 cal. 558
5. crl. Rvn. Case 199/46
6. [1921] A.I.R. Nag. 7
7. [1873] 19 W.R. 73
8. [1894] P.R. Cr. 21

but pecuniary circumstances as was done by the Allahabad High Court. The only reason advanced by Mahmood J. in *In the matter of the Petition of Din Muhammad* [3] was that the expression "change in the circumstances" was preceded by the word "wife" and followed by a limitation as to the amount of the monthly allowance and hence it indicated that it excluded the idea of total discontinuance of the allowance. The learned Judge of the Nagpur High Court commented on that reasoning in the following terms :

"I am unable in the first place to see what the position of the words 'wife or child' has to do with the question. They are merely a part of the description of one of the two classes of persons in whose circumstances a change would empower the Magistrate to make an alteration in the allowance. They are indeed otiose and might easily have been omitted. As to the limitation of the amount, that is merely a maximum, and to say that because of that limitation the alteration could not be to nothing would be to say that because of the same limitation in Section 488 the Magistrate could not refuse to give an allowance on proof that the applicant was not the wife or child of the non-applicant."

He observed that a valid divorce is such a change in the circumstances as is contemplated by Section 489, and that the alteration in the amount of the order could be a reduction of it to nothing and that is a necessary consequence of the view taken that a wife ceases entirely to be entitled to an allowance previously ordered when she is completely and validly divorced. The judgment concludes with this observation :

"I hold therefore that when a wife, whose husband has been ordered to pay her an allowance under Section 488, Criminal Procedure Code, is proved to have been completely and validly divorced, a Magistrate is not only bound to refuse to enforce the order under Section 490 but is also empowered to alter the amount payable under it to nothing under Section 489, that is to say, he can set aside the order."

With this conclusion and with the reasoning of the learned Judge I am, with respect, in entire agreement.

Apart however from the interpretation of the expression "change in the circumstances" in Section 489, all Courts including the Allahabad High Court have taken uniformly the view that if the conjugal tie is proved to have been severed, barring the liability to pay maintenance during the period of Iddat, the wife ceases to have any right to enforce against the husband any order for maintenance made in her favour under Section 488. In the case already cited *In the matter of the petition of Din Mohamed* [3], Mahmood, J. quoted the observations in *Abdur Rahman* v. *Sakhina* [4] to the following effect :

"It is as essential to the continued operation as to the original making of an order of maintenance, that the recipient of the allowance should be a wife at the time for which maintenance is claimed."

If the plea of divorce is raised before him by the husband, the magistrate must determine on such evidence as may be before him whether there has or has not been a legally valid divorce.

"If he finds that there has been a valid dissolution of the marriage tie, he should refrain from taking any steps to enforce the order of maintenance from the date of such dissolution."

The *ratio decidendi* will be found in the following passage :

"The whole of Chapter XLI of the Criminal Procedure Code, so far as it relates to the maintenance of wives, contemplates the existence of the conjugal relation as a condition precedent to an order of maintenance and, on general principles, it follows that as soon as the conjugal relation ceases, the order of maintenance must also cease to have any enforceable effect. When and in what manner a cessation of the conjugal relation takes place is a question which, ex *necessitate rei*, must be determined according to the personal law to which the parties concerned are subject . . . .

All that the Magistrate has to determine in a case of this kind is, whether the woman claiming maintenance is still the wife of the person against whom she advances such a claim. If the question is determined in the affirmative, the order of maintenance must continue to be operative. On the other hand if it is found that by the effect of some rule of the personal law of the parties concerned, the conjugal relation has absolutely ceased to exist, the order of maintenance, *ipso facto* becomes *functus officio*, and can no longer be enforced."

Knox, J. in *Mahaburan* v. *Fakir Baksh* [9] had dissented from this view. But it is unnecessary to discuss that ruling because of its having been overruled by a Full Bench of that court in *Shah Abu Ilyas* v. *Ulfat Bibi* [2] to which Knox, J. who dissented from the majority view, was a party. The majority decision was in confirmity with the dicta of Mahmood, J. just referred to. The judgment of the majority was that when a plea of divorce is put forward the magistrate is not only competent, but it is his imperative duty to inquire into the plea, and determine on such evidence as may be adduced before him whether the relation of husband and wife subsists between the person against whom an order is asked for and the person making the application. All the previous cases bearing upon the question were fully reviewed and overruling *Mahaburan* v. *Fakir Baksh* [9], Aikman, J. pointed out that the view of

9. [1893] 15 All. 143

Knox, J. was opposed not only to the decision of the Allahabad High Court, but to the decisions of the Calcutta, Bombay and Madras High Courts, and the Chief Court of the Punjab and had not been adopted by any authority save Knox J. himself. Aikman J. said :

"It has been repeatedly held that the Legislature in enacting Section 488 of the Criminal Procedure Code did not intend to interfere with the right of divorce".

It cannot, in my opinion, be disputed that it is only on proof of the existence of conjugal relations between a man and a woman that the man can under Section 488 be ordered to provide for the woman's support and I hold that it is only on the supposition of the continued existence of that relationship that the allowance can continue."

In another place it was pointed out that under Section 490 of the Code of Criminal Procedure the question for the magistrate to consider is not merely whether he has jurisdiction over the person affected by the order, and whether he is satisfied as to the identity of the parties. It was observed :

'A most material question which in my opinion it is incumbent on him to consider is whether the order to which it is sought to give effect is still in force, or whether it has become 'functus officio' "

This view has been taken in a long line of cases *Abdur Raheman* v. *Sakhina* [4], *In the matter of the Petition of Din Mohamed* [3], *In re Kasan Pirbhai* [10], *In re Abdur Ali Ismailji* [11], *Mahomed Abid Ali Kumar Kadar* v. *Luddan Sahiba* [12] and a number of cases of the Punjab High Court as also in the latest decision of the Calcutta High Court in *Ahmed Hasim Molla* v. *Khatun Bibi* [13].

That this principle is of still wider application and the doctrine, that when the basic relationship of husband and wife terminates in any lawful manner the magistrate has not only the power under the Code of Criminal Procedure to alter the amount but to cancel the order of maintenance made by him is also applicable to the case of Hindus has been held by Krishnan J. in *Meenatchi Ammal* v. *Karuppanna Pillai* [14]. The learned Judge said :

'It was contended that under Section 489 the Magistrate could not altogether cancel the order of maintenance but could only alter it or reduce it. I do not think the word 'alter' is used in any such restricted meaning. The reduction of the maintenance to nothing would also come within the meaning of the word 'alteration'."

10. [1871] 8 Bom. H. C. R. 95.
11. [1883] 7 Bom. 180
12. [1887] 14 Cal, 276
13. [1932] 59 Cal 833
14. [1926] M. W. N. 67 : 48 Mad. 503



It only remains now to examine the two decisions of Burn J. and Kuppuswami Aiyar J. adverted to in the reference by the Chief Presidency Magistrate. With regard to the ruling of Burn J. it will have to be remembered that the question that arose in that case was whether during the period of Iddat the maintenance could be enhanced as was done by the Magistrate, and since for the purpose of such enhancement a divorce cannot be deemed to be a change in the circumstances, the learned Judge held that the order of the Presidency Magistrate was without jurisdiction and set it aside. The point to be noted is that the order granting enhancement of the maintenance was set aside and the wife's petition was rejected. With reference to the second decision again, the circumstances were at that stage somewhat different. Divorce had not been satisfactorily proved and admittedly maintenance for the period of Iddat had not been paid. The particular question whether by reason of any irrevocable divorce the order made under Section 488 should stand vacated on account of cessation of the marital tie was not in question in the petition as it has been directly raised in this proceeding.

I may incidentally refer to a recent ruling of Kuppuswami Aiyar J. in *Abdul Khadar* v. *Azeeza Bee* [15], where under identical circumstances the learned Judge held that the wife will not be entitled to maintenance after the date when the factum of her having been divorced was duly communicated to her. He said:

"Whatever it be there is the definite admission of P. W. 1 that she (the wife) came to know of the thalaknama from the Sub Inspector before she was examined which was on 5th May 1943. So at any rate from the date on which the Sub Inspector informed her the divorce had come into effect. The wife will therefore not be entitled to maintenance, at any rate, after 5th May 1943 as she came to know of the thalak before that date."

I hold, therefore, in agreement with the view expressed by the Nagpur High Court in the case cited above, which is the view consistently obtaining in all the Courts, that in circumstances such as these which are assumed to exist in the present case the magistrate is not only bound to refuse to enforce the order under Section 490 of the Code of Criminal Procedure but is also empowered under Section 489 of the Code of Criminal Procedure to alter the amount payable under it to nothing, that is to say, by a combined effect of both these provisions

15. [1944] M.W.N. 64: Cr. 40

he is competent to set aside the order. The records in the case will be returned to the magistrate with a copy of this order.

N.T.R. —

Criminal Revision Case No. 960 of 1946
(Case Referred No. 33 of 1946)
*November* 29, 1946
YAHYA ALI J.
EMPEROR
v.
PALLI MUNISAMI & ANOTHER.

*Criminal Procedure Code (V of 1898), Ss.* 562 *Proviso,* 349 *(1-A) &* 380—*Reference under s.* 562 *proviso—More than one accused—Procedure.*

*There is nothing in the language of sections* 562 *and* 380 *Criminal Procedure Code which prohibits a Magistrate of the second or third class sending up all the accused, the whole case and the entire proceedings to the sub divisional magistrate in a case where he suggests that action should be taken under section* 562 *against only one or a few of the accused persons.*

*Both section* 562 *and section* 380 *form part of the same Code and they provide the necessary machinery and therefore section* 349 *(1-A) may not in terms apply to references under section* 562. *But independently of section* 349 *(1-A), if the magistrate so chooses, the entire proceedings, the whole case and all the accused may be forwarded. In any case, such a course is not repugnant to the language of sections* 562 *and* 380.

1943 *M.W.N.* 60 *(1): Cr.* 9 *(1) &* 1936 *M.W.N.* 1351: *Cr.* 235, referred to.

Case referred for the orders of the High Court, under Section 438 of the Criminal Procedure Code by the Additional District Magistrate of Chittoor in his letter No. R. O. C. D. 21630-46 dated 2-9-46.

*Public Prosecutor* (*V. L Ethiraj*) for Crown.

ORDER.

This is a reference made by the Additional District Magistrate, Chittoor, under Section 438 of the Code of Criminal Procedure in the following circumstances. Two persons were tried by the Stationary Sub Magistrate, Tirupathi in C. C. No. 813 of 1946 for offences of theft and receiving stolen property. The first accused, P. Muniswami aged 18 years was convicted by the Sub Magistrate under Section 380 of the Code of Criminal Procedure in respect of the theft of a gramaphone and a wireless set from the Military Stores, Renigunta. The second accused Krishniah was convicted under Section 411 of the Indian Penal Code, for having dishonestly received those two articles knowing them to be stolen. The Stationary Sub Magistrate after convicting the two accused considered that the first accused being a first offender and an adolescent should be dealt with under Section 562 of the Code of Criminal Procedure and in that view he forwarded the proceedings to the Sub Divisional Magistrate, Chandragiri, for appropriate orders and in doing so he sent up both the accused to the Sub Divisional Magistrate for being dealt with in accordance with law. The Additional District Magistrate considers that the legality of such a proceeding is not free from doubt in view of certain decisions of this Court and has solicited a definite ruling to meet cases of this kind.

The proviso to Section 562 of the Code of Criminal Procedure enacts that where any first offender is convicted by the magistrate of the third class or a magistrate of the second class not specially empowered by the Provincial Government in this behalf and the magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect and submit the proceedings to a magistrate of the first class or Sub-Divisional Magistrate, forwarding the accused to, or taking bail for his appearance before such magistrate, who shall dispose of the case in a manner provided by Section 380. Section 380 of the Code of Criminal Procedure is to the following effect:

"Where proceedings are submitted to a Magistrate of the first class or a Sub-divisional Magistrate as provided by Section 562, such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken."

These two sections practically constitute in themselves a complete and self-sufficient machinery to meet cases of this description and it is hardly necessary to invoke the aid of section 349 of the Code of Criminal Procedure to determine whether in such cases all the accused should be sent up or only the person against whom action under Section 562 of the Code of Criminal Procedure is contemplated. Section 349 (1) lays down the procedure when a magistrate cannot pass a sentence that he considers to be appropriate to meet the ends of justice in a case. He may in such a case forward the accused to the District Magistrate or Sub-Divisional Magistrate to whom he is subordi-

nate. Sub-section (1–A) of that section reads :

'When more accused than one are being tried together and the Magistrate considers it necessary to proceed under sub-sec. (1) in regard to any of such accused, he shall forward all the accused who are in his opinion guilty to the District Magistrate or Sub-Divisional Magistrate."

Thus it will be seen that in this sub-section statutory provision has been expressly made requiring that in a case where the magistrate has decided to take action under section 349 he must forward all the accused who are in his opinion guilty. In such a case he does not convict the accused but only records his opinion that the accused is guilty and submits the proceedings to the superior magistrate. In such a case again the superior magistrate has the right, either on a perusal of the record or on making further inquiry under sub-section (2) of the same section, to pass any order including an order of acquittal of all the accused. Obviously these characteristic features of section 349 do not fit into a case arising under section 562. In such a case the magistrate before sending up the proceedings convicts the accused including the person against whom action under section 562 is sought. The superior magistrate to whom the record goes has the power under section 380 to pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken. It has however been held by this court that in such a case he cannot pass an order of acquittal against any of the persons sent up since the magistrate who tried the accused and who has forwarded the case has already convicted the accused and the proceedings before the superior magistrate are not in the nature of appellate proceedings — see *The Public Prosecutor* v. *Malaipathi Gurappa Naidu* [1]. It was apparently in this view that Byers, J. held in *Piramanaga Pandaram* v. *Emperor* [2] that section 349 (1–A) has no application to the procedure under section 562 of the Code of Criminal Procedure. That decision however cannot be deemed to have overruled the contention on an interpretation of sections 562 and 380 of the Code of Criminal Procedure that there is nothing in those provisions which precludes the convicting magistrate from sending up the entire case or all the accused to the superior magistrate. To put it in another way there is nothing in these sections which compels the court to hold that the trying magistrate is bound to send up only that person against whom action is required under Section 562 and he must himself pass sentence upon the other persons who are not to be so dealt with. The consequences of courts of different grades dealing with different accused in the same case are apparent. The case against one or some of the accused would have been dealt with by the second or third class magistrate as the case may be and the accused would have been convicted. The case against the person dealt with under Section 562 would have been dealt with by the Sub Divisional Magistrate who would have passed sentence on that person. The appeal against the conviction awarded by the Sub Magistrate would lie to the same Sub Divisional Magistrate who had dealt with a part of the case while the appeal against the order of the Sub Divisional Magistrate would lie to a higher court and it is not unlikely that conflicting decisions might be the result with regard to the different accused persons in the same case. Unless therefore the language of Section 562 compels an interpretation which must unvoidably lead to such anomalous results such a construction should be avoided. But it is not necessary to invoke this principle of construction because on a scrutiny of the language of the proviso to Section 562 and the language of Section 380 it is possible to find that such a result was not intended, viz, to prohibit the trying magistrate from sending up, if he so chooses, all the accused whom he has tried including the person against whom he recommends action under Section 562. The proviso says that when a first offender is convicted by such a magistrate and he is of opinion that the case should be dealt with under this section, he should submit "*the proceedings*" to the superior magistrate forwarding "*the accused*" to that magistrate who shall dispose of "*the case*" in manner provided by Section 380. The words "the proceedings" "the accused" and "the case" occurring in section 562 seem to indicate that the forwarding of the entire proceedings, all the accused and the whole case is not either expressly or by implication excluded. Likewise in section 380 it is stated that the superior magistrate when the records come to him may pass such

1. [1933] M.W.N. 716: Cr. 104 : 57 Mad. 85
2. [1943] M.W.N. 60(1) : Cr. 9(1)

sentence or order as he might have passed in "the case" originally heard by him. Here also the indication is that the possibility of the entire case going before the magistrate was not ruled out. There is therefore nothing in the language of these two sections which prohibits a magistrate of the Second or Third class sending up all the accused, the whole case and the entire proceedings to the Sub Divisional Magistrate in a case where he suggests that action should be taken under section 562 against only one or few of the accused persons.

I may refer to three other cases bearing upon this issue which were decided in this court. In *Emperor* v. *Narayanaswami Naidu* [3] Pandrang Row, J. was of opinion that section 349 applied to such a case. That view, as I have already indicated, is opposed to the decision of Buyers J. in the case cited above. Pandrang Row, J. however did not take into consideration the provisions of section 380 and did not have in that case to enter into a detailed examination of the language of sections 562 and 380 with a view to decide whether the principle of section 349 (1-A) rather than the provision itself is not implicit in the language of these two sections. The next case in *Emperor* v. *Mottiyan* [4] was decided by Lakshmana Rao J. The first accused in that case was a juvenile and the trying magistrate was not empowered to deal with him under the Madras Children Act and hence the records were sent up to a higher magistrate. It was held that both the accused should be sent up and not the juvenile alone. This view found approval in the judgment of a Bench of this court in *Subbiah Goundan In re* [5]. That was also a case which arose under the Madras Children Act and the learned Judges held that the case fell within sub-section (1) of section 349 and that sub-section (1-A) should have been conformed to.

These two cases are not cases arising under section 562. So far as section 562 is concerned both that section and section 380 form part of the same Code and they provide the necessary machinery and in that view section 349 (1-A), may not in terms be directly applicable to such a case as has been held by Byers J. But independently of section 349 (1-A), the language of sections 562 and 380, in my opinion, yields to the construction that what was intended was that if the Magistrate so chooses the entire proceedings, the whole case and all the accused may be forwarded. In any case it is not provided in those sections, nor is it suggested by Byers, J. in his decision that such a course is repugnant in any manner to the language of sections 562 and 380.

In this view of the matter the action taken by the Sub-Magistrate in forwarding both the accused and the entire case records to the Sub-Divisional Magistrate is in accordance with law and the Sub-Divisional Magistrate should dispose of the case as provided in section 380 of the Code of Criminal Procedure. The reference is answered accordingly.

N.T.R.

3. [1936] M.W.N. 1351 : Cr. 235
4. [1941] M.W.N. 768 : Cr. 96
5. [1945] M.W.N. 182 : Cr. 34

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Cr. M. P. No. 1736 of 1946

*November* 18, 1946

HORWILL & KUPPUSWAMI AYYAR, JJ.

T. K. VERGHESE VAIDYAR

v.

EMPEROR & ANOTHER

*Criminal Procedure Code* (V of 1898), *s.* 54, *Seventhly—Arrest under.*

*The petitioner was arrested without a warrant by the Sub-Inspector of Police, Calicut on credible information received from the Special Inspector of Police, Alleppy (Travancore State) that an offence was committed by the petitioner. The petitioner was produced before the Sub-Divisonal Magistrate, Calicut who remanded him to the sub-jail. The petitioner had been charged under the Travancore Penal Code of offences corresponding to ss.* 148, 149, 324, 342 *and* 436 *read with s.* 109 *of the Indian Penal Code.*

Held, *that the arrest and detention of the petitioner was warranted by s.* 54, *seventhly Cr. P. C.*

The facts appear from the following extracts from the affidavit filed in support of the petition and the Order.

"2. The petitioner herein was arrested by the Sub-Inspector of Police, Calicut Town on the 4th of November 1946 at 7–15 p. m. at the office of the daily newspaper, 'Desabimani' in my presence. The Sub-Inspector produced no warrant of arrest and on enquiry it was found that the petitioner was arrested under section 54(1) sub-clause (7) of the Code of Criminal Procedure. The police have arrested the petitioner without a warrant for his arrest either by any Magistrate of Malabar or by any Extradition Warrant under the Extradition Act.

3. The petitioner thereafter was taken

before the Sub-Divisional Magistrate and he was remanded to the custody of the respondent in the Calicut Sub-Jail for 2 weeks.

4. I am advised that the arrest of the petitioner and his detention in the Calicut Sub-Jail are illegal in as much as there is no Extradition warrant issued yet and the petitioner is being detained in anticipation of the receipt of the Extradition warrant.

5. I am also advised that the petitioner could not be arrested under Section 54 (1) Clause 7 of the Code of Criminal Procedure without an Extradition Warrant from the Native State where the offence is alleged to have been committed by the petitioner.

6. It is therefore just and necessary that this Hon'ble Court be pleased to order the respondent to produce the petitioner before this Hon'ble Court and set him at liberty."

Petition under Section 491 of the Code of Criminal Procedure, 1898, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order of the nature of Habeas Corpus directing the second respondent herein, the Superintendent, Sub Jail, Calicut to produce before the High Court of Judicature at Madras the petitioner herein now in the Sub Jail at Calicut in the custody of the second respondent and set him at liberty.

*A. Ramachandran* for *Messrs Row & Reddy* for Petrs.

*Assistant Public Prosecutor*, (*A. S. Sivakaminathan*), for Crown.

ORDER

(HORWILL J.)

This is an application under Section 491 of the Code of Criminal Procedure, alleging that the petitioner was illegally and improperly detained by the Superintendent, Sub jail, Calicut and praying that this court do issue an order for his release.

The petitioner was arrested without a warrant by the Sub Inspector of Police of Calicut Town on information received from the Special Inspector of Police, Alleppy. The petitioner was produced before the Sub Divisional Magistrate of Calicut, who remanded him to the Sub Jail Calicut.

It is argued that the procedure adopted by the police in this case was not warranted by law. Section 54(7) of the Code of Criminal Procedure authorises any police officer to arrest without a warrant any person (1) against whom credible information has been received that he has done an act outside British India which if done within British India would be an offence and (2) who under any law relating to extradition etc., is liable to be apprehended or detained in custody in British India. It is not denied that credible information that an offence was committed by the petitioner was received; but it is argued that the petitioner is not under any law relating to extradition liable to be apprhended or detained in custody. We can find no authority for such a contention. Section 23 of the Extradition Act says:

"... any person arrested without an order from a Magistrate and without a warrant, in pursuance of the provisions of Section 54, clause seventhly, may ... be detained in the same manner and subject to the same restrictions as a person arrested on a warrant issued by such magistrate under Section 10 of that Act."

The learned advocate relies on the dictum of Mukherjee J. in *Subodhchandar Roy Chowdhuri* v. *Emperor* [1] in which the learned Judge read into the second part of Section 54, clause seventhly, a proviso that the person should be liable to be arrested without a warrant if the offence had been committed in British India. With respect, we find nothing in Section 54 or elsewhere which justifies that conclusion; but we are not here dealing with a non-cognizable case. The petitioner has been charged under the Travancore Penal Code of offences corresponding to Sections 148, 149, 324, 342 and 436, read with Section 109 of the Indian Penal Code. If such offences had been committed in British India, there can be no doubt that the petitioner could have been arrested by the police without a warrant.

A great deal has been said about the procedure to be adopted in extradition proceedings; but we are not here concerned with the extradition proceedings proper. We do not know whether they have yet been initiated or not. The Magistrate who committed the petitioner to the Sub Jail has authority over him and can modify his orders if he subsequently finds that the petitioner ought not to be kept under further detention.

The petition is dismissed.

N.T.R. — *Petition dismissed*

A. A. O. Nos. 216 to 219 & 340 to 343 of 1946

*November* 18, 1946

WADSWORTH & GOVINDARAJACHARI, JJ.

D. SUBRAMANIA IYER

v.

THE PODANUR BANK LTD. (in liquidation), Tiruvadamarudur, by its Official Liquidator

*Companies Act (VII of* 1913*), Ss.* 237 *&* 202 *—Order under s.* 237*—Notice—Considera-*

1. [1925] 52 cal. 319

*tions in ordering prosecution—Reasons for order—Nonstatement—Effect—Appeal.*

*S. 237 of the Companies Act does not in terms require the court to make any particular enquiry or to give the person who is to be prosecuted an opportunity to show cause before the official liquidator is directed to file a complaint. The order for prosecution cannot be set aside merely because it was passed* ex parte, *particularly when there has been a full investigation and an adequate opportunity had been given by the official liquidator to the directors to exculpate themselves from the charges.*

*An order directing a prosecution which from its very nature is most likely to result in appeal and which involves a matter of very great importance to the person to be prosecuted should be supported by some indication of the reasons which justify it. But the order will not be set aside merely because of its excessive brevity, if it was in fact justified by the materials before the court.*

*While the court directing the prosecution should take into consideration the financial position of the company and the desires of the shareholders and creditors, whether it is reasonable to saddle the assets of the company with the costs of prosecution, the court has a discretion to ignore the opposition of creditors to the prosecution, if in its opinion the object of the opposition was not so much to save the company's funds as to save the guilty directors.*

*An order under s. 237 directing the prosecution of officers of a company is appealable unnder s. 202, Companies Act.*

Appeals against the orders of the District Court West Tanjore dated 29-8-1946 and made respectively in proceedings Nos. 2438 etc. in O. P. No. 9 of 1943.

*G. R. Jagadesa Iyer*, for Applt.

*M. S. Krishnamurthi Sastri*, for Respts.

JUDGMENT

[WADSWORTH, J.]

These appeals arise out of a series of orders directing the Official Liquidator of the Podanur Bank Ltd., Tiruvidamarathur, to prosecute the appellant, his co-directors and the Secretary of the Company for offences under the penal provisions of the Indian Companies Act. That the orders in question are appealable under Section 202 of the Indian Companies Act is established so far as this Court is concerned by the decisions in *Kesavaloo Naidu* v. *Murugappa Mudali* [1] and *Chockalingam* v. *Official Liquidator* [2]. The winding up of the Company was ordered by the learned Judge on the Original Side of this Court in January 1943 and further proceedings were to be in the Court of the District Judge of West Tanjore. On 3rd November 1943 an application was filed under section 235 of the Indian Companies Act alleging various acts of misfeasance etc. on the part of the Directors and the Secretary and asking the Court to require the respondents to make good the loss occasioned by their default. In the enquiry into this petition interrogatories were served on the respondents and an opportunity was given to them to state their case and to be represented by their Counsel. The enquiry was very prolonged and on 31st July 1945 the District Judge wrote a detailed order in the course of which he expressed the opinion that whereas the guilt of the Secretary was fairly clear, so far as the Directors were concerned it is a matter of considerable difficulty to decide whether they were merely culpably negligent, or were conniving parties to the fraudulent concealment of facts from the general body in the balance sheets, or the alleged unauthorised and fraudulent sales. The learned District Judge came to the conclusion that further investigation was necessary to establish *prima facie* the criminal liability of the directors for the preparation of false balance sheets or for fraudulent sales. He seems to have been influenced by an offer made by Counsel on their behalf to purchase the unsold decrees and make good any losses so that payment in full may be made. The learned District Judge therefore directed the Official Liquidator to make a report to the Police and if possible to procure a special officer of the Criminal Investigation Department to make further investigation. Meanwhile the petition was treated as "closed". On 17th February 1946 the report of the Special Investigation Officer was received and on the 19th February the Official Liquidator applied for the revival of the application praying that the Directors and the Secretary should make good the losses to the Company. On 20th February 1946 the learned District Judge passed *ex parte* proceedings reviving the former application and directing notices to the respondents and he also passed a very unsatisfactory order authorising the Liquidator to prosecute "any director, manager or other officer for any offence which might have been committed." This latter

1. [1907] 30 Mad. 22

2. [1943] M.W.N. 716(2): I.L.R. 1944 Mad. 540

order has been set aside in our judgment in C. M. A. No. 197 of 1946 as being obviously defective. On 13th March 1946, that is to say, nearly a month after this order for prosecution had been passed, I. A. No. 96 of 1946 was preferred by two shareholders and one creditor asking the Court to direct the sale of the unrealised assets and the distribution of a further dividend out of the balance in the hands of the liquidators and also asking that the prosecution already ordered should not be financed out of the funds of the Company. At the same time there was a further petition I. A. No. 97 of 1946 in which the same petitioners prayed for an interim stay of the proceedings for the prosecution of the Directors and the Secretary. The latter application was dismissed on the 14th March. On the 29th March, the learned District Judge adjourned I. A. No. 96 of 1946 and at the same time *suo motu* he passed orders for the prosecution of the directors and the secretary for the offences they were alleged to have committed under the provisions of the Companies Act. It is these orders which are challengd in the appeals now before us.

The contentions taken in the various memoranda of appeals are that the orders were illegal in that they were passed without notice to the persons sought to be prosecuted, without enquiry into the question of the desirability of the prosecutions, without any materials or legal evidence justifying the prosecutions and without consultation of the creditors or shareholders who were affected by the charging of the costs of prosecution to the company's assets.

Section 237(1) of the Indian Companies Act runs as follows :

"If it appears to the Court in the course of a winding up by, or subject to the supervision of, the Court that any past or present director, manager or other officer, or any member of the Company has been guilty of any offence in relation to the Company for which he is criminally liable, the Court may, either on the application of any person interested in the winding up or of its own motion, direct the liquidator either himself to prosecute the offender or to refer, the matter to the Registrar."

This section does not in terms require the court to make any particular enquiry or to give to the person who is to be prosecuted an opportunity to show cause before the Official Liquidator is directed to file a complaint. On the facts of the present case it would appear that in the Official Liquidator's own enquiry the Directors and the Secretary had been given every opportunity to put forward their version of the facts on the various charges of misfeasance which are substantially the matters forming the foundation for the present prosecutions. Seeing that the section contemplates action by Court not merely at the instance of third parties but also on its own motion, we do not think that it can be laid down as an absolute rule that the court must call upon the persons concerned to show cause before it directs their prosecution. When as in this case there had been a very full investigation and an adequate opportunity had been given to the Directors and the Secretary to exculpate themselves from the charges against them we do not think that the order for prosecution can be set aside merely because it was passed *ex-parte*.

On the question of lack of materials before the learned District Judge there were no doubt very considerable materials before him at the time when he passed his order of 31st July 1945. Those materials were, so far as directors were concerned, apparently sufficient only to convince the District Judge that they were either culpably negligent or were conniving parties to the fraudulent concealment of facts from the general body in the balance sheets and the other misfeasances alleged. At the time when the orders now under appeal were passed the learned District Judge had also before him the report of the Special Investigating Officer which unfortunately was treated as confidential. We cannot see what was the necessity for treating this report as confidential since substantially everything it contained had necessarily to be made public as soon as the prosecution started. The effect of this rather misguided secrecy is certainly to make it more difficult for any one interested to challenge or support the correctness of the orders of the learned District Judge. Those orders themselves contain no statement of reasons whatever and they did not even contain sufficient materials to enable the appellate court without further research to satisfy itself that the learned District Judge did give due consideration to the materials available. There is, however, no provision in Section 237 of the Companies Act requiring the court to set forth its reasons when directing the Liquidator to launch prosecutions: and although it is obviously desirable whenever a court passes an appealable order that some indication should be given that the court has applied its mind to the questions which have to be decided in

passing the order, it seems to us difficult to say that the order has necessarily to be vacated, merely because it does not itself set forth the reasons which caused the Court to pass it.

Section 202 of the Indian Companies Act confers a very wide right of appeal against the orders of a Court in the winding up of a Company and it is perhaps going too far to say that every order in such a matter which might conceivably form the subject of appeal, should contain a detailed exposition of the reasons supporting it. But we are of opinion that an order directing a prosecution which from its very nature is most likely to result in appeal and which involves a matter of very great importance to the person to be prosecuted, should be supported by some indication of the reasons which justify it. We do not however, think that the order should be set aside merely because of its excessive brevity if it was in fact justified by the materials before the Court. We have ourselves examined the report of the Special Investigating Officer and we are of opinion that there were materials before the District Judge which justified him in directing a prosecution of the appellant for the offences alleged. That being so we do not think that it is necessary to set aside the order of the District Judge and require him to draw up a fresh order with an adequate statement of his reasons.

Mr. Jagadisa Aiyar for the appellant has strenuously argued on the authority of *In re Northern Counties Bank Ltd.* [3] that the question whether a prosecution should be directed in the matter of the alleged misdeeds of directors of the company is mainly a question whether having regard to the financial position of the Company and the desires of the shareholders and creditors, it is reasonable to saddle the assets of the company with the costs of prosecution. We do not read the case cited as laying down such a drastic rule and in fact the learned Judge who decided the case has himself in a later case, *re Charles Denham & Co., Ltd.*, [4] pointed out that the Court has a discretion to ignore the opposition of creditors to the prosecution if in its opinion the object of the opposition was not so much to save the Company's funds as to save the guilty director. The principles which should govern the Court in deciding whether or not to direct the prosecution of a delinquent director of a company as part of the proceedings in liquidation have been laid down by Buckley J. in *London and Globe Finance Corporatian Ltd.* [5]. The learned Judge says :

> "What are the considerations which ought to govern it? The principle lies, I think in the answer to the following question. If the persons at whose expense the prosecution would be instituted were not a class, but were a single person, and that person were an honest and upright man desirous as a good citizen of doing his duty by the State, are the circumstances such as that in discharge of that duty he would feel that he ought at his own expense and to his own loss to institute a prosecution? Not in every case in which a criminal offence has been committed would such an one think it his duty to prosecute. The question to be answered is, would he in this case think his duty to the State required him to prosecute? If that question be answered in the affirmative, then upon principle, I think that the Court ought to direct a prosecution. Further, I think that the Court can, and in a proper case ought to, direct a prosecution without the assent, and even notwithstanding the dissent, of the class or many of the class at whose expense the prosecution would be instituted."

Now what are the facts in the present case? The company in liquidation had already paid a dividend of as. 10 in the rupee. The liquidator had in cash approximately Rs. 4000 out of which Rs. 2500 was set aide for a further dividend of As. 2. It is not shown that the balance after this distribution of As. 2 would not suffice for the costs of these prosecutions. The opposition to the prosecutions was not put forward until after the District Judge had in his defective order of the 20th February 1946 come to the conclusion that proceedings ought to be taken and then the objection was preferred by two shareholders whose holdings were infinitesimal and one creditor. There were no indications before the learned District Judge of any wide divergence of views on the part of the general body of share holders and creditors such as would make it desirable for him to ascertain the wishes of the persons concerned before deciding to launch a prosecution. And the fact that a prosecution was likely to result from the investigation must have been well known to all parties long before the learned District Judge decided to prosecute. The probable cost of these prosecutions are not likely to diminish very seriously the dividend which the creditors can expect to get. We are not therefore disposed to interfere with the order of the learned District Judge on the ground that the District Judge did not give proper consideration to the financial implications of these orders. In the result, therefore,

3. [1883] 31 W.R. 546
4. [1885] 51 Law Times 570
5. 1903] 1 ch. D. 728

although we are definitely of the opinion that the orders of the learned District Judge should have been supported by some indication of the grounds of his decision, we are not prepared on that reason alone to interfere in appeal. The appeals are therefore dismissed with costs of the Official Liquidator in C.M.A. No. 216 of 1946.

N.T.R. — *Appeal dismissed*

Cr. M. P. No. 67 of 1947
*January* 24, 1947
YAHYA ALI, J.

MUNIA SERVAI
v.
THANGAYYA ONTURIYAR & Others

*Cr.P.C.* (*V of* 1898) *Ss.* 145 & 561*A—Order under S.* 145*–Disputed lands in the hands of receiver—Stay of delivery pending revision —Grant of—No jurisdiction in High Court.*

*The High Court has no jurisdiction to entertain a petition for stay of delivery of possession of disputed lands and for continuance of the lands in the possession of the receiver pending disposal of the petition to revise the order passed by the magistrate under S.* 145, *Cr.P.C.*

[1925] *M.W.N.* 772 *followed.*

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing stay of delivery of possession of the disputed lands to the Respondents herein by the Agent appointed in the proceedings in the Court below (M.C. No. 14 of 1946 on the file of the court of the Additional I class Magistrate, Kumbakonam pending disposal of Cri-Rev. Case No. 57 of 1947 presented to the High Court to revise the order of the Court of the Additional I class Magistrate of Kumbakonam dated 31--12--46 and made in the said M.C. No. 14 of 1946.

*T. R. Venkatarama Sastri & M. Srinivasagopalan,* for Petr.

*A. V. Viswanatha Sastri,* for Respt.

ORDER

Mr. Visvanatha Sastri, the learned advocate for the respondents, raises an objection *in limine* against the admissibility of this application for stay of delivery of possession of the disputed lands to the respondents and for continuance of the lands in possession of the village munsif any further. His argument is that this Court has no jurisdiction to entertain such a petition, since the only provision of law upon which it could possibly be founded, viz. section 561-A, Cr. P. C., does not confer any new or additional powers on this court and this court has no inherent power to appoint a Receiver in proceedings that come up under section 145 Cr. P. C., in revision before it. For this position reliance is placed on the decision of a Bench of this court in *Marudayya Thevar* v. *Shanmuga Sundara Thevar* [1]. There an application was made asking this court to appoint a Receiver pending disposal of an application to revise an order passed by the magistrate under section 145, Cr. P. C. The learned Judges constituting the Bench held that the High Court has no jurisdiction to entertain such a petition pending disposal of a Criminal Revision Petition. A further contention was pressed before the Bench that this court has all the powers that the magistrate has got in the enquiry under section 145 Cr. P. C. This contention was repelled with the following observations :

"Even assuming for the sake of argument that the High Court has that power, it would not in the least avail petitioner. For, in the first place, the Magistrate and therefore *ex-hypothesi*, the High Court, can only appoint a Receiver while the enquiry is pending and the enquiry is now over, and in the second place, the magistrate, and therefore again the High Court can appoint a Receiver only where it is satisfied that a dispute likely to cause a breach of peace exits, whereas now the magistrate's order has put respondent in possession of the property and there is no danger of a breach of the peace unless the petitioner intends to defy the order of the Magistrate, and the High Court would certainly not encourage a party who announces his intention of doing so."

Mr. Venkatrama Sastri endeavoured to distinguish this ruling on the ground that the village munsif was appointed in this case by consent of both the parties; but that was when the case was pending enquiry. The reasoning in this portion of the judgment extracted above still remains, as this is a case of continuing the Receiver appointed after the termination of the enquiry. This court cannot continue such a Receiver or appoint a new Receiver unless it is satisfied afresh that a dispute likely to cause a breach of the peace exists.

Another point of distinction may perhaps be that, as it appears from the judgment in the Bench case, the respondent had been already put in possession of the property, whereas in the present case the village munsif still continues in possession thereof. The real position is that the respondents were deprived of possession on the 24th Septem-

1. [1925] M.W.N. 772

ber, 1946, when the village munsif was appointed by the court to take possession of the lands and to harvest the crops. Mr. Venkatarama Sastri concedes that if the Bench decision is applicable to the facts of the case, the preliminary objection has to prevail; but he endeavoured to distinguish it on the ground already stated.

I am of opinion that I am bound by the decision of the Bench and I must, following it, hold that the application for stay of possession which virtually means the appointment of the village munsif as a Receiver cannot be maintained. The petition is dismissed.

In this view I have not gone further into the merits of the case and into the various questions involved, viz., about the occupancy rights of the respondents, the nature of the regrant to the petitioner's vendor, etc.

N.T.R. — *Petition dismissed*

Cr. R. C. No. 147 of 1946
Cr. R. P. No. 141 of 1946
*September* 9, 1946

YAHYA ALI, J.

KUPPUSWAMI PADAYACHI
v.
JAGADAMBAL

*Cr.P.C.* (*V of* 1898), *s.* 489—*Order for maintenance—Resumption of cohabitation—Effect. When once after the passing of an order of maintenance under s.* 488, *Cr. P. C., the husband and wife have resumed cohabitation, the order becomes ineffective and unenforceable. No formal order of cancellation of that order is necessary. If there was neglect or refusal on the part of the husband subsequently, that would furnish a ground for the wife to make a fresh application; but she would not be entitled to claim payment of maintenance on the strength of the order passed before the resumption of cohabitation.* *I.L.R.* 1942 *Mad.* 24, applied.

Petition under Sections 435 and 439 of the Code of Criminal Procedure 1898 praying the High Court to revise the order of the Court of the Sub Divisional Magistrate, Ariyalur dated 28—1—1946 and made in M. C. No. 49 of 1945.

*N. Suryanarayana*, for Petr.

*G. Gopalaswami & S. Venkatachalam*. for Respt.

ORDER

This is an application to revise an order made by the Sub Divisional magistrate of Ariyalur dismissing an application under section 489 of the Code of Criminal Procedure filed by the petitioner for cancellation of an order of maintenance that had been passed in M.C. 40 of 1944. In M.C. 40 of 1944 the petitioner was directed to pay maintenance to his wife, who was the petitioner in that petition and who is the respondent here. A revision application was filed against that order and when that application came up for hearing in this Court on 5th February 1945, it was represented by the petitioner that the case had been compromised. The respondent's advocate then mentioned to the Court that he had not heard about it and he took time to verify the information. On 7th February 1945 it was reported by both parties that the husband and wife had resumed cohabitation and on that ground the petition was not *pressed* and was eventually dismissed. No specific orders were however then passed regarding the order of maintenance which had been passed in M.C. No. 40 of 1944. It would appear that as reported then to this Court the respondent rejoined the petitioner and lived together, according to the petitioner, for six months. Subsequently, however, on account of differences that arose again, the respondent left the petitioner's house and claimed the maintenance awarded in M.C. No. 40 of 1944 to be continued. That occasioned the filing of the application under Section 489 of the Code of Criminal Procedure by the petitioner, for the cancellation of the maintenance order. The learned magistrate dismissed that petition on grounds which appear to me to be wholly untenable.

It is unnecessary to canvass those grounds as the matter is covered by direct authority. It was held by the learned Chief Justice and Mockett J. in *Venkayya* v. *Raghavamma* [1] that a decree obtained by a Hindu wife against her husband for maintenance becomes annulled by reason of subsequent resumption of cohabitation and is not merely suspended during such period of resumption. The learned Chief Justice in his judgment reviewed the Indian as well as the English precedents on the question of alimony and held that by returning to her husband the wife became disentitled to claim maintenance against him and the decree which she had obtained must be regarded in the circumstances as having become ineffective. It was observed that by going back to her husband the wife restored the position to what it was when they were married. In dealing with the repercussion of this principle on the provisions of the

1. [1941] M.W.N. 978 : I.L.R. 1942 Mad. 24

Indian Code of Criminal Procedure the learned Chief Justice stated that he could see no difference in principle between an order passed under section 488 of that Code and an order under the Matrimonial Causes Act, 1878, or the English Summary Jurisdiction (Married Women) Act, 1895. He pointed out that if the principle stated by Lord Elden in *Bateman* v. *Ross* [2] was to be applied, there can be no question of the suspension of the order; the order goes entirely. Mockett J. in concurring with this view pointed out that the view taken by Curgenven J. in *Kanagammal* v. *Pandara Nadar* [3], was not in conformity with the well settled principles. The learned Chief Justice also referred to this decision of Curgenven J. and said that the decision ran directly counter to the principle embodied in the judgment in *Haddon* v. *Haddon* [4]. The position thus is that when once after the passing of an order of maintenance under Section 488 the husband and wife have resumed cohabitation, the order becomes automatically ineffective and unenforceable. No formal cancellation of that order appears to be necessary. If therefore there was neglect or refusal on the part of the husband subsequently, that would furnish a ground for the wife to make a fresh application, but she would not be entitled to claim the payment of maintenance on the strength of the order passed before the resumption of cohabitation. This principle was followed in and applied to a criminal case under Section 488 by Kuppuswami Aiyar J. in *Munuswami Pillai* v. *Doraikannu Ammal* [5]. There the learned Judge emphasised that the joint living should have been resumed as husband and wife. The facts of that case were peculiar. The husband in that case brought the wife by a ruse into his house only to get over the order of maintenance that had been passed against him and never lived with her thereafter, but lived in a separate house with his concubine. The wife was attended to, if at all, by the husband's mother and she was made to do some menial work in the house. In those circumstances the learned Judge was of the opinion that such conduct did not amount to resumption of joint living and cohabitation. The facts of the present case are entirely different and there is evidence that for a period of six months the petitioner and the respondent lived as husband and wife after the order of dismissal was passed by this court in Criminal Revision case No. 874 of 1944. Following the Bench decision I must hold that the maintenance order passed in M.C. No. 40 of 1944 ceased to be effective automatically on the resumption of cohabitation between the petitioner and the respondent and that the learned Magistrate ought in those circumstances to have cancelled the order when an application was made under Section 489 seeing that an attempt was being made by the respondent to enforce the order.

In the result the petition is allowed and the application made by the petitioner under Section 489 is granted and the order of maintenance passed in M. C. No. 40 of 1954 aginst him in favour of the respondent is cancelled.

N. T. R

2. 3 E. R. 634
3. [1927] M. W. N. 111 ; 50 Mad. 663
4. [1887] 18 Q. B. D. 778
5. [1945] M. W. N. 691 ; Cr. 127

Criminal Revision Case No 1000 of 1945
(Criminal Revision Petition No. 934 of 1945).
*April* 18, 1946.

KUPPUSWAMI AYYAR J.

M. MUNISWAMI GOUNDAR

v.

EMPEROR.

*Foodgrains Control Order*, 1942, *Cl.* 3—*Applicability.*

*Where the manager of a joint Hindu family was conducting business on behalf of the family and had obtained a licence under the Food Grains Control Order*, 1942 *in his name on behalf of the family, a coparcener helping in the family trade is not liable to be convicted as having traded without a licence in violation of cl.* 3 *of the Foodgrains Control Order*, 1942.

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898 praying the High Court to revise the Judgment of the Court of Session of North Arcot division at Vellore dated 3—10—1945 in Criminal Appeal No. 120 of 1945 (C. C 28 of 1945 on the file of the Court of the Additional First Class Magistrate Vellore).

*P. M. Srinivasa Ayyangar & P. V. Srinivasachari* for Petitioner.

*Public Prosecutor* (*V. L. Ethiraj*) for Crown.

JUDGMENT.

The petitioner is the second accused in C. C. No. 28 of 1945 on the file of the court of the Additional First Class Magistrate, Vellore. He was tried along with another who was the first accused. They were both members of a joint Hindu family, being cousins, and they were engaged in rice trade. The prosecution case was that they traded without a licence and therefore violated clause 3 of the Food Grains Control Order, 1942, and sold rice in excess of 20 maunds in a single transaction. Their

defence was that they were members of a a joint Hindu family and the second accused was only helping in the trade and that they did not commit any offence. The first court found both the accused guilty on the ground that the licence was issued only in the name of the first accused and not in the name of both. On appeal the learned Sessions Judge of North Arcot acquitted the first accused because there was a licence in his name and ordered a retrial as against the second accused. But it must be remembered that this is a case in which the second accused was not trading himself. If he had traded in his own name and on his own behalf then he would be bound to take a licence. If he had been the manager of the joint family and if as such manager he had to conduct the business on behalf of the family, then he would have taken the licence in his name for doing such business. In this case the first accused has taken a licence. The second accused even in his plea had stated that he was only helping the joint family as a member of the joint family. Consequently, it cannot be said that he was carrying on any business to necessitate his taking out a licence. Clause 3 runs thus :—

" No person shall engage in any undertaking which involves the purchase etc. or storage for sale in wholesale quantities of any foodgrain except under and in accordance with a licence issued in that behalf by an officer authorised by the Government."

This is not a case of the second accused engaging himself in any such undertaking. He was only helping the family which was engaged in such an undertaking and the family has obtained the licence in the name of the first accused who was engaged in the business on behalf of the family. In these circumstances the learned Sessions Judge was not justified in ordering a retrial against the second accused. The order of the Sessions Judge directing a retrial is set aside and the second accused is acquitted.

N. T. R.

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Criminal Revision Case No. 461 of 1946.
(Criminal Revision Petition No 443 of 1946)

*December* 9, 1946

YAHYA ALI J.

K. C. VELAYUDHAN.

v.

P. R. RAMAN NAIR.

*Cr. P.C. (V of* 1898*) Ss.* 435 & 436—*Order of discharge setting aside — Fresh evidence available—Not a sufficient ground.*

*The availability of fresh evidence is not a sufficient ground for a Court of revision to set aside an order of discharge and direct fresh enquiry.*

*It is open to the complainant to file a fresh complaint on the same averments and to make the fullest use of the fresh evidence upon which he is resting his case in revision.*

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898 praying the High Court to revise the order of the Court of Session South Malabar dated 25—3—1946 in Crl. R. P. No 2 of 1946 perferred against the order of the Stationary Sub Magistrate, Palghat dated 28—12—1946 in C. C. No. 145 of 1945

*V. V. Srinivasa Iyengar & R. Krishnamachari* for Petr.

*T. S. Veraraghava Iyer* for Respt.

ORDER.

The petitioner was the first accused in C. C. No. 1415 of 1945 on the file of the Stationary Sub-Magistrate, Palghat. He was along with six others charged under section 430 I. P. C. for causing mischief by digging a channel in a certain plot of land and wrongfully diverting water from the respondent's wet lands. After examining the prosecution witnesses the trying magistrate discharged accused 1 and 6 and framed charges against the remaining accused. Against the order discharging the petitioner, (first accused), an application was filed in the Sessions Court South Malabar, by the complainant. The learned Sessions Judge set aside the order of discharge so far as the petitioner is concerned and directed further enquiry. The present revision petition has been filed against that order.

The sole ground on which the further enquiry has been ordered by the learned Sessions Judge is that in a petition dated 3rd December 1945 sent by the petitioner to the Sub-Magistrate, Alatur, the petitioner has stated that he directed the second accused to divert the water. The learned Sessions Judge pointed out that if the petition is admitted in evidence and proved it would show that the first accused abetted by instigation the commission of the offence with which the second accused was charged.

The complainant alleged in the Sessions Court that he had applied for an adjournment to summon a clerk of the Alatur Sub-Magistrate's Court to prove the petition referred to above, and that in spite of it the magistrate discharged the first accused on the ground of want of evidence. On the filing of the revision petition a report appears to have been called for by the learned Sessions Judge from the Sub-Magistrate with reference to this averment and the Sub-Magistrate denied that any such application was made for adjournment or that a certified copy of any such petition was tendered in

evidence. Subsequent to this an affidavit was filed by the complainant respondent's advocate to which reference is made by the learned Sessions Judge; but apparently the learned Sessions Judge did not further consider the matter in view of the specific denial by the Sub Magistrate of the fact of any such application for adjournment having been made or petition having been offered in evidence. After discussing this part of the case the learned Sessions Judge said, "however as the lower court's ground for discharging the first accused cannot be supported in view of the evidence of the petition, the order of the discharge of the first accused is set aside." Therefore the order of the Sessions Judge is based upon the ground that fresh evidence is available which would establish the fact of instigation on the part of the petitioner and in view of that circumstance the matter should be re-opened and enquired into afresh. Such a course is not ordinarily to be adopted by a revision court. As pointed out by Sankaran Nair, J. in *Lakshmi Narasappa* v. *Mekala Venkatappa* [1] "a power to order what is practically a re-trial, to give a complainant another opportunity of re-examining his witnesses and adducing fresh evidence ought not to be presumed, as it is unjust to the accused and opens a wide door to perjury and corruption." The learned Judge observed:— "That the case is only one of discharge, which is not ordinarily at any rate a bar to a fresh prosecution, supports the same view as the injustice, if any, to the complainant may be thereby remedied."

These remarks are quite apposite to the present case. It is open to the respondent to file a fresh complaint forthwith on the same averments against the petitioner and to make the fullest use of the document upon which he is resting his present case in revision. That however, is not a special or sufficient ground for the court of revision to set aside the order of discharge or to direct a fresh enquiry.

The petition is allowed and the order of the Sessions Judge is set aside.

N.T.R.

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Cr. R. C. No. 1009 of 1946
Cr. R. P. No. 967 of 1946
*January* 23, 1947

YAHYA ALI, J.

N. KANDASWAMI PILLAI & another
v.
THE EXECUTIVE OFFICER, PANCHAYAT BOARD, ATTUR (Salem Dist).

1. [1908] I.L.R. 31 Mad. 133

*Local Boards Act (Mad. Act XIV of* 1920), *ss.* 194 & 207—*Erecting factory without permission — Prosecution and acquittal — Fresh prosecution—Cr. P. C. (V of* 1898), *Ss.* 242, 248 & 403.

*The erection of a factory without permission from the prescribed authority is not a continuing offence and hence a previous acquittal under s.* 194 *read with s.* 207 *of the Local Boards Act for having erected the factory is a bar to a fresh prosecution. The fact that the complaint was withdrawn on the previous occasion even before the question was put to the accused under s.* 242 *Cr. P. C. is immaterial, for in a summons case the trial begins when the accused appears or is brought before the magistrate and not when he is asked to show cause why he should not be convicted.*

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898 praying the High Court to revise the order of the Stationary Sub-Magistrate, Attur dated 31—8—1946 in C. C. No. 1211 of 1946.

*K. Kalyanasundaram* for the Petitioner.
*The Public Prosecutor* on behalf of the Crown.

ORDER.

The petitioner in this case was acquitted on a previous occasion of an offence under Section 194 read with Section 207 of the Madras Local Boards Act, 1920, for having erected a factory without permission from the prescribed authority. He was subsequently prosecuted for running the factory and convicted. After that conviction it would appear that a fresh charge-sheet was filed against him for the erection of the factory and he was prosecuted under the same sections namely Section 194 read with section 207 of the Act. When the case came up the plea was raised on behalf of the petitioner (accused) that a fresh prosecution did not lie in view of the previous acquittal, being barred by the doctrine of *autrefois acquit* under Section 403 of the Code of Criminal Procedure. The magistrate who dealt with the case overruled this objection and directed that the trial should proceed. The reason mentioned by him is that the executive officer withdrew the complaint on the previous occasion even before the question was put to him under section 242 of the Code of Criminal Procedure and therefore it cannot be held that the accused were tried and acquitted within the meaning of section 248 of the Code of Criminal Procedure. This view is clearly wrong. As set out in Section 242 of the Code the trial of a summons case begins when the accused appears or is brought before the magistrate, and not when

he is asked to show cause why he should not be convicted. Before setting aside the order I wanted to be sure whether the erection of a factory is not a continuing offence and whether Section 403 of the Code applies to a continuing offence. The language of Section 207 of the Local Boards Act itself clearly shows that in order to constitute a continuing offence within the meaning of schedule IX of the Act, it is necessary that the person should have been first convicted of that offence and then continued to commit the same offence again. In the present case there has been no such original conviction and a continuance of the offence. Even otherwise the erection of a factory cannot be deemed to constitute a continuing offence because it is an act which can be performed only once although the running of the factory may constitute a continuing offence.

The petition is allowed and the order of the magistrate is set aside and the proceedings before the magistrate are quashed in view of the bar arising by reason of the previous acquittal.

N.T.R. —

Criminal Revision Cases Nos. 1097 and 1098 of 1945 and 411 of 1946, (Criminal Revision Petitions Nos. 1016 and 1017 of 1946, and 396 of 1946
*December* 19. 1946

KUPPUSWAMI AYYAR, J.

M. RAMANATHAN CHETTIAR

*v.*

EMPEROR

*Local Boards Act (Mad Act XIV of* 1923)—*S.* 206–*Notification under–Extension of provisions of District Municipalities Act (V of* 1920*) S.* 347 *not made applicable—Prosecution—If maintainable.*

*By a notification issued under S.* 206 *Local Boards Act, the Local Government extended certain provisions of the District Municipalities Act to a Local Board area; but in S.* 347 *District Municipalities Act, the provision for starting prosecutions, was not included in the notification. The petitioners were prosecuted under the extended provisions.*

Held, *that the prosecution could not be maintained until the provisions of s.* 347 *District Municipalities Act, are made applicable to the local board area.*

Petitions under Ss. 435 and 439, of the Code of Criminal Procedure 1898, praying the High Court to revise the Judgment of the Court of the Stationary Sub Magistrate of Dharmapuri dated 13—11—45 in C. C. 1851 & 1852 of 1945 etc.

*C. S. Swaminathan,* for Petr.

*P. Govinda Menon,* for Respt.

*Public Prosecutor* (*V. L. Ethiraj*) for crown.

ORDER.

These three revision petitions arise out of prosecutions under the District Municipalities Act. The area in which these offences are said to have been committed is no doubt not a portion of the Municipal area but a portion of the Local Board area. The provisions of the District Municipalities Act were extended to this area. The petitioners in these three cases have been prosecuted in C.C. No. 1851 of 1945 (Cr. R. C. No. 1097 of 1945), and C.C. No. 1852 of 1945 (Cr. R.C. 1098 of 1945) and C.C. No. 2113 of 1945 (Cr. R. C. No. 411 of 1946) for offences punishable under Section 199 read with Section 317 of the Madras District Municipalities Act in the former two cases and in the third case for offences punishable under Sections 205 and 317 of the same Act. These offences relate to default with regard to the obtaining of sanction for erecting buildings. When the local Government at the request of the Panchayat Board of Dharmapuri extended the provisions of the District Municipalities Act to the area under the control of the Panchayat Board, a notification order was issued under Section 206 of the Madras Local Boards Act which runs thus :

"No. 623—In exercise of the powers conferred by section 206 of the Madras Local Boards Act 1920 (Madras Act XLV of 1920), the Government of Madras are hereby pleased at the request of the Dharmapuri Panchayat and of the Dharmapuri District Board to extend to the Dharmapuri village, the following provisions of the Madras District Municipalities Act 1920 (Madras Act V of 1920) and the rules framed thereunder: (i) Chapter IX Streets and Chapter X—Buildings Regulations; (ii) so much of sections 303 (3), 313, 317 and 338 and Schedules VII and VIII as relate to Chapters IX and X aforesaid; and (iii) clauses (4), (11), 24 and (29) of section 3, clauses (8) and (10) of section 306 read with section 203-A of the Madras Local Boards Act, 1920, and section 344 of the Madras District Municipalities Act, 1920 subject to the modification that in the said provision, all references to 'Municipal Council' 'Council', 'Municipal' and 'Municipality' shall be construed as references to Panchayat, all references to 'Chairman' or 'Executive authority' as references to President of the Panchayat and the reference to 'Schedule IV' in section 344 as a reference to Schedule IV to the Madras Local Boards Act, 1920."

Unfortunately the provision of Section 347 of the District Municipalities Act was not included in this notification with the result that the provision as regards the person who is to prosecute any such offence is not included and that there is no machinery

for starting these prosecutions. It is therefore contended that in the absence of such a provision for starting prosecutions in such cases these prosecutions must fail, since it can be started only by a person specifically mentioned. On the other side it is argued that these prosecutions must have been construed as prosecutions under the Local Boards Act. It is not a prosecution under the provisions of the Local Boards Act. It is only a case where the provisions of the District Municipalities Act are extended to the Local Board area and the prosecution is one under the District Municipalities Act and the provision providing the machinery by which the prosecution is to be started is not there. The lacuna of such a provision would not entitle Local Board to act in the way in which it did. This is not a case in which it can be said that the prosecution under the Local Boards Act is a prosecution under the District Municipalities Act in respect of a portion of the Local Board area to which this Act is extended.

Consequently all the three petitions are allowed and it is found that the prosecution cannot be maintained until the provisions of section 347 are applied to this Local Board area with the necessary amendments as regards the persons who are to start the prosecutions. It will be open to the local Government to take the necessary steps to remedy the defect in future.

N.T.R.

Cr. R. C. No. 532 of 1946
Cr. R. P. No. 511 of 1946
*January* 16, 1947

YAHYA ALI, J.

S. M. A. R. M. ARUNACHALAM CHETTIAR *alias* Veerappa Chettiar

v.

M. S. T. THANNEERMALAYAN CHETTIAR

*District Municipalities Act (Mad. Act V of 1920), S. 353A—Applicability—Tests.*

*At a meeting of a Municipal Council an altercation arose between two Councillors petitioner and the respondent about the method of recording the result of a poll and in the course of the altercation the petitioner is said to have abused the respondent and threatened to knock out his teeth. The respondent accepted the challenge and asked him to try. When the challenge was so accepted the petitioner is said to have left his seat and proceeded to the place where the respondent was sitting and called him out so that he may knock out his teeth and show him what he could do. He scratched the respondent's right hand, pulled the right lapel of his coat and tore it: One of the Councillors intervened and separated them. Immediately the petitioner is said to have taken up his shoe and rushed towards the respondent to strike him. Again some of the Councillors intervened and separated them. At that stage the meeting adjourned. Then the petitioner went out of the hall and stood in the verandah and threw out a challenge in abusive language to the respondent to come out of the hall saying that he was prepared to shoe him and even go to prison. When he said this he had his shoe in hand and was brandishing it. Upon these averments a complaint was filed alleging commission of offences under Sections 323, 352, 355 and 504 Penal Code.*

Held *that* (1) *the first stage ending with the throwing of the challenge and the acceptance of it was done while acting or purporting to act in the discharge of official duty and previous sanction under S. 353-A District Municipalities Act is required for the prosecution ;*

(2) *the subsequent acts were not done while acting or purporting to act in the discharge of official duty and previous sanction is not necessary for prosecution for offences then committed.*

*The correct test to be applicable would be whether the act complained of was done while acting or purporting to act in the discharge of official duty and whether the said act can reasonably be related to the official character of the person who did the act or in other words there was anything in the nature of the act complained of that attaches it to the official character of the person doing it.*

Petition under Ss. 435 and 439, of the Code of Criminal Procedure 1898 praying the High Court to revise the Order of the Court of Session Ramnad division at Madura, dated 15—4—1946 and made in Crl.R.C No. 8 of 1946 C. C. No. 1 of 1946 Additional Sub Magistrate's Court, Tiruppattur)

*L. S. Veeraraghhava Iyer* for Petr.

*C. Balasubramanian for Public Prosecutor*, for Crown.

*G. N. Chari* for Complt.

ORDER

On 2nd January 1946 the respondent who is a member of the Municipal Council, Karaikudi filed a complaint before the Additional Sub-Magistrate, Tirupattur against the petitioner who is another member of the Council complaining of certain offences committed by the petitioner during and after

a meeting of the Municipal Council held on the evening of the 27th December 1945. At that meeting a resolution was moved with reference to the improvement to be effected to a market in Karaikudi. The petitioner and the respondent expressed opposite views on the resolution and when the sense of the house was taken six members voted for the complainant's view while four were against it. One other Councillor remained neutral. The chairman started recording the result of the poll and in doing so he noted first, the fact of one of the Councillors remaining neutral and thereafter the result of the division with regard to the resolution. The petitioner (accused) objected to this method of recording the minutes and said that the division should be noted first and thereafter the neutral vote. He suggested that what had been already recorded should be scored out from the minutes book. According to the complaint, the complainant also supported this suggestion but the accused was not pleased with the complainant's support since he felt chagrined by the defeat his resolution had suffered. An altercation ensued between the petitioner and the respondent and in the course of the altercation the petitioner is said to have abused the respondent and threatened to knock out his teeth. The respondent accepted the challenge and asked him to try. This is the first stage of the incident. When the challenge was so accepted the petitioner is said to have left his seat and proceeded to the place where the respondent was sitting and called him out so that he may knock out his teeth and show him what he could do. He scratched the complainant's right hand, pulled the right lapel of his coat and tore it. One of the Councillors intervened and separated them. Immediately the petitioner is said to have taken up his shoe and rushed towards the respondent to strike him. Again some of the councillors intervened and seperated them. At that stage the meeting was adjourned. This may be regarded as the second stage of the incident. After the adjournment of the meeting the petitioner went out of the meeting hall and stood in the outside verandah and threw out a challenge in abusive languge to the respondent to come out of the hall, saying that he was prepared to shoe him and even go to prison. When he said this he had his shoe in his hand and was brandishing it. The petitioner was, according to the complainant, caught hold of and pushed and taken away from the place.

Upon these averments a complaint was filed alleging the commission by the petitioner of offences under sections 323, 352, 355 and 504 of the Indian Penal Code. The Additional Sub-Magistrate dropped further proceedings with regard to the complaint and discharged the accused, taking the view that under section 353 (A) of the District Municipalities Act sanction of Provincial Government was necessary to enable the Court to take cognizance of these offences in view of the circumstances that all the acts complained of were done by the accused while acting or purporting to act in the discharge of his duties as a municipal councillor. An application to revise that order was made before the Sessions Judge of Ramnad, who, however took a different view and held that sanction of the Provincial Government was not required for the prosecution of the petitioner and set aside the order of the Sub-Magistrate and directed enquiry into the complaint. The present application by the accused in that case is to revise the order of the Sessions Jude.

Section 353 (A) of the District Municipalities Act provides :

"When the Chairman, any Councillor or the Executive Authority is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Provincial Government."

It will be noticed that the corresponding Section 227-A of the Madras Local Boards Act is in identical language. Section 197 of the Code of Criminal Procedure which also requires the sanction of the Provincial Government in certain cases contains the phrase "while acting or purporting to act in the discharge of his official duty" which occurs in the two Acts referred to above. Section 270 (1) of the Government of India Act has also been referred to and there the consent of the Governor of the Province is required in the case of a person employed in connection with the affairs of the Province with regard to any act done or purporting to be done in the execution of his official duty as a servant of the Crown. Literally speaking Section 270 of the Government of India Act is not concerned with acts or things done "while acting or purporting to act in the discharge of his official duty" but with acts done or purporting to be done in the execution of a duty as a servant of the Crown. A distinction has been drawn between the language of this section and

Section 197 of the Code of Criminal Procedure by Varadachariar J. in *Dr. Horiram Singh* v. *The Crown* [1], where the learned Judge at page 509, points out that Section 197 of the Code Criminal Procedure cannot be treated as bearing a true analogy to Section 270 (1) of the Constitution Act. It is unnecessary to go into that aspect of the matter although I may while on this decision of the Federal Court usefully advert to the test that Varadachariar J. laid down with reference to Section 197 of the Code Criminal Procedure, as the correct test applicable to a case arising under that section. After examining the various decisions bearing upon the question the learned Judge pointed out that there are three groups of cases which have laid down three different tests. In the first group it is insisted that there must be something in the nature of the act complained of that attached it to the official character of the person doing it. In the second group more stress is laid on the circumstance that the official character or status of the accused gave him the opportunity to commit the offence; 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. Varadachariar J. was of the opinion that the first was the correct test; and referring to the time test namely that mentioned in the third group of cases the learned Judge said:

"The use of the expression 'while acting etc' in Section 197 of the Criminal Procedure Code (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."

There seems to be no reported case decided directly under Section 353-A of the District Municipalities Act; at any rate none has been cited before me. On behalf of the petitioner my attention has been drawn however to some decisions of this Court given under Section 227-A of the Local Boards Act and Section 197 of the Code of Criminal Procedure. I must first advert to the Bench decision reported in *Gangaraju* v. *Venki* [2] which was a case under Section 197 of the Code of Criminal Procedure. It was held in that case that the question in such cases is not as to the nature of the offence but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official duty. Any discussion, therefore, as to the nature of the offence is of remote relevance on the question whether sanction is necessary under any of these special protective provisions. The test laid down by Waller J. in the Bench decision cited above is whether it was committed by a public functionary acting or purporting to act as such in the discharge of his official duty. The three other decisions, all decided by Pandrang Row J. bearing upon this question are *Karuppiah Thevan* v. *Krishna Pillai* [3], *Subbaiah* v. *Ramacharlu* [4], and *in re Subramania Mudaliar* [5]. In all these cases the learned Judge took the view that the act need not be an authorised or official act, the reasoning being that if it was an authorised or official act it would not be an offence. The protection is given only with reference to acts which transgress the limits of one's official competence. But in *Karuppayya Thevan* v. *Krishna Pillai* [3], the learned Judge took care to point out that the question for decision was not whether the particular act alleged was within the jurisdiction or competence of the Board but whether the act was done while the accused purported to act in discharge of his duties and whether the act can be reasonably related to the official character of the person who did it. By laying down this test namely that the act should be reasonably related to the official character of the person who did it, the learned Judge was virtually adopting the criterion laid down by Varadachariar J. in *Dr. Horiram Singh* v. *The Crown* [1], namely that there should be something in the nature of the act complained of that attached it to the official character of the person doing it. It is not necessary to refer to the other cases cited as they do not carry the discussion further.

On a scrutiny of all the decisions bearing upon the point the correct test to be applicable would in my opinion be whether the act complained of was done while acting or purporting to act in the discharge of official duty and whether the said act can reasonably

1. [1939] M.W.N. 497: Cr 69.
2. [1929] M.W.N. 387: Cr 61: 52 Mad. 602
3. [1939] M.W.N. 240 ; Cr. 32
4. [1939] M.W.N. 741 ; Cr. 105
5. [1940] M.W.N. 353 ; Cr. 45

be related to the official character of the person who did the act or in other words there was anything in the nature of the act complained of that attaches it to the official character of the person doing it.

Applying this criterion to the present case there can be little doubt that the first stage ending with the throwing of the challenge and the acceptance of the challenge was done while acting or purporting to act in the discharge of official duty. The precise language employed by the offending councillor may not be justified as "Parliamentary" but it was allegedly uttered while exercising his right of objecting to his collegue intruding when he was making his protest to the chair about the method adopted at recording the proceedings in the minute book. If therefore any offence is alleged to have been committed at that stage, sanction would be required under Section 353-A of the District Municipalities Act. With reference to acts said to have been committed during the second and third stages, there can be no doubt that they were not done while acting or purporting to act in the discharge of official duty as they did not in any manner whatsoever relate to the official character of the person at that time. Any offence committed during those stages therefore does not require the previous sanction of the Provincial Government under Section 353-A of the District Municipalities Act.

The order of the Sessions Judge is accordingly modified and the Stationary Sub Magistrate of Tiruppattur is directed to proceed with the case according to law in the light of the observations made in this judgment.

N.T.R.

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Cr. R. C. Nos. 268 to 271 of 1946
Cr. R. P. Nos. 261 to 264 of 1946

GOVINDARAJACHARI, J
*February* 7, 1947

Miyala NARASIMHACHARIAR & others
v.
EMPEROR

*Criminal Procedure Code (V of* 1898*) Ss.* 350 *(1) Proviso (a) &* 537*—Right to recall witnesses—Commencement of proceedings—Meaning of—Refusal to recall—Defect if cured by S.* 537.

*The cases against the accused were adjourned to* 12*th July* 1945 *for further cross-examination of P. W.* 12 *but before that date the magistrate was transferred and another magistrate was posted in his place. The cases however had still to be adjourned several times as P. W.* 12 *continued to be ill. On* 13*th September* 1945 *the accused applied under S.* 350 *(1) Proviso (a) of the Criminal Procedure Code that all the prosecution witnesses be resummoned and re-heard. The magistrate refused the request holding that if the accused desired to avail themselves of the right conferred by S.* 350 *(1) proviso (a) they should have applied on* 12*th July* 1945 *when the cases were called on before him. The trial proceeded resulting in convictions. In revision,*

Held *that the second magistrate cannot be said to have commenced his proceedings at any date before the* 13*th September* 1945 *and the accused were quite within their right in asking that the prosecution witnesses should be resummoned and reheard on* 13*th September* 1945.

*The commencement of proceedings within the meaning of Proviso (a) to S.* 350 *(1) Criminal Procedure Code means an effective commencement of the proceedings and not a mere posting of the case from one date to another.*

Held *further that the defect in procedure was not cured under S.* 537 *Cr. P. C. and the conviction must be set aside.*

Held also *that in the circumstances lapse of time since the date of the alleged offence was not a ground for not ordering retrial.*

Petitions under Sections 435 and 439 of the Code of Criminal Procedure 1898, praying the High Court to revise the Order of the Court of the Sessions Judge of South Kanara dated 4-3-46 and made in C. A. Nos. 1 to 4 of 1946 .C.C. Nos. 138 to 140 & 142 of 1943 Sub Divisional Magistrate's Court. Coondapur).

*V. T. Rangaswami Aiyangar, D. B. Jagannatha Rao, L. S. Raju, G. Gopalaswami & S. Venkatachalam* for Petitioners.

*Public Prosecutor (V. L. Ethiraj)* for Crown.

ORDER.

The same point arises in these four criminal revision cases which can therefore be conveniently dealt with together. Crl. R. C. Nos. 268, 269, 270 and 271 of 1946 have arisen respectivcly out of C. C. Nos. 138, 139, 140 and 142 of 1943 on the file of the Sub-Divisional Magistrate, Coondapur. The sole accused in C. C. No. 138 of 1943 is one Miyala Narasimhacharya who held two powers of attorney from the previous Swamiar of Sri Pejawar Mutt in Udipi who died on 16th October 1939. The accused is said to have continued in management of the affairs of the mutt even thereafter. It is alleged that he was entrusted with and was having dominion over certain gold jewels

belonging to the said mutt. In C. C. No. 139 of 1943 Narasimhacharya is the first accused and the second accused is a person who is described as his shanbhogue. Narasimhacharya and a clerk are the accused in C. C. No. 140 of 1943. The sole accused in C. C. No. 142 of 1943 is a person who is described as a Kottari. Narasimhacharya has been convicted under section 409 of the Indian Penal Code. The second accused in C. C. No. 139 of 1943 and the second accused in C. C. No. 140 of 1943 have each been convicted in the alternative under section 409 read with section 109 of the Indian Penal Code or under section 411 of the Indian Penal Code or under section 414 of the Indian Penal Code. The accused in C. C. No. 142 of 1943 has been convicted under section 411 of the Indian Penal Code or section 414 of the Indian Penal Code. All these convictions have been upheld by the Sessions Judge of South Kanara. The offences in C. C. No. 138 of 1943 are said to have been committed on or about 14th December 1938, 10th January 1939 and 4th September 1939. In C. C. No 139 of 1943 the offences are said to have been committed in or about September 1939. In C. C. No. 140 of 1943 the offences are said to have been committed in or about December 1938 and in C. C. No. 142 of 1943 the offences are said to have been committed on or about 17th May 1939, 4th September 1939 and 3rd February 1940. It is unnecessary to refer to the sentences in any detail.

The cases were pending on the file of the Sub Divisional Magistrate, Coondapur for a considerable time for the further cross-examination of P. W. 12 who was very ill and were being adjourned from time to time. On 30th June 1945 the magistrate adjourned the cases to 12th July 1945 for the same purpose; but before 12th July 1945 the magistrate who had heard the cases previously was transferred and another magistrate was posted in his place. The cases however had still to be adjourned several times as P. W. 12 continued to be ill. On 13th September 1945 the accused in the several cases applied under section 350 (1) proviso (a) of the Code of Criminal Procedure that all the prosecution witnesses might be resummoned and reheard. The magistrate however refused the request holding that if the accused desired to avail themselves of the right conferred by section 350 (1) proviso (a) of the Code of Criminal Procedure they should have applied on the 12th July 1945 when the cases were called on before him or on any of the subsequent dates to which the cases were being re-posted. The trial proceeded resulting in convictions as already stated.

It is argued by Mr. Rangaswami Aiyangar, advocate for the petitioners in Cr. R. C. Nos. 268, 269 and 270 of 1946 that the accused were quite within their rights in asking that the prosecution witnesses should be re-summoned and re-heard on 13th September 1945. This argument was adopted by Mr. Gopalaswami who appeared for the petitioner in Cr. R. C. No. 271 of 1946. Section 350(1) and proviso (a) run as follows:

"Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself; or he may re-summon the witnesses and recommence the enquiry or trial.

Provided as follows: (a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard"

The question that arises is whether the second magistrate can be said to have commenced his proceedings at any date before the 13th September 1945. The argument is that at no earlier date was there any effective commencement of the proceedings by him and that the cases were simply being adjourned from one date to another. There is direct authority in support of this argument in the judgment of Happel, J. in Cr. R. C. No. 415 of 1944. The judgment of the learned Judge does not set out the facts of that case but it appears from the order of the Additional First Class Magistrate, Villupuram, which was revised by Happel, J. that in that case too the accused was attending the court on two occasions, 14th April 1944 and 21st April 1944, after the new Magistrate took charge and that the application for the resummoning and rehearing of the witnesses was made only on 9th May 1944. The learned Public Prosecutor admits that this is the only direct ruling on the matter. I respectfully agree with it, and in my opinion, commencement of proceedings within the meaning of the proviso means an effective commencement of the proceedings and not mere posting of the case from one date to another. In view of this defect of procedure which is not curable by section 537 of the Code of Criminal Procedure, the convictions and

sentences of all the petitioners in the several cases must be set aside.

Mr. Rangaswami Aiyangar argued that in view of the long lapse of time between the dates of the several alleged offences and now, no retrial need be ordered. He referred to the case in the *Public Prosecutor* v. *Kadiri Koya* [1] as an instanec where a Bench of this court refused to order retrial while setting aside a conviction on the ground of illegality of procedure and also placed considerable reliance on what he regarded as the halting nature of the finding in the matter of the identity of the jewels. After giving the matter my best consideration, however, I think that a retrial should be ordered in the interest of justice. It would be noticed that notwithstanding that the offences are alleged to have been committed in 1938 and 1939 the cases were actually disposed of by the Sub-Divisional Magistrate, Coondapur only on 29th December 1945. Moreover, it was open to the accused to have come up to this court in revision against the order of the Magistrate dated 18th September 1945 refusing to resummon and rehear the prosecution witnesses and the matter would then have been immediately set right. They permitted the proceedings to go on, and I do not think they should be permitted to rely upon the delay that has taken place since then as a ground for refusing a re-trial. The circumstances in the *Public Prosecutor* v. *Kadiri Koya* [1] were essentially different from those in the present cases. I do not consider it desirable to discuss the nature of the findings as to the identity of the jewels which Mr. Rangaswami Aiyangar characterised as a halting finding but which the learned Public Prosecutor claims as all that could possibly be given in the circumstances.

The convictions and sentences are therefore set aside, and the cases are directed to be re-tried.

N.T.R.

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Cr. App. Nos. 35 & 36 of 1947
*January* 17, 1947

YAHYA ALI, J.

THE PUBLIC PROSECUTOR
v.
V. S. VISWANATHAN & another

*Penal Code (XLV of* 1860*) ss.* 160 & 116 — *Offering bribe to officer to reconsider decision — Offence.*

*Where a textile officer had rejected an application for the grant of a permit for extra supply of yarn and the next day the applicant repeated his request and offered a bribe, and the textile officer stated in evidence that once he had rejected the application he had never granted it on repeated applications,*

Held, *the person who offered the bribe was not guilty of the offence of abetment of bribery.*

*The decision in* [1929] *M. W. N.* 695 : *Cr.* 143 *is still good law.*

Appeals under Section 417 of the Code of Criminal Procedure 1898, against the acquittal of the aforesaid 1st Respondent (Accused 1) by the Sessions Judge of Madura in C. A No. 130 of 1946 on his file and of the aforesaid 2nd Respondent (Accused 2) by the City First Class Magistrate, Madura, in C C. No. 167 of 1946 on his file.

JUDGMENT

The appellate magistrate who acquitted the respondents in these two appeals filed by the Public Prosecutor of the alleged offence of abetment of bribery came to the conclusion in view of certain admissions made by the Textile Officer P. W. 1, that the decision in *Venkatarama Naidu In re* [1] applied to the facts of this case. P. W. 1 stated that he had considered the application presented by the respondents for the grant of a permit for extra supply of yarn on its merits and had come to the conclusion that it had no merits. He had decided not to give additional yarn and apparently conveyed his decision to the concerned parties. The next day, the respondent in C. A. 35 of 1947 alone appeared before P.W. 1, and repeated his request for the permit and offered a bribe of Rs. 300. P. W. 1, the concerned officer, stated further that once he had rejected the application for special quota, he had never granted it on repeated applications. In view of these clear statements of the Textile Officer, the Bench decision referred to above directly applies. There, Coutts Trotter, C.J. observed:

"If a man, in the vain hope of getting a public officer to reconsider a question as to which that public officer is *functus officio* offers a bribe he commits no offence by doing so and presumably the public officer would commit no offence by taking it."

The other learned Judge, Pakenham Walsh J. agreed with this view. The appellate magistrate was clearly right in feeling bound to follow the Bench decisions of this Court. Offering a bribe is *per se* no offence under section 160 I. P. C.; the respondents are sought to be implicated with the aid of section 116 I. P. C. as abettors; in the circumstances of cases like this, it it difficult to con-

1. [1915] M.W.N. 504 : 39 Mad. 527

1. [1929] M.W.N. 695: Cr. 143

ceive how such an act can, under the present law, amount to abetment of taking the bribe.

The learned Public Prosecutor contends that the case in *Venkatarama Naidu In re* [1] was wrongly decided and requires reconsideration. The decision has stood all these years without any dissent. The more effective remedy would be, as proposed by the learned Chief Justice in that case, to bring comprehensive legislation with a view to render the giver of the bribe also substantively punishable and to extend its scope to other departments of national life on the lines of Fry's Act in England.

The appeals are dismissed.

N.T.R. — *Appeal dismissed.*

Referred Trial No. 161 of 1946

HORWILL & BELL, JJ.

*January* 22, 1947

Bheemavarapu SUBBA REDDI & another

v.

EMPEROR

*Criminal Procedure Code (V of* 1898), *S.* 161–*Statement under—Recording.*

*It is not the duty of the investigating officer to do more than record a gist of the statements made to him. It is desirable that the notes however and whenever taken by the police officer should be preserved. It is not the law that the police must record individual statements under S.* 161. *Nothing is more natural than that he should make rough notes of information which later he would set out in proper form in the case diary.*

Per Horwill J. *It is desirable that statements should be recorded where reasons of urgency do not preclude this course.*

Trial referred by the Court of Session of the Kistna Division for confirmation of the sentence of death passed upon the said Prisioners in C.C.No. 19 of 1946 on 24–10–1946 and appeals respectively by the said prisoners (accused 1 and 2) against the said sentences of death passed upon them in the said case.

*K. S. Jayarama Ayyar for C. K. Venkatanarasimham*, for 1st Accused.

*V. V. Radhakrishnan*, for 2nd accused.

*Assistant Public Prosecutor*, for Crown.

JUDGMENT

BELL, J:—The appellants are a brother and a sister who were charged respectively with the murder and abetment of murder of one Guntaka Somireddi in the village of Nunna on 13—5—1946. They were both sentenced to death.

The facts shortly are as follows: The first accused had married the daughter of P. W. 6. She had died in 1942 leaving children including one minor son. The first accused remarried and with his family lived with the second accused who was a widow. His children by his first wife went to live with their grandfather P. W. 6. In 1944 there was a partition between A-1 and his minor son who was represented by P. W. 6 and the properties were divided equally between them. A-2 as a widow was fortunate in obtaining two acres and a house and cash for her maintenance.

P. W. 6, in addition to his deceased daughter, the former wife of the first accused, had two sons, P. W. 7 and the deceased. They formed a joint family.

In the early evening of the night in question there was a quarrel between the parties. P. W. 6, 7 and the deceased wanted to cart some manure on the minor's part of the property. A-1 objected and eventually slapped P. W. 6 on the face. Thereupon P.W. 6, 7 and the deceased "fisted" him and threw him on the manure heap. P.W. 8 attempted to mediate and as a result they agreed to consult the partition deed, and for this purpose P. W. 9 the village school master was asked to read it out to them. He said that there was no mention therein either of a manure heap or of a stone heap about which there had been a previous quarrel.

A-1 was not satisfied with this apparently, and he went away shouting to the following effect, "As I have been unnecessarily beaten I will cut one of you". Then it was said that A-2 his sister also threatened, unless and until one of you three are cut, dispute won't settle". It is curious that only P. W. 9 and P. W. 6 say that A-2 was present on that occasion and repeated the threats of A-1. P. W. 1 and P. W. 8 make no reference to her being there, nor did P. W. 6 in his section 164 statement to the Magistrate. The circle inspector says that at his first investigation no reference was made to the threats of either A-1 or A-2. It may be mentioned that P.W.9 also added that he did not tell the police about A-2 in this connection.

Later, at about 9 P. M., according to the prosecution case, P. W. 7 and the deceased went to rest in their own yard, the deceased being on a raised platform while P. W. 7 and

the father P. W. 6 lay on a cot. Somewhere about 1 A.M. according to P. W. 7 he heard a cry and woke up. He noticed that the cattle had stood up and then he saw A-1 hitting the deceased on the face with an axe more than once. A-2, he said, was standing near. Thus P. W. 7 was a direct eye-witness according to his story. P. W. 6 says that he also was awakened and saw A-1 and A-2 turning away from the platform on which the deceased lay. They were side by side and he recognized them clearly. P. W. 10 a neighbour heard the noice and came to the scene. P.W. 7 told him what had happened and mentioned both A-1 and A-2 as being concerned.

P. W. 7 then went to his own house and then to the house of the village munsif, which was quite close, and there he gave the First Information Report, Exhibit P. 7, at about 3 A.M. This is substantially the same as the story he told in the Sessions Court. The Report was duly forwarded by the village munsif, P.W. 11, and it reached the police at about 9-30 A.M. Investigation was commenced, as we think, without any undue delay.

As a result of this an entirely independent witness was discovered. P. W. 2 a man who comes from another village and who appears to be a man of some substance, says that he was on the way at or about the material time to bale water in his field which is near the village in question. He was going along the 'vagu' and there he saw A-1 and A-2 in the dry bed of the stream. A-1 had an axe in his hand and was followed by A-2. P.W. 2 says that he asked A-1 why he was walking so quickly, but received no reply.

In the lower courts A-1 raised the defence of *alibi* and said that he had been at all material times in a village about 20 miles away rescuing his cattle from the pound there, and he produced a register Exhibit P. 17 in support of his story as well as D.W.1 who is an ex-village munsif. The learned Sessions Judge in paragraph 38 of his judgment has dealt at length with the evidence, this defence witness and with this particular defence. He says that it is scarcely possible to believe the story that the cattle of the accused strayed 20 miles. He refused to accept the evidence of D.W. 1 whom he held to be unreliable. We think that the learned Sessions Judge was justified in coming to this conclusion about this witness.

We will deal first with the case of the second accused because in our opinion there is an element of doubt in her case to the benefit of which she is entitled. The evidence of P. Ws. 6 and 7 would go no further than to show that she was present in the yard at the time of the attack on the deceased. There might have been many reasons for her presence there and for her being awake at such an hour in this agricultural community. P. W. 2, for example, had a lawful business at that very time and it might well have been so with her. Threats alone amount to very little and we are not satisfied that the prosecution case was proved beyond doubt against her. Certainly there could have been no motive for her to attack P.W. 6 or his family, because she should have been grateful for the maintenance which she was receiving out of the properties in which they had an interest. With regard to A-2 therefore we set aside her conviction and the sentence imposed on her, and allow her appeal.

With regard to A-1, the case stands in our opinion on a very different footing. There is abundant evidence of unfriendly relations between him and the family of P.W. 6 with whom he had been connected by marriage and with whom his children by his first wife were living. It is clear from the evidence of P.Ws. 1, 8 and 9 that A-1 was not satisfied with the partition which had been effected and that on more than one occasion he had protested vigorously against the assumption by P. W. 6 and his sons of a right to take manure and stone which he denied. The witnesses mentioned speak to the final quarrel a few hours before the occurrence at which A-1 and others descended to blows and A-1 was not only struck by them but was thrown on to the manure heap. As related already, there was a suggestion that the partition deed should be looked into and P. W. 9, the school master, read it out to them when it became clear that A-1's claims were unjustified. He then went away uttering the threats already mentioned. This was but a few hours before the events related by P. Ws. 6 and 7 who are the only eye witnesses. They are both quite clear in their statements. P.W.7, who informed the village munsif without any undue delay gave, as we think, the same information of the occurrence as he gave in the Sessions Court. The learned Sessions Judge, who carefully analysed his evidence, accepted it and we see no reason to disagree either with his reasoning or with his conclusion. P. W. 10

their neighbour, not interested at all in the quarrel, came on the scene, hearing the cries raised by P. Ws. 6 and 7, and P. W. 7 at once named the first accused as the assailant of the deceased and said that the blows were struck with an axe. P. W. 2, against whom nothing is said or can be said, swore that about the material time he saw A-1 walking out of the river bed carrying an axe.

On the first point raised by Mr. Jayarama Ayyar, viz., as to the reliability of P. Ws. 6 and 7 we are satisfied that their account was true. As we have said the only defence raised by this accused was one of alibi. Any one with knowledge of local conditions in this country could but agree with the Sessions Judge's conclusion that the story about cattle straying about 20 miles and being impounded by a subsequently dismissed village munsif who happened to be the friend of the accused cannot be accepted.

Mr. Jayarama Ayyar, however, has raised a point to which some attention must be given. He says that the method of investigation employed by the police was such as to deprive the accused and his advisers of the assistance or oppportunity which the Criminal Procedure Code provides for scrutinising the evidence called for the prosecution. He based his contention in the main on the evidence of P. W. 14 the Circle Inspector, and on that of P. W. 13 the Sub Inspector, to a smaller extent. P. W. 13 in cross examination said that he collected the witnesses and kept them ready for investigation by his superior officer. He said that he did not examine any witness and that that was done by the Circle Inspector. The witnesses, he said, were examined separately and they were asked to state what they knew. As they were being examined, the Circle Inspector took some notes. The Circle Inspector, P. W. 14, says that he examined P. Ws. 1, and 6 to 9 and 11 besides five others. "I examined witnesses. From my case diary I cannot say whom I examined first and whom I examined second and so on. I cannot say from my case diary as to what each witness stated. I cannot also state from my memory. I took down my own notes. I first asked one by one what the witnesses knew of the offence and then took my own notes and questioned the witnesses again by way of verification of what notes of events I had taken down. In my notes I took a summary of what all the witnesses stated. Those notes will also give an idea of what each witness stated if carefully gone through. On the same day I elaborated it into the form I have in my case diary. I took into account all the reports, inquest report, mediators' report, first information report etc. I have my rough notes with me. They are not required to be sent anywhere. There is no prescribed rule under which these rough notes should be filed.....As it is not necessary to prepare individual statements, I did not prepare any."

On these words Mr. Jayarama Ayyar builds up the contention that the police failed in their duty in not taking individual statements from each witness and preserving them so that they could have been available if required for the accused and his advisers to check the evidence given in the witness box by the various witnesses.

He has referred us to sections 160, 161, 162 and 172 of the Criminal Procedure Code. Section 160 provides that a police officer has power to require the attendance of any person who appears to be acquainted with the circumstances of the case. Section 161 provides that when such a person has been ordered to attend, the police officer may examine him orally as to the facts and circumstances of the case. Such person is bound to answer any questions put to him by the police officer, unless they would tend to incriminate him. By a recent amendment of Act II of 1945, it is provided that if the police officer thinks fit he may reduce into writing any statement made to him in the course of his investigation, and if he does so, he must make a separate record of the statement of each person. If the police officer so decides, and a statement is taken from the individual witness, then under section 162 that may be used in the circumstances provided for in that section. Under section 172 there is a general direction that every police officer making an investigation must compile a diary day by day. Whether he does so from memory or by means of notes taken by him at the time is not provided and it would seem that the circumstances of each case must be considered if and when the conduct of the police in conducting an investigation is questioned.

In this case on a plain reading, as it seems to us, of the Circle Inspector's evidence, he interviewed various witnesses and asked them one by one what they knew about the events. He then made some notes of what

they said and asked them again as to whether the effect of his notes was correct. He was in fact preparing the material for the case diary which he was bound to compile some time during the day. He says that he took no individual statement from any witness, although he says that his notes and the case diary would give some idea of what each witness had said. One must not forget that P. Ws. 1, 2, 8 and 10 spoke about their own knowledge of the events which was not the evidence of the eye-witnesses. P. Ws. 6 and 7 only spoke to the murder and their evidence is practically the same. It has been held recently in *Guruva Vannan, In re*: [1] that it is not the duty of the investigating officer to do more than record a gist of the statement made to him. To require otherwise would paralyse any investigation of the kind which took place in this case. Mr. Jayarama Ayyar has urged that the police officer must deliberately have refrained from taking individual statements and contented himself with rough notes in order to prejudice the accused at his trial. We can see no basis for the contention. It is no doubt desirable as was pointed out in *Baliram Tikaram* v. *Emperor* [2] that notes however and whenever taken by the police officer should be preserved. In that case the rough notes taken by the police officer had been destroyed. In this case the Circle Inspector in the witness box in the Sessions Court said that he had his rough notes in his pocket. No request was made by Counsel for the accused that they should be produced so that he might read them. If such a request had been made, it would unquestionably have been granted. In fact, while the case was in the committing court, an application was made by the legal advisers of the first accused for copies of the section 162 statements, if any, and the reply was given not only then, but again in the Sessions Court that there were no such statements. The authorities, however, at once tendered the case diary in order to assist the accused in every way that was possible. We have looked at the case diary and also at the rough notes which we caused to be sent here, and it is clear to us that the case diary is merely an amplification of the rough notes taken by the investigating officer. The officer has sworn that he took no other statements, and we think that no criticism can be made of his conduct. Whatever there was in the way of documents was made available to the advisers of the accused at the earliest possible opportunity. The learned Sessions Judge has observed that:

"the defence has been given an opportunity of perusing all the statements recorded in the diary and the learned Public Prosecutor has discharged his duties on behalf of the Crown in an exceptionally impartial manner and has given all the co-operation to the defence counsel necessary to make section 162 Cr. P. C work smoothly with the consent of this Court".

He adds that he is unable to find any ground for complaint by the counsel for the defence and we agree with his conclusion. It cannot, we think, be the law that a police officer investigating a crime has only two alternatives, viz., to record nothing, or to take a separate statement from each witness. It is not the law, we think, that the police must record individual statements under section 161 which specifically says that he may and not that he must reduce the statement of a witness into writing. To expect the police officer to compile his case diary from memory is also, we think, absurd; and indeed might in certain circumstances be most undesirable. Nothing is more natural than that he should make rough notes of information which later he would set out in proper form in the case diary for the scrutiny of his superior officers in whose hands, after all, lies the subsequent control of the matter.

We think therefore that there is no substance in the point raised by Mr. Jayarama Ayyar. Apart from that, the evidence, we think, is more than adequate to support the prosecution case against A-1. This was a brutal murder, the deceased being killed while he was asleep. There appear to be no extenuating circumstances. In our opinion the conviction of A-1 and the sentence imposed upon him should be confirmed and his appeal dismissed.

HORWILL, J: I would like to add a word or two on the objection taken by Mr. Jayarama Ayyar to the form of the police records and to the procedure adopted during the trial.

Two questions arise; (1) whether the investigating Officer committed any irregularity which vitiated the proceedings; and (2) whether the defence was in any way prejudiced by the manner in which the proceedings took place in the lower Court and the police records examined.

It has been generally held by all the High Courts of India that it is not necessary for the Investigating Officer to record verbatim what the various witnesses tell them. For

1. [1944] M.W.N. 213: Cr 51
2. [1945] A.I.R. Nag 1

example, Mockett, J. said in *Guruva Vannan* In re [1]:

"It is not the duty of the Investigating Officer to do more than record a gist of the statements made to him."

Since that judgment was pronounced, however, there has been an amendment of s. 161 Cr.P.C., and Mr. Jayarama Ayyar argues that it is now incumbent upon the police if they write anything at all during the course of their investigation, to record a verbatim statement. The new sub-section runs:—

"The police officer may reduce into writing any statement made to him in the course of an examination under the section, and if he does so he shall make a separate record of the statement of each person whose statement he records."

It is difficult to believe that the the legislature intended by this amendment that an Investigating Officer should record a statement of every person examined with the same meticulous care as a court records a deposition; for that would be losing sight of the principal purposes of an investigation, which are to detect the offence, arrest the accused, and to file a charge-sheet before a competent court. There may be circumstances in which an investigation can proceed at leisure; but it may often be the case that an Investigating Officer has time only to record the outlines of what has been said, and then to proceed to something more urgent, such as the arresting of the accused or the recovery of property. Undue delay in examining witnesses might make it much more difficult, if not impossible, to complete an investigation successfully; and it does not seem that s. 161 (3) was intended to make it incumbent upon the investigating officer to record a statement in greater detail than was the practice prior to the amendment. This new sub section seems to hit at the practice of writing against the names of certain witnesses after the first that they corroborated the statements of the earlier witness.

If the notes in the present case had been in the form of summaries of statements made by the individual witness, then those notes should have been made available to the defence. It is noteworthy that although the notes were on the person of the Inspector during his examination in the Sessions Court, he was not asked to show them. We have examined them in this court to see if they are mere summaries of statements and we find that they are not. The entries in the case diary are in the form of a detailed narrative, in which the actions or presence of various witnesses are frequently referred to; so that it is possible to infer from the particulars of the narrative that certain things were seen by certain witnesses, and that they gave certain information. We find that the notes give a very brief summary of the narrative found in the case diary, and do not take the form of summaries of individual statements made by the various witnesses;so that if the Police Officer had objected to the production of his notes–which he did not–he would have been fully justified in doing so.

The learned Sessions Judge felt–as indeed did the Public Prosecutor–that every concession should be given to the defence, so that they might know what was said and done during the investigation; and so the defence were allowed to examine the case Diary. Even if the notes had been inspected no more information would have been available to the defence. Mr. Jayarama Ayyar has seen the notes and concedes that they are unintelligible to one unacquainted with the records.

Although no irregularity was committed by the taking of notes for the preparation of the Case diary instead of recording statements it seems desirable that statements should be recorded where reasons of urgency do not preclude this course. It can easily be seen that if the practice adopted in this case were generally followed and statements never produced, the discretion given to the police under s. 161 Cr. P. C., might be much abused. An unscrupulous investigating Officer might record statements, draw up notes suitable for the preparation of the case diary, and then suppress the statements, denying their existence. It is often of great assistance to the court to know what the earlier statement of witnesses were; and an accused who cannot point to contrary statements made by witnesses when first examined, because those statements were not recorded, labours under a disadvantage that should be avoided unless the exigencies of the investigation make the recording of statements undesirable.

N.T.R. — *Appeal dismissed*

Cr. R. C. Nos. 515 and 516 of 1946
Cr. R. P. Nos. 495 and 496 of 1946
*February* 28, 1947
YAHYA ALI, J.
M. L. VERGHESE
v.
EMPEROR

*Criminal Procedure Code* (*V of* 1898), *s.* 188 —*Scope of.*

*Section* 188, *Cr. P. C. as amended in* 1923, *is not governed or controlled by the preceding sections* 179 *to* 187 *but in turn itself governs and controls the same. British Indian Courts have no jurisdiction under S.* 188, *Cr. P. C. as amended to try an offence committed wholly or partly in a Native State without the certificate of the political agent.*

Petitions under sections 435 and 439 Cr. P. C. 1898, praying the High Court to revise the judgment of the Court of Session of South Malabar dated 16-4-46 and passed in C. A. Nos. 23 and 24 of 1946 respectively preferred against the judgments of the Court of the Additional 1st Class Magistrate of Palghat in C. C. Nos. 278 and 282 of 1945 respectively.

*Govind Swaminathan & Gopinath*, for Petrs.

*Public Prosecutor (V. L. Ethiraj)* for Crown.

ORDER

These are two revision petitions arising out of different cases in which the petitioner, who was the accused in both the cases was convicted by the Additional First Class Magistrate Palghat, under s. 409 I.P.C. The convictions, on appeal, were confirmed by the Sessions Judge of South Malabar.

The petitioner was running a bank called the Malabar Central Bank with its head office at Chowghat and a branch office at Orumanayur, both places being situated in British India. The charge against him in both the cases was that he received gold ornaments from different persons by way of pledge and after doing so, sub pledged them for higher amounts to other banks. According to the prosecution, these amounted to acts of criminal breach of trust as in subpledging the jewels, and that for higher amounts, the petitioner must be deemed to have acted with a dishonest intention. This view prevailed in both the courts below. At the appellate stage, an objection was raised to the convictions on the ground that since the sub-pledging had been done by the petitioner with the Savings and Investments Corporation, Ltd. at Trichur, which is situated in the State of Cochin, the British Indian Courts had no jurisdiction to to try the accused. This objection is based upon the provisions of s. 188 of the Criminal Procedure Code as amended by Act XVIII of 1923. The material portion of s. 188 runs thus :—

". . . . . When any British subject commits an offence in the territories of any Native Prince or Chief in India , . . . . . he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found : Provided that *notwithstanding anything in any of the preceding sections of this Chapter* no charge as to any such offence shall be inquired into in British India unless the Political Agent, if there is one for the territory in which the offence is alleged to have been committed, certifies that, in his opinion the charge ought to be inquired into in British India; and where there is no Political Agent the sanction of the Provincial Government shall be required , . . . ."

The words underlined were added by the Amending Act of 1923 and the purpose of that amendment will be set forth presently. The learned Sessions Judge negatived this contention relying upon s. 181 (2) of the Criminal Procedure Code which is to the following effect :—

"The offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person or the offence was committed. '

Referring to this sub section, the learned Sessions Judge held that the articles which are the subject of the offence were received by the appellant either at Orumanayur or at Chowghat and that consequently the trial court had jurisdiction. He was of the opinion that in view of the express provision contained in s. 181 (2), s. 188 had no application and he pointed out that a contrary view would lead to the results that courts in British India would be absolutely powerless if the offender disposes of property taken from British India in an adjoining Native State. On a consideration of the judicial precedents as they stood before the amendment introduced in the proviso to s. 188 of the Code and the scope of the amendment which was enacted expressly for the purpose of overcoming the effect of those decisions and the decisions that have been given after the amendment, I am of opinion that the objection as to want of jurisdiction in the trial court to try the accused in this matter must be upheld. I would refer only to one of the decisions prior to the amendment. In *The Asst. Sessions Judge North Arcot* v. *Ramaswami Asari* [1], it was held by Sadasiva Ayyar and Spencer, JJ. in a case where a person A entrusted three jewels to the accused at Vellore for sale and the accused pledged two of them in Bangalore and misappropriated the third at Madras contrary to the arrangement that he should return the jewels or their price to A at Vellore, that the British Indian Court at Vellore had jurisdiction to try the accused for breach of trust or dishonest misappropriation without a certificate under s. 188, Criminal Procedure Code. It is clear from the report of the

1. [1914] M.W.N. 324: I.L.R. 38 Mad. 779

Select Committee which proposed the amendment to section 188 that the *non obstante* clause was inserted in the proviso to that section expressly for the purpose of getting over the effect of the ruling in *The Asst. Sessions Judge, North Arcot* v. *Ramasami Asari* [1] and other rulings to similar effect. The Committee said this :—

"Certain decisions of the Madras High Court seems to make it doubtful whether section 188 is subject to the provisions of sections 179 to 184 and we think it is desirable to clear this up. We are not satisfied that this was the intention of section 188, and in our opinion it is safer, when a man is tried in British India in respect of an offence committed in a Native State, to require the Political Agent's Certificate in every case. The amendments which we propose will make this clear."

After this amendment was effected, we have had a series of decisions of this court which have held that section 188 as amended is not governed or controlled by the preceding sections 179 to 187 but in turn itself governs and controls the same. I shall refer to two cases. *Sreeramamurthy In re* [2] is a decision by a single Judge, Pandrang Rao, J. There the accused was charged under section 290 of the Indian Penal Code for having committed a public nuisance by arranging a marriage procession with music and by letting off fire-works whereby disturbing the sleep of the people in the vicinity of Frenchpeta, a part of French territory. An objection was raised that the British Indian Court had no jurisdiction to try an offence which was committed in Frenchpeta. It was held that even if section 179, Criminal Procedure Code was applicable, the case could not be tried without a certificate of the French Political Agent as required by section 188 of the Code. The learned Judge observed :—

"The fact that some of the persons who were annoyed by the music and fire-works were living in British territory would not give jurisdiction to the Magistrate. Even otherwise, and assuming that section 179, Criminal Procedure Code would apply to a case of this kind, there is another provision in the Criminal Procedure Code, viz section 188 which provides that notwithstanding anything in the preceding sections of Chapter XV, no charge in respect of any offence committed by an Indian subject of the crown in any place without or beyond the limits of British India shall be inquired into in British India unless the Political Agent if there is one for the territory in which the offence is alleged to have been committed certifies that in his opinion the charge ought to be inquired into in British India . . . . . ."

The ruling in *Fakrullakhan, In re* [3] was given by a Bench consisting of Curgenven and King, JJ. There it was specifically laid down that a British Indian Court has no jurisdiction under section 188, Criminal Procedure Code, as amended in 1923, to try an offence committed wholly or partly in a Native State, without the certificate of the political agent. The fact that part of the consequences have ensued within its jurisdiction is of no avail. That was a case of commitment and it was held that a commitment made without such certificate was illegal and must be quashed. The consideration urged by the learned Sessions Judge as to the possible result of taking such a view of the law in the matter of encouraging people who have committed such offences to dispose of their property in an adjoining Native State is without much force as in a case of this kind presumbly there would be little difficulty in obtaining a certificate from the authority prescribed in the proviso to section 188, Criminal Procedure Code. In any case an *argumentumab inconvenienti* is of no avil when the provisions of law are sufficiently explicit and imperative.

The petitions are allowed and the convictions of the petitioner in both the cases and the sentences passed on him are set aside.

*N.T.R.* — *Petition allowed*

2. [1934] M.W.N. 1316 : Cr. 244
3. [1935] M.W.N. 325 (2) : Cr. 53

Criminal Revision Case No. 1110 of 1946
(Criminal Revision Petition No. 1063 of 1946)

*February* 21, 1947

YAHYA ALI, J.

K. SUBBA RAO
*v.*
EMPEROR

*District Municipalities Act* (*Mad. Act V of* 1920), *Ss.* 197, 199, 201, 202 *&* 317 (*c*)—*Building without licence—Offence.*

*The petitioner filed an application on the 1st October* 1945 *for making some additions to his house and some correspondence was going on between him and the executive authority for proper plans drawn to scale and for other information which was necessary for the disposal of the application. The petitioner without waiting for the permission carried out the improvements and completed the same by the* 20*th December* 1945 *evidently commencing the work before the expiry of* 60 *days from the date of the application. The petitioner did not make any written request to the Council and he did not choose to wait for the period of sixty days.*

Held *that the act amounts to an offence under S.* 199 *read with S.* 317 (*c*) *District Municipalities Act.*

*Under Ss.* 197, 199, 201 *and* 202 *read together it is clear that an applicant for permission to construct or reconstruct a building cannot carry out or complete any construction or reconstruction within at least a period of sixty days after the date of the application and if the does so he commits an offence under S.* 199 *read with S.* 317 *(c) District Municipalities Act.*

*Without making a written request to the Council it is not open under the Act for any applicant for permission to construct or reconstruct a building to carry out or complete the work without the express permission of the executive authority.*

Petition under Sections 435 and 439 of the Code of Criminal Procedure 1898, praying the High Court to revise the judgment of the court of the Sub Divisional Magistrate of Vizagapatam dated 2—7—46 and passed in C. A. No. 36 of 1946 preferred against the judgment of the court of the II class Bench of Magistrates Anakapalli in B. C. No. 83 of 1946.

*Kasturi Sivaprasada Rao* for Petr.
*Public Prosecutor (V. L. Ethiraj)* for Crown.

ORDER

The petitioner who is an advocate practising at Vizagapatem has been convicted by the Bench Court, Anakapalle, under section 199 read with section 317 (c) of the District Municipalities Act, 1920 and sentenced to pay a fine of Rs. 20, in default to simple imprisonment for one day. He appealed against the conviction and sentence to the Sub-Divisional Magistrate, Vizagapatam who confirmed the conviction and sentence.

The case against him is that he carried out and completed certain repairs and improvements to his house in contravention of the provisions of the Act. The petitioner filed an application on the 1st October 1945 for making some additions to his house, and some correspondence was going on between him and the executive authority for proper plans drawn to scale and for other information which was necessary for the disposal of the application. The petitioner, however, without waiting for the permission of the executive authority, carried out the improvements and completed the same by the 20th December 1945. He must evidently have commenced the work before the expiry of 60 days from the date of the application. The question is whether this act amounts to an offence under section 199 read with section 317 (c) of the Act. Under section 199, a construction or reconstruction of a building should not be begun unless and until the executive authority has granted permission for the execution of the work. Section 201 requires that within 30 days after the receipt of an application for permission to construct or reconstruct a building the executive authority should either grant the same or refuse it on one or more of the grounds mentioned in section 203. Under section 202 the applicant is entitled, if permission has not been granted within the 30 days mentioned in section 201 to make a written request to the Council, and on receiving such a request the Council is bound to determine by written order whether such approval or permission should be given or not. The applicant has, after putting in the written request to the Council, to wait for one month longer to give time to the Council to make the decision; but after the expiry of that one month, such approval or permission would be deemed to have been given if the Council has not within one month determined whether such approval or permission should be given or not, and in such a case the applicant is entitled to proceed to execute the work. But even then he should do so without contravening the provisions of the Act or any bye-laws made under the Act. Reading sections 197, 199, 201 and 202 together, it is clear that the applicant cannot carry out or complete any construction or reconstruction of a building within atleast a period of sixty days after the date of the application, and if he does so, he commits an offence under section 199 read with section 317 (c) of the Act. It is from the facts of this case, manifest that the applicant did not make any written request at all to the Council and he did not even choose to wait for the period of sixty days. Without making such a request to the Council, it is not open under the Act for any applicant for permission to construct or reconstruct a building to carry out or complete the work without the express permission of the executive authority.

The conviction of the petitioner is right. I do not propose to interfere with the sentence as the petitioner, being an advocate, must be presumed to be fully aware of the relevant provisions of the Act and there can be no excuse for his not complying with them and contravening the express direction contained in the Statute. The petition is dismissed.

N.T.R. — *Petition dismissed.*

PRIVY COUNCIL
(Appeal from Madras High Court)
*December* 19, 1946

LORD WRIGHT, LORD SIMONDS, LORD UTHWATT & SIR JOHN BEAUMONT

PULUKURI KOTTAYA AND OTHERS
v.
THE KING EMPEROR

*Evidence Act (I of 1872), S. 27—Scope of—Extent of admissibility of confession under—Cr.P.C. (V of 1898) Ss. 162 & 537—Breach of S. 162—Effect.*

*In prosecutions for offences arising out of faction, where the Crown witnesses belong to the party hostile to accused, their evidence requires very careful scrutiny.*

*The Police Sub-Inspector held an inquest on the body of the murdered man and examined some witnesses and wrote down their statements in his note book. After the conclusion of the inquest the Circle Inspector took over the investigation from the Police Sub Inspector and on the same day he examined all the witnesses including all the witnesses who had been examined by the Police Sub-Inspector and their statements were recorded in the case diary prepared by the Circle Inspector. The notes of the examination by the Circle Inspector were made available to the accused at the earliest opportunity but the note book of the Police Sub Inspector was produced towards the end of the prosecution case when the police Sub Inspector was in the witness box.*

Held, *that there was a breach of the proviso to S. 162, Cr.P.C. in that the entries in the Police Sub Inspector's note book were not made available to the accused, as they should have been, for the cross-examination of the witnesses for the Crown.*

*But that in the peculiar circumstances of the case, since the statements of the witness were made available, though too late to be effective, and as no point was made of any inconsistency between the statements made to the Police Sub Inspector and those made later in the day to the Circle Inspector, no prejudice was occasioned to the accused by the failure to produce in proper time the note book of the Police Sub Inspector; and that the trial was valid notwithstanding the breach of S. 162, such breach being cured by S. 537.*

*The right given to an accused person by S. 162 Cr.P.C. is a very valuable one and often provides important material for cross examination of the prosecution witnesses. However slender the material for cross-examination may seem to be, it is difficult to guage its possible effect. Minor inconsistencies in his several statements may not embarass a truthful witness, but may cause an untruthful witness to prevaricate, and may lead to the ultimate breakdown of the whole of his evidence. Where the statements are never made available to the accused, an inference, which is almost irresistible, arises of prejudice to the accused.*

*The contention that S. 537, Cr. P. C. cannot cure a breach of a direct and important provision of the Code of Criminal Procedure is based on too narrow a view of the operation of S. 537. When a trial is conducted in a manner different from that prescribed by the Code, the trial is bad and no question of curing an irregularity arises, but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under S. 537 and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code.*

*I. L. R. 49 All. 475 & I. L. R. 45 Mad. 820,* overruled.

*S. 27, Evidence Act provides an exception to the prohibition imposed by the preceding section and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequsnce of information received from a person accused of any offence in the custody of a police officer must be deposed to and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. On normal principles of construction, the proviso to S. 26 added by S. 27, should not be held to nullify the substance of the section. It is fallacious to treat the fact discovered within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this; and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Any information*

*which serves to connect the object discovered with the offence charged is not admissible under S. 27. The difficulty however great of proving that a fact discovered on information supplied by the accused is a relevant fact can afford no justification, for reading into S. 27 something which is not there and admitting in evidence a confession barred by S. 26. Except in cases in which the possession or concealment of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law.*

1937 *M.W.N.* 442 ; *Cr.* 74 : *I.L.R.* 1937 *Mad.* 695 *F.B.* overruled.

*I.L.R.* 10 *Lah.* 283 *& I.L.R.* 56 *Bom.* 172, approved.

*D. N. Pritt, K. C. & R. K. Handoo,* for Applts.

*John Megaw,* for Rspts.

JUDGMENT

SIR JOHN BEAUMONT: This is an appeal by special leave against the judgment and order of the High Court of Judicature at Madras, dated 22nd October, 1945, dismissing an appeal against the judgment and order of the Court of Sessions, Guntur Division, dated the 2nd August, 1945, whereby the appellants, who were accused Nos. 1 to 9 and nine others, were found guilty on charges of rioting and murder. Appellants 1, 2, 3, 4, 7 and 8 were sentenced to death, and appellants Nos. 3 to 9 were sentenced to transportation for life. There were other lesser concurrent sentences which need not be noticed. At the conclusion of the arguments their Lordships announced the advice which they would humbly tender to His Majesty, and they now give their reasons for that advice.

The offence charged was of a type common in many parts of India in which there are factions in a village, and the members of one faction are assaulted by members of the other faction, and, in the prosecution which results, the Crown witnesses belong to the party hostile to the accused; which involves that their evidence requires very careful scrutiny. In the present case the assessors were not prepared to accept the prosecution evidence, but the learned Sessions Judge, whilst taking careful note of the fact that the six eye-witnesses were all hostile to the accused, nevertheless considered that the story which they told was substantially true and accordingly he convicted the accused. As already noted, this decision was upheld by the High Court in appeal.

The grounds upon which leave to appeal to His Majesty in Council was granted were two :—

1. The failure of the prosecution to supply the defence at the proper time with copies of statements which had been made by important prosecution witnesses during the course of the preliminary police investigation involving, it is alleged a breach of the express provisions of section 162 of the Code of Criminal Procedure.

2. The alleged wrongful admission and use in evidence of confessions alleged to have been made whilst in police custody by appellants Nos. 3 and 6. This point involves an important question as to the construction of Section 27 of the Indian Evidence Act upon which the opinions of High Courts in India are in conflict.

Their Lordships will deal first with the alleged infringement of Section 162 of the Code of Criminal Procedure. The relevant portions of that section are as follows :—

"162. (1) No statement made by any person to a Police-officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police-diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made :

Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, the court shall on the request of the accused, refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872. When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination."

The facts material upon this part of the case are these. The offence took place at about 6–30 p.m. on the 29th December, 1944, and at 7 a.m. on the 30th December, the police sub-Inspector held an inquest on the body of one of the murdered men. He examined five of the prosecution witnesses, including four of the alleged six eye-witnesses, and wrote down their statements in his note-book. After the conclusion of the inquest the Circle Inspector took over the investigation from the police sub-Inspector and on the same day, that is the 30th December, he examined all the alleged eye-witnesses and others, including all the witnesses who had been examined by the police sub-Inspector and their statements were

recorded in the Case Diary prepared by the Circle Inspector. It is the failure to produce the not-book of the police sub-Inspector which constitutes the alleged infringement of the proviso to Section 162, and the facts as to this are stated in an affidavit of Gutlapally Venkata Appayya sworn on the 19th October, 1945, and are not challenged. Prior to the commencemeat of the preliminary inquiry before the Magistrate an application was made on behalf of the accused for grant of copies of statements under Section 162 of the Code of Criminal Procedure recorded by the sub-Inspector and the Circle Inspector of Police from the prosecution witnesses in the case during investigation. The accused were supplied with copies of statements made by witnesses before the Circle Inspector of Police and were informed that statements made to the sub-Inspector of Police were not available. During the Sessions trial, when prosecution witness No. 2, who was the principal prosecution witness, was in the witness box, Counsel for the accused represented to the Court that he had not been supplied with copies of statements recorded by the sub Inspector at the first inquest, and requested the Court to make those statements available to enable him to cross-examine the important prosecution witnesses with reference to the earliest statements. The learned Sessions Judge directed the Public Prosecutor to comply with the request. The Public Prosecutor, after consulting the sub-Inspector and Circle Inspector, who were present in Court, submitted to the Court that except what was recorded in the inquest report itself, no other statements were recorded by the sub-Inspector, and the learned Judge directed the defence Counsel to proceed. The next day, when the cross examination of prosecution witness 2 was continued, Counsel for the accused submitted to the Court that he desired to file an application for copies of statements recorded by the sub-Inspector at the first inquest so that it might be endorsed by the prosecution that no such record of statements existed. Then the public prosecutor stated to the Court that he fully realized his responsibility in making the statements he had made on the previous day, but there was no record of any statement made at the inquest available. On the fourth day of the trial, after the principal prosecution witnesses had been discharged, the police sub-Inspector gave evidence, and he then produced in the witness-box his note-book containing the statements of the five witnesses he had examined at the inquest, and a copy of such statements was then supplied to the accused. There are some discrepancies between the statements made to the police sub-Inspector and the statements of the witnesses in the witness box, but it is not suggested that such discrepancies are of a vital nature.

It is clear from the facts narrated above that there was a breach of the proviso to s. 162 of the Code of Criminal Procedure, and that the entries in the police sub-Inspector's note-book were not made available to the accused, as they should have been, for the cross-examination of the witnesses for the Crown. The right given to an accused person by this section is a very valuable one and often provides important material for cross-examination of the prosecution witnesses. However slender the material for cross-examination may seem to be, it is difficult to gauge its possible effect. Minor inconsistencies in his several statements may not embarrass a truthful witness, but may cause an untruthful witness to prevaricate, and may lead to the ultimate break-down of the whole of his evidence; and in the present case it has to be remembered that the accuseds' contention was that the prosecution witnesses were false witnesses. Courts in India have always regarded any breach of the proviso to s. 162 as matter of gravity. *Baliram* v. *King Emperor* [1] where the record of statements made by witnesses had been destroyed, and *Emperor* v. *Bansidhar and others* [2] where the court had refused to supply to the accused copies of statements made by witnesses to the police, afford instances in which failure to comply with the provisions of s. 162 have led to the convictions being quashed. Their Lordships would, however, observe that where, as in those two cases, the statements were never made available to the accused, an inference, which is almos irresistible, arises of prejudice to the accused. In the present case, the statements of the witnesses were made available though too late to be effective, and their contents are known. This by itself might not be decisive, but, as already noted, the Circle Inspector re-examined the witnesses whom the police sub-inspector had examined, and did so on the same day. The notes of the examination by the Circle Inspector

1. [1945] A.I.R. Nag. 1
2. [1931] 53 All. 458

were made available to the accused at the earliest opportunity, and when the note-book of the police sub-inspector was produced towards the end of the prosecution case, Counsel for the accused was in a position to ascertain whether there was any inconsistency between the statements made to the police sub-inspector and those made later in the day to the Circle Inspector. If any such inconsistency had been discovered, this would have been a strong point for the accused in their appeal, but no such point was taken; indeed, the only complaint upon this subject in the High Court was that the police sub-inspector ought to be presumed to have prepared a Case Diary which he was suppressing. The High Court rejected this contention rightly as their Lordships think. Nor has any such point been taken before this Board, and the entries from the Circle Inspector's diary are not on record. In the result their Lordships are satisfied that, in the peculiar circumstances of this case, no prejudice was occasioned to the accused by the failure to produce in proper time the note-book of the police sub Inspector.

Even on this basis, Mr. Pritt for the accused has argued that a breach of a direct and important provision of the Code of Criminal Procedure cannot be cured, but must lead to the quashing of the conviction. The Crown, on the other hand, contends that the failure to produce the note-book in question amounted merely to an irregularity in the proceedings which can be curred under the provisions of section 537 of the Code of Criminal Procedure if the court is satisfied that such irregularity has not in fact occasioned any failure of justice. There are, no doubt, authorities in India which lend some support to Mr. Pritt's contention, and reference may be made to *Tirkha and anor* v. *Nanak and anor* [3] in which the court expressed the view that section 537 of the Code of Criminal Procedure applied only to errors of procedure arising out of mere inadvertence, and not to cases of disregard of or disobedience to, mandatory provisions of the Code, and to *In re Madura Muthu Vannian* [4] in which the view was expressed that any failure to examine the accused under s. 342 of the Code of Criminal Procedure was fatal to the validity of the trial and could not be cured under s. 537. In their Lordships' opinion this argument is based on too narrow a view of the operation of s. 537.

3. [1927] 49 All. 475
4. [1922] M.W.N. 601:45 Mad. 820

When a trial is conducted in a manner different from that prescribed by the Code (as in *N. A. Subramania Iyer's* Case [5]), the trial is bad, and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under S. 537, and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather than of kind. This view finds support in the decision of their Lordships' Board in *Abdul Rahman* v. *The King Emperor* [6], where failure to comply with Section 360 of the Code of Criminal Procedure was held to be cured by Sections 535 and 537. The present case falls under Section 537 and their Lordships hold the trial valid notwithstanding the breach of Section 162.

The second question, which involves the construction of Section 27 of the Indian Evidence Act, will now be considered. That section and the two preceding sections, with which it must be read, are in these terms:—

"25. No confession made to a Police officer, shall be proved as against a preson accused of any offence.

"26. No confession made by any person whilst he is in the custody of a Police officer unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.'

The explanation to the section is not relevant.

"27 Provided that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a Police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in conse-

5. [1901] 28 I.A. 257: 25 Mad. 61 P.C.
6. [1927] M.W.N. 103: 5 Rang. 53, P.C.

quence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. Mr. Megaw, for the Crown, has argued that in such a case the "fact discovered" is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that this required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to section 26, added by section 27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat that the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of he fact that a knife is concealed in the house of the informant to his knowlege, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.

High Courts in India have generally taken the view as to the meaning of s. 27 which appeals to their Lordships, and reference may be made particularly to *Sukhan* v. *The Crown* [7] and *Ganuchandra Kashid* v. *Emperor* [8] on which the appellants rely, and with which their Lordships are in agreement. A contrary view has, however been taken by the Madras High Court, and the question was discussed at length in a Full Bench decision of that Court *In re Athappa Goundan* [9] where the cases were referred to. The Court, whilst admitting that the weight of Indian authority was against them, nevertheless took the view that any information which served to connect the object discovered with the offence charged was admissible under s. 27. In that case the Court had to deal with a confession of murder made by a person in police custody, and the Court admitted the confession because in the last sentence (readily separable from the rest) there was an offer to produce two bottles, a rope, and a cloth gag which, according to the confession had been used in, or were connected with, the commission of the murder, and the objects were in fact produced. The Court was impressed with the consideration that as the objects produced were not in themselves of an incriminating nature their production would be irrelevant unless they were shown to be connected with the murder, and there was no evidence so to connect them apart from the confession. Their Lordships are unable to accept this reasoning. The difficulty, however great, of proving that a fact discovered on information supplied by the accused is a relevant fact can afford no justification for reading into section 27 something which is not there, and admitting in evidence a confession barred by section 26. Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it

7. [1929] 10 Lah. 283
8. [1931] 56 Bom. 172
9. [1937] M.W.N. 442: Cr. 74: I.L.R. 1937 Mad. 695 F.B.

can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law.

In their Lordships' opinion *Athappa Goundan's* case [9] was wrongly decided, and it no doubt influenced the decision now under appeal.

The statements to which exception is taken in this case are first a statement by accused No. 6 which he made to the police sub-Inspector and which was reduced in writing, and is Exhibit "P". It is in these terms:—

"The mediatornama written at 9 a. m. on 12th January, 1945, in front of Maddineni Verrayya's choultry and in the presence of the undersigned mediators.

Statement made by the accused Inala Sydayya on being arrested. About 14 days ago, I Kotayya and people of my party lay in wait for Sivayya and others at about sunset time at the corner of Pulipad tank. We, all beat Boddupati China Sivayya and Subayya, to death. The remaining persons, Pullayya Kotayya and Narayana ran away. Dondapati Rammayya who was in our party received blows on his hands. He had a spear in his hands. He gave it to me then. I hid it and my stick in the rick of Venkatanarasu in the village. I will show if you come. We did all this at the instigation of Pulukuri Kotayya"

(Signed) POTLA CHINA MATTAYYA
" KOTTA KRISHNAYYA
(Sgd) G. BAPAIAH,
Sub-Inspector of Police.

12th January, 1945.

The whole of that statement except the passage "I hid it (a spear) and my stick in the rick of Venkatanarasu in the village. I will show if you come" is inadmissible. In the evidence of the witness Potla China Mattayya proving the document the statement accused 6 said "I Mattayya and others went to the corner of the tank land. We killed Sivayya and Subayya,' must be omitted.

A confession of accused 3 was deposed to by the police sub-Inspector, who said that accused 3 said to him:—

"I stabbed Sivayya with a spear. I hid the spear in a yard in my village, I will show you the place."

The first sentence must be omitted. This was followed by a Mediatornama Exhibit Q. 1, which is unobjectionable except for a sentence in the middle,

"He said that it was with that spear that he had stabbed Boddapati Sivayya."

which must be omitted.

The position therefore is that in this case evidence has been admitted which ought not to have been admitted, and the duty of the Court is such circumstances is stated in section 167 of the Indian Evidence Act which provides: "The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision." It was therefore the duty of the High Cuurt in appeal to apply its mind to the question whether, after discarding the evidence improperly admitted, there was left sufficient to justify the convictions. The Judges of the High Court did not apply their minds to this question because they considered that the evidence was properly admitted, and their Lordships propose therefore to remit the case to the High Court of Madras, with directions to consider this question. If the Court is satisfied that there is sufficient admissible evidence to justify the convictions they will uphold them. If, on the other hand, they consider that the admissible evidence is not sufficient to justify the convictions, they will take such course, whether by discharging the accused or by ordering a new trial, as may be open to them.

Their Lordships have, therefore, humbly advised His Majesty that this appeal be allowed and that the case be remitted to the High Court of Madras, with directions to consider whether the evidence on record apart from the confessional statements of accused No. 3 and accused No. 6 which their Lordships have held to be inadmissible, is sufficient to justify the convictions and to make such order in the matter as may be right having regard to their decision upon the question remitted to them.

— *Appeal allowed.*

PRIVY COUNCIL

[Appeal from Calcutta High Court]

*February* 18, 1947.

LORD WRIGHT, LORD DU PARCQ, LORD NORMAND
SIR MADHANNIAR & SIR JOHN BEAUMONT

ZAHIRUDDIN

v.

THE KING EMPEROR.

*Criminal Procedure Cade (V of* 1898*), Ss.* 162 *&* 172*—Breach of—Effect—S.* 537*—Applicability.*

*A contravention of S.* 172*, Cr. P. C. lays the evidence of the police officers open to adverse criticism and may diminish its value but it*

*does not have the effect of making that evidence inadmissible.*

*The effect of a contravention of S.* 162 (1) *depends upon the prohibition which has been contravened. If the contravention consists in the signing of a statement made to the police and reduced into writing, the evidence of the witness who signed it does not become inadmissible. Still less has the statute the effect of vitiating the whole proceedings when evidence is given by a witness who has signed such a statement. But the value of his evidence may be seriously impaired as a consequence of the contravention of this statutory safeguard against improper practices.*

*The use by a witness while he is giving evidence of a statement made by him to the police raises different considerations. The categorical prohibition of such use would be merely disregarded if reliance were to be placed on the evidence of a witness who had made material use of the statement when he was giving evidence. When the Magistrate or presiding Judge discovers that a witness has made material use of such a statement it is his duty under the section to disregard the evidence of that witness as inadmissible.*

*S.* 537 *cannot apply to a case in which the Magistrate has refused to overlook an irregularity and has acquitted.*

*J. D. Casewell, K. C. & A. G. P. Pullan,* for Applt.

*B. McKenna,* for Crown.

JUDGMENT

LORD NORMAND. This is an appeal from a judgment of the High Court in Bengal which allowed an appeal against a Police Magistrate's order acquitting the appellant of a charge of accepting a bribe brought under section 161 of the Indian Penal Code. The High Court set aside the order of acquittal, convicted the appellant and sentenced him to one year's rigorous imprisonment.

The main ground of appeal is that there have been contraventions of section 162 of the Code of Criminal Procedure, that the High Court's judgment relies on the testimony of a witness, Mr. Roy, who had given a signed statement to the police in breach of the section and had, also in breach of the section, had it before him and made substantial use of it while he was giving evidence. It was also made a ground of appeal that the police officers engaged on the investigation had failed to keep a diary in contravention of section 172 (1).

The appellant was employed from June till the 24th August, 1944, by the East Indian Railway as a grain depot officer at Horwarth staion. His chief duty was to receive from contractors articles for which orders were placed by the head officer of the company, to compare them with approved samples and subsequently to distribute them. On 22nd August, 1944, a contractor named Bhattacharjee reported to Deputy Superintendent Dutt of the Calcutta Police that the appellant had solicited from him a bribe of 400 rupees to pass a sale of 80 maunds of mustard oil and that he proposed to make this payment next day. Bhattacharjee subsequently gave evidence at the trial that the appellant had made this demand, but this evidence was not corroborated by any other witness. A police trap was laid for the appellant on the 23rd August, but its only result was that Bhattacharjee reported that the appellant was now refusing to take 400 rupees and was demanding that 800 rupees should be paid to him on the 24th August at his residence at Park Circus. Another police trap was therefore prepared for the appellant, and on 24th August Police Superintend Dutt, Mr. Roy, a magistrate whose services as a witness had been obtained, Police Inspector Lahiri and Bhattacharjee went in a taxi driven by one Yasin to the block of flats in Park Circus where the appellant and his brother Nazimuddin lived. It was then after 8 p. m. the black out was in force, and it was raining heavily. It was decided that Bhattacharjee should stay in the taxi with Mr Roy, while Mr. Dutt and Inspector Lahiri stood by a lorry which was stranded on the pavement between the taxi and the flats. One of the party then called the door-keeper, Ram Surdar, and sent him with a message to the appellant that some one had come by taxi to see him but was prevented by an injured leg from going up to the appellant's flat.

From this point the controversy of fact between the parties becomes acute. Bhattacharjee deponed that the accused came out of the block of flats, entered the taxi, took the seat beside the driver and, after asking who Mr. Roy was, and whether Bhattacharjee had brought the money with him, received from Bhattacharjee marked notes to the value Rs. 800. Bhattacharjee, further says that after some more talk the accused left the taxi, that he, Bhattacharjee, then gave a prearranged signal by flashing his torchlight,

and that he saw the appellant being seized by the police witnesses.

The police witnesses testified that they saw the accused come down from his flat and enter the taxi, that after seeing the signal made by the torchlight they arrested him as he was about to re-enter the block of flats, and that as they did so he flung away a bundle of notes which they later found on the mudguard of the stranded lorry and identified as the notes previously marked. Mr. Roy gave evidence which corroborated Bhattacharjee's evidence about the passing of the marked notes from Bhattacharjee to the appellant, and the flashing of the torch; and which corroborated also the police evidence about the finding of the notes after the arrest of the appellant. Through Mr. Roy identified in court the appellant's brother as the man who had taken the notes in the taxi, he identified the man who was arrested and who was undoubtedly the appellant with the man who received the notes. His identification of the brother in court may therefore have been a mistake. What is more important is that the magistrate has entered on the record at the end of Mr. Roy's examination chief this note: "He refreshed his memory from time to time, by consulting his written statement to the police during investigation." The magistrate called as Court witness under section 540 of the Criminal Procedure Code the doorkeper of the block of flats, Ram Surdar, and the taxi driver, Yasin, and they gave evidence that it was not the appellant but his brother who was in the taxi at the material time.

The police magistrate in his judgment, after expressing his complete distrust of Bhattacharjee and commenting adversely on the police evidence, speaks of Mr. Roy's defect of memory as evidenced by his free use of the written statement while he was deponing. The statement was made to the police three months after the events with which it dealt, it was signed by him and it was made to the police in the course of their investigation of the alleged offence. The magistrate held that when a police officer during the investigation of an offence obtains a signed statement from a witness in contravention of section 162 of the Criminal Procedure Code the evidence of the witness at the trial must be rejected. The record does not disclose how it came about that the magistrate did not stop Mr. Roy at the beginning of his evidence from using the statement, and their Lordships are not disposed to seek information about this from sources outside the record. They must assume that the magistrate intervened, as was his duty, as soon as he became aware of the irregularity.

The learned Judges of the High Court held "that breaches of the provisions of section 162 of the Code of Criminal Procedure are not in themselves necessarily fatal to the proceedings and may in appropriate circumstances be cured as the expression is under the terms of section 537 of the Code of Criminal Procedure". In their opinion there was no substantial reason for thinking that Mr. Roy's evidence without the use of the statement to refresh his memory would have been in any material particular different from the evidence which he actually gave. For this reason they held Mr. Roy's evidence to be admissible, and they greatly relied on it in reaching the conclusion that the appeal from the magistrate's order should be allowed and that the appellant should be convicted.

The objection to the conviction founded on the failure of the police witnesses to keep a diary as required by section 172 (1) of the Criminal Procedure Code may be conveniently disposed of at this stage. It was contended by learned Counsel for the appellant that the evidence of the officers was inadmissible. This contention was not supported by reference to the statute or to authority, nor was it the view taken by the magistrate. In the opinion of their Lordships a contravention of section 172 lays the evidence of the police officers open to adverse criticism and may diminish its value, but it does not have the effect of making that evidence inadmissible.

The next question concerns the effect of section 162 (1) of the Criminal Procedure Code, which provides that no statement made by any person to a police officer in the course of an investigation shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (saving certain exceptions not material to the present proceedings) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made. It was submitted for the appellant that the proceedings were

entirely vitiated and, alternatively, that Mr. Roy's evidence was rendered inadmissible, for either of two reasons: first, because he had previouly given a signed statement to the police, and, second, because in giving his evidence he made use of the signed statement to prompt his memory. On the other hand it was argued for the respondent that a contravention of section 162 (1) merely affected the value of the evidence and that the High Court had taken the correct view of its effect in the present case. It appears to their Lordships that the effect of a contravention of the section depends on the prohibition which has been contravened. If the contravention consists in the signing of a statement made to the police and reduced into writing, the evidence of the witness who signed it does not become inadmissible. There are no words either in the section or elsewhere in the statute which express or imply such a consequence. Still less can it be said that the statute has the effect of vitiating the whole proceedings when evidence is given by a witness who has signed such a statement. But the value of his evidence may be seriously impaired as a consequence of the contravention of this statutory safeguard against improper practices. The use by a witness while he is giving evidence of a statement made by him to the police raises different considerations. The categorical prohibition of such use would be merely disregarded if reliance were to be placed on the evidence of a witness who had made material use of the statement when he was giving evidence at the trial. When, therefore, the magistrate or presiding judge discovers that a witness has made material use of such a statement it is his duty under the section to disregard the evidence of that witness as inadmissible. In the present case there is in the note at the end of Mr. Roy's examination-in-chief and in the judgment of the magistrate what amounts to a finding of fact that Mr. Roy while giving his evidence made substantial and material use of the signed statement given by him to the police, and the magistrate was accordingly bound to disregard his evidence. The magistrate's reason for doing so is too broadly stated, for it is not the mere fact that Mr. Roy had signed the statement but the fact that he had it before him and cousulted it in the witness box that renders his evidence incompetent.

It follows that in the opinion of their Lordships the learned judges of the High court erred in law when they treated Mr. Roy's evidence as admissible. Section 537 of the Code of Criminal Procedure, to which they made reference, requires a Court of Appeal subject to the earlier provisions of the Statute to affirm an order of a court of competent jurisdiction where there has been an irregularity in the proceedings unless the irregularity has in fact occasioned a failure of justice. The section cannot apply to a case like the present, in which the magistrate has refused to overlook an irregularity and has acquitted. The further observations of the learned judges that there was no substantial reason to think that Mr. Roy's evidence unaided by the written statement would have been in any material point different from the evidence which he gave, and that no real prejudice was caused to the appellant by the use of the statement, are in the opinion of their Lordships unfortunate and ill-founded. It is impossible to say what Mr. Roy's evidence would have been if he had not used the statement to aid his memory; and it is also impossible to say that prejudice may not have been suffered by the appellant. But the conclusive answer to the reasoning of the judgment is that the language of the Statute clearly prohibits any such use of the statement, and it must receive effect.

It was argued for the respondent that even without Mr. Roy's evidence, there was a sufficiency of other evidence accepted as reliable by the learned judges of the High Court to justify the conviction. While it is true that the police evidence taken along with the evidence of Bhattacharjee is relevant to infer the guilt of the appellant, that evidence is contradicted by other witnesses, and it has been the subject of adverse comment by the magistrate. It is possible also that the High Court would have treated the evidence of the police and Bhattacharjee with less respect if it had not had Mr. Roy's evidence before it. The judgment of the High Court largely depends on his evidence. It could therefore be neither logical nor fair to affirm the order of the High Court, while holding that the Court erred in taking Mr. Roy's evidence into consideration. On the other hand the submission for the appellant that the acquittal by the magistrate should at this stage be finally re-affirmed would have been appropriate if the irregularity which has taken place had had the effect of vitiating the whole proceedings, but it is too favouralbe to the appellant on the opinion

which their Lordships have expressed upon the effect of section 162. The appellant's complaint that the High Court had failed to have due regard to the principles laid down in *Sheo Swarup* v. *The King Emperor* [1], would have had greater force if the High Court had not believed itself entitled to rely on the evidence of Mr. Roy, and without that evidence these principles will manifestly have a special relevance to the circumstances of the case.

Their Lordships consider that the fair course is to allow the appeal to the effect to setting aside the order of the High Court, and to remit to the High Court to re-hear and determine the appeal on the evidence in the case subject to a direction to exclude from consideration the evidence of Mr. Roy and to deny it all effect.

Their Lordships will humbly advise His Majesty accordingly.

— *Appeal allowed.*

PRIVY COUNCIL

[Appeal from the Bombay High Court]

*February* 18, 1947

LORD THANKERTON, LORD PORTER, LORD SIMONDS SIR MADHAVAN NAIR & SIR JOHN BEAUMONT

THE KING EMPEROR

v.

SADASHIV NARAYAN BHALERAO

*Defence of India Rules*, 1939, *r.* 34 (6) (*e*)—*Penal Code* (*XLV of* 1860), *s.* 124–*A*—*Offence under.*

*It is not an essential ingredient of a prejudicial act as defined in r.* 34 (6) (*e*) *of the Defence of India Rules* (*or of the offence under s.* 124–*A, Penal Code*) *that it should be an act which is intended or is likely to incite to public disorder. There is nothing in the language of either s.* 124–*A, Penal Code or Defence Rule* 34 (6) (*e*) *which could suggest that 'the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency.*

1942 *F. C. R.* 38 overruled.

*The word 'sedition' does not occur either in s.* 124–*A or in the Rule; it is only found as a marginal note to s.* 124–*A and is not an operative part of the section. There is no jurisdiction for restricting the contents of the section by the marginal note. In England there is no statutory definition of sedition; its meaning and content have been laid down in many decisions, but these decisions are not relevant, when there is a statutory definition of that which is termed sedition.*

*Sir W. Monckton K. C. & W. Wallach*, for Applt.

*Respondent*, not represented.

JUDGMENT

LORD THANKERTON. This is an appeal by special leave from a judment of the High Court of Judicature at Bombay, dated the 25th January, 1944, which affirmed an order of Mr. S. D. Adhav, Magistrate of the 1st Class, Jalgaon City, dated the 22nd June, 1943, acquitting the respondent who had been charged under Rule 38 (5) of the Defence of India Rules for having, on the 26th January, 1943, made, published and distributed copies of a leaflet which contained prejudicial reports within the meaning of Rule 34 (7) read with Rule 34(6) (e) and (g) of the Defence of India Rules, and having thus contravened Rule 38 (1) (c).

The Defence of India Rules, which were made by the Central Government under section 2 of the Defence of India Act, 1939 (Act No. XXXV of 1939)—so far as material —provide as follows :

"34 (3) 'prejudicial act' means any act which is intended or is likely—

... ... ...

(e) to bring into hatred or contempt, or to excite disaffection towards, His Majesty or the Crown Representative or the Government established by law in British India or in any other part of His Majesty's dominions,

... ... ...

(g) to cause fear or alarm to the public or to any section of the public : ... ...

34 (6) 'prejudicial report' means any report, statement or visible representation, whether true or false, which, or the publishing of which, is, or is an incitement to the commission of, a prejudicial act as defined in this rule;

... ... ...

38 (1) No person shall, without lawful authority or excuse, ... ...

(c) make, print, publish or distribute any document containing, or spread by any other means whatsoever, any prejudicial report;

... ... ...

(5) If any person contravenes any of the provisions of this rule he shall be punishable with imprisonment for a term which may extend to five years or with fine or with both."

The document which formed the subject matter of the charge was admittedly made and published by the respondent at Jalgaon City on the 26th January, 1943, and he admittedly distributed printed copies thereof. It consisted of a leaflet addressed "To all the patriots", and it will be sufficient to quote some of the statements in the leaflet :

"Unprecedented calamity has befallen our nation and the whole of our country has been undergoing sufferings. The Imperialists have by their bar-

1. [1934] M.W.N. 1017: Cr. 193; 61 I.A. 398 P.C.

barous policy turned the entire country into a cremation ground. When we were in great need of the national leaders for the purpose of the national defence. the bureaucracy has declared the National Congress unlawful and have detained all the leaders in jail.

By reason of firings and arrests several villages in Khandesh have been made desolate and on account of this great calamity the people are losing their moral courage (day by day) and the whole of the country is putting on moribund appearance. The people in Khandesh have been harassed by the inequitable collective fines. As the Government is unable to solve the food problem, the cry of hunger is heard everywhere; and a situation has arisen every where in which serious food riots are expected. By depriving the mills of the coal 50 thousand familes of the workers have been thrown into the ditch of hunger.

But the Imperialists do not stop even at this. They are making ceaseless efforts to create a split between the people and the patriots. They have been trying to strengthen their hold by creating disputes and differences among the people by various ways such as creating a split between the owner and the worker on the question of dearness allowance and coal, between the merchants and consumers on the question of food grains and between the Muslims and the non-Muslims on the question of collective fines. The disunion among the people is their last resort.

. . . . . .

If we blindly carry on sabotage activities simply because the Imperialists are not transferring power to us the Japanese Imperialism may dominate over us. Therefore in order to face both these calamities we must achieve this great task of bringing about unity on the burning questions before the public such as national defence and self-determination and must take over the control of national defence".

After a trial, the learned Magistrate acquitted the respondent. He pointed out that it was nowhere suggested in the leaflet that the work of national defence should be snatched away from Government forcibly, that the national leaders should be freed by using force or that national government should be formed by resorting to unconstitutional methods, but that, on the contrary, the public was exhorted to achieve national unity for all the above purposes, not resort to sabotage, and to take part in the campaign of achieving worldwide freedom. In the absence of any incitement to public disorder, he held himself bound to acquit, in view of the decision of the Federal Court in *Niharendu Dutt Majumdar* v. *King Emperor* [1] to which their Lordships will refer later.

On appeal by the Crown, the decision of the Magistrate was affirmed by the High Court and the appeal was dismissed; the learned judges held themselves bound by the decision of the Federal Court in *Niharendu's* case (1). The charge of having committed a prejudicial act within the meaning of Rule 34(6)(g) was not pressed and may be disregarded. The learned Judges, at the request of the Crown. certified for the purpose of section 205 of the Government of India Act, 1935, that the case does not involve a substantial question of law as to the interpretation of the Government of India Act or any order in council made thereunder. Thereafter the Crown obtained special leave to appeal against the decision of the High Court on an undertaking "that no further proceedings in connection with the said charges would be taken against the respondent in any event so long as that undertaking does not prejudice the reality of the appeal." The respondent has not appeared in the appeal, which has been heard *exparte*.

The purpose of this appeal is to challenge the soundness of the decision in *Niharendu's case* [1], which their Lordships will therefore consider in some detail. In consequence of a speech made at Calcutta, Niharendu was convicted by the Additional Chief Presidency Magistrate of offences under Rule 34 (6), sub-paragraphs (e) and (k), of the Defence of India Rules. The conviction was upheld by the High Court, from which Niharendu appealed to the Federal Court, which allowed the appeal and acquitted the appellant on the ground that the speech of the appellant did not costitute a prejudicial act within the meaning of Rule 34(6)(e). The Federal Court did not deal with sub-paragraph (k) of Rule 34 (6). The judgment of the Court was delivered by Sir Maurice Gwyer C. J., who said, in reference to sub-paragraph (e), that the prejudicial act was "described in precisely the same language as is used to describe the offence of sedition in section 124A of the Indian Penal Code. We were invited to say that an offence described merely as a 'prejudicial act' in the Defence of India Rules ought to be regarded differently from an offence described as 'sedition' in the Code, even though the language describing the two things is the same. We cannot accept this argument. Sedition is none the less sedition because it is desbribed by a less offensive name; and in our opinion the law relating to the offence of sedition as defined in the Code is equally applicable to the prejudicial act defined in the Defence of India Rules. We do not think that the omission in the Rules of the three 'Explanations' appended to the section of the Code affects the matter. These

1. [1942] M.W.N.417; Cr. 89:1942 F.C.R.38

are added to remove any doubt as to the true meaning of the Legislature; they do not add to or subtract from the section itself; and the words used in the Rules ought to be interpreted as if they had been explained in the same way." The learned Chief Justice then proceeds to consider the meaning of sedition in English law, as defined and explained by decision of the Courts, and states the principles to be derived therefrom as follows: "public disorder or the reasonable anticipation or likelihood of public disorder, is thus the gist of the offence. The acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency." The learned Chief Justice then applied that test to the appellant's speach, and found that it contained no incitement, or intention or tendency to incite, to public disorder and the conviction was set aside.

Their Lordships are unable to accept the test laid down by the learned Chief Justice, as applicable in India.

Their Lordships agree, for the purposes of the present appeal, that there is no material distinction between Rule 34(6), sub-paragraph (e) and section 124-A of the Penal Code, though it might be suggested that the words "an act which is intended or likely to bring" in the Rule are wider than the words "brings or attempts to bring" in the Code. They further agree with the learned Chief Justice that the omission in the Rule of the three explanations in the Code should not lead to any difference in construction.

The word "sedition" doet not occur either in section 124-A or in the Rule; it is only found as a marginal note to section 124-A, and is not an operative part of the section, but merely provides the name by which the crime defined in the section will be known. There can be no justification for restricting the contents of the section by the marginal note. In England there is no statutory definition of sedition; its meaning and content have been laid down in many decisions, some of which are referred to by the Chief Justice, but these decisions are not relevant when you have a statutory definition of that which is termed sedition, as we have in the present case.

Their Lordships are unable to find anything in the language of either section 124A or the Rule which could suggest that "the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency." The first explanation to section 124A provides, "The expression 'disaffection' includes disloyalty and all feelings of enmity." This is quite inconsistent with any suggestion that "excites or attempts to excite disaffection" involves not only excitation of feelings of disaffection, but also exciting disorder. Their Lordships are therefore of opinion that the decision of the Federal Court in *Niharendu's* case (1) proceeded on a wrong construction of section 124A of the Penal Code and of sub-paragraph (e) of Rule 34 (6) of the Defence of India Rules.

In that view their Lordships are of opinion that there should have been a conviction in the present case, for they have no difficulty in agreeing with the learned Judges of the High Court in this case, who have both stated that, if disorder were not an essential element, there are undoubtedly passages in the leaflet which hold the Government up to hatred or contempt, and which would have led them to convict.

In the High Court three decisions of this Board were referred to, but the learned Judges preferred the decision of the Federal Court in *Niharenedu's* case [1] as the same sub-paragraph of Rule 34 (6) was the subject of decision and it was the latest case; it is unnecessary to consider whether the learned Judges had sufficient ground for distinguishing these decisions such as would avoid the binding nature of decisions of this Board. In the opinion of their Lordships, the principle of decision in these three cases is inconsistent with the decision of the Federal Court in *Niharendu's* case, and it is regrettable that the Federal Court did not pay attention to these cases, two of which are Indian.

In *Queen Empress* v. *Bal Gangadhar Tilak* [2], the charge was under section 124A as it then stood, confined to disaffection, without any reference to hatred or contempt. Strachey, J., in an admirable charge to the jury, which was subsequently approved by this Board, said (at p. 135), "The offence consists in exciting or attempting to excite in others certain bad feelings towards the Government. It is not the exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small. Whether any disturbance, or outbreak was caused by these articles, is absolutely immaterial. If the accused intended by the articles to excite re-

2. [1897] I.L.R. 22 Bom. 112 & 52 P.C.

bellion or disturbance, his act would doubtless fall within section 124A, and would probably fall within other sections of the Penal Code. But even if he neither excited nor intended to excite any rebellion or outbreak or forcible resistance, to the authority of the Government, still if he tried to excite feelings of enmity to the Government, that is sufficient to make him guilty under the section. I am aware that some distinguished persons have thought that there can be no offence against the section unless the accused either counsels or suggests rebellion or forcible resistance to the Government. In my opinion, that view is absolutely opposed to the express words of the section itself, which as plainly as possible makes the exciting or attempting to excite certain feelings, and not the inducing or attempting to induce to any course of action such as rebellion or forcible resistance, the test of guilt. I can only account for such a view by attributing it to a complete misreading of the explanation attached to the section and to a misapplication of the explanation beyond its true scope." In refusing leave to appeal, *inter alia*, on the ground of misdirection as to the proper construction of section 124 A, the Board expressly approved of the charge. It is sufficient for their Lordships to adopt the language of Strachey, J. as exactly expressing their view in the present case.

In *Besant* v. *Advocate General of Madras* [3] it was pointed out by the Board that section 4 of the Indian Press Act of 1910, which was under consideration in that case, was closely similar in language to section 124-A of the Penal Code, which had been the subject of careful consideration in *Tilak's case* [2] above referred to.

In *Wallace Johnson* v. *The king* [4], under sub section 8 of section 326 of the Criminal Code of the Gold Coast, "seditious intention" was defined as an intention "to bring into hatred or contempt or to excite disaffection against....the Government of the Gold Coast as by law established." It was held by this Board that the words were clear and unambiguous, and that incitement to violence was not a necessary ingredient of the crime of sedition as thereby defined.

In conclusion, their Lordships will only add that the amendments of section 124-A in 1898, the year after *Tilak's case* [2], by the inclusion of hatred or contempt and the addition of the second and third explanations, did not affect or alter the construction of the section laid down in *Tilak's* case [2] and, in their opinion, if the Federal Court, in *Niharendu's* case [1], had given their attention to *Tilak's* case [2], they should have recognised it as an authority on the construction of section 124A by which they were bound.

Their Lordships are accordingly of opinion that the appeal should be allowed and that the judgments and orders of the Courts below should be set aside, and that it should be declared that it is not an essential ingredient of a prejudicial act as defined in subparagraph (e) of Rule 34 (6) of the Defence of India Rules that it should be an act which is intended or is likely to incite to public disorder, Their Lordships will humbly advise His Majesty accordingly, There will be no order as to costs.

— *Appeal allowed*

3. [1919] M.W.N. 555 : I.L.R. 43 Mad. 146 P.C.

4. [1940] A.C. 231

Cr. App. No. 710 of 1946

*March* 4, 1947

YAHYA ALI, J.

THE PUBLIC PROSECUTOR

v.

KODALI ARJUNA RAO & another.

*Prevention of Food Adulteration Act (Mad. Act III of* 1918), *Ss.* 5 *(2),* 6 *&* 20 *& Rr.* 27 *&* 29*—Owner of milk found adulterated—Liability—Possession of milk—Presumption—Offence.*

*The owner of milk which is found adulterated (and from whose possession it is not recovered) cannot be convicted under the Prevention of Adultertion Act, when there is no evidence counecting him with the adultertion or sale of the milk.*

*No inference can be drown from the mere factum of possession of aduterated milk that such possession was for the purpose of sale. In order that any presumption under S.* 5 *(2) might be drawn against a person, it must first be established that he was in the habit of manufacturing or storing like articles for sale.*

Appeal under Section 417 of the Code of Criminal Procedure, 1898. against the acquittal of the aforesaid Respondents (Accused 1 and 2)by the sub Divisional Magistrate of Gudivada in C. C. No. 27 of 1946 on his file.

*Public Prosecutor V. L. Ethiraj),* for Crown.

*Respondents* ex parte.

JUDGMENT

This an appeal by the Crown from the acquittal of the respondents in C. C. No. 27

of 1946 on the file of the Sub Divisional Magistrate, Gudivada. The case was first tried by the Stationary Sub Magistrate, Gudivada and he subsequently forwarded it under section 349 (1) Cr. P. C. to the Sub Divisional First Class Magistrate, Gudivada for disposal as he was of the opinion that since the second respondent was a child within the meaning of the Madras Children Act, his case called for a different punishment from that which he was empowered to inflict. The Sub Divisional Magistrate on a review of the evidence came to the conclusion that no case had been made out against either of the respondents and he accordingly acquitted both of them.

The charge sheet in the case was filed by the executive authority of the Gudivada Municipality and the respondents were alleged to have committed offences under rules 27 and 29 of the rules framed under section 20 of the Madras Prevention of Adulteration Act and also under section 109 read with section 136 of the Public Health Act. They were stated to have been responsible for the adulteration of milk and for the sale of the adulterated milk and in the charge sheet it was further alleged that the first accused being the owner who offered for sale adulterated milk and the second accused being in possession of adulterated milk for sale were both liable for conviction. The milk was seized while it was being delivered by the second accused at the coffee hotel of P. W. 1 by the Municipal Sanitary Inspector, P. W. 2, who after complying with the provisions of the Act took samples and sent them to the Government Analyst. The Government Analyst was of opinion that the milk seized from the second accused contained 51 per cent of added water. The learned Sub-Divisional Magistrate on a careful scrutiny of the evidence came to the conclusion that the first accused was not proved to have had anything to do with the milk or the transaction in it and as regards the second accused he was of the opinion that it was not proved by the prosecution that he was offering any milk for sale. He found that there was not the slightest indication that he added water to the milk that was tested or that he even knew of the addition of water to the milk by the person who handed him over the milk vessel. The case of the first accused was that he had nothing to do with the milk and that the second accused was not his servant at all. The second accused pleaded in his statement that he was employed under one Somayya thereby meaning that he was not the employee of the first accused. He stated that when he was going to Gudivada taking his master's milk to be supplied to their regular constituents he was asked on the way by the first accused's wife to take some milk and give it in P. W. 1's hotel and that he complied with that request. The milk that was seized from him by P. W. 2 was not his master Somayya's milk but the milk that was given to him on the way by the wife of the first accused.

Upon the facts there is little doubt that adulterated milk was recovered from the second respondent but it is equally clear from the evidence that the second respondent was not having the milk in his possession for sale nor was the milk proved to have been adultered by him. Further it has not been proved that the first accused who was not the master of the second accused had any knowledge whatever of the transaction. I am therefore in entire agreement with the findings of fact arrived at by the learned Sub Divisional Magistrate. Since however some legal contentions have been raised by the learned Public Prosecutor it is necessary to set out the relevant provisions.

Section 5 (1) (a) of the Madras Prevention of Adulteration Act provides that every person who sells any food which is not of the nature, substance or quality of the article demanded by the purchaser shall be punishable with fine extending to Rs. 100 for the first offence and with higher fines for subsequent offences. Section 20 of the Act empowers the Local Government to make rules generally to carry out the purposes of the Act and in particular *inter alia* to prescribe standards of purity for milk etc., and also to prohibit in the interests of public health the addition of water or other diluent or adulterant to any food. In exercise of these powers Rule 27 was, among other rules, enacted which provides that no person shall add any water or any skimmed or separated milk to milk intended for sale and that no person shall either by himself or by any servant or agent sell or offer or expose for sale and no person shall have in his possession for the purpose of sale any milk to which any such addition has been made. Rule 29 provides that whoever commits a breach of any of the rules shall be punished with (a) in the case of a first conviction with fine which may extend to Rs. 100 and (b) in the case of a

subsequent conviction with fine which may extend to Rs. 500. It is not necessary for the purpose of this case to set out the provisions of the Public Health Act.

The charge sheet, as I have already stated, proceeded on the footing that the first accused being the owner offered for sale adulterated milk. There is no foundation whatever in the evidence for holding that he had any knowledge of the transaction or of the adulteration of the milk; much less is there anything to show that he offered for sale the adulterated milk. The only record we have of anything implicating the first accused is the statement of the second accused in which he mentioned that on his way to the hotel when he was carrying his master's milk the wife of the first accused entrusted to him a pail of milk to be delivered at the same hotel. But that statement has not been substantiated and the learned Sub Divisional Magistrate was right in finding that there are several circumstances casting a doubt upon the truth of that statement. It must therefore be found that there is no legal evidence of any kind connecting the first accused with the adulteration or sale of the milk.

Coming to the second accused, the case was that he was in possession of the adulterated milk for the purpose of sale. This expression is used in the charge sheet in view of the language of Rule 27 which says that no person shall have in his possession for the purpose of sale any milk to which water has been added. I have already found that the second accused was not in possession of the adulterated milk for the purpose of sale. The further question that has to be considered is whether mere possession of adulterated milk constitutes by itself an offence within the meaning of rule 27 and whether there is scope for an inference from the mere factum of possession that such possession was for the purpose of sale. The learned Public Prosecutor invited my attention to sub section (2) of section 5 of the Madras Prevention of Adulteration Act, which lays down that in every prosecution for an offence under this section, the Court may presume that any food found in the possession of a person who is in the habit of manufacturing or storing like articles for sale has been manufactured or stored by such person for sale. In order that any such presumption might be drawn against the second respondent it must first be established that he was in the habit of manufacturing or storing like articles for sale. That is not the prosecution case against the second accused and consequently this provision can conceivably have no application to the second accused. No other provision in the Act or in the rules has been brought to my notice under which an inference can be drawn that such possession was for the purpose of sale. Section 6 (1) merely says that the plea of ignorance by the vendor as to the nature, substance or quality of the food sold by him is no defence to a prosecution for an offence under section 5. There is no case at least so far as the milk involved in this case goes that the second accused was the vendor.

A decision of Byers, J. in C. A. 392 of 1944 of this Court (unreported) has also been brought to my notice by the learned Public Prosecutor. I do not think it necessary to refer to the facts of that case as they are entirely different from the facts of the present case. There the learned Judge pointed out that milk was being carried by the accused every day for being sold to a shopkeeper and that the shop keeper was purchasing the milk from the accused every day.

For the foregoing reasons, I agree with the learned Sub Divisional Magistrate that neither the first accused nor the second accused is guilty of having contravened the provisions of the Madras Prevention of Adulteration Act or Rules 27 and 28 framed under that Act. The appeal is accordingly dismissed.

N.T.R. — *Appeal dismissed*

Cr. R. C. No. 1253 of 1946
(Case Ref. No. 50 of 1946)
*February* 13, 1947

YAHYA ALI, J.

Rethu VENKATA APPALA NAIDU & others
v.
Bhavaraju VENKANNA

*Criminal Procedure Code (V of* 1898*). s* 522 *—Applicability.*

*What is required for s. 522 (3), Cr. P. C. to apply is that the offence should have been attended by criminal force or show of force or by criminal intimidation and it should appear to the court that by such force or show of force the complainant was dispossessed of the land. Hence where the offence of trespass (s.* 447 *I. P. C.) was attended by criminal force and the complainant was dispossessed of the land by show of force or use of force, an order under s.* 522 (3) *can be made in favour of the complainant.*

Case referred for the orders of the High Court

under Section 438 of the Criminal Procedure Code 1898 by the Sessions Judge, Vizagapatam in his letter dated 12—11—1946.

The FACTS appear from the order of the sessions Judge:

"The petitioner was the complainant in calendar Case No.652/45. He had filed a complaint against three accused, charging them with offences of trespass on a land and assault punishable under section 447 and 352 I. P. C. The accused were convicted of an offence of trespass on land punishable under Section 447 I. P. C ; they were acquitted of the offence of assault. Then he filed this petition under section 522 clause (3) to restore him to possession of the land, and the learned Magistrate dismissed the petition, and this petition is now before me to revise that order."

"The short point on which the learned Magistrate dismissed this petition is that an offence under Section 447 does not in law involve show or use of force or intimidation and that an order under sectiou 522 can be passed only when there has been show or use of force or intimidation. In a decision reported in *Roda and others*—v. *Autar Singh* [A.I.R. 1938 Lah. 839] an order was made under section 522 where there was a conviction of an offence under section 448 of the Indian Penal Code, i. e. house breaking. The learned Magistrate in his order now before me distinguishes that case on the ground that therein the accused had broken open the lock and entered the house and therefore there was use of criminal force. In a decision reported in *Vangaveti Narayana and another* v. *Madarkhan* (1944) M. W. N. 436; Cr. 108) there was conviction of the accused for an offence of trespass on land under section 447. There was a petition to restore possession. That was ordered. The two criminal Revision Petitions in the High Court one against the conviction and the other against the order of restoration were dismissed indicating that there might be an order made under section 522 Cr.P.C. when there was conviction only under section 447 I. P. C. The question whether an order can be made under section 522 if there is conviction only under section 447 does not appear to have been specifically raised of considered. The learned Counsel for the petitioner has drawn my attention to a report appearing in summary of recent cases attached to 53 L. W. 45—wherein in was held that an offence under section 447 Indian Penal Code, involving as it does the use or show of force comes within section 522 (3), Cr.P.C. It would appear, therefore, that even where there is conviction only under section 447 I.P.C an order under section 522 (3) Cr.P.C. can be made.

In the present case, I called for the records and they have been produced and on perusal of the records it appears that P W 1 stated: 'Three accused, abused us, beat the bullocks, and drove them away,' P W 2 said 'the accused came and untied the bullocks and said that the land cannot be ploughed.' P W 5 said that the accused came with sticks and asked them to get away. When they did not go away they unyoked the bulls, beat them and drove them away. I am satisfied that in this case there is sufficient evidence to show that in fact there was force or show of force. It would appear therefore that an order under section 522 Cr. P. C. could be made. The records will be submitted to the High Court so that their Lordships may be pleased in revision to consider the matter and pass such orders as they deem fit.

*Accused* not represented.

*Public Prosecutor* (*V.L. Ethiraj*) for Crown.

ORDER.

This is a reference made by the Sessions Judge, Vizagapatam, under section 438 of the Code of Criminal Procedure to revise the order made by the Sub Divisional Magistrate, Vizianagaram under section 522 (1). It was a case of trespass against the three accused for which they were convicted. Following the conviction, the complainant applied under section 522 (3) of the Code of Criminal Procedure for the restoration of possession of the land to him. The Sub Divisional Magistrate took the view that section 522 (3) would apply only if there was show of force or use of force. The learned Sessions Judge has pointed out that that view is not correct and that what is required is that the offence should have been attended by criminal force or show of force or by criminal intimidation and it should appear to the court that by such force or show of force the complainant was dispossessed of the land. In the present case there was evidence, as indicated by the learned Sessions Judge, that the offence was attended by criminal force and that the complainant was dispossessed of the land by show of force or use of force. The order of the Sub Divisional Magistrate under sub-section (3) of section 522 of the Code of Criminal Procedure is set aside and the three accused

are directed to restore possession of the land to the complainant's legal representatives as it is reported that the complainant has since died.

N.T.R.

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Criminal Miscellaneous Petitions Nos. 99, 100 and 112 to 121 of 1947

*February* 5, 1947

HORWILL & BELL, JJ.

D. CHENCHIAH & others

THE COMMISSIONER OF POLICE MADRAS & others.

*Maintenance of Public Order Ordinance (Mad. Ord. 1 of 1947)—When comes into force—General Clauses Act, S. 3 (7)—Arrest before publication of Ordinance—Legality.*

*On the 23rd January 1947 at 4-30 or 5 a. m. the petitioners were arrested but were not told why they were arrested or under whose orders or even under what provision of law. Later on that day Ordinance I of 1947 was published in the Fort St. George Gazette which empowered the provincial government or the Chief Presidency Magistrate to issue an order for the detention of any person if the provincial government or the Chief Presidency Magistrate was satisfied that it was necessary to detain that person with a view to prevent him from acting in any manner prejudicial to the public safety or to the maintenance of public order The petitioners filed applications under S. 491 Cr. P. C. and contended that the arrests were illegal because they were effected at a time when the ordinance had not become law and secondly that the requirements of Section 4 of the ordinance had not been complied within that the petitioners had not been informed on what grounds they had been detained. It appeared that there was some delay in giving reasons to the petitioners*

Held *that the ordinance was in operation at the time when the arrests were made. An Act which comes into force on a particular day is deemed to have effect from the first moment of that day.*

*There is no reason to think that the Madras legislature in framing the definition of "commencement" in the General Clauses Act meant to give a different meaning by the use of the word "time" and depart from the long recognized interpretation whereby farctions of a day are ignored and the statute deemed to come into force at the first moment of the day on which it becomes law.*

Held *further that the delay in furnishing the petitioners with the reasons for their detention would not justify an order for their release.*

Petitions praying that in circumstances stated in the respective affidavits filed with the petitions, the High Court will be pleased to issue directions in the nature of a *Habeas Corpus* directing the respondents to produce the respective petitioners before the High Court and set them at liberty.

*A. Ramachandran for messrs Row and Reddy* for Petr.

*Crown Prosecutor*, for Respt.

ORDER

[HORWILL, J.]

On the 23rd January 1947 at 4–30 or 5 a.m. the twelve petitioners were arrested by police officers; but were not told why they were arrested, or under whose orders they were arrested, or even under what provision of law. From their homes they were taken to the Central Jail at Vellore. Later on, during the working hours of the Government Press, Ordinance No. 1 of 1947,* signed by the Governor of Madras, was published in the Fort St George Gazette of that day, Part IV-B, Extraordinary, which empowered the Provincial Government or the Chief Presidency Magistrate to issue an order for the detention of any person, if the Provincial Government or the Chief Presidency Magistrate, as the case might be, was satisfied that it was necessary to detain that person with a view to prevent him from acting in any manner prejudicial to the public safety or to the maintenance of public order. In the course of the same day, two of the petitioners filed applications under section 491 of the Code of Criminal Procedure for the issue of writs of the nature of *habeas corpus* directing the Government of Madras to produce the petitioners before the Court. Neither the Chief Presidency Magistrate nor the Superintendent of the Central Jail, Vellore, was impleaded, as it was not then known who had issued the order for arrest or where the petitioners were detained. On Monday, the 27th January, the remaining petitioners filed petitions asking for the same reliefs.

It was alleged that these petitioners were illegally arrested and detained, because they were not told by the police officers arresting them under what authority the arrests were made. Having since become acquainted with Ordinance No. 1 of 1947, two arguments have been put forward on behalf of the petitioners. The first is that the arrests were illegal, because they were effected at a time when the

*1947 M.W.N. Supp. p. 14 Cr. Acts & Rules p. 13

Ordinance had not become law, in that it had not, as required by section 88 of the Government of India Act, been promulgated. The second is that the requirements of section 4 of the Ordinance had not been complied with, in that the petitioners had not been informed on what grounds they had been detained.

When the matter came on for hearing on Wednesday the 29th January, no reasons had by then been given to the petitioners. On that day, the petitions were adjourned to give the learned counsel for the petitioners an opportunity of meeting the points raised by the learned Crown Prosecutor and of impleading the Chief Presidency Magistrate, who was found to have issued the order. On Friday, the date to which the petitions were adjourned, an affidavit was filed by the Chief Presidency Magistrate to the effect that he had given reasons to the petitioners, that he had informed them that they could make representations against the orders concering them, and that he would give them every facility to do so. In view of this affidavit, it is unnecessary to say very much with regard to the second point raised by the learned counsel against the validity of the detention. It is very difficut, without having before us all the material available, to decide whether or not the Chief Presidency Magistrate was justified in not communicating to the petitioners for more than a week the grounds on which his order had been based; but as he presumably knew the grounds before he issued the order, one would have expected him to have furnished the petitioners with reasons for their arrests and detention within a day or so. Since, however, the reasons were subsequently furnished, we should not be justified in ordering the release of the petitioners on the ground of this delay.

The more important question is whether the arrests of the petitioners were illegal, because at the time of their arrests the Ordinance had not become law. It is not denied by the learned Crown Prosecutor that publication in the Fort St. George Gazette was necessary to give the ordinance the force of law, and it is true that the petitioners were arrested before the act of promulgation had taken place. It is however a well-known maxim of the law regarding the interpretation of Statutes that the law takes no account of fractions of a day, for the very practical reason that it is ordinarily impossible to know the moment at which an Act came into force.

It is well settled that an Act which comes into force on a particular day is deemed to have effect from the first moment of that day. Applying that principle to the facts of this case, the Ordinance must be deemed to have had effect from midnight on the night of the 22nd-23rd, which means that it was in operation at the time when the petitioners were arrested. It is unnecessary to cite authorities for the proposition that a statute begins to operate from the first moment of the day on which it becomes law; because the learned advocate for the petitioners does not in general deny it. That the law in India on this subject is the same as in England is indicated by a decision of this Court in *In re Court Fees* [1], in which case the Government announced an increase in court fees on the 5th May 1922, which was not published until after certain suits had been filed on the Original Side of the High Court. It was nevertheless held that the plaintiff was bound to pay the enhanced court-fe on the plaints filed by him on that day.

The learned advocate for the petitioners has pointed out the difference between the wording of section 3 (12) of the Imperial General Clauses Act and that in section 3 (7) of the Madras General Clauses Act in the definition of the word "commencement," as used with reference to an Act or Regulation. Whereas the Imperial General Clauses Act defines "commencement" as meaning the *day* on which the Act or Regulation comes into force, the Madras Act—with which we are here concerned—defines "commencement" as meaning the *time* at which the Act comes into force. There is no reason, however, to think that the Madras Legislature, in framing the definition of "commencemet", meant to give a different meaning to that word from that given by the Imperial Government and to depart from the long recognized interpretation, whereby fractions of a day are ignored and the Statute deemed to come into force at the first moment of the day on which it becomes law.

Section 1(3) of the Ordinance says that it shall come into force "at once", from which it is argued that it came into force at the moment that it became law i. e., was published. Our attention has not been drawn to any Act, Ordinance, or Statute in which the expression "at once" has been used. 35 & 36 Vict. c. 63, s. 3, provided for an application for an order of affiliation..... "after the passing of this Act." In interpret-

1. [1923] M.W.N. 883: 46 Mad. 685

ing this clause the learned Judges in *Tomlinson Bullock* [2] held that this meant that the Act came into immediate operation, which was construed as meaning the 10th of August, 1872, the day on which the Act became law. They therefore held that the Act operated from the first moment of that day and therefore applied to a child born at any time of that day, even though the child might have been born before the royal assent was given to the Act.

Our attention has not been drawn to any instance since the 'Acts of Parliament' Act of 1793 in which a person has been found guilty of having committed an offence when the act constituting the offence was not at the moment at which it was done an offence. Nor have we been shown any case since that year in which a person has been made liable for arrest for an act for which he was not liable to be arrested at the moment that he did it, presumably because care is ordinarily taken to see that penal statutes, even by a legal fiction, do not have retrospective effect thereby violating an elementary principle of justice that a man should not be punished for an act that was not punishable at the time when it was committed. A violation of this elementary principle has indeed occurred in this case; but it is hoped that the purpose of effecting the arrests at such an early hour before the Ordinance had been promulgated was not to take shelter behind a technical point in the interpretation of Statutes in order to be able to violate this elementary principle of justice with impunity. However that may be, we are unable to say that the arrests of the petitioners were illegal. The petitions are therefore dismissed.

We have been asked to grant a certificate under section 205 of the Government of India Act to enable the petitioners to appeal to the Federal Court. The questions discussed in these applications do not however involve any interpretation of the Government of India Act, still less of any Order in Council. The matters argued before us relate to the interpretation of Ordinance I of 1947 and to a general rule regarding the interpretation of Statutes. It is true that the learned advocate for the petitioners raised a question as to the meaning of "promulgation" in section 88 of the Government of India Act; but the learned Crown Prosecutor conceded the correctness of the view of the petitioners' learned Advocate that "promulgation" meant publication, and that publication in the Fort St. George Gazette was necessary in order to make the Ordinance signed by the Governor effective. No certificate will therefore be granted.

*N. T. R.* — *Petitions dismissed*

3. [1878-79] 4 Q. B. 230

Criminal Revision Case No. 701 of 1946
(Criminal Revision Petition N. 670 of 1946)

YAHYA ALI J.

*March* 7, 1947

KARUMURI VENKATARATNAM
v.
EMPEROR.

*Penal Code* (*XLV of* 1860), *s.* 504—*Essentials of offence under—Abusive words—Proof of*

*One of the essential elements constituting the offence under s* 504 *Penal Code is that there should have been an act or conduct amounting to intentional insult. Where that act in a case is the use of abusive words, it would be necessary to know what those words were in order to decide whether the using of those words amounted to intentional insult. A mere finding that the accused abused the complainant is not sufficient by itself to warrant a conviction under s.* 504 *Penal Code, as in the absence of the words used, it is not possible to decide whether the ingredient of intentional insult is present in the case.*

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the First Class Bench Magistrates, Rajamundry dated 29—12—1945, and passed in F B C Nos 804 and 805 of 1945.

*K. S. Jayarama Ayyar for C. K. Venkatanarsimham & K. Narayanaswai* for Petitioner.

*Public Prosecutor* (*V.L. Ethiraj*) for Crown.

ORDER

The petitioner has been convicted by the First Class Bench of Magistrates, Rajahmundry, under section 504 I. P. C, and sentenced to pay a fine of Rs. 25. He is said to have sold on the previous day some tobacco to the complainant. Next day the complainant came to the petitioner and without paying him the money removed the tobacco. This infuriated the petitioner and the petitioner is said to have used abusive words which provoked the complainant to beat him. It is also urged by the complainant that the petitioner besides abusing threatened to strike him with a knife; but the Magistrates did not accept that part of the case. They found, however, that the accused did abuse the complainant for the non payment of his dues and for removing the produce without payment and this abuse brought about the breach of the peace.

This finding is not sufficient to support the conviction under section 504 I. P. C.

That section requires firstly that there should be an intentional insult; and secondly that thereby the offender should have given provocation to any person intending or knowing it to be likely that such provocation will cause him to break the public peace or to commit any other offence. One of the essential elements constituting the offence is that there should have been an act or conduct amounting to intentional insult. That act in this case being the use of abusive words, it would be necessary to know what those words were in order to decide whether the using of those words amounted to intentional insult. The judgment of the Bench Magistrates does not set out those words, and in the absence of those words it is not possible to decide whether the ingredient of intentional insult is present in this case. The Magistrates were content with findidg that the petitioner abused the complainant, but that is not sufficient by itself to warrant a conviction under section 504 I. P. C.

For these reasons the conviction of the petitioner cannot be maintained. The petition is allowed and the conviction and sentence are set aside.

*N. T. R.* — *Conviction set aside.*

Criminal Revision Case No. 1033 of 1946
(Criminal Revision Petition No. 968 of 1946)

*November* 1, 1946

YAHYA ALI, J.

ALAGATHORAI PADAYACHI

v.

EMPEROR

*Arms Act (IX of* 1878). *S.* 19 *(i)–Possession of gun after expiry of license pending renewal. The period of one month's grace during which a license holder under the Arms Act could keep the weapon in his possession pending renewal of license is not intended to extend the period of the license or in any manner to limit the scope of section* 14 *or section* 16 *of the Act. The weapon which is not covered by the license has to be deposited as soon as the license expires. The period of grace is not a statutoroy period and it is not open to the holder of the weapon either to claim it as a matter of right or to state that he is not bound to deposit the weapon after the expiry of the period of the license.*

Petition under sections 438 and 439 of the Code of Criminal Procedure, 1898 praying the High Court to revise the judgment of the Sub-Divisional First Class Magistrate of Ariyalur dated 27—6—46 and passed in C.C. No. 35 of 1945.

*K. C. Subramaniam*, for Pettioner.

*Public Prosecutor (V. L. Ethiraj)*. for Crown.

ORDER

The petitioner has been convicted under section 19 (i) of the Indian Arms Act for failing to deposit a gun under the provisions of the said Act. The license expired on the 31st December 1945 and it would appear that the petitioner had applied before that date for the renewal of the license; but the renewed license was not received until the 5th February 1946. Usually a month's period of grace is allowed within which the licenseholder may keep the weapon even though the renewed license was not received. The petitioner's case is that he took advantage of the period of grace and kept the weapon in his possession without depositing it as required under the Arms Act. He fell ill on the 21st January 1946 and recovered on the 17th February; but in the meantime on the 5th February, the license had been renewed. The question to be considered is whether in these circumstances an offence under section 19 (i) of the Indian Arms Act has been committed. The period of grace is not intended to extend the period of the license, or in any manner, to limit the scope of section 14 or section 16 of the Indian Arms Act. The weapon which is not covered by the license has to be deposited as soon as the license expires. In this case it was liable to be renewed on 1st January 1946, but the authorities may refrain from taking any action for such period as they may fix according to their own regulations. But that is not a statutory period and it is not open to the holder of the weapon either to claim it as a matter of right or to state that he is not bound to deposit the weapon after the expiry of the period of the licence. Technically, therefore, an offence under section 19 (i) must be held to have been committed in this case. But the circumstances show that the petitioner was deterred from fulfilling the requirements of the Arms Act in the matter of the deposit of the weapon, whose licence had expired, on account of three considerations. The first is that he had applied for renewal in time, the second is that he in good faith thought that he was lawfully entitled to keep the weapon for a month even though no renewed license was received and thirdly that he fell ill within that period and ultimately the license was received before he recovered from his illness. Having regard to these considerations the sentence has to be very nominal. The fine is reduced to Rs. 5, in default to one week's simple imprisonment. The excess fine will be refunded.

N T.R. —

Criminal Appeal No. 645 of 1946
*March* 6, 1947
YAHYA ALI, J.
THE PUBLIC PROSECUTOR
v.
CHAKKA KONDAPPA

*Local Boards Act (Mad. Act XIV of* 1920), *Ss.* 93, 228 *& Sch. IV Rr.* 31 *&* 33 *(2)— Prosecution for non-payment of profession tax—Legality of assessment—If can be questioned.*

*In a prosecution under Rule* 33 (2) *of the Rules in Sch. IV to the Madras Local Boards Act, for non-payment of profession tax, it is open to the accused to question the legality of the assessment, notwithstanding R.* 31. *The finality referred to in R.* 31 *is only for the purpose of the Act and where the legality of the assessment is questioned, whether in a civil suit or in a criminal proceeding, there will be no bar arising under the Rule or under S.* 228 *of the Act.*

*I.L.R.* 34 *Mad.* 130 distinguished.

Appeal under Section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid Respondent (Accused) by the Stationary Sub-Magistrate of Gooty in C. C. No. 237 of 1946 on his file.

*Public Prosecutor (V. L Ethiraj)* for Crown
*K. S Jayaram* for Respondent.

JUDGMENT.

This is an appeal by the Public Prosecutor from the acquittal of the respondent, Chakka Kondappa, in C. C. No. 237 of 1946 in the Court of the Stationary Sub Magistrate, Gooty. The respondent was prosecuted under Rule 33 (2) of the Rules in Schedule IV attached to the Madras Local Boards Act for non-payment of profession tax due by him and payable to the District Board, Anantapur in respect of the exercise of money-lending profession during the years 1944–45 and 1945–46. The total amount of tax which was demanded from him was Rs. 18–2–0 including a warrant fee of two annas. In the charge sheet filed by the District Board President it was mentioned that the tax and the warrant fee due by the assessee could not be collected as he had refused to pay the tax when demanded by the Licence Inspector and also obstructed him in executing the warrant. The accused denied that he exercised the profession of money-lending during the periods in question within the limits of the District Board.

The Sub-Magistrate found on the facts and the evidence that it was not satisfactorily proved that he was exercising the money-lending profession as alleged by the prosecution and that the notices of demand were not served on him as required by law and that consequently he had no opportunity to prefer an appeal to the District Board, as is provided in the Local Boards Act. The prosecution, however, raised a legal contention at the time of the trial to the effect that since assessment had been made and within the time fixed for appeal, no appeal had been filed, the assessment became final under the provisions of the Local Boards Act, and it was not open to the accused to let in any evidence on the question of his liability to the tax, that is to say, on the question as to whether notices were properly served on him or not and whether he exercised the money-lending profession during the periods in dispute. The Sub-Magistrate negatived this contention also, and in the end acquitted the accused holding that no tax was lawfully due by and leviable from the accused by the Anantapur District Board.

Before me the learned Public Prosecutor did not question the findings of fact of the Sub-Magistrate; but he urged that on a proper scrutiny of the relevant provisions of the Local Boards Act it should be held that it was not open to the accused to raise the plea that he had not exercised the profession of money-lending in respect of which he has been assessed. Profession tax is leviable in a local board area under section 93 of the Act, and Rule 11-A in Schedule IV requires that notice should be served in the prescribed manner and in the prescribed form on the person who is liable to be assessed for the half year in question. Under Rule 26 in the same Schedule a right of appeal is provided, and then comes Rule 31 which is to this effect:

"The assessment or deemed of any tax, when no appeal is made as hereinbefore provided, and when such an appeal is made, the adjudication of the panchayat thereon, shall be final."

It is also necessary in this connection to refer to section 228 (1) of the Act which provides:

"No assessment or demand, made, and no charge imposed, under the authority of this Act shall be impeached or affected by reason of any clerical error or by reason of any mistake . . . . provided that the provisions of this Act have been in substance and effect, complied with and no proceedings under this Act shall merely for defect in form be quashed or set aside by any Court of Justice."

Reliance is placed on behalf of the Crown on the expression "final" occurring in Rule 31

and on the phrase in section 228 which refers to the compliance in substance and effect with the provisions of the Act and the bar against any proceedings under the Act being interfered with by a Court of Justice merely on the ground of an error or mistake. On the other hand, the respondent wholly relies upon the provisions of section 228 for the purpose of contending that the bar arising under that section does not operate unless it is shown by the prosecution that there was substantial compliance with the provisions of the Act, for instance in the matter of service of notice and by way of proving that he had exercised a profession in respect of which he could be assessed to profession tax under the provisions of the Act. It is also argued by Mr. Jayaram with reference to Rule 31 that the finality referred to therein is only for the purpose of the Act, and where the legality of the assessment is questioned whether in a civil suit or in a criminal proceeding there will be no bar arising either under the Rule or under s. 278.

This question has formed the subject-matter of numerous decisions of this court. I may start with referring to the leading case on the subject decided by Shephard and Boddam, JJ. reported in *Municipal Council, Cocanada* v. *The Standard Life Assurance Company* [1]. That was a case that arose under section 262 of the District Municipalities Act corresponding to section 228 of the Local Boards Act. There the question was whether when the petitioner company was not doing business within the Coconada Municipality, a suit to question the correctness of its assessment to profession tax was maintainable in a civil court. The matter was put specifically by the learned Judges in these words at page 213:

> "The question really is whether when a Company, which in respect of its particular business is not taxable under the Act or does not transact business within the Municipality, is nevertheless taxed, it can be said that 'the provisions of the Act have been in substance and effect complied with.' The question whether there has been a substantial compliance with the Act is one of fact which has to be determined with reference to the particular circumstances of the case."

Upon this view it was held that there was no difference in principle between the exaction of a tax which has not been legally imposed and the exaction of a tax from a person who is not taxable under the Act. In the latter case no less than in the former there has been a substantial disregard of the provisions of the Act.

Before I deal with the further cases which have consistently followed this view, I may dispose of the solitary ruling cited on behalf of the Crown which, it was contended, took the opposite view. That was the case in *Veeraraghavulu* v. *The President, Corporation of Madras* [2] decided by Wallis, J. (as he then was) and Krishnaswami Ayyar, J. That case arose under section 172 of the City Municipal Act of 1904. It is hardly necessary to set out the facts of that case in detail and it is clear from the judgment of both the learned Judges that the decision proceeded entirely upon the particular language of section 172 of the Act of 1904 which was found to be radically different from the language of the corresponding section in the old City Municipal Act of 1884. Wallis, J. further observed:

> "as regards the sections as to finality the provisions in section 196 against suits to recover back taxes levied under the Act, provided the provisions of the Act had been substantially complied with, is omitted in section 177. Further in section 191 which corresponds to section 208 of the old Act and saves irregularities due to defect of form, the words 'provided the directions of the Act be in substance and effect complied with' are omitted."

In view of these essential differences in the language of the relevant sections in the Act it was held that the decisions under the District Municipalities Act that persons not liable to the tax can sue to recover it back were clearly inapplicable under the City Municipal Act as they proceeded upon language which is not used in the latter Act. Consequently the decision in *The Municipal Council, Cocanada* v. *The Standerd Life Assurance Company* [1] and the decisions referred to in that case were not acted upon. Krishswamy Ayyar, J. also made observations at page 137 to the same effect.

Continuing the trend of the decision *The Municipal Council Cocanada* v. *The Standard Life Assurance Company* [1] I may refer to *Balasuryaprasada* v. *The Taluk Board, Chicacole* [3] which was a decision under section 228 of the Local Boards Act. In that case the learned Judge has collected all the decisions which were given after *The Municipal Council, Cocanada* v. *The Standard Life Assurance Company* [1] namely, *Municipal Council, Mangalore* v. *Codial Bail Press* [4], (decided under the District Munci-

1. [1901] I.L.R. 24 Mad. 205
2. [1910] M.W.N. 583: I.L.R. 34 Mad. 130
3. [1931] M.W.N. 1026
4. [1904] I.L.R. 27 Mad. 567

cipalities Act), *Arunachalam Cheitior* v., *Namakkal Union Board* [5] (Local Boards Act) and *Bombay Company Limited* v. *Municipal Council, Dindigal* [6] and *Chairman of the Municipal Council, Kumbakonam* v. *Ralli Brothers* [7] (both under the District Municipalities Act) *Bala Suryaprasada* v. *The Taluk Board Chicacole* [3] was also a case of a person who was alleged to have been exercising money lending profession and as such assessed to profession tax. The legality of the assessment was impugned in a civil court and the plaintiff contended that he was not exercising that profession. The lower courts did not examine the contention on its merits but dismissed the suit as barred by sub-section 2 of section 228 of the Local Boards Act. Madhavan Nair J. after reviewing the decision in *The Municipal Council, Cocanada* v. *The Standard Life Assurance Company* [1] and the subsequent decisions mentioned above came to the conclusion that the complaint of the plaintiff being that he was not liable to be taxed under the Act, section 228 (2) was not a bar to the suit and that the lower courts should have gone into the merits of the case and disposed of it in accordance with law. In one of the earlier cases referred to in that judgment the principle was laid down that where the Board has disregarded a provision of law and taxes a person who is not taxable at all, the jurisdiction of courts is not ousted. Cases of fundamental departures from the meannig of the statute are excluded from the operation of the bar.

It is unnecessary to refer to the other cases which have dealt with the question of the jurisdiction of civil courts, and since this is a criminal case, I shall refer to the set of cases which have dealt with the right of an accused person in a prosecution of this kind to raise the question of his liability and the jurisdiction of the criminal court to examine that question on its merits. *Smith In re* [8] was a decision given by Krishnan, J. sitting singly in a case that arose under the City Municipal Act. In that case dealing with the argument used by the Magistrate in support of the assessment, namely, that as the accused did not go to the Standing Committee and seek redress before them, it should be taken as settled that the accused is bound to pay the tax imposed upon him, that it had become final under the law and that the Magistrate could not question its legality, the learned Judge while expressing disagreement with that view, pointed out that there could be no kind of estoppel in a criminal case and said:

"The prosecution must establish affirmatively to his satisfaction that the tax was payable and that there was a default in payment of the tax. The fact that the accused did not appeal to the Standing Committee cannot be treated as in any way preventing him from raising the plea before the Criminal Court, where he is sought to be convicted of an offence by the Prosecutor."

This case, arising as it does under the City Municipal Act, is an additional answer to the argument of the learned Publih Prosecutor based upon *Veeraraghavulu* v. *The President, Corporation of Madras* [2]. This principle was followed by Devadoss, J in *Chairman Municipal Council Chidambaram* v. *Tirunarayana Iyengar* [9] which arose out of a prosecution under section 338 of the District Municipalitiet Act. The principle was there extended to an act which was *ultra vires* a statutory body, and with reference to such act when a person is prosecuted, it was held that it was open to him to raise the contention, and the Court was not prevented from considering the legality of the order. In the same volume at page 866 is another decision *Gopayya* v. *Emperor* [9a] to the same effect of Phillips and Madhavan Nair, JJ which was given in a case arising under the Local Boards Act. The next was the case in *Raheem Sahib In re* [10] under section 221 of the Local Boards Act decided by Waller and Krishnan Pandalai, JJ. where also the same view was taken. Dealing with all these cases Pandrang Row and Venkataramana Rao, JJ. in *Ramaswami Iyengar* v. *The Sivakasi Municipality* [11] said in a case that arose under the District Municipalities Act under analogous provisions that the finality mentioned in the rule was only for the purpose of the Act and that the said finality would not prevent a person from impugning the legality or validity of the assessment in a Civil Court, and turning to the position with regard to a Criminal prosecution the learned Judges said this:

'Ordinarily where a person is proseouted for any criminal offence it is incumbent upon the prosecution to affirmatively prove that an offence has been committed and if *prima facie* proof has been let in

5. A.I.R. 1928 Mad 346
6. A.I.R. 1929 Mad 148
7. [1931] M.W.N. 329
8. [1923] 45 M.L.J. 731
9. [1928] M.W.N. 379: I.L.R. 51 Mad 876
9a. [1928] M.W.N. 319: I.L.R. 51 Mad 866
10. [1929] M.W.N. 515: Cr. 101 I.L.R. 52 Mad 714
11. [1936] M.W.N. 1337: Cr. 221.

by the prosecution, it is open to the accused to plead and prove that he has not committed any offence. The fact that the prosecution has been launched under the provisions of a special Act would not displace this elementary rule unless there are provisions in the said Act to the contrary."

Referring to section 354, which corresponds to section 228 of the Local Boards Act they observed:

"So far as the right of the municipality to levy any tax is concerned, they must strictly conform to the provisions of the Act, If they do not do so, they have no right to enforce the tax. In fact section 354 says that a charge can be validly imposed if the provisions of the Act are substantially complied with. If not there is no jurisdiction to levy it The imposition of a tax on a person not taxable under the Act would be a substantial disregard of the provisions of the Act and in a suit for refund of the tax it is open to a person to prove that he is not taxable under the Act. We do not see why a different principle should apply in the case of a criminal prosecution and how a person can be convicted of a criminal offence for non-payment of a sum which he is not legally liable to pay. If Mr. Sitarama Rao's argument is to be pushed to its logical conclusion, it comes to this, that when once the municipality imposes an assessment it becomes final; the assessee must pay the tax and then go to a Civil Court and in the meanwhile if he is prosecuted criminally he must undergo punishment even though ultimately the Civil Court may give him redress. It will be a sorry state of affairs if such were to be the state of the law."

From the survey of the case law bearing upon the question there cannot be the slightest doubt as regards the position that where the legality of the assessment is questioned or where it is contended that the assessee is not taxable at all, then the assessment that is imposed upon him has no legal existence and it would be open to him in a civil suit to question the legality of the assessment notwithstanding Rule 31 for the reason that under section 228 the condition precedent is substantial compliance with the provisions of the Act and that requirement has not been satisfied. *A fortiori* would such a right be available to an accused person in a criminal prosecution not only for the reasons mentioned but for the additional reason mentioned in the decisions I have cited above, namely, that it is for the prosecution affirmatively to prove that the accused is lawfully bound to pay the tax. In the persent case, apart from the general contentions, there is the further fact which has been found by the trial court that notices were not duly served on the accused, and that would furnish an added reason to hold that there was no substantial compliance withe the provisions of the Act so as to bar a prosecution in a criminal Court in respect of the said tax.

The appeal is dismissed.

N.T.R. — *Appeal dismissed*

**Criminal Revision Case No. 702 of 1946**
**(Criminal Revision Petition No. 671 of 1946)**
*March* 14 1947
RAJAMANNAR, J.

T. C. KANDASWAMI CHETTIAR
v.
EMPEROR

*Madras Rice Mills Licensing Order*, (1943), *Cl. 2—Offence under.*

*Applications for licence under the Madras Rice Mills Licensing Order*, 1943, *had to to be made in From I in the schedule to the Order and the Form provided for a declaration 'I agree not to mill rice except by these processes in future from the date of this application'.*

*Petitioner applied for a licence under the provisions of this Order on the 2nd March* 1945. *He was charged with having hulled paddy in his rice mill without a licence on the 11th March* 1945, *i.e., after the date of his application. By that date no order had been passed on his application for a licence. There was no evidence that the petitioner hulled rice by any process contrary to the provisions of the Order.*

Held, *that the provision that the applicant should agree not to mill rice except by certain processes mentioned in the licence to be granted in future from the date of the application did not appear easy to understand; and that the only way in which it could be reconciled with the terms of cl. 2 of the Order was to hold that the intention of the Order was that when an application for licence was granted in due course such a licence must be deemed to be valid from the date of the application:*

*that there was a salutary rule that a person should not be convicted upon the terms of an enactment which was obscure and which lawyers could not construe clearly. and that the benefit of this rule should be given to the petitioner.*

(1946) 2 *All. E. R.* 100, applied

Petition under Sections 435 and 439 of the Code of Criminal Procedure 1898 praying the High Court to revise the Judgment of the Court of Session of the Coimbatore Division dated 29—1—1946 and pased in C. A. No. 203 of 1945 (C. C. No. 203 of 1945. Additional 1 Class Magistrate's Courts, Erode).

*N. Somasundaram & P. S. Kailasam*, for Petr.
*Assistant Public Prosecutor* for Crown.

ORDER.

This appears to be a case which, in the words of Singleton J. in a recent case in the

Kings Bench Division. "is very much easier to argue than one in which to give judgment."

The petitioner was convicted under Rule 81 (4) of the Defence of India Rules read with clause 2 of the Madras Rice Mills Licensing Order, 1943. and sentenced to one month's rigorous imprisonment and a fine of Rs. 150. On appeal to the Sessions Judge the conviction was confirmed, but the sentence of imprisonment was reduced to the period already served and the sentence of fine was upheld. The petitioner seeks to revise the said decision of the Sessions Judge.

The offence with which he was charged was that he hulled paddy in his rice mill without a licence in contravention of clause 2 of the Madras Rice Mills Licensing Order 1943. Under clause 2 of that Order, on and after the date from which that order came into force no person shall carry on the business of milling rice by power driven machinery except under and in accordance with the conditions of a license issued in that behalf by the Collector of the District. Clause 3 provides that applications for license under the Order shall be made in Form I in the Schedule to that order to the Collector of the District; and under Clause 4, the licenses issued under the order shall be in Form II in the schedule to the Order. Form I is certainly peculiar. In addition to the particulars of the applicant's name, address and place of the situation of the mill, there is a provision for a declaration that the applicant is the proprietor or manager of the rice mill covered by the application. Then occur the following provisions.

"I have carefully read the Madras Rice Mills Licensing Order, 1943, and the conditions of license in Form II in the Schedule to the said Order and I agree to abide by them."

"I declare that I have in my possession the following stock of rice which has been processed otherwise than by the processes described in paragraph 4 of the form of licence (Form II) and I agree not to mill rice except by these processes in future from the date of this application."

It has been found that the petitioner applied for a license under the provisions of this order on the 2nd March 1945. He was charged with having hulled paddy in his rice mill without a license on the 11th March 1945, i.e.; after the date of his application. By that date no order had been passed on his application for a license.

The learned sessions Judge says that the object of the order was to see that in machines of the single huller type rice shall be passed through the huller only once. There was no evidence in the case that the petitioner was passing paddy through the huller more than once.

The question is whether in these circumstances the petitioner was rightly convicted under the order. From the preamble to the order it appears that it was found necessary for maintaining supplies of rice essential to the life of the community, to regulate the treatment of paddy in rice mills in the Province of Madras. Form I must be taken to have been embodied in the order itself because of clause 3 which says that applications for license shall be in that form. In his application in accordance with that form the applicant has to agree not to mill rice except by the processes described in paragraph 4 of the form of license to be granted in future from the date of the application. The learned advocate for the petitioner relies upon this last provision, that is to say, the provision that the applicant agrees not to mill rice except by certain processes indicated in the license to be granted, from the date of the application and not from the date of the grant of the licence. It is true that under clause 2 of the Order no person can carry on the business of milling rice by power driven machinery except under a license issued in that behalf by the Collector of the District. Obviously on the date of the application for the license the applicant cannot be expected to have a license in his favour. In fact he is asking for one. Therefore it would appear that even though he has made an application, he cannot carry on the business of milling rice even after that date till a licence is granted to him. The provision therefore that the applicant should agree not to mill rice except by certain processes mentioned in the license to be granted in future from the date of the application does not appear easy to understand. Does it mean that if he follows any of the processes so mentioned that he could mill rice from the date of the application? In my opinion there is one way in which this provision may probably be reconciled with the terms of clause 2 of the Order and in attempting at this reconciliation I am taking into consideration the object of the Order and the possible inconvenience which is likely to result not merely to the man who is doing the business of rice hulling but to the entire community. It is not unreasonable to suppose that when

an application for licence is made, and in the ordinary course it is granted, the licence shall be deemed to be in operation from the date of the application. No doubt, in some enactments there is express provision for such a result. But in my opinion such a result can also be inferred by necessary intendment. Having regard to the terms of Form I of the schedule it must have been the intention that when an application for licence is granted in due course such a licence must be deemed to be valid from the date of the application. That is why the applicant is made to agree not to mill rice except by the processes mentioned in the licence to be granted even from the date of the application. With great respect I would in deciding this case respectfully follow the principle laid down in a recent decision of the King's Bench Division in *Serdale* v. *Binne* [1]. Humphreys, J. referred therein to certain observations which fell from Lord Goddard L. C.J. in the course of the argument in that case. This is what he says :—

"I desire to associate myself heartily with some observations which fell from my Lord in the course of the argument when he observed that he was very much averse to the notion that any person would be convicted in this country upon the terms of an Act of Parliament which was obscure and which lawyers could not construe clearly. If an Act of Parliament is so drawn as to make it really difficult to say what was intended and what facts come within it, the benefit of that obscurity should be given to the accused person."

Having regard to the finding that there was no evidence that the petitioner contravened any of the provisions of the license set out in Form II, I think that he should be given the benefit of this salutory rule. I therefore set aside the conviction and sentence of the petitioner and direct that the fine if paid should be refunded to him.

N.T.R. — *Petition allowed*

## PRIVY COUNCIL

(Appeal from Madras)

*March* 27, 1947

LORD THANKERTON, LORD UTHWATT, LORD DU PARCQ & SIR JOHN BEAUMONT

THIAGARAJA BHAGAVATHAR & Another

v.

THE KING EMPEROR

*Cr. P. C. (V of* 1898), *s* 411-*A—Appeal on facts—Scope of.*

*Once leave is granted under s.* 411-*A, Cr.P.C., the matter is at large and the court of appeal must dispose of the appeal upon the merits paying due regard however to such matters as* (1) *the views of the jury implicit in their verdict as to the credibility of the witnesses:* (2) *the presumption of innocence in favour of the accused;* (3) *the right of the accused to the benefit of any doubt; and* (4) *the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. If attaching due weight to those matters, the court hearing an appeal on the facts under s.* 411-*A comes to the conclusion that the verdict of the jury was wrong, it is bound to allow the appeal and reverse the verdict. It has no right to uphold the verdict merely on the ground that it is not preverse or unreasonable.*

47 *Bom. L. R.* 364 *(F.N.),* approved.

*There is no analogy between the hearing of an appeal under s.* 411-*A and the hearing of a reference under s.* 307. *The court hearing an appeal on the facts under s.* 411-*A is in a similar position to a court hearing an appeal from the verdict of a jury under s.* 449, *or an appeal from the verdict of a jury which has resulted in the passing of a death sentence under ss.* 374 *and* 418 (2), *in both of which cases an appeal lies on the facts.*

47 *Bom. L.R.* 363, overruled.

*Decision of the Madras High Court in* 1946 *M.W.N.* 49: *Cr.* 9, reversed.

*D.N. Pritt, K.C.& P.V. Subba Row* for Applts

*G. Slade, K.C & D.A Grant* for Crown.

## JUDGMENT.

SIR JOHN BEAUMONT. These are consolidated appeals by special leave from a judgment of the High Court at Madras in its appellate criminal jurisdiction dated the 29th October, 1945, which affirmed a judgment of the same Court in its original criminal jurisdiction dated the 3rd May, 1945.

The appellants were tried by the said High Court with certain other persons, for conspiracy under section 120-B of the Indian Penal Code and abetment to commit murder under section 302 read with section 109, and were convicted on both charges, and sentenced to transporation for life. They appealed to the High Court, and by an Order dated the 12th July, 1945, the Appellate Court allowed them to appeal on matters of fact as well as of law under section 411-A (1) (b) of the Code of Criminal Procedure.

The appeal raises an inportant question as to the scope of the powers of the court under secetion 411-A of the said Code which

1. [1946] 2 All. E.R. 100

was introduced into the Code by Act XXVI of 1943. In order to appreciate the effect of the new section, it is desirable to notice the provisions of the Code relating to trials by jury in the High Courts, and to appeal from the verdicts of juries in sessions trials held in the Moffussil.

The High Courts in the old Presidency Towns of Madras, Calcutta and Bombay possess, under their letters patent, original criminal jurisdiction, and s. 267 of the Code of Criminal Procedure directs that all Criminal trials before a High Court shall be by jury. S. 274 provides that in trials before the High Court, the jury shall consist of nine persons, and s. 299 imposes upon the jury the duty of deciding all questions of fact. Under s. 305 the judge is bound by the unanimous opinion of the jury, but when the jury are divided and as many as six are of one opinion and the judge agrees with them, the judge shall give judgment in accordance with such opinion. Under the letters patent affecting such High Courts, there is no appeal from any sentence or order passed or made in any criminal trial before the courts of original criminal jurisdiction, though a point of law may be reserved by the trial judge, or may be brought before the court on a certificate of the Advocate General.

In the case of trial by jury in a Court of Session in the Moffussil, there is a right of appeal against conviction under s. 410 of the Code, and against acquittal under s. 417. But s. 418 provides (1) that an appeal may lie on a matter of fact as well as a matter of law except where the trial was by jury, in which case the appeal shall lie on a matter of law only. (2) Notwithstanding anything contained in sub-section (1) or in s. 423, sub-section (2), when, in the case of a trial by jury, any person is sentenced to death, any other person convicted in the same trial with the person so sentenced may appeal on a matter of fact as well as a matter of law. This sub-section must be read with s. 374 which requires any sentence of death passed by a Court of Session to be confirmed by the High Court. S. 423 (1) confers various powers upon the court of appeal but sub-section (2) provides "Nothing herein contained shall authorize the court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the judge, or to a misunderstanding on the part of the jury of the law as laid down by him." Section 449 allows an appeal from the verdict of a jury upon a matter of fact as well as upon a matter of law in cases tried under Chap. 33 of the Code which relates to cases in which European and British Indian subjects are concerned. It may be noticed also that it is provided under section 307 that if the judge disagrees with the verdict of the jurors or a majority of them and is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court, he shall submit it accordingly and on such reference the High Court may exercise any of the powers which it may exercise on an appeal, and shall dispose of the reference as provided in the section.

In that state of the law, Act XXVI of 1943 enacted as follows :—

"*Insertion of new section* 411-*A in Act V of* 1898,—After section 411 of the Code of Criminal Procedure 1898 (V of 1898) (hereinafter referred to as the said Code), the following section shall be inserted, namely :—411-A. *Appeal from sentence of High Court.* —(1) Without prejudice to the provisions of section 449 any person convicted on trial held by a High Court in the exercise of its original Criminal jurisdiction may, notwithstanding anything contained in section 418 or section 423, sub-section (2), or in the Letters Patent of any High Court, appeal to the High Court :—

(a) against the conviction on any ground of appeal which involves a matter of law only;

(b) with the leave of the appellate Court, or upon the certificate of the judge who tried the case that it is a fit case for appeal, against the conviction on any ground of appeal which involves a matter of fact only, or a matter of mixed law and fact, or any other ground which appears to the appellate Court to be sufficient ground of appeal : and

(c) with the leave of the appellate Court against the sentence passed unless the sentence is one fixed by law.

(2) Notwithstanding anything, contained in section 417, the Provincial Government may direct the Public Prosecutor to present an appeal to the High Court from any order of acquittal passed by the High Court in the exercise of its original criminal jurisdiction, and such appeal may, notwithstanding anything contained in section 418, or section 423, sub-section(2) or in the Letters Patent of any High Court, but subject to the restrictions imposed by clause (b) and clause (c) of sub-section (1) of this section on an appeal against a conviction, lie on a matter of fact as well as a matter of law."

The Act contains certain consequential amendments of the Code and of the Letters Patent to which it is not necessary to refer.

In the appeal of the appellant to the High Court at Madras, the leading judgment was given by the Learned Chief Justice. He considered the powers which the court possessed where leave to appeal on the facts

had been given. He noticed that clauses (a), (b) and (c) of sub section (1) of section 411-A followed the language of clauses (a), (b) and (c) of section 3 of the English Criminal Appeal Act 1907. But he also noticed that there was omitted from the Indian Act any provision corresponding to section 4 (1) of the English Act which provides "The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal." The Learned Chief Justice then discussed various decisions of English courts upon the Criminal Appeal Act, 1907, and expressed the view that the powers of the High Courts in India were similar to those of the Court of Criminal Appeal in England notwithstanding the omission of any provision corresponding to section 4 (1) of the English Act, and that the court had power to set aside the verdict of a jury, if on consideration of the facts and of the circumstances of the case, it was convinced that the verdict was unreasonable. After considering the evidence against the appellants and the summing up by the trial judge, the court held that the jury had been properly directed and that there was material on which their decision could reasonably be based. Accordingly, without considering whether or not the court agreed with the verdict of the jury, the appeal of the appellants was dismissed.

Before considering the correctness of the judgment under appeal their Lordships will notice certain decisions upon section 411-A which have been given by the High Court of Judicature at Bombay. In the case of *Ganpat Jivaji* v. *The King Emperor* [1] which is reported in a foot note in 47 Bombay Law Reporter, page 365, leave to appeal on the facts had been granted *ex parte* by the Court of Appeal. The leading judgment was given by Chagla J., Lokur and Weston JJ concurring. Mr. Justice Chagla expressed the view that it was impossible on the construction of section 411-A to hold that the powers of the court were limited as were those of the Court of Criminal Appeal in England; that where an appeal on facts was before the court, the court was bound to dispose of it like any other appeal on facts, and that if the court came to the conclusion that the verdict of the jury was wrong they could not uphold it on the ground that it was not perverse or unreasonable. But the learned judge expressed the fear that the introduction of s. 411-A, construed in the manner in which he felt bound to construe it, would reduce trial by jury in the High Court to a mockery, and he expressed some surprise that the legislature should have treated the verdict of a High Court jury based on the summing-up of a High Court judge as of less consequence than a verdict of a Moffussil jury. The question as to the construction of s. 411-A was considered by another Full Bench of the Bombay High Court in the case of *Government of Bombay* v. *Inchya Fernandez* [2]. In that case the jury had returned a unanimous verdict of not guilty and the trial judge, Mr. Justice Chagla had given a certificate authorizing an appeal on the facts. The leading judgment was given by Divatia, J. Lokur and Weston, JJ. the other members of the court delivered separate but concurring judgments. Mr. Justice Divatia expressed the view that although the powers of the court hearing an appeal on the facts under section 411-A were unfettered, the court was not bound to exercise its powers in full, and that it was entitled to deal with the appeal on grounds analogous to those upon which the High Court acted when hearing a reference made under section 307 of the Code and to interfere with the verdict of the jury only if satisfied that such verdict was perverse and unreasonable. The court held that there had been no failure in the summing-up, and that the verdict of the jury could not be regarded as either opposed to the evidence or manifestly wrong or unreasonable, and accordingly dismissed the appeal. The views of Chagla, J. in the earlier case were treated as dicta only. That case has been followed in other cases in the High Court of Bombay and appears to be regarded as having settled the law on the subject.

Their Lordships have not been referred to any decision of the High Court at Calcutta, which is the other High Court possessing original criminal jurisdiction.

1. [1945] 47 Bom. L.R. 365 F.N.

2. [1945] 47 Bom. L.R. 363

It will be observed that the High Court at Madras and the High Court at Bombay have both reached the conclusion that in an appeal upon the facts under section 411-A, the court should only interfere with the verdict of the jury if it considers such verdict perverse or clearly unreasonable. but they have reached such conclusion on quite different grounds. Their Lordships think that both courts, in their anxiety to prevent the introduction of a right of appeal under section 411-A from destroying the effective operation of trial by jury in the High Courts, have over-looked the important safeguard provided by the legislature against such risk. An appeal on a matter of fact can only be brought on a certificate of the trial judge or with the leave of the Court of Appeal. In view of the importance obviously attached throughout the Code to the verdict of juries, to the difficulty which always faces a Court of Appeal when called upon to appreciate the evidence of witnesses whom it has not seen, to the risk of undermining the sense of responsiblity of juries if their verdicts are subject to frequent appeal, and to the danger of depriving those tried in the High Court of the effective enjoyment of the right to trial by jury conferred upon them by the Code, their Lordships think that the Indian Legislature may well have assumed that leave to appeal upon the facts from the verdict of a jury would not be given so long as such verdict appeard to be reasonable and supported by the evidence. and not to have been induced by an error in the summing up. A judge hearing an application for leave to appeal on the facts has an absolute discretion to grant or withold such leave, but it is a discretion to be exercised judicially. He is bound to consider any special features in the particular case, but he cannot ignore the effect which the granting of leave to appeal without due discrimination may have upon the whole system of trial by jury in the High Court. Leave once having been granted, however, the matter is at large, and the Court of Appeal must dispose of the appeal upon the merits paying due regard however to the principles on which Courts of appeal always act in such cases. Those principles were summarised by Lord Russell of Killowen delivering the opinion of the Board in the case of *Sheo Swarup* v. *The King Emperor* [3] where the Board was considering the powers which the High Courts possess in hearing an appeal against acquittal, in the following passage:—

> But in exercising the power conferred by the Code and before reaching its conclusions upon fact the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been accquited at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses"

Only slight modifications in that passage are necessary to adapt it to an appeal against the verdict of a jury. It is of course true that the Court of Appeal does not know what view the jury took of the evidence of any particular witness, but it knows the view which the jury took of the evidence as a whole. In the passage above quoted for the words "the views of the trial judge as to the credibility of the witnesses" must be substituted the words "the views of the jury implicit in their verdict as to the credibility of the witnesses." If, attaching due weight to those matters, the court hearing an appeal on the facts under section 411-A comes to the conclusion that the verdict of the jury was wrong, it is bound to allow the appeal and reverse the verdict. It has no right to uphold the verdict merely on the ground that it is not perverse or unreasonable. So to do would be to deprive the appellant of the right of appeal which the Statute gives to him.

In their Lordships' opinion the High Court of Madras in the judgment under appeal approached the case from the wrong angle. It is always dangerous to construe an Indian Act by reference to an English Act however closely the language of the two Acts may approximate, and this is particularly true of Acts dealing with such a matter as trial by jury in which, as pointed out by the Board in the case of *Abdul Rahim* v. *The King Emperor* [4] the attitude of the legislatures in the two countries has been dissimilar in many respects. The elision in section 411-A of section 418 and section 423 (2), which would have prevented an appeal on facts, and the omission of any limitations on the powers of the court similar to those contained in section 4 (1) of the English Act, make it clear, their Lordships think,

3. [1934] M.W.N. 1017; Cr. 193: L.R. 61 I.A. 398

4. [1946] M.W.N. 474 (2): Cr 70: L.R. 73 I.A. 77

that the Indian legislature was not minded to impose on the powers of the Court of Appeal in India any fetter similar to that imposed on the English Court of Criminal Appeal in dealing with the verdicts of juries.

Referring to the Bombay cases, their Lordships are in agreement generally with the view of the law expressed by Mr. Justice Chagla in *Ganpat Jivaji's* Case [1]. Whether the fear expressed by the Learned Judge that the right of appeal given by section 411-A will reduce trial by jury in the High Courts to a mockery must depend on the manner in which the judges of the High Courts exercise the powers conferred upon them by the section. If judges make a practice of giving leave to appeal on facts from the verdict of a jury which is not perverse or unreasonable on the ground that the judge himself does not agree with the verdict or that he thinks that the Court of Appeal might take a different view of the evidence from that which appealed to the jury (as Mr. Justice Chagla himself seems to have done in *Inchya Fernandez's* case [2]) the result no doubt will be to deprive people tried in the High Court of the effective enjoyment of their right to trial by jury: but the remedy lies in the hands of the judges.

Their Lordships are not in agreement with the views expressed in the case of *Inchya Fernandez* [2]. There is no analogy between the hearing of an appeal under section 411-A and the hearing of a reference under section 307. As held by this Board in the case of *Ramanugrah Singh* v. *The King Emperor* [5], the powers of the court on such a reference are conditioned by the terms of the section, which imposes a special Code and is not concerned with appeals. The court hearing an appeal on the facts under section 411-A is in a similar position to a court hearing an appeal from the verdict of a jury under section 449, or an appeal from the verdict of a jury which has resulted in the passing of a death sentence under sections 374 and 418 (2), in both of which cases an appeal lies on the facts. In the latter class of cases it could hardly be suggested that the court would be justified in dismissing an appeal and confirming a sentence of death based on the verdict of a jury which the Court thought wrong, though not perverse.

As the High Court at Madras did not apply its mind to the question whether the verdict of the jury finding the appellants guilty was right or wrong but considered only whether it was reasonable, their Lordships will humbly advise His Majesty that this appeal be allowed and the appeal of the appellants against their conviction on the 3rd May, 1945, by the trial Judge to the High Court of Judicature at Madras be remitted to that Court to be disposed of according to law.

— *Appeal allowed*

## PRIVY COUNCIL

(Appeal from Rangoon)

*December* 19, 1946

LORD WRIGHT, LORD PORTER, LORD SIMONDS, LORD UTHWATT & SIR JOHN BEAUMONT.

CHITTAMBARAM

v.

THE KING EMPEROR

*Government of Burma Act* 1935, *ss.* 139 & 84—*Government of India Act*, 1935, *ss.* 93 & 223—*Establishment of special court—Jurisdiction.*

*When the Governor assumes all legislative powers vested in the legislature, under s.* 139 *of the Government of Burma Act,* 1935, *and enacts a Special Act it has the force and validity of an Act of the Legislature and is part of the law of Burma at every material time.*

*Under the emergency powers given to the Governor under s.* 139, *he can validly make the same sort of change which the Legislature could have done and so can legally change the pre-existing system of jurisdiction. Under his emergency powers the Governor could establish a new or collateral court and he cannot thereby be said to infringe the provisions of the proviso to s.* 139 *(1)*

*J. D. Casewell, K.C. & A.Pennell* for Applt.

*Sir David Maxwell Fyfe, K. C & D. A. Grant* for Crown.

### JUDGMENT

LORD WRIGHT. At the conclusion of the arguments in this appeal, their Lordships expressed their opinion that the appeal should be dismissed and stated that they would give their reasons later. This they now proceed to do.

This is an appeal from the judgment of Mr. Justice Dunkley, Acting Chief Justice of the High Court of Rangoon, dated the 26th March 1946 in which he reviewed and confirmed a judgment given on the 25th February, 1946, by U. Kyaw U, a special Judge appointed under the Special Judges Act, 1943 (Burma Act No. X of 1943) for Rangoon Town Dis-

5. [1946] M. W. N. 468: Cr. 76: L. R. 73 I. A. 174

trict. The said Special Judge had convicted the appellant under section 302 of the Indian Penal Code and sentenced him to death. This sentence was confirmed by the High Court.

The appellant petitioned His Majesty in Council for special leave to appeal both on the merits and on the question of the jurisdiction of the Special Judge. His submission on the latter point was that the Special Judge had no jurisdiction to try him and that the whole of the proceedings in his trial were illegal and void. Special leave to appeal was granted by Order in Council dated the 28th October, 1946, solely on the question of the jurisdiction of the Special Judge.

The Special Judges Act (Burma Act No. X of 1943) was an emergency and temporary Act enacted by the Governor of Burma at a time when the Japanese forces had occupied and taken military control of Burma, including Rangoon. The Act was in fact promulgated in Simla, to which place the Governor and the Government of Burma had retired during the hostile occupation. The preamble to the Act may usefully here be quoted :—

"Whereas it is expedient to provide for the appointment of Special Judges for the trial of offences during the present emergency, and to define their jurisdiction and powers;

"And whereas by Proclamation dated the tenth day of December, 1942, the Governor of Burma has assumed to himself all powers vested by or under the Government of Burma Act, 1935, in the Legislature or in either Chamber thereof;"

The Act gave the Governor power to appoint in any area to which the Act extends a Special Judge for the trial of accused persons under the Act. It defined among other things the requisite qualifications which a Special Judge had to possess. The Special Judge was empowered to try any offence punishable under any law for the time being in force and to pass any sentence authorised by law and to take cognisance of offences without the accused having been committed for trial. The Special Judge was given wide discretion as to the conduct of the trial. There was to be no appeal by a convicted person and no application for revision was to be entertained by any Court. The only provision for any revision was in the case of a death sentence, which was to be submitted for review by a Judge of the High Court nominated by the Governor. That Judge's decision was to be final. There were other provisions of the Act departing from the procedure prescribed by the Code, but subject to all these provisions the Code and any other law for the time being in force, so far as applicable, were to apply to the trials before a Special Judge appointed under the Act. Legal proceedings in respect of anything done or intended to be done in good faith under the Act were barred.

It was under this Act that the Judge who tried the appellant was appointed and under this Act that all the proceedings took place. The Act had been duly notified so that according to its tenor it came into force in Rangoon and was in force at the material time, having been duly extended from time to time by Resolutions of both Houses of Parliament. The appellant however claimed that the Special Act was wholly illegal and void and accordingly that his conviction and sentence should be set aside as having been *coram non judice*. In order to examine this contention it will be necessary to refer as briefly as possible to the legal position of the Courts in Burma.

The Government of Burma Act (26 Geo 5 c. 3) was passed by Parliament in 1935 to give effect to the separation of Burma from India and to define the Constitution of Burma. Part II of the Act vested the executive powers in the Governor. Parts III and IV dealt with the Legislature and it may be noted that certain sections (41 to 43) gave to the Governor particular powers to promulgate ordinances or enact laws under his discretionary powers and subject to the prescribed conditions. Section 34, however, saved the powers of Parliment to legislate for Burma, and also provided that except as expressly permitted by Act, the Legislature should not be empowered to make any law amending the Act or any Order in Council made under it, or any Rules made under it by the Secretary of State, or by the Governor in his discretion. Part VIII of the Act dealt with the High Court of Rangoon, called the High Court, which was to consist of a Chief Justice and such number of other Judges as His Majesty might deem necessary to appoint by warrant under the Sign Manual.

Section 84 has been much referred to in argument and may be quoted in full:—

'84. Subject to the provisions of this Act, to the provisions of any Order in Council made under this or any other Act and to the provisions of any Act of the Legislature, the jurisdiction of, and the law administered in, the High Court and the respective powers of the judges thereof in relation to the administration of justice in the court, including any power to make rules of court, and to regulate the sittings of the court and of members thereof sitting alone or in division courts, shall be the same as immediately before the commencement of this Act.''

This section in terms provided for the continuance of the legal system existing at the commencement of the Act, but the whole section was subject (inter alia) to the provisions of any Act of the Legislature.

Part XII (section 139) is of first importance for the decision of this appeal. It contains what are described as provisions in event of failure of constitutional machinery :

"139—(1) If at any time the Governor is satisfied that a situation has arisen in which the Government of Burma cannot be carried on in accordance with the provisions of this Act, he may by proclamation—

(a) declare that his functions shall, to such extent as may be specified in the Proclamation, be exercised by him in his discretion ;

(b) assume to himself all or any of the powers vested in or exercisable by any body or authority in Burma :

and any such Proclamation may contain such incidental and consequental provisions as may appear to him to be necessary or desirable to give effect to the objects of the Proclamation including provisions for suspending in whole or in part the operation of any provisions of this Act relating to any body or authority in Burma :

Provided that nothing in this subsection shall authorise the Governor to assume to himself any of the powers vested in or exercisable by the High Court, or to suspend, either in whole or in part the operation of any provisions of this Act relating to the High Court. . . ."

The remainder of the section contains certain requirements necessary for the continuance in force of such a Proclamation, in particular a Resolution of both Houses of Parliament. Special attention however should be drawn to subsection (4) of the section which is in the following terms :—

"(4) If the Governor by a Proclamation under this section assumes to himself any power of the Legislature to make laws, any law made be him in the exercise of that power shall, subject to the terms thereof, continue to have effect until two years have elapsed from the date on which the Proclamation ceases to have effect unless sooner repealed or re-enacted by Act of the Legislature, and any reference in this Act to Acts of the Legislature shall be construed as including a reference to such a law"

The conditions were satisfied. It is now necessary to set out the effect of the Proclamation issued at Simla on the 10th December, 1942. by the Governor of Burma. It was not contended by the appellant that the Proclamation was *ultra vires*. It begins by reciting that the Governor of Burma is satisfied that a situation has arisen in which the Government of Burma cannot be carried on in accordance with the provisions of the Government of Burma Act, 1935. As no suggestion is made that the Governor acts otherwise than in good faith, this declaration cannot be challenged, as the House of Lords held in *Liversidge* v. *Anderson* [1]. The Governor then goes on to declare as follows :

"Now therefore in the exercise of the powers conferred by section 139 of the Act, the Governor by this Proclamation

(a) declares that notwithstanding anything to the contrary in the Act all his functions under the Act shall be exercised by him in his discretion;

(b) assumes to himself all powers vested by or under the Act in the Legislature of Burma and all powers vested in either Chamber of the Legislature, but not so as to affect any power exercisable by His Majesty with respect to Bills reserved for the signification of His Majesty's pleasure or the disallowance of Acts :

(c) in exercising legislative powers under or by virtue of this Proclamation the Governor, acting in his discretion, shall prepare such Bills as he may deem necessary and declare as respects any Bill so prepared either that he assents thereto in His Majesty's name or that he reserves it for the signification of His Majesty's pleasure."

Their Lordships have omitted the reference to incidental or consequential provisions which deal with executive matters which in their Lordships' opinion are not material here. What is material is that the governor assumes all legislative powers vested in the Legislature. In this capacity he enacted the Special Act, which in all the circumstances has the force and validity of an Act of the Legislature, and is part of the Law of Burma at every material time.

It is clear that the Special Act has altered the jurisdiction of and the law administered in the High Court in several material aspects as compared with the position described in section 84, of the Act of 1935, but section 84, as already stated, was subject to the provisions of any Act of the Legislature. Now it is in their Lordships' judgment clear that by the Emergency Powers given to the Governor by section 139 of the Act of 1935, and in virtue of the Proclamation whereby he has (*inter alia*) assumed to himself the powers vested in the Legislature under the Government of Burma Act, he can validly and legally change the pre-existing system of jurisdiction at least to the extent which he has done in the Special Judges Act. Under the Emergency Powers of legislation he could validly make the same sort of changes which the Legislature could have made, so far as is relevant for the purposes of this case. The Special Judges Act is in truth an Act of the Legislature.

The appellant has sought to show that the Special Judges Act was incompetent on vari-

1. [1942] A. C. 206

ous grounds. That the Act altered the law cannot be questioned. The accused was under the Act deprived of the right to have the evidence taken at a public enquiry on oath before a magistrate, of a trial by jury presided over by a Judge of the High Court selected by the High Court, and of a right of appeal. But any one of these infringments of the subject's rights may have happened in wartime to any subject of any of the allies and may be justifiable in law as an emergency or temporary measure. The main specific objection taken on behalf of the appellant is that the Governor has infringed the provisions of the proviso to section 139 (1) of the Burma Act by assuming to himself powers vested in or exercisable by the High Court or has suspended the operation of the provisions of the Act in relation to the High Court. This in their Lordships' judgment involves a misconception. The Governor did not interfere with the High Court or its jurisdiction. There was nothing to give exclusive jurisdiction to the High Court. Indeed if that is material, the High Court was not able to exercise its jurisdiction; it was not functioning. But in any case there was no law to prohibit the legislative authority in Burma from establishing a new or collateral Court. It is obviously a fallacy to say that by establishing a new Court the Governor was assuming to himself the powers vested in the High Court. He was not making himself the Judge and he was entitled to vest the right to appoint the judges of the new Court, as he did under the Special Judges Act. Nor was he altering the jurisdiction of the High Court by establishing a new Court with its own jurisdiction. All the objections taken by the appellant fail in their Lordships' judgment. They are of opinion that the Special Judges Act was valid and authorised what was done under it.

Such are the reasons for the advice humbly given to His Majesty that the appeal should be dismissed.

—— *Appeal dismissed*

## PRIVY COUNCIL

(Appeal from Calcutta.)

*March* 27, 1947.

LORD UTHWATT, SIR MADHAVAN NAIR & SIR JOHN BEAUMONT,

**Mohamed Amin**

v.

**Jogendra Kumr Bannerjee & others.**

*Malicious prosecution—Suit for damages—Prosecution — What amounts to—Test — Cr.P.C. (V of* 1898), *Ss.* 190, 200 & 202.

*The foundation of the action for damages for malicious prosecution lies in the abuse of the process of the court by wrongfully setting the law in motion and it is designed to discourage the perversion of the machinery of justice for an improper purpose. The plaintiff must prove that the proceedings instituted against him were malicious, without reasonable and probable cause, that they terminated in his favour (if that be possible) and that he has suffered damage. Damages might be claimed in such an action under three heads,* (1) *damage to the person,* (2) *damage to property and* (3) *damage to reputation.*

*A criminal charge involving scandal to reputation or the possible loss of life or liberty to the party charged does necessarily involve damage and in such a case damage to reputation will be presumed.*

*The word 'prosecution' in the title of the action is not used in any techinal sense which it bears in criminal law,*

*To found an action for damages for malicious prosecution based upon criminal proceedings the test is not whether the criminal proceedings have reached a stage at which they may be correctly described as a prosecution; the test is whether such proceedings have reached a stage at which damage to the plaintiff results.*

*The mere presentation of a false complaint which first seeks to set the criminal law in motion will not* per se *found an action for damages for malicious prosecution. If the magistrate dismisses the complaint as disclosing no offence with which he can deal, it may well be that there has been nothing but an unsuccessful attempt to set the criminal law in motion, and no damage to the plaintiff results. But where the magistrate took cognizance of the complaint, examined the complainant on oath, held an inquiry in open court under S.* 202 *Cr.P.C. which the plaintiff attended, and at which he*

*incurred costs in defending himself, an action for damages for malicious proceedings would be well founded.*

*I.L.R.* 38 *Cal.* 880, *I.L.R.* 8 *Pat* 285, *I L.R.* 53 *All.* 771 & *I.L.R.* 13 *Rang.* 764, overruled.

*Sir Thomas Strangmen, K. C. Chas, Bagram & J.U.R. Jayakar*, for Applts.

*S. P. Khambatta, K. C. & H. J. Umregar*, for Respts.

## JUDGMENT

SIR JOHN BEAUMONT :—This is an appeal from a Judgment and decree of the High Court of Judicature at Fort William in Bengal dated 1st February, 1945, in appeal from its original jurisdiction, which affirmed a judgment and decree of that High Court dated 31st March, 1943, in its original jurisdiction, dismissing the appellant's suit for damages for malicious prosecution.

The question arising in this appeal is :—

At what stage will criminal proceedings instituted falsely and maliciously before a Magistrate under the provisions of the Indian Code of Criminal Procedure lay the foundation for a suit for damages for malicious prosecution ?

Before dealing with the facts of the case it will be convenient to notice the relevant provisions of the Code of Criminal Procedure. Section 190 so for as relevant enacts that except as hereinafter provided, any Presidency Magistrate, District Magistrate or Subdivisional Magistrate or other Magistrate therein mentioned may take cognizance of any offence (a) upon receiving a complaint of facts which constitute such offence. The exceptions referred to are not relvant to this appeal. Chapter 16 which is headed "Of complaints to Magistrates" contains the following provisions :

"Section 200. A Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath and the substance of the examination shall be reduced to writing and shall be signed by the complainant and also by the Magistrate :

Section 202 (1). Any Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance or which has been transferred to him under section 192, may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or, if he is a Magistrate other than a Magistrate of the third class, direct an inquiry or investigation to be made by any Magistrate subordinate to him, or by a police officer, or by such other person as he thinks fit, for the purposes of ascertaining the truth or falsehood of the complaint :

Provided that, save where the complaint has been made by a Court, no such direction shall be made unless the complainant has been examined on oath under the provisions of section 200.

(2-A) Any Magistrate inquiring into a case under this section may, if he thinks fit, take evidence of witnesses on oath.

Section 203. The Magistrate before whom a complaint has been made or to whom it has been transferred, may dismiss the complaint, if, after considering the statement on oath (if any) of the complaint and the result of the investigation or inquiry (if any) under section 202, there is in his judgment no sufficient ground for proceeding. In such case he shall briefly record his reasons for so doing."

Chapter 17 which is headed "Of the Commencement of Proceedings before Magistrates" lays dow the procedure when the Magistrate decides to issue process upon the complaint.

The relevant facts are these. In March, 1940, an agreement was entered into between the appellant and the 1st respondent which was contained in certain letters whereby the appellant agreed to sell certain property to a company which was to be formed by the 1st respondent. The appellant alleged that subsequently an oral agreement was made between himself and the 1st respondent containing certain provisions which went beyond the written agreement. The 3rd respondent copany was incorporated on the 16th April, 1940, in order to carry out the purchase from the appellant, and certain property was transferred by the appellant to such company. Subsequently the appellant took the view that the terms of the oral agreement which he had made with the 1st respondent had not been carried out and accordingly he refused to transfer the rest of the property included in the sale to the company. The dispute, as the learned trial judge in this suit has held, was on a purely civil character and it is unnecessary to discuss the merits of it. On the 16th September, 1940, the 2nd respondent, acting of behalf of himself and the 1st and 3rd respondents, filed a petition of complaint against the appellant in the court of the Police Magistrate at Sealdah, a suburb of Calcutta, under the provisions of section 190 of the Code of Criminal Procedure. The petition, after setting out the facts relating to the dispute, alleged that as the accused had refused to deliver the remainder of the properties agreed to be sold he had committed an offence under section 422 of the Indian Penal Code or section 406 of such Code in the alternative, and asked that he might be summoned to answer the said charge. The charge was duly regis-

tered by the Magistrate on the 16th September 1940, as a charge of cheating under section 420 of the Indian Penal Code, and it is not disputed that the charge was intended to be one of cheating under section 420 or criminal breach of trust under section 406.

The Magistrate, having taken cognizance of the complaint, forwarded it to a Mr. N. N. Mukherjee for enquiry and report under the provisions of section 202 of the Code. Mr. Mukherjee, by letter dated the 22nd September, 1940 gave the appellant notice that a criminal case had been instituted against him by the 2nd respondent, that it had been referred to the writer for inquiry, and that the inquiry would be held on the 25th October. For some reason, which has not been explained, Mr. Mukherjee did not hold the inquiry, and the Magistrate then referred the matter to a Mr. Banerjee who also did not hold the enquiry. Thereupon the Magistrate himself held the inquiry in open court. Notice of the inquiry was given to the appellant who attended with Counsel. At such inquiry the 1st respondent deposed that "we have brought this case for cheating as against the accused Md. Amin." On the 3rd December, 1940, after the completion of the inquiry, the Magistrate made an order, which concluded with these words:—

> "No case of cheating and for the matter of that no criminal case of any nature could be made out by the complainant."

He thereupon dismissed the complaint under s. 203 of the Code of Criminal Procedure.

On the 26th June 1941, the appellant filed this suit against the respondents. The only effective defendants were Nos. 1 to 3 (respondent Nos. 1, 2 and 3). No relief was claimed against defendants (respondents) Nos. 4, 5 and 6. The plaintiff claimed certain relief arising out of the civil dispute with the respondents Nos. 1-3 but this part of his action was dismissed by the trial Judge and was not the subject of appeal. The claim relevant to this appel was for Rs. 28,500 for damages for malicious prosecution, made up of costs incurred in his defence to the inquiry, damage to business and damage to reputation.

The case was tried by Mr. Justice Gentle on the Original Side of the High Court. The learned judge held that there was no reasonable and probable cause for the Criminal proceedings taken by the respondents, that there was not the slightest justification for filing a criminal complaint, and that the respondents were actuated by malice. The learned judge, however, felt himself bound to follow the case of *Golap Jan* v. *Bholanath Khettry* (1) and to hold that the plaintiff's suit failed since there had been in law no prosecution. The learned judge stated that in the absence of authority he would have been inclined to a contrary view and that the only damages which he would have awarded, had the suit succeeded, would have included Rs. 1,000 in respect of the costs to which the appellant had been put in connection with the filing of the complaint. He was not satisfied that the loss of business alleged in the plaint had been established, and he did not deal with the claim to damages for loss of reputation. Accordingly, by decree dated the 31st March, 1943, the plaintiff's suit was dismissed.

From that decree the plaintiff filed an appeal and on the 1st February, 1945, the appeal was dismissed. The learned Chief Justice who gave the leading judgment followed the case of *Golap Jan* v. *Bolauath Khettry* (1) and expressed the view that the case was rightly decided.

The first question which arises in this appeal is whether in *Golap Jan's* case (1) the correct principle was applied. The case has been followed in some courts in India and dissented from in others, and their Lordships will examine the position of the authorities. *Golap Jan's* case (1) was decided in the year 1911 by a division Bench of the Calcutta High Court presided over by Sir Lawrence Jenkins, the Chief Justice. A complaint had been made before a Magistrate by the defendant against the plaintiff of criminal breach of trust and the Magistrate had referred the matter for inquiry by the police under section 202 of the Code of Criminal Procedure and on receiving the report of the police, dismissed the complaint under s. 203 of the Code. The court held that in those circumstances no prosecution had commenced and accordingly no suit for malicious prosecution would lie. Reliance was placed by the court on the heading to Chapter 17. "The commencement of proceedings before Magistrates," and it was held that stage had never been reached. The court also relied on the decision of the English Court of Appeal in *Yates* v. *The Queen* [2] where the learned judges expressed the view that a prosecution could not be said to commence before a person was summoned to answer a complaint.

1. (1911) I.L.R. 38 Cal. 880
2. (1885) L.R. 14 Q.B.D. 648

But in that case the court was not dealing with a suit for malicious prosecution. It had to decide the question when a criminal prosecution had commenced within the meaning of section 3 of the Newspaper Libel and Registration Act, 1881.

*Golap Jan's* case [1] was followed in 1912 by a Single Judge in Madras in the case of *K. Sheik Meeran Sahib* v. *C. Ratnavelu Mudali* [3].

In the same year, namely 1912 in the case of *C. H. Crowdy* v. *L.O. Reilly* (4) a Division Bench of the Calcutta High Court consisting of Mr. Justice Mukerjee and Mr. Justice Beachcroft expressed the view that a suit for damages for malicious prosecution lay whenever the criminal law had been set in motion maliciously and without reasonable cause, and that it was not necessary to show that there had been a prosecution in the restricted sense in which that word is used in the Code of Criminal Procedure. To that extent, the reasoning in *Golap Jan's* case (1) was criticised, but it was distinguished upon the facts, because in the case of *Crowdy* v. *Reilly* (4) the complaint relied on as the foundation of the suit had not asked for the prosecution of the plaintiff but that security proceedings should be taken under section 145 or section 107 of the Code of Criminal Procedure, and the Magistrate had not directed any inquiry.

In the year 1914, the case of *Bishun Persad Narain Singh* v. *Phulman Singh* (5) came before a Bench of the Calcutta High Court consisting again of Mr. Justice Mookerjee and Mr. Justice Beachcroft. In that case the complaint charged the plaintiffs with certain acts of a criminal nature and prayed that security might be taken from them, as otherwise his life and property would be in danger. The Magistrate examined the complainant on oath who gave evidence as to the incidents mentioned in the petition and prayed that proceedings under s. 107 of the Code of Criminal Procedure might be taken against the plaintiffs. The Magistrate thereupon referred the matter to the Deputy Magistrate for inquiry and report. The Deputy Magistrate issued notice to the parties and examined a considerable number of witnesses. The Deputy Magistrate in due course submitted his report, and the Magistrate in charge accepted the report and refused to proceed with the complaint. The facts in that case appear to their Lordships in substance to raise the same question as arose on the facts in *Golap Jan's* case (1) since although the complaint only asked for security proceedings to be taken, it alleged facts on which it would have been open to the Magistrate to frame a criminal charge. The court, following their former decision, held that proceedings under s. 107 amounted to a prosecution for the purposes of a suit for malicious prosecution and they further held that under the circumstances of the case the prosecution had commenced. The court was not prepared to accept the reasoning in *Golab Jan's* case (1) and expressed the view that the prosecution—that act of the prosecutor which renders him liable to be cast for damages if malicious, and not based on reasonable and probable cause—commenced when the prosecutor had made his complaint to the Magistrate. The learned Judge further expressed the view that the view that action for damages for malicious prosecution was not a creature of any statute and that it was wide of the mark to investigate the precise meaning of the expression "prosecution" in the Code of Criminal Procedure, or the exact point of time, when a prosecution may be said to commence within the meaning of that Code.

*Bishun Persad Narain Singh's* case (5) was followed in the case of *Gur Saram Das* v. *Israr Haidir* (6) by a Bench of the Chief Court of Oudh where it was held that the essence of an action for malicious prosecution lies in the institution of criminal proceedings and their termination in the plaintiff's favour and that the proceedings started with the issue of the complaint. The Court disagreed with *Golap Jan's* case (1).

The views expressed in *Bishun Persad Narain Singh's* case (5) were approved by Benches of the Calutta High Court in *Narendra Nath De* v. *Joytish Chandra Pal* (7) and in *Rabindra Nath Das* v. *Jogendra Nath Deb* (8), though those cases were distinguishable on the facts as they were concerned with applications for sanction to prosecute.

On the other hand *Golap Jan's* case (1) has been followed by a Bench of the Patna High Court in the case of *Subhag Chamar* v. *Nand Lal Sahu* (9). by a Bench of the Allahabad High Court in the case of *Ali Muhammad* v. *Zakir Ali* (10), and by a Bench of the

3. (1912) I.L.R. 37 Mad. 181
4. (1912) 17 C.W.N. 555
5. (1914) 19 C.W.N. 935
6. (1927) I.L.R. 2 Luck. 746
7. (1922) I.L.R. 49 Cal. 1035
8. (1929) I.L.R. 56 Cal. 432
9. (1929) I.L.R. 8 Pat. 285
10. (1931) I.L.R. 53 All. 771

Rangoon High Court in the case of *Gowri Singh* v. *Bokka Venkanna* (11).

If *Golap Jan's* case (1) which was decided 36 years ago, had met with general approval in India, their Lordships might have been prepared to accept it on the principle of *stare decisis*, but, as the above discussion shows, the case has not met with universal approval. Nor can it be said to lay down any principle which may have served as a guide to conduct in other cases. No man can be heard to say that he lodged a false complaint maliciously without any justification in the belief that, though supported by his own oath, the Magistrate would have no difficulty in detecting its falsity and in dismissing it without calling upon the accused. Their Lordships think it right therefore to examine the principle upon which the case was based.

The action for damages for malicious prosecution is part of the common law of England, administered by the High Court at Calcutta under its letters patent. The foundation of the action lies in abuse of the process of the court by wrongfully setting the law in motion and it is designed to discourage the preversion of the machinery of justice for an improper purpose. The plaintiff must prove that the proceedings instituted against him were malicious, without reasonable and probable cause, that they terminated in his favour (if that be possible), and that he has suffered damage. As long ago as 1698 it was held by Holt C. J. in the case of *Savile* v. *Robberts* (12) that damages might be claimed in such an action under three heads, (1) damage to the person, (2) damage to property and (3) damage to reputation, and that rule has prevailed ever since. That the word "prosecution" in the title of the action is not used in the technical sense which it bears in Criminal Law is shown by the fact that the action lies for the malicious prosecution of certain classes of civil proceedings, for instance falsely and maliciously presenting a petition in bankruptcy or a petition to wind up a company *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre* (13). The reason why the action does not lie for falsely and maliciously prosecuting an ordinary civil action is, as explained by Bowen, L.J. in the last mentioned case, that such a case does not necessarily and naturally involve damage to the party sued. A civil action which is false will be dismissed at the hearing. The defendants' reputation will be cleared of any imputations made against him, and he will be indemnified against his expense by the award of costs against his opponent. The law does not award damages for mental anxiety, or for extra costs incurred beyond those imposed on the unsuccessful party. But a criminal charge involving scandal to reputation or the possible loss of life or liberty to the party charged does necessarily and naturally involve damage and in such a case damage to reputation will be presumed.

From this consideration of the nature of an action for damages for malicious prosecution emerges the answer to the problem before the Board. To found an action for damages for malicous prosecution based upon criminal proceedings the test is not whether the criminal proceedings have reached a stage at which they may be correctly described as a prosecution; the test is whether such proceedings have reached a stage at which damage to the plaintiff results. Their Lordships are not prepared to go as far as some of the courts in India in saying that the mere presentation of a false complaint which first sees to set the criminal law in motion will *per se* found an action for damages for malicious prosecution. If the Magistrate dismisses the complaint as disclosing no offence with which he can deal, it may well be that there has been nothing but an unsuccessful attempt to set the criminal law in motion and no damage to the plaintiff results. But in this case the Magistrate took cognisance of the complaint, examined the complainant on oath, held an inquiry in open court under section 202 which the plaintiff attended, and at which as the learned judge has found, he incurred costs in defending himself. The plaint alleged the institution of criminal proceedings of a character necessarily involving damage to reputation and gave particulars of special damage alleged to have been suffered by the plaintiff. Their Lordships think that the action was well founded, and on the findings at the trial the plaintiff is entitled to judgment.

As already noted the learned judge was prepared, to allow Rs. 1000 as special damage to property, but did not consider the question of damage to the reputation of the plaintiff which the plaint assessed at Rs. 25,000. Before this Board, however, counsel for the appellant stated that he did not ask for more than nominal damages and was willing to accept such sum as the Board might award.

11. (1935) 1 L.R. 13 Rang. 764
12. (1698) 1 Ld. Rayam 374
13. (1883) L.R. 11 Q.B.D. 674

The parties did not ask for a reference as to damages and in the circumstances their Lordships are prepared to take the course which was taken by the Board in the case of *Nawab Sidhee Nuzur Ally Khan* v. *Rajah Ojoodhyaram Khan* (14) and to assess the damages themselves. They accept the figure of Rs. 1,000 which the learned judge would have awarded as special damage, and they assess general damage to reputation at Rs. 100.

Their Lordships will therefore humbly advise His Majesty that this appeal be allowed, that the decree of the Appeal Court dated the 1st February, 1945, be set aside and that the decree of Mr. Justice Gentle dated the 31st March, 1943, also be set aside and that judgment be entered for the appellant against respondents 1 to 3 for the sum of Rs 1,100. Respondents Nos. 1-3 must pay the costs of this appeal and of the appeal in India and half of the appellant's costs of the trial.

— *Appeal allowed.*

Criminal Revision Case No. 725 of 1946
(Criminal Revision Petition No. 694 of 1946)

*November*, 28, 1946

YAHYA ALI, J.

**Narayanaswami Mudali v. Emperor**

*Kerosene Control Order*, 1942, *Cl.* 12—*Dealer —Who is.*

*Where the evidence was that the petitioner conducted a solitary transaction of sale, that does not constitute him a retailer, nor does it constitute the transaction a business ta amount to his carrying on business as retail dealer within the meaning of Cl.* 12 *of the Kerosone Control Order*, 1942.

*Carrying on a business always connotes conducting of more transactions than one by way of trade or commerce and the concept of dealer also has in it implict the notion that he carries on transactions of purchase, sale or distribution as a business and both these expressions exclude the idea of a solitary transaction of purchase or sale constituting either a business or constituting the person making the sale a retail dealer.*

Petition under Sections 435 and 439 of the Code of Criminal Procedure 1898 praying the High Court to revise the Judgment of the Court of Sessions North Arcot Division at Vellore dated 15-3-1946 and passed in Criminal Appeal No 14 of 1946 preferred against the Judgment of the Court of the Additional 1 Class Magistrate ot Ranipet in C.C. No. 123 of 1945.

14. (1865) 10 M.I.A. 540

*A. Nagarajan*, for Petr.

*Public Prosecutor* (*V. L. Ethiraj*) for Crown.

ORDER

The petitioner has been convicted of an offence under section 81 (4) of the Defence of India Rules for violating clause 12 of the Kerosene Control Order, 1942 which prescribes that no person shall carry on business as a retail dealer unless he has been registered as such under the Kerosene Control Order by the Collector having jurisdiction over the place where the retail dealer carries on business. A dealer has been defined in the control Order itself as a person dealing in the purchase, sale or distribution of kerosene. In the present case the only evidence is that the petitioner conducted a solitary transaction of sale of one tin of kerosene but that does not constitute him a retailer nor does it constitute the transaclion a business to amount to his carrying on business as retail dealer within the meaning of clause 12. Carrying on a business always connotes conducting of more transactions than one by way of trade or commerce and the concept of dealer also has in it implicit the notion that he carries on transactions of purchase, sale or distribution as a business and both these expression exclude the idea of a solitary transaction of purchase or sale constituting either a business or constituting the person making the sale a retail dealer. The petition is allowed and the conviction is set aside and the fine if paid will be refunded.

N.T.R. — *Petition allowed.*

Criminal Revision Case No. 642 of 1946
(Criminal Revision Petition No. 611 of 1946)

*February* 21, 1947

YAHYA ALI, J.

**Tirumal Raju v. Emperor**

*Cr. P. C.* (*V of* 1898) *Ss.* 423, 439 (3) & 545 *—Sentence—Appellate Court — Powers — Order under S.* 545*—Who can pass.*

*The petitioner was convicted under S.* 498, *Penal Code by a Sub Magistrate and sentenced to rigorous imprisonment for four months. On appeal the joint magistrate while confirming the conviction converted the sentence to a fine of Rs.* 1000 *and directed that out of the fine if collected Rs.* 500 *should be paid to the husband of the woman.*

Held, *that the appellate court has no power to impose a punishment higher than what the court of first instance can do and the*

*Joint magistrate cannot levy a higher fine than Rs.* 200 *which is the maximum that could have been imposed by the trial court.*

*But the fine was maintained in exercise of the revisional powers of the High Court under S.* 439 (3).

*Any criminal court which imposes a fine or any criminal Court which confirms in appeal the sentence of fine can make an order under s.* 545 *Cr.P.C.*

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Joint Magistrate of Chandragiri in C. A. No. 2 of 1946 dated 19-1-1946 (C.C. No. 270 of 1945 on the file of the Court of the Stationary Sub-Magistrate of Puttur).

*V. T. Rangaswami Ayyangar* for Petr.

*V. Rajagopalachari* for P.W. 2

*Public Prosecutor* (*V. L. Ethiraj*) for Crown.

ORDER.

The petitioner was convicted by the Stationary Sub Magistrate, Puttur, under section 498, I. P. C. and sentenced to rigorous imprisonment for four months. On appeal the Joint Magistrate, Chandragiri, while confirming the conviction converted the sentence of imprisonment to a fine of Rs. 1000 and further directed that out of the fine, if collected Rs. 500 should be paid to P.W. 1 by way of compensation under s. 545, Criminal Procedure Code. Both the courts have found that inducement was offered to the wife of P.W. 1, before she was enticed by the petitioner from the house of her husband. It is in evidence that some time prior to the occurrence the petitioner told P. W. 1's wife "It is not possible to come and go like this, come along. I will take you and keep you as my concubine". This amounts to saying that he could not continue the liason in the house of P. W. 1 any longer and that if she wanted to maintain the friendship she should agree to desert her husband's roof and go over to the petitioner and live with him and in that case he undertook to keep her as his mistress. I cannot conceive of a stronger inducement than this to amount to enticement.

The next contention raised is that the Joint Magistrate who for the first time levied a fine of Rs. 1000 was not competent to do so as the appellate court has no power to impose a punishment higher than what the Court of first instance can do. There is force in this contention and I agree that the Joint Magistrate should not have levied a higher fine than Rs. 200, which is the maximum fine that could have been imposed by the trial Court. But under sub-section (3) of s. 439, this court as a court of revision can inflict the punishment which might have been inflicted by the First class Magistrate. In exercise of the powers conferred under s. 439, I impose a fine of Rs. 1,000 on the petitioner for the offence committed by him.

Lastly with regard to the order made under s 545, it is contended that only the trial Court could make such an order or an appellate court which dealt with the sentence of fine imposed by the trial court and that an appellate court which for the first time imposed a sentence of fine could not make such an order. This contention is altogether untenable. It empowers any criminal court which imposes a fine or any criminal court which confirms in appeal the sentence of fine to make the order contemplated in that section. I do not see any circumstantial explanation of the petitioner's crime. He was holding a responsible position as Village Munsif and in that capacity played upon the confidence of an unsophisticated person viz. P.W. 1's wife. It is brought to my notice that on account of the overwhelming sense of humiliation, the husband has since died and the woman has borne an offspring to the petitioner.

The petition is dismissed. The conviction and sentence and the order under s. 545 Criminal Procedure Code, are confimed.

N.T.R. —— *Petition dismissed*

Criminal Revision Case No. 1080 of 1946

(Case referred No. 40 of 1946)

*February* 27, 1947

YAHYA ALI, J.

**Emperor**

**v.**

**Oomayan** *alias* **Muthiah Thevan**

*Criminal Procedure Code* (*V of* 1898), *S.* 341 *— Deaf and Dumb accused—Penal Code— S.* 379*—Offence under—Conviction.*

*In the case of a deaf and dumb person who is unable to understand the proceedings of the Court, it is not safe to act on mere gestures to infer that he was the thief or to hold that he admitted the offence in Court and convict the accused.*

Case referred for the orders of the High Court under section 341 of the Criminal Procedure Code by the Stationary Sub-Magistrate of Uttamapalayam.

*Public Prosecutor* (*V. L. Ethiraj*) for Crown.

ORDER.

The accused has been convicted under s. 379 of the Indian Penal Code by the Sub Magistrate of Uthamapalayam and under s. 341 of the Code of Criminal Procedure the case has been submitted to this court as the accused is a deaf and dumb person aud was as such unable to understand the proceedings. The conviction is based upon the finding that the accused, by signs admitted the offence in court and that before the police he had also by signs pointed out the stolen property. It is not easy to see how even with the help of the brother of the accused who is said to have helped the court in interpreting the court's proceedings to the accused, it was possible to come to the conclusion that the accused admitted all the ingredients required to constitute an offence under s. 379 of the Indian Penal Code in an unequivocal manner. Even with regard to the pointing out of the stolen property it would only be by gestures which could conceivably admit of theories other than that he himself had stolen the property or concealed it there with the knowledge that it was stolen. In the case of a person of this description I do not consider it safe to act on mere gestures of this kind either to infer that he was the thief or to hold that he admitted the offence in court. The conviction is set aside and the accused to be set at liberty forthwith.

N.T.R. — *Conviction set aside.*

## PRIVY COUNCIL

(Appeal from a Court-Martial holden at Calcutta)

LORD THANKERTON, LORD PORTER, LORD SIMONDS, MADHAVAN NAIR & SIR JOHN BEAUMONT

**Mohammed Yakub Khan**

v.

**The King Emperor**

*Army Act (VIII of 1911)—Court Martial—Appeal to Privy Council.*

*The jurisdiction of the Judicial Committee of the Privy Council is purely statutory, resting on the Judicial Committee Act of 1833 and the amending Acts. Where it is sought to bring an appeal from an Order of a Court established under the provisions of an Act framed long after the Act of 1833, the competence of appeal must be determined by considering, not whether there are express words taking away prerogative, but whether there ever was the intention of creating the tribunal with the ordinary incident of an appeal to the Crown. Applying this test, the Indian Army Act intended the findings of a Court Martial as and when confirmed by the proper confirming officer to be final, subject only to the power of revision for which the Act provides.*

Petition for special leave to appeal.

JUDGMENT.

LORD THANKERTON: The jurisdiction of the Judicial Committee of the Privy Council is purely statutory, resting on the Judicial Committee Act of 1833 and the amending Acts. The material provision is in section 3 of the Act of 1833, which reads as follows: "All appeals or complaints in the nature of appeals whatever, which either by virtue of this Act, or of any law, statute or custom, may be brought before His Majesty or His Majesty in Council from or in respect of the determination, sentence, rule or order of any court, judge or judicial officer, and all such appeals as are now pending and unheard, shall from and after the passing of this Act be referred by His Majesty to the said Judicial Committee of His Privy Council, and such appeals, causes and matters shall be heard by the said Judicial Committee, and a report or recommendation thereon shall be made to His Majesty in Council for his decision thereon" as therein provided.

Where it is sought to bring an appeal from an Order of a Court established under the provisions of an Act framed long after the Act of 1833, the competence of the appeal must be determined by the test laid down by Lord Cairns in *Theberge and Another* v. *Loudry* (1) where Lord Cairns says this "In other words their Lordships have to consider, not whether there are express words here taking away prerogative, but whether there ever was the intention of creating this tribunal with the ordinary incident of an appeal to the Crown." Applying this test, their Lordships are clearly of opinion that the Indian Army Act intended the findings of a Court Matrial as and when confirmed by the proper confirming officer, to be final; subject only to the power of revision for which this Act provides. There is no room for an appeal to His Majesty in Council consistently with the subject matter and scheme of the Act.

Their Lordships will, therefore, humbly advise His Majesty that the Petition should be dismissed.

— *Petition dismissed.*

1. (1877) 2 App. Cas. 102 (108)

FEDERAL COURT

Appellate Jurisdiction

Cr. Apps. Nos. I to IV of 1947 & IV to IX of 1946
On appeal from the High Courts of Bombay Madras & Sind.

*April 11, 1947*

SIR PATRICK SPENS C.J., SIR MD. ZAFRULLA KHAN & H. J. KANIA, JJ.

J. K. GAS PLANT MANUFACTURING CO., (RAMPUR) LTD. & OTHERS.

v.

THE KING EMPEROR.

*Government of India Act, 1935,—s. 102 (4)—s. 40 (1) of old Act—If mandatory—Scope of—Ordinances after proclamation of emergency under India and Burma (Emergency Provisions) Act, 1940—Operation of—Trial of offence under Defence Rules after 30—9—1946—Legality.*

*Having regard to the application of the provisions of the General Clauses Act to the Defence of India Act and the rules made thereunder, the authority empowered to make orders under rule 81 (2), Defence of Indian Rules and referred to therein as the Central Government is in fact the Governor-General in Council. There is no substantial difference whether the phrase 'Governor-General in Council' is used or the phrase 'Central Government.' 'Central Government' has to be construed as meaning "Governor-General in Council."*

*The provisions of s. 40 (1) of the old Government of India Act (continued in force as one of the transitional provisions of the 1935 Act) cannot be held to be mandatory and an order of the Central Government not complying with the requirements of s. 40 (1) in that it is not expressed to be made by the Governor-General in Council is not invalid for that reason.*

*The old and present Constitution Acts of India must be given a large and liberal construction and no narrow construction applicable in respect of a body or corporation created by statute should be put on any provision in the Acts.*

*S. 40 (1) is not a sub-section prescribing a manner and form in which orders of the Governor-General must be made to be valid. It is only a directory provision as to how orders and proceedings already made should be expressed.*

*The emergency on the happening of which an Ordinance can be promulgated is separate and distinct from and must not be confused with the emergency which occasioned the passing of the Act and the clear effect of the words of India and Burma (Emergency provisions) Act, 1940 on s. 72 is that Ordinances promulgated under that sub section during the period specified in s. 3 of the Act are subject to no time limit as regards their existence and validity, unless imposed by the Ordinance themselves, or other amending or repealing legislation, whether by Ordinance or otherwise.*

*The trial of a case for an offence under s. 81 (4) Defence Rules (read with the provisions of a Control Order) can be continued after (the 30th September 1946) the expiration of the period of six months after the Proclamation of emergency under s. 102 has ceased to operate.*

*The effect of sub-section 4 of s. 102 as amended by s. 5 of the India (Central Government and Legislature) Act, 1946, is that any provision of the Defence of India Act purporting to deal with Provincial subjects has to cease to have effect on the 30th September 1946 except to the extent to which any saving provision can be found in sub-section (4) itself. The words "except as respect things done or omitted to be done" in sub-section (4) of s. 102 authorises a continuation of a prosecution for an offence under R. 81 (4) Defence Rules after 30th September 1946.*

63 *T.L.R.* 6 followed.

*M. C. Setalvad*, Senior Advocate, Federal Court with him *J. M. Thakore* instructed by Rajinder Narain, Agent for Appellants in Cr. App. Nos. 1 & 2 of 1947.

*Sir Noshirwan P. Engineer*, Advocate, General of India, with him *G. N. Joshi* & *B. D. Boovariwala*, instructed by K. Y. Bhandarkar, Agent for Respt.

*M. C. Setalvad*, with him *J. M. Thakore* instructed by Vasant Lal D. Mehta, Agent through Rajinder Narain, Agent for Appellants in Cr. App. 3 of 1947.

*C. K. Daphtary*, Advocate General, Bombay with him *G. N. Joshi*, instructed by Ganpat Rai, Agent, for Respt.

*M. C. Setalvad* with him *J. M. Thakore* instructed by Naunit Lal, Agent, for Appellant in Cr. App. 4 of 1947.

*Fatechand Asudomal*, Advocate General Sind with him *Narain Andley* instructed by Ranjit Singh Narula Agent, for Respt.

*Sri Alladi Krishnaswami Ayyar*, Senior Advocate, Federal Court with him *K. Subramanyam* & *Alladi Kuppuswami Iyer* instructed by Naunit Lal, Agent, for Appellants in Cr. App. No. 4 of 1946.

*K. Rajah Iyer*, Advocate General of Madras with him *D. Narasa Raju* instructed by Ganpat Rai, Agent, for Respt.

*N. Rajagopala Iyengar* instructed by *Naunit Lal* Agent for Appellants in Cr. Apps. Nos. 5 to 9 of 1946.

*K. Rajah Iyer* with him *D. Narasa Raju* instructed by Ganpat Rai, Agent for Respt.

*Sri Noshirwan P. Engineer* Advocate General of India with him *G. N. Joshi*, instructed by K. Y. Bhandarkar, Agent, for Intervener.

JUDGMENT

SPENS, C. J.—This group of appeals all arise out of proceedings initiated against the various appellants for alleged offences contravening orders or regulations made under the war emergency legislation. As certain submission against such proceedings being allowed to be continued were sought to be established in all the cases and other submissions with like purpose were advanced in more than one case, it was thought convenient that all the appeals should be called on and dealt with by this cout together. All counsel agreed to this course. For purposes of this judgment and to clarify the grounds of the decision in each case, we shall deal at length with the arguments submitted on behalf of the appellants and record the decisions of the court and the reasons therefor in Criminal Appeal No. 1 of 1947. Thereafter we shall apply the results of such decisions to each of the other appeals.

*Criminal Appeal No. 1 of 1947*

This appeal arises out of the initiation of proceedings on the 19th February 1946 against five accused before a special tribunal known as the Second Lahore Tribunal, in respect of certain acts of the accused alleged to have been committed during the month of November 1944 in contravention of the provisions of clauses 5 and 8 of the Iron and Steel (Control of Distribution) Order, 1941. Such contraventions were alleged to constitute offences punishable under certain of the Defence of India Rules, and in respect of them the said Tribunal on the 14th October 1946, despite previous lengthy arguments submitted on behalf of the accused against the legal existence of the Tribunal and of any jurisdiction in the matters, proceeded to frame charges against the accused. The accused are :—

1. Juggilal Kamlapat, Gas Plant Manufacturing Company, Limited, Rampur, through Kailashpat Singhania, Kamla, Tower, Cawnpore.

2. Juggilal Kamlapat (Rampur) Limited, through Kailashpat Singhania, Kamla Tower, Cawnpore.

3. Kailashpat Singhania, Kamla Tower Cawnpore.

4. B. B. Mathur, Bandi Bilas, Arya Nagar, Cawnpore.

5. S.K. Seth, Manager, Juggilal Kamlapat Gas Plant Manufacturing Company (Rampur) Limited, Kamla Tower, Cawnpore. The first two accused both claim to be foreign corporations being registered or incorporated, in and according to the law of the State of Rampur. At all material times the second accused company was acting as the managing agents of the first accused company. The third accused was the Chairman and the fourth accused a Director of both the accused companies, whilst the fifth accused was the Manager of the first accused company. The transactions in respect of which the charges were ultimately framed against the accused may be shortly described as follows:—The first accused company was duly authorised by licence to acquire in Delhi during the months of July and August 1943 and consign to Rampur to be used in specified manners certain iron and steel. From these consignments, it was alleged that some portion was then improperly moved to Bombay and there in November 1943 some 25 tons was sold to unauthorised persons. Such disposal of these 25 tons was alleged to contravene the provisions of clauses 5 and 8 of the Iron and Steel (Control of Distribution) Order, 1941, (hereinafter referred to as "the Distribution Order"). The Tribunal framed charges against the accused on the 14th October 1946 and thereupon the appellants (being accused Nos. 1, 2 and 3) filed an application in revision before the High Court of Judicature at Bombay. This application of the appellants was heard by Stone, C. J., and Lokur, J., who on the 20th December 1946 dismissed the application in revision and directed the proceedings before the Tribunal to continue, but granted a certificate under s. 205 (1) of the Government of India Act, 1935, (hereafter referred to as "the Constitution Act").

One of the points taken on behalf of the appellants before the High Court at Bombay and the first point taken on their behalf in this Court was that the Distribution Order was not and never had been a vaild Order. The grounds for this submission can be summarised as follows:

The Distribution Order which was notified in the official Gazette of 26th July 1941, was purported to be made under powers conferred by sub-rule (2) of Rule 81 of the Defence of India Rules, which authorised "the Central

Government" to provide by order for certain matters including without doubt, control of the user and disposal of iron and steel. At the time when the Distribution Order was made the words "or the Provincial Government" had not been introduced into sub-rule (2) of Rule 81. Rule 81 was itself made under the rule making powers conferred by s. 2 of the Defence of India Act, 1939, upon "the Central Government". The Defence of India Act, 1939, was a Central Act to which the provisions of the General Clauses Act (X of 1897) applied. By Rule 3 (1) of the Defence of India Rules it is provided that the General Clauses Act, 1897, shall apply to the interpretation of the Defence of India Rules as it applies to the interpretation of a Central Act.

By the General Clauses Act (X of 1897) as modified by the Government of India (Adaptation of Indian Laws) Order, 1937, it is provided that

'(8ab) 'Central Government' shall—

(a) in relation to anything done or to be done after the commencement of Part III of the Government of India Act, mean the Federal Government."

"(18a) 'Federal Government' shall

(a) in relation to anything done or to be done after the commencement of Part III of the Government of India Act, 1935 but before the establishment of the Federation, mean, as respects matters with respect to which the Governor General is by and under the provisions of the said Act for the time being in force required to act in his discretion, the Governor-General and as respects other matters, the Governor-General in Council."

Having regard to the application of these provisions of the General Clauses Act (X of 1897) to the Defence of India Act, 1939, and the rules made thereunder, it is clear that the authority empowered to make orders under r. 81 (2) and referred to therein as the Central Government is in fact the Governor-General in Council.

By virtue of Ss. 312, 313 and 417 of the Constitution Act, s. 40 (1) of the Old Government of India Act, set out in the Ninth Schedule to the Constitution Act, is in force as one of the Transitional Provisions of the Constitution Act. It has been strongly argued before us that the Distribution Order does not comply with the requirement of s. 40 (1). It was contended that under s. 40 (1) it is imperative that all orders and proceedings made by the Governor-General in Council should fulfil three requirements :

(1) that they should be made by the Governor-General in Council.

(2) that they should be expressed to be so made, and

(3) that they should be signed by the proper person therein mentioned.

It was submitted that the Governor-General in Council is a legal entity created by and deriving its existence and all its powers from Statute, including the powers of making orders, and that the statutory provisions relating to the exercise of such powers must be scrupulously and in every detail observed, if the orders are to be legally valid. Only therefore when all the three requirements above set out are complied with, can the order be held to be validly made.

Section 40 is as follows:—

40—*Business of the Governor-General in Council*

(1) All orders and other proceedings of the Governor-General in Council shall be expressed to be made by the Governor-General in Council and shall be signed by a Secretary to the Government of India or otherwise as the Governor General in Council may direct, and, when so signed, shall not be called into question in any legal proceeding on the ground that they were not duly made by the Governor-General in Council.

(2) The Governor-General may make rules and orders for the more convenient transaction of business in his Executive Council, and, every order made or act done, in accordance with such Rule and orders, shall be treated as being the order or the act of the Governor-General in Council."

The Distribution Order on the face of it purports to be made by "the Central Government'. It has been signed by a Secretary to the Government of India. It was therefore argued that while the condition as to signature may have been fulfilled the condition about the order being expressed to be made the Governor-General in Council has not been complied with.

In support of this contention strong reliance was placed on the wording of Ss. 17 and 59 of the Constitution Act. Counsel drew attention to s. 175 of the Constitution Act corresponding to s. 30 of the Government of India Act of 1915, with reference to orders passed by the Provincial Governors. It was pointed out that the Old Section 30 has been construed to be imperative. It has been held that a contract has to be made in the name of the Provincial Government and also signed by the authorised person. Reliance was placed in this connection on *Secretary of State for India in Council* v. *Bhagavandas Goverdhanadas* (1), and the observa-

1. (1938) Bom. L.R. 19

tions in particular at page 28. That case, however, is not helpful because the initial correspondence, which was contended to contain the contract, was not carried on in the name of the Secretary of State or with his authority. At a later stage the Government passed a resolution accepting the transaction, but that was a one sided move. In pursuance of that resolution when a contract form was offered to the other party he refused to accept the transaction. Therefore, at no stage was an offer made in the name of the Secretary of State and accepted by the other party. Similarly, in *Krishnaji Nilkant Pilkar* v. *Secretary of State for India* (2), the employee was never employed in the name of the Secretary of State. Counsel further relied strongly on Maxwell on the Interpretation of Statutes (9th Edition) at page 376 (last three lines), where the imperative meaning of the word 'shall' is stated in the following words :

> "Where a company or public body is incorporated or established by statute for special purposes only and is altogether the creature of statute law, the prescriptions for its acts and contracts are imperative and essential to their validity."

It must be noticed, however, that these observations are in respect of a body or corporation created by Statute for certain purposes only. It has also been held that in such cases strict compliance with the conditions must be made. That is natural because the Act creating the body is its sole charter and the latitude of action is controlled by the words of the charter. We are however, by no means satisfied that this criterion must be strictly applied to an Act passed to establish the Government of a Dominion or in this case India. From *Edwards* v. *The Attorney-General of Canada* (3) and *British Coal Corporation* v. *The King* (4) it appears that no narrow construction such as might be applicable to the affairs of an English parish is to be applied to an Act passed to ensure the peace, order and good government of a British Colony. Still less, in our opinion, should any such narrow construction be put upon any provisions of the old or present Constitution Act of India. Such Acts must be given a large and liberal constructions.

In further support of their contentions numerous other cases in the reports of the United Kingdom and of British India were cited to us on behalf of the appellants. We do not propose to deal with such other cases on other statutes in respect of other statutory bodies. The general principles on which courts have to decide such cases as this, where a statute requires that something shall be done in a particular manner without expressly declaring what shall be the consequences of non-compliance, are in our judgment accurately and conveniently set out in s. 3 "Imperative or Directory" on pages 372 to 374 of Maxwell. It is to be noted that the question whether the provision is affirmative or negative has a material bearing. If it is in the affirmative, it is a weaker case for reading the provisions as mandatory *Vita Food Products Inc.* v. *Unus Shipping Company Ltd.* (5). Further according to this passage in Maxwell, we are in our judgment entitled to consider certain questions :—First, would the whole aim and object of the Legislature in constituting the Governor-General in Council and conferring the far reaching powers which have by statute been conferred on the Governor-General in Council be plainly defeated if the provisions of s. 40 (1) were not held to imply a prohibition to allow validity to orders of the Governor-General in Council expressed otherwise than as provided in sub-section (1) of s. 40? Secondly, would the construction contended for by the appellants involve general inconvenience and injustice to innocent persons without promoting the real aim and object of the Constitution Act? Thirdly, is the construction suggested in conformity with the whole scope and purpose of the Constitution Act? In our opinion the answer to the first qustion, so far as this case is concerned, is clearly in the negative. It is to our minds inconceivable that if such overriding, if not vital, importance was intended by Parliament to be put upon the manner and form in which orders of the Governor-General in Council were to be expressed to be made, the provisions of s. 40 (1) would not have been enacted originally in the old Constitution Act and in the Transitional Provisions of the Constitution Act in more absolute and emphatic terms and reinforced by clear enactments, as to the complete invalidity of orders nor strictly complying with the requirements of s 40 (1). As to the second question, no one can possibly doubt the immense general inconvenience and injustice which would be caused to inncent persons, if the appellant's construction of s. 40 (1) were held to be justified. As to the third, after the most careful

2. (1917) Bom. L.R. at p. 807
3. (1930) A.C. 124 at p. 136
4. (1935) A.C. 500 at p. 518-519
5. (1939) A.C. 277

examination of the scope and purpose of the Act, we cannot conclude that its scope and purpose demand a construction giving a mandatory rather than a directory effect to these words in s. 40 (1). On this reasoning we prefer to approach the question feeling ourselves not compelled, so far as authorities are concerned, to put either a mandatory or directory construction on the provision in question, but free to construe it having regard to the ordinary meaning to be put upon the sub section itself and the context in which the provision is found. In the first place, it must be noticed, dealing with sub-section (1) of s. 40 alone, that the provision that all orders of the Governor General in Council are to be expressed to be made by the Governor General in Council does not define how orders are to be made but only how they are to be expressed. It appears to imply that the process of making an order proceeds, or is something different from, the expression of it. It does not say that orders can only be made by "being" or "if", expressed to be made by the Governor General in Council. Secondly, it must be noticed that these provisions are not confined to orders only. They also include 'proceedings'. In the case of 'proceedings' it is still more clearly a method of recording proceedings which have already taken place if they are to be valid. Thirdly, there is the addition of the provision relating to the signature by a Secretary to the Government of India or other persons indicated, which clearly indicates that it is a provision as to the manner in which a previously made order should be embodied in publishable form. Lastly, there is the result indicated in the last words of the sub section, that if the previous directions, either both the direction as to the expressing of orders and proceedings and that as to signature or the latter as to signature only (whichever be the true construction) are complied with, the orders and proceedings shall not be called into question in a court of law on one ground only. All these points in the sub-section itself indicate that it is not a sub-section prescribing a manner and form in which orders of the Governor General must be made to be valid. It may be that there are two possible constructions of the sub section. Either the whole is to be read together as one provision prescribing the manner in which orders and proceedings of the Governor-General in Council are to be expressed and signed, for the limited purpose of preventing them being called in question in courts of law as not duly made by the Governor-General in Council, or the directions as to manner of expression are separate from those as to the signature and it is the signature only of the appropriate person which gives the necessary protection against investigation in court of law. Clearly, if the first construction be the right one, the purpose of the sub-section is a very limited one and does not go near to forming any sound basis for the submissions of of the appellants. They have to rely on the second and maintain that the provision as to the expression is completely separate and mandatory by itself, though unfortunately coupled with provisions as to signature which clearly are inserted for very limited purposes. In our judgment it is not necessary to decide which is the true construction of the sub-section, for, if we accept the view put forward by the appellants that the provision as to the method of expression of orders of the Governor-General should be read as a separate provision, we cannot read it, placed as it is in close juxtaposition with the provision as to signature and its limited purpose, as a separate imperative provison as to the only valid method in which orders can be made, nor give it in its context any force beyond that of a directory provision as to how orders and proceedings already made should be expressed.

That this is the right view is in our judgment strongly reinforced by a consideration of sub-section (2) of the same section which is clearly not a mandatory provision. In such context it would be surprising to find one independent mandatory provision.

For all these reasons in our judgment the provision cannot be held to be mandatory and given the construction and effect claimed by the appellants.

We would further add this, that in any event we are prepared to hold that s. 40 (1) has in substance been complied with. It is the Distribution Order that has in this case to be construed, to determine whether it adequately complies with the provisions of s. 40 (1). By virtue of the provisions of sub-section (2) of the Defence of India Act, 1939, and of Rule 81 and of the application thereto of the General Clauses Act (X of 1897), the expression Central Government in the Distribution Order has to be construed as the equivalent of the Governor-General in Council. In the circumstances there is no sub-

stantial difference in such an order, which has to be construed in the Courts of British India, in accordance with the General Clauses Act (X of 1897), whether the phrase Governor General in Council in used or the phrase the Central Government. The latter phrase has to be construed as meaning the former.

In our judgment there is therefore no force in this first contention urged on behalf of the appellants.

Some attempt was then made on behalf of the appellants to suggest that on some evidence tendered to the Tribunal by the crown before the charges were framed, it might be deduced that the Distribution Order was made and approved by one Member of the council only and not by the Governor-General in council at all and might therefore be invalid. In this connection reference was made to the Rules of Business made under the powers conferred on the Governor-General by sub-section (2) of s. 40 which purported to authorise such action by one Member of the council, and it was suggested that any such delegation of authority to one Member only was *ultra vires*. It was submitted that the only Rules of Business which were authorised by the sub-section were rules in respect of business actually transacted by Members of the Council when in council assembled, emphasis being laid on the expression "business in his Executive Council". and it was contended that no order could be made except at a meeting of the council. In our judgment there is no substance in this point. We are of opinion that in sub-sec. (2) the phrase "business in his Executive Council" really means business of the Governor General in Council, and that the sub-section gives authority for rules of business to be made for the more convenient transaction of such business. In the circumstances it is unnecessary for the court to consider the alleged evidence on the point.

The appellants then proceeded to make a vigorous challenge to the continued existence of the Tribunal at various material dates. For this purpose it is desirable to consider the history and Constitution and jurisdiction of the Second Lahore Tribunal before whom the proceedings against the appellants were initiated. By the Criminal Law Amendment Ordinance, 1943, (XXIX of 1943), promulgated on the 11th September 1943, two Special Tribunals, one to sit at Calcutta and one at Lahore, were constituted to try certain cases allotted to them respectively. The names of the accused and the offences in respect of which charges might be preferred were indicated in the Schedules. From time to time this Ordinance XXIX of 1943 was amended by other Ordinances, in particular by Ordinance XVI of 1944, by which a third Special Tribunal at Lucknow was constituted, by Ordinance LII of 1944 by which two more were constituted including the Second Tribunal at Lahore, by Ordinance XII of 1945 by which it was provided that the Central Government might from time to time by notification in official Gazette allot cases for trial to each Special Tribunal, and by Ordinance XXII of 1945 by which the Tribunals were invested with jurisdiction to try offences committed under the Defence of India Rules. By virtue of the provisions of the original Ordinance, as so amended from time to time, the Second Lahore Tribunal was thus constituted and given jurisdiction to try cases including such offences so allotted to it by notification in the official Gazette. By a notification in the Gazette of the 21st November 1945, the Central Government purported to allot for trial to the Second Lahore Tribunal at Lahore the case to which this appeal refers.

Ordinance I of 1946, promulgated on the 5th January 1946, repealed a number of Ordinances, including Ordinance LII of 1944, which was the Ordinance amending the original Ordinance XXIX of 1943 so as to authorise, as stated, the constitution of the Second Special Tribunal at Lahore. A submission, somewhat tentatively advanced, that after the repeal of Ordinance LII of 1944 the Second Lahore Tribunal ceased to exist, could not be maintained and was not persisted in having regard to the saving provisions in clause 3 of Ordinance I of 1946 itself and s. 6A of the General Clauses Act (X of 1897). Thereafter the attack was developed on more general lines.

These Ordinances were made under the powers conferred on the Governor-General by s. 72 of the ninth Schedule to the Constitution Act, as amended by the India and Burma (Emergency Provisions) Act, 1940 (3 & 4 Geo. 6, Ch. 33). Under the said s. 72 as it origiinally stood, Ordinances were limited to an effective life of six months only from the date of promulgation. Sub-secion (3) of s. 1 one of the said Act, however provided

that in respect of Ordinances made under s, 72 during the period specified in s. 3 of the Act, s. 72 should have effect as if the words "for the space of not more than six months from its promulgation" were omitted. The period specified in s. 3 of the Act is "the period beginning with the date of the passing of this Act and ending with such date as His Majesty may by Order in Council declare to be the end of the emergency which was the occasion of the passing of this Act." The date of the passing of this Act was the 27th June 1940, and the emergency was notified to have come to an end on the 1st April 1946.

It was contended on behalf of the appellants that the true construction to be given to s. 72 as so amended was in effect to substitute in s. 72 in respect of the duration of an Ordinance, the period specified in s. 3 of the Act for the original six months' period and that accordingly on the expiration of that period, *viz*: on the 1st April 1946, Ordinances made after the passing of the Act automatically came to an end. It was not made very clear how one could arrive at such a construction. It appeared to be based on the suggestion that the power to promulgate an Ordinance under s. 72 was by the section confined to the existence of an emergency, cf. the words in the sub-section "in cases of emergency", and that the Act was intitled an Act to make emergency provision with respect to the Government of India and Burma and defined the period of emergency. Unless therefore the construction contended for by the appellants was accepted no period would be provided for the continuance of these Ordinances, and—that could not have been the intention of the legislature, as the ordinance-making power of the Governor-General was recognised as temporary only. In our opinion, the emergency on the happening of which an Ordinance can be promulgated is separate and distinct from and must not be confused with the emergency which occasioned the passing of the Act and the clear effect of the words of the Act on s. 72 is that Ordinances promulgated under that sub-section during the period specified in s. 3 of the Act are subject to no time limit as regards their existence and validity, unless imposed by the Ordinances themselves, or other amending or repealing legislation, whether by Ordinance or otherwise. In our judgment, it is clear that the Second Lahore Tribunal did not cease to exist or to have jurisdiction in the case under appeal by reason of the expiration on the 1st April, 1946, of the period specified in s. 3 of the Act in question.

On the other hand, it must be remembered that the constitution and jurisdiction vested in the Second Special Tribunal at Lahore and the subject matters of the Distribution Order were *prima facie* matters which would come within List II—Provincial Legislative List in the Seventh Schedule and in particular within items Nos. 1, 2, 29 and 37 and that the power of making Ordinances promulgated under s. 72 (whether within the period specified in s. 3 of the said Act of 1940 or not) is subject to the like restrictions as the powers of the Indian Legislature to make laws. Under the transitional provisions in Part XIII of the Constitution Act and s. 316 thereof in particular, the Indian Legislature was given the powers of legislation conferred on the Federal Legislature by the provisions for the time being in force of the Constitution Act. Having regard to the relevant provisions relating to the exercise of Legislative powers by the Federal Legislature and the Provincial Legislatures respectively, the Indian Legislature, apart from the provisions of s. 102, has no powers to legislate on matters comprised in the Provincial Legislative List. By virtue however of s. 102, if the Governor General has in his discretion issued a Proclamation of Emergency as therein defined, power was given to the Federal Legislature and therefore to the Indian Legislature to make laws for a Province or any part thereof with respect to any of the matters enumerated in the Provincial Legislative List. Such a Proclamation of Emergency was made on the 3rd September, 1939. It is by virtue of these provisions and the making of this Proclamation of Emergency that not only was the Indian Legislature authorised to enact the Defence of India Act, 1939, with wide powers to make rules and orders extending in innumerable cases to matters comprised in the Provincial Legislative List, but the Governor-General also was able by Ordinances issued by him under s. 72 to legislate in respect of matters comprised in the Provincial Legislative List.

By sub-section (3) of s. 102, a Proclamation of Emergency may be revoked by a subsequent Proclamation. The Proclamation of Emergency of the 3rd September, 1939, was in fact revoked by a Proclamation of the 1st April 1946.

Sub section (4) of s. 102 is as follows:—

"A law made by the Federal Legislature which that Legislature would not but for the issue of a Proclamation of Emergency have been competent to make shall cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period."

Section 5 of the India (Central Government and Legislature) Act, 1946, (9 & 10 Geo : 6. Ch. 39) which came into force on the 26th March, 1946, provided as follows:—

*"Duration of Laws passed by virtue of a Proclamation of Emergency:*—A law made by the Indian Legislature whether before or after the passing of this Act, during the continuance in force of the Proclamation of Emergency being a law which that Legislature would not, but for the issue of such a Proclamation, have been competent to make, shall not cease to have effect as required by sub-section (4) of section one hundred and two of the Government of India Act, 1935, except to the extent to which the said Legislature would not but for the issue of that Proclamation, have been competent to make it, and accordingly, in the said sub-section (4) for the words "shall cease to have effect" there shall be substituted the words "shall to the extent of the incompetency, cease to have effect."

So far therefore as the constitution and jurisdiction of the Second Lahore Tribunal in respect of the alleged offences by the appellants against the provisions of the Distribution Order is concerned, it may well be that they might have come to an end on the 30th September, 1946, had not an Act of the Bombay Legislature (No. XXI of 1946) been passed and published on the 30th September, 1946 having been assented to by the Governor-General on the 28th September 1946, This Act provided that the Tribunal (meaning the Special Tribunal know as the Second Special Tribunal at Lahore) should have jurisdiction to try the cases specified in the Schedule of the Act as if it had been constituted by an Act of the Provincial Legislature. In the Schedule were included two cases, namely, this case which this appeal is concerned and the case against the appellants with which the next appeal is concerned. There were consequential provisions in the Act, giving the Tribunal all the powers which it had under the Ordinances and giving effect to all prior proceedings.

It was not contended that if in fact the Tribunal was still in existence when this Bombay Act became law, the Act would not authorise its continued existence and jurisdiction in the case under appeal. It was submitted that if its existence or jurisdiction had already ceased, the Act would not be effective to revive it or reinvest it with jurisdiction. As in our opinion the Tribunal had not ceased to exist or been deprived of jurisdiction at any time prior to the 30th September, 1946, we have no doubt that the Act was effective to continue its existence and jurisdiction as a Provincial Tribunal after the 30th September, 1946.

It must however be noted that the offences with which the Tribunal is thus authorised to continue to deal by the Act are still the same offences, namely, under Rule 81 (4) of the Defence of India Rules read with clauses 5 and 8 of the Distribution Order. The appellants contend that the trial of such a case cannot be continued after the 30th September, 1946. The Distribution Order was made under sub-rule (2) of Rule 81 of the Rules made under the Defence of India Act, 1939. The Defence of India Act itself was enacted pursuant to the powers conferred by s. 102 of the Constitution Act after the Proclamation of Emergency of the 3rd September 1939. It deals, as mentioned earlier, with a number of subjects comprised in the Provincial Legislative List as well as subjects comprised in the Federal Legislative List. By sub-section (4) of s. 1 it was provided that the Act should be in force during the continuance of the present war and for a period of six months thereafter. By Ordinance X of 1946 promulgated on the 5th February 1946 it was declared that for the purposes of any provision made after the 2nd September 1939 in any enactment the present war should be deemed to continue and to end on the day on which the Proclamation of Emergency made on the 3rd September 1939 under s. 102 of the Constitution Act is revoked. As previously stated that Proclamation was revoked on the 1st April 1946. The Defence of India Act therefore expired on the 30th September 1946 and with it all rules and orders made thereunder, likewise all offences, proceedings and prosecutions thereunder, unless authority is to be found to save them in some provision in the Act itself or elsewhere.

But Ordinance XII of 1946 promulgated on the 30th March 1946 sub-section (4) of s. 1 of the Defence of India Act, 1939, was amended by the addition of the following saving provisions :—

"but its expiry under the operation of this sub-section shall not affect—

*(a)* the previous operation of, or anything duly done or suffered under, this Act or any rule made thereunder or any order made under any such rule or

*(b)* any right, privilege, obligation or liability acquired, accured or incurred under this Act or any rule made thereunder or any order made under any of such rule or

*(c)* any penalty, forfeiture or punishment incurred in respect of any contravention of any rule made under this Act or any order made under any such rule, or

*(d)* any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if this Act had not expired."

The express insertion of these saving clauses was no doubt due to a belated realisation that the provisions of s. 6 of the General Clauses Act (X of of 1897) apply only to repealed statutes and not to expiring statutes, and that the general rule in regard to the expiration of a temporary statute is that "unless it contains some special provision to the contrary, after a temporary Act has expired, no proceedings can be taken upon it and it ceases to have any further effect. Therefore offences committed against temporary Act must be prosecuted and punished before the Act expires and as soon as the Act expires any proceedings which are being taken against a person will *ipso facto* teminate". Craies on Statute Law, p. 347 (4th Edition).

*Prima facie* the amendment to sub-section (4) of s. 1 of the Defence of India Act made by Ordinance XII of 1946 would clearly save prosecutious against breaches of orders for acts or omissions committed prior to the expiration of the Act, save for one matter. The Defence of India Act in so far as it dealt with provincial subjects is itself subject to the provision of s. 102 of the Constitution Act as amended by s. 5 of the India (Central Government and Legislatures) Act, 1946. The effect of sub-section (4) of s. 102 as so amended is that any provision of the Defence of India Act purporting to deal with Provincial subjects has to cease to have effect on the 30th September 1946 except to the extent to which any saving provision can be found in sub-section (4) itself. That sub-section does in fact provide that what may be called the incompetent provisions of such an Act as the Defence of India Act, shall "cease to have effect" on the 30th September 1946, "except as respects things done or omitted to be done" before that date. The ultimate question therefore is whether these words do authorise a continution of the prosecution in this case. On behalf of the appellants it was argued that the scope of these words was only to protect or indemnity officials in respect of acts or omissions on their part. It is difficult to see why they should be given such a restricted meaning in any event. But any doubts which the court might have felt in the matter are fortunately dispelled as a result of the consideration of reports of a recent case in England of a very similar nature under the English Emergency Powers (Defence) Act, 1939. The case is *Vicks* v. *Director of Public Prosecutions* [7]. At present this court has only received the reports published in 62 T. L. R. 674 (Court of Criminal Apppeal) and 63 T.L.R. 6 (House of Lords). The decision is not binding on this court but of course must be considered by us with deep respect, particularly having regard to the fact that the Lord Chief Justice and four Judges in the court of Criminal Appeal and Viscount Simon and six others of their Lordships all came to the same conclusion. The relevant facts of the case as reported in the House of Lords were as follows:—

"The offences charged against the appellant were committed between April, 1943, and January, 1944. and were offences against regulation 2A of the Defence (General) Regulations, 1939, made under the Emergency Powers (Defence) Act, 1939. The Act and the regulations expired on February 24, 1946. The appellant was arrested on March 31, 1946, and convicted on May 28, 1946. He contended that a prosecution could not validly be launched against him after the regulation on which it was based had expired.

Regulation 2A provided:—"(1) If, with intent to assist the enemy, any person does any act which is likely to assist the enemy .... then .... he shall be guilty of an offence against this regulation and shall, on conviction or indictment, be liable to penal servitude for life."

In his speech Viscount Simon stated as follows;—

"The question raised by the appeal, therefore, is simply this: Is a man entitled to be acquitted when he is proved to have broken a defence regulation at a time when that regulation was in operation because his trial and conviction take place after the regulation has expired? As was pointed out in the course of the argument, to which we have closely listened, very strange results would follow if that were so. Supposing the case were one in which a man broke the regulation a week or two before it expired, then, on the argument of the appellant, as those appearing for him have quite frankly admitted, he could never be punished, unless indeed, that trial

7. 62 T.L.R. 674 & 63 T.L.R. 6

was carried to the point of conviction before the regulation itself expired. One could put a more extreme case: the authorities may have been so prompt as to start the posecution before the regulation had expired, but if the trial were not over, then at the very moment when the regulation expired, the trial would necessarily cease and the man would go free. In so far as one is entitled to consider the reasonableness of the contentions put forward by the appellant, obviously those results would be far from reasonable. But the question is not, or at any rate not mainly, whether such a result would be reasonable, or such as one should expect; the question is a pure question of the interpretation of sub-section (3) of s. 11 of the Emergency Powers (Defence) Act, 1939. I need not read it, because we have gone through it, with the help of counsel, very carefully.

It is pointed out that the Interpretation Act, 1889, does not apply to the case of a statute, or a regulation which has the power of a statue, when it expires by effluxion of time. The section in the Interpretation Act is addressed to Acts which have been repealed, and not to Acts which expire owing to their purely temporary validity. It is, I apprehend, with this distinction in mind, which is quite well known, and certainly quite well known to the authorities who frame statutes, that the draughtsman inserted the words used in section 11. Section 11 begins with the words "Subject to the provisions of this section", and those introductory words are enough to warn anybody that the provision which is following immediately is not absolute, but is going to be qualified in some way by what follows. It is therefore not the case that, at the date chosen, the Act expires in every sense; there is a qualification. Without discussing whether the intermediate words are qualifications, sub-section (3), in my opinion, is quite plainly a qualification. It begins with the phrase, "The expiry of this Act"—A noun which corresponds with the verb "expire"—"The expiry of this Act shall not affect the operation thereof as respects things previously done or omitted to be done". Counsel for the appellant have therefore been driven to argue ingeniously, but to admit candidly, that the contention which they are putting forward is that the phrase "things previously done" does not cover offences previously committed. I think that view cannot be correct. It is clear that Parliament did not intend sub-section (3) to expire with the rest of the Act, and that its presence in the statute is a provision which preserves the right to prosecute after the date of expiry. This destroys the validity of the appellant's argument altogether.

The Court of Criminal Appeal, after a most careful exammination of the whole matter, came to this conclusion—I am quoting the words of the Lord Chief Justice (62, The Times L. R. 676, at p. 677): "In our opinion, giving the words of the sub-section their natural meaning, there is neither doubt nor ambiguity and the result would appear to be both just and reasonable". I think that your Lordships unanimously agree with the conclusion of the Court of Criminal Appeal, and I therefore move the House that this appeal be dismissed.'

There can be no difference between the provision in s. 11 (3) of the English Act and that in s. 102 (4). as amended, of the Constitution Act.

In our judgment none of the grounds of appeal on behalf of the appellants in this case succeed and the appeal is dismissed.

We should add that counsel for the apppellants asked leave to argue that some of the charges as framed went beyond the jurisdiction vested in the Tribunal. Having regard to the early stage at which the appellants have thought fit to have recourse to the High Court and this court, we refused leave. It is not convenient that such a matter should be debated before us before the Tribunal have been given a chance to consider it. But in refusing leave this court must not be thought to have formed or expressed any view on the point.

*Criminal Appeal No. 11 of* 1947.

In this appeal the accused and the appellants are the same as in Criminal Appeal No. I of 1947. The offences of which the appellants accused were allotted in the same manner and at the same time as the offences in Criminal Appeal No. I of 1947 to the Second Special Tribunal at Lahore to be dealt with by that Tribunal.

The complaint was lodged on the same date as that in Criminal Appeal No. 1 and arose out of the same transactions. It was based on alleged infringements by the accused of clause 2 of Iron and steel (Movement by Rail) Order, 1942, in that the appelants and the two accused, who have not appealed between the 1st and 18th August 1943 and during September and October 1943 offered for transport by rail to the railway authorities at Rambur and at Moradabad railway stations certain consignments of the iron and steel, acquired by the accused as set out in the judgment in Criminal Appeal No. I, without a valid permit and without a valid priority certificate and procured the movement of these commodities by rail to Wadi Bundar, Bombay, thus rendering themselves liable to punishment under Rule 81 (4) of the Defence of India Rules.

The Iron and Steel (Movement by rail) Order, 1942 (hereafter referred to as 'the Movement Order') was comprised in Government Notification No. 914 of the 17th September 1942, which was published in the Government Gazette of the 26th September 1942. It was made under the powers conferred by sub rule (2) of Rule 81 of the Defence of India Rules. It was expressed to be an order made by "the Central Government" While, however, the Distribution Order dealt with matters within the provincial Legislative List in the Seventh Sche-

dule to the Constitution Act, the Movement Order dealt with matters within the Federal Legislative List' being in particular matters within items 20 and 42 in List I in the Seventh Schedule. Subsequently to the lodging of the complaint, the proceedings against the accused before the Tribunal progressed in the same way as in Criminal Appeal No 1. In these proceedings also, as soon as the charges were framed the appellants applied to the High Court of Bombay in revision and the High Court dealt with both appeals together and gave a certificate under s. 205 (1) in this case also. The High Court set aside a charge of an offence alleged to have taken place at Rampur station in Rampur State as being outside the sphere of legislation of the Indian Legislature and consequently of the Governor General in council and of the ordinance-making powers of the Governor-General. There was no appeal on this point.

On the appeal to this Court the same points were submitted and argued as in Criminal Appeal No. I of 1947 save that inasmuch as the Movement Order and the Defence of India Rules in this case dealt with Federal subjects only, the question of the effect of the saving provisions under s. 102 (4) did not arise and the only point on saving provisions which had to be considered was the sufficiency (which was not really contested) of the provisions inserted into sub-section (4) of s. 1 of the Defence of India Act, 1939, by Ordinance XII of 1946, to authorise the continuation after the 30th September 1946 of the proceedings before the Tribunal in this case.

In regard to all the points raised on behalf of the appellants in this case, our conclusions in Criminal Appeal No. I of 1947 above apply. This appeal also fails and is dismissed.

*Criminal Appeal No III of 1947.*

In this case the appellant No 1 Motiram Narayan Desai is the proprietor of the firm of Rao Bahadur Anant Shivaji Desai Topiwalla and the appellants 2, 3 and 5 are employees of the firm. The appellants were arrested by an inspector of the Anti Corruption Branch of the Bombay C.I.D. on various dates in June 1946 for an alleged contravention of clause 12 (1) of the Cotton Cloth and yarn (Control) Order, 1945, read with the Government of India, Department of Industries and Civil Supplies Notification No. TC (12) 22, dated the 14th October 1944. The order purported to be made by "the Central Government" exercising the powers conferred by sub-rule (2) of Rule 81 of the Defence for India Rules. A complaint was made on the 27th August 1946 before the Presidency Magistrate, 6th Additional Court, Bombay, in which the facts alleged were that the appellants had sold or abetted the sale of 31 yards of velveteen, imported cloth, at the rate of Rs. 20 per yard againt its landed cost of Rs. 3—15—5 and had thus committed an offence as regards appellant No. I punishable under Rule 81 (4), and as regards the rest of the appellants under Rule 81 (4) read with Rule 121 of the Defence of India Rules. Evidence was taken and on the 18th September 1946 charges were framed. The case was adjourned to the 2nd October 1946, on which date the appellants raised objections against the continuance of the trial and upon this objection the Presidency Magistrate referred the matter to the Bombay High Court for opinion under s. 432 of the Criminal Procedure Code. The High Court sent an answer to the reference following their judgment in Criminal Appeals Nos. I and II above and directed that the trial should continue. A certificate under s. 205 was however granted *suo motu* by the High Court.

All the arguments which were advanced in Criminal Appeal No. I of 1947, except those as to the existence and jurisdiction of the Tribunal, were also submitted as applicable in this case.

Our judgment on the relevant points in Criminal Appeal No. I of 1947 governs this case. This appeal fails and is dismissed.

*Criminal Appeal No. IV of* 1947.

This is an appeal from an order of the Chief Court of Sind.

Appellants Nos. 1 to 6 are partners and appellants 7 to 11 employees of the firm of Ganesh Khopra Mills, Karachi. The proceedings started on a complaint presented against the accused by the police on the 2nd September 1946 in the court of the Additional District Magistrate, Karachi. It was alleged that between the months of December 1943 and September 1944 the accused persons conspired to sell raw cocoanut oil, cocogold and empty tins for profit in excess of the profits allowed under the Hoarding and Profiteering Prevention Ordinance (No. XXXV of 1943), and profiteered in these commodities, thus contravening s. 6 of that Ordinance and thereby committing an offence punishable under s. 13 thereof. Before the commencement of any formal

proceedings the accused on the 17th October 1946 filed applications before the Additional District Magistrate, praying that as the Ordinance in question was made and promulgated under s. 72 of the Ninth Schedule of the Constitution Act, it was a temporary statute and therefore expired on the 30th September 1946, and the prosecution against them could not be continued.

The Magistrate by his order dated the 14th November 1946 rejected these applications and on the 22nd November 1946 the accused filed an application in revision to the Chief Court of Sind. The application was heard by Davis C.J. and O'sullivan J. who by order dated 9th January 1947 dismissed the application and directed the trial to continue, but granted a certificate under s. 205 (1).

Ordinance XXXIV of 1943 was promulgated under the powers conferred upon the Governor General under s. 72 as amended by the India and Burma (Emergency Provisions) Act, 1940. It deals with goods and offences which, but for the provisions of s. 102 of the Constitution Act, would be matters for provincial legislation. The only point, therefore, which counsel for the appellants attempted to submit on this appeal was that raised in Criminal Appeal No. I of 1947 as to the true construction and effect of the saving provision in sub-section (4) of s. 102 of the Constitution Act as amended by s. 5 of the India (Central Government and Legislature) Act, 1946.

Our decision on this point in Criminal Appeal No. 1 of 1947 disposes of this appeal. The appeal fails and is dismissed.

*Criminal Appeal No. IV of* 1946.

The appellants are the managing agents of Sree Meenakshi Mills Ltd., Madura, and in the course of business used to hand out yarn manufactured by the mills to weavers outside the mill premises for conversion into cloth and upon conversion took possession of the cloth for their own purpose after paying wages to the weavers for the labour involved.

On the 7th February 1946 the Provincial Textile Commissioner, Madras, purporting to act under clause 18-B (1) (b) of the Cotton and Yarn (Control) Order, 1945, issued directions to the accused persons prohibiting them from issuing yarn except to certain persons to be specified. The order is alleged to have been received by the appellants on the 13th February 1946. The Provincial Textile Commissioner, Madras, specified the authorised persons on the 20th February 1946. In the meantime on the 14th February 1946 the appellants had issued yarn to certain persons, as is alleged, other than those specified in the communication referred to. Certain proceedings are alleged to have taken place concerning the seizure of certain yarn with which this Court is not in any way concerned. On the 27th July 1946 the textile Control officer of Madura, filed a complaint before the Additional District Magistrate, Madura, against the appellants for their alleged contravention of the Order dated the 7th February of the Textile Commissioner concerning the issue of yarn.

On the 16th October 1946 the appellants applied to the High Court at Madras under ss. 439 and 561 A of the Criminal Proceedure Code to quash the proceedings before the Additional District Magistrate, Madura.

The application with other similar applications) was heard by Happell and Shahabud-Din JJ. who by order dated the 19th November 1946 dismissed all the applications but granted a certificate under s. 205 (1) of the Constitution Act.

Shortly after the opening of Criminal Appeal No 1. above and when Mr. Setalvad had indicated his point on the construction of s. 40 (1) in the Ninth Schedule to the Constitution Act, Sir Alladi Krishnaswami Iyer on behalf of the appellants in this case asked, and was given, leave to amend his grounds of appeal by adding a similar ground in this case.

In all respects therefore the submissions advanced on behalf of these appellants were similar to those advanced on behalf of the appellants in Criminal Appeal No. 1 of 1947. Our judgment in that appeal governs this case. This appeal fails and is dismissed.

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The material facts in the remaining appeals are as follows:—

*Criminal Appeal No. V of* 1946.

Accused Venkataraman Chettiar, a merchant at Salem, is alleged to have sold sugar at a price above the price fixed by an order dated the 25th March 1946 of the Collector of Salem purporting to act under the powers conferred on the Provincial Government by Rule 81 (2) of the Defence of India Rules. The offence is punishable under rule 81 (4) of the Defence of India Rules.

The offence is alleged to have been committed on the 18th July 1946 and the complaint was filed by the authoritities on the 8th

September 1946 in the court of Additional First Class Magistrate, Salem. No formal proceedings took place in the court before the appellant filed in the High Court an application under ss. 439 and 561A, Criminal Proceedure Code, praying for the quashing of the proceedings.

*Criminal Appeal No. VI of 1946*

Srinivasan and Annamalai, merchants at Salem, are alleged to have sold sugar at rates above the control rates being abetted therein by Narayanaswami Chettiar, their shop assistant, on the 18th July 1946. Srinivasan and Annamalai are also accused of having failed to issue a proper receipt for the price charged.

The complaint was filed by the authorities on the 8th September, 1946 in the court of Additional First Class Magistrate, Salem, The offence alleged is the contravention of a notification issued on the 25th March 1946 by the District Collector, Salem, under Rule 81 (2) of the Defence of India Rules, an offence punishable under Rule 81(4) of the said Rules. No formal proceedings took place in that court before the appellants filed in the High Court an application under ss. 439 and 561A, Criminal Procedure Code, praying for the quashing of the proceedings.

*Criminal Appeal No. VII of 1946*

Appellants Ramakrishnan, Ramalingam, Nagappa Chetti and Peran Chetty are the accused, of whom Ramakrishnan, accused No. 2 is the shop assistant, and Nagappa Chetti and Peran Chetty, accused Nos. 3 and 4, are the owners of the shop where the offence is alleged to have been committed. It is alleged that accused No. 1 committed and accused No. 2 abetted an offence against the Hoarding and Profiteering Prevention Ordinance (No. XXXV of 1943) in that they contravened the provisions of s. 10(1) (c) and s. 4(3) of the said Ordinance, in the matter of Petromax Light on the 18th July 1946, and became liable to punishment under s. 13(2) and s. 13(1) of the Ordinance. It is further alleged that they failed to issue a proper receipt for the price charged and thereby rendered themselves liable to punishment under Rule 81 (4) of the Defence of India Rules.

The complaint was filed by the authorities on the 12th September 1946 in the court of the Additional First Class Magistrate, Salem. No formal proceedings took place in that court before the appellants field an application in the High Court under ss. 439 and 561 A, Criminal Procedure Code, praying for the quashing of the proceedings.

*Criminal Appeal No. VIII of 1946.*

Appellant Rangaraju Naidu, an agent of the Burmah Shell Oil Company and a wholesale dealer in kerosine oil at Salem, is alleged to have failed to write up the stock book from the 5th July 1946 to the 10th July 1946 and thereby to have committed an offence punishable under Rule 81 (4) of the Defence of India Rules with reference to the licence granted to him under the Madras Kerosene Control Order, 1945, an Order made by the Madras Government purporting to act under Rule 81 (2) of the Defence of India Rules.

The complaint was filed on the 12th August 1946 and charges were framed by the Additional First Class Magistrate, Salem, on the 17th September 1946. Thereafter the appellant filed on the 17th October 1946 an application in the High Court praying for an order quashing the proceedings.

*Criminal Appeal No. IX of 1946.*

Rangaraju Naidu, the same accused as in Criminal Appeal No. VIII, was charged with having an excess stock of kerosine in his possession and was therefore complained against by the authorities in the court of the Additional First Class Magistrate, Salem, Madras. The offence alleged is the contravention of clause 10 of the Madras Kerosine Control Order, 1945, an offence punishable under Rule 81 (4) of the Defence of India Rules. In this case the summons only was served on the accused person. This was on an unspecified date prior to the 30th September 1946, No formal proceedings were started in the court. On the 18th October 1946 the accused filed an application in the High Court praying for the quashing of the proceedings under ss. 439 and 561A of the Criminal Procedure Code.

These applications under ss 439 and 561 A, Criminal Procedure Code, to quash the respective proceedings in the cases, now the subject of Appeals Nos. V to IX inclusive were all heard together with the case, the subject of Appeal No. IV of 1946 and by the same Bench of the Madras High Court as heard that Appeal and were dismissed, but a certificate under s. 205 (1) was granted in each case.

On these appeals before this court counsel for the appellant admitted that the only point to be argued and decided was as to the true construction and effect of the saving provision in sub-section (4) of s. 102 of the

Constitution Act as amended by s. 5 of the India (Central Government and Legislature) Act, 1946. In all cases the orders for the contravention of which prosecutions had been initiated were in respect of matters normally the subject of Provincial Legislation, and their validity was derived from the powers to make them conferred by the Defence of India Act, 1939, or in the case of Criminal Appeal No. VII, from Ordinance XXXV of 1943.

Our decision in Criminal Appeal I of 1947 applies to all these cases. The appeals all fail and are dismissed.

There remains one further point to which we desire to draw attention. Section 205 (1) under which certificates have been given by the respective High Courts in these cases requires that the appeal should be from a "judgment, decree or final order". It is not enough merely that the case before the High Court should involve a substantial question of law as to the interpretation of the Constitution Act or any Order in Council made thereunder. Whilst this court accepts the position that it is not for this court to question certificates granted by High Courts or to permit an appeal to this court against any refusal to grant a certificate, this court does hold itself at liberty-it may indeed be the duty of this court-to determine, if necessary, whether the appeal is really from a "judgment, decree or final order ", so as to ensure that this court has jurisdiction in the matter under the provisions of s. 205. A study of the provisions of sub-section (2) of s. 205 seems to indicate important considerations why this court should not be asked to deal with an appeal until the High Court has finally disposed of the case and the rights of parties are finally determined. An order of the High Court made upon an application involving the revisional jurisdiction of the court or upon an application to quash proceedings, which puts an end to such proceedings for good and all may well be a "judgment' decree or final order "from which an appeal would properly lie to this court upon the grant of a certificate. It is not so easy to be assured that an order on either form of application made during the continuation of proceedings which falls, with the result that pending proceedings continue, is such a "judgment, decree or final order" as the sub-section contemplates. Still less may an order of an High court answering a reference submitted to it by a Presidency Magistrate under s. 432 of the Criminal Procedure Code be such a judgment, decree or final order. It is not necessary for us on these appeals to come to a decision whether all or any of the orders under appeal are judgments decrees or final orders winhin the proper construction to be put upon these words in s. 205 (1). We must not, however, because this court has entertained and allowed these appeals to be argued and expressed our conclusions upon questions of construction and law involved therein, be taken to accept the view that any or all of these orders are such judgments, decree or final orders.

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Criminal Revision Case No. 1060 of 1946
(Criminal Revision Petition No. 1014 of 1946)
*March* 21, 1947.

YAHYA, ALI J.

THANIKACHALA MUDALI & OTHERS
*v*
PONNAPPA MUDALI

*Cr. P. C. (V of* 1898*), S.* 436, *Proviso—Discharge—What amounts to.*

*Where a magistrate dismisses a complaint without issuing process to the accused, the accused person cannot be said to have been discharged within the meaning of the proviso to s.* 436, *Cr. P. C.; and therefore no notice is necessary to him when the Sessions Judge directs further inquiry into the complaint.*

49 *Mad.* 918 *F. B. &* 47 *All.* 722 followed.

Petition under Section 435 and 439 of the Code of Criminal Procedure 1898 praying the High Court to revise the order of the Court of Session of North Arcot Division at Vellore in Criminial R. P. No. 8 of 1946 dated 9—8—1946 (C C. No. 9 of 1946 on the file of the Court of the Additional I Class Magistrate of Ranipet).

*D. Munikanniah & S. Vaidyanathan*, for Petrs.

*P. Krishnamachari*, for Respts.

*Public Prosecutor (V. L. Ethiraj)* for Crown.

ORDER.

The facts of the case out of which this revision petition arises are very simple and are fully set out in the judgment of the learned Sessions Judge. The petitioners were the accused in C. C. No. 162 of 1945 on the file of the Additional First Class Magistrate, Ranipet. That was a case brought by Ponnappa Mudali charging the accused with having defamed him. After four prosecution witnesses were examined the case stood posted to 24th January 1946 for the examination of the rest of the prosecution witnesses. When the case was called on the date the complainant was said to be absent and

the accused were discharged under Section 259 Cr. P. C. The complainant did not file a revision petition against that order of discharge, but he preferred a fresh complaint against the petitioners for the same offence as he was clearly entitled to do under the law. The Additional First Class Magistrate dismissed that complaint after recording the sworn statement of the complainant and without issuing process to the accused. The complainant preferred a revision petition in the Sessions Court of Vellore against the order of dismissal of the complaint, and the Sessions Judge set aside that order and directed the restoration of, and further enquiry into, the complaint.

The main objection raised for the petitioners is that the Sessions Judge ordered further enquiry against the petitioners without notice to them and without giving them an opportunity to show cause, as required in proviso to section 436 Cr. P.C. It is pointed out that this was the second complaint and that in the prior proceeding the accused had appeared and had contested the case and that thereafter the accused were discharged. I find no force in this contention as the proviso to section 436 only directs notice in the case of "any person who has been discharged" and not in the case of a person to whom no process had been issued and when the complaint has been dismissed without notice to him. It has been held by a Full Bench of this court in *Apparao Mudaliar* v. *Janaki Ammal (1)*.

"And accused person is said to be discharged (within the meaning of the proviso to section 436 Cr. P. C.) when the case against him is thrown out under sections 209 253 or 259 or when the Advocate-General enters a *Nolle prosequi* under section 333. The expression person who has been discharged in section 436 refers to a person who has been discharged under sections 209, 253 or 259. A person against whom no process has been issued under section 204 is not a discharged person and therefore no notice is necessary to him when . . . the Sessions Court directs further enquiry into a complaint dismissed under section 203 or sub-section (3) of section 204".

The same view was held by the Allahabad High Court in *Emperor* v. *Gajaraj Singh [2]*.

On the merits there is no substance in this case. As pointed out by the learned Sessions Judge, the real test is good faith, and this is amply satisfied by the fact that the complainant was present at 11 a. m. on the date of hearing. The only default committed was that he was not there at 10 A. M. which was mentioned in the muchalika executed by him; but it is evident that he came within the appointed time and he had to go away to instruct his vakil and came back to court at 11 A. M. which was the appointed hour for the sitting of the Court. In these circumstances the dismissal of the second complaint by the Additional First Class Magistrate was not justified, and the learned Sessions Judge was right in reversing that order and directing further enquiry.

The petition is dismissed.

*N.T.R.* —— *Petition dismissed*

1. [1926] I. L. R. 49 Mad. 918 (F. B.)
2. [1925] I. L. R. 47 All, 722.

Criminal Revision Case No. 1309 of 1946
(Criminal Revision Petition No. 1249 of 1946)

*March* 26, 1947.

YAHYA ALI, J.

APPAVOO PILLAI

*v.*

EMPEROR

*District Police Act (Mad. Act XXIV of 1859), s. 53—Applicability.*

*S. 53 District Police Act applies to those actions and prosecutions which are taken against persons for anything done or intened to be done either under the provisions of the District Police Act or under the provisions of any other law for the time being in force conferring powers on the police. Actions and prosecutions contemplated under s. 53 are those instituted against police officers for acts done in the discharge of their police duties. It does not apply to a case where action is taken under s. 47 of the Act against a person for addressing a letter to the District Superintendent of Police that a certain police officer conducted a certain investigation in a perfunctory manner and the allegation is found to be baseless.*

Petition under Sections 435 and 439 of the Code of Criminal Procedure 1898, praying the High Court to revise the orders of the Court of Session of the Trichinopoly division dated 5–10–1946 and made in Cr. R. P. No. 21 of 46 (C. C. No. 1396 of 1946, Sub-Magistrate's Court, Lalgudi).

*P. Chandra Reddi & R. Rangachari* for Petr.

*Public Prosecutor (V. L. Ethiraj)* for Crown.

ORDER.

The first contention put forward by Mr. Chandra Reddi in this case for the defence is that the prosecution is barred under section 53 of the District Police Act as it was beyond three months after the act complained of. The act complained of was that the police officer conducted the investigation in this particular case in a perfunctory manner,

This complaint was made in a communication that was addressed by the petitioner to the District Superintendent of Police, Trichinopoly. On the wrapper it was superscribed to the Inspector General of Police, Madras, and was received at Madras and transmitted to the District Superintendent of Police who in his turn sent it to the Police Inspector who after enquiry found that the allegations against the police officer were baseless. Upon this report action was taken against the petitioner under section 47 of the District Police Act which provides:

"If any person shall assault or resist any police officer in the execution of his duty, or shall aid or incite any other person so to do, or shall maliciously and without probable cause prefer any false or frivolous charge against any police officer, such person shall, on conviction of such offence before any Magistrate be liable to a fine not exceeding fifty rupees,..."

The complaint was first filed before the Sub-Magistrate, Musiri. That Sub-Magistrate transferred the case to the file of the Sub-Magistrate, Lalgudi. The matter came up to this court in Criminal Revision Case No. 984 of 1945 on the question as to whether that court had jurisdiction. The petition was dismissed, holding that the court in Trichinopoly Lalgudi had jurisdiction and that prosecution need not be instituted in Madras as was contended. The District Magistrate, Trichinopoly appears to have subsequently withdrawn the case to his file and again retransferred it to the file of the Sub-Magistrate, Lalgudi, for disposal.

The point raised under section 53 of the District Police Act is that the order of the District Magistrate withdrawing the case to his file and transferring it to the Sub Magistrate, Lalgudi was beyond three months after the act complained of and that therefore the prosecution is barred by time. I find no force whatever in this contention. Section 53 has no application to cases of this kind. It applies to those actions and prosecutions which are taken against persons for anything done or intended to be done either under the provisions of the District Police Act or under the provisions of any other law for the time being in force conferring powers on the police. It cannot be said that the petitioner is a person who did anything or intended to do anything under the provisions of the District Police Act or under the provisions of any other law conferring powers on the police. The remaining provisions of Section 53 also distinctly indicate that the actions and prosecutions contemplated under section 53 are those instituted against police officers for acts done in the discharge of their police duties.

The next argument is that Lalgudi court had no jurisdiction whatever and that the District Magistrate by withdrawing it to his file could not confer such jurisdiction. The learned Public Prosecutor points out that the letter addressed to the District Superintendent of Police was posted by the petitioner at Tiruvasi which is within the limits of Lalgudi Sub-Magistrate's jurisdiction and for defamation the place of posting is one of the places where complaints can be filed, because it is the commencement of the process of publication. I find no substance whatever in the petition.

The petition is accordingly dismissed.

*N.T.R.* — — *Petition dismissed.*

Criminal Appeal No. 27 of 1947.
*March, 28, 1947.*

YAHYA ALI, J.

THE PUBLIC PROSECUTOR
v.
PARAMESWARA AIYAR

*Prevention of Adulteration Act (Mad. Act III of 1908), R. 28B — Amendment of rule — Effect.*

*The effect of the decision in 1945 M.W.N.636 Cr. 130 has been got over by the amendment of R. 28B of the Adulteration Rules and under the amendment where a sweet meat is fried or otherwise cooked in ghee, such ghee for the purpose of the rule shall be deemed to be an ingredient of the sweetmeat.*

Appeal against the order of the Second Class Sub-Magistrate, Periakulam, dated 16-8-1946 and made in C.C. No. 1318 of 1946 acquitting the accused.

*Public Prosecutor (V. L. Ethiraj)* in person.
*C. A. Md. Ibrahim* for Respondent.

JUDGMENT.

This is an appeal by the Public Prosecutor against the acquittal of the respondent in C. C. No. 1318 of 1946 on the file of the Stationary Sub-Magistrate of Periakulam. The respondent was charged with having in his possession and having sold "jilebi" which was adulterated with 20 per cent of fat not derived from milk or cream.

Rule 28B of the Rules framed under Section 20 of the Madras Prevention of Adulteration Act provides that where in any hotel, sweetmeats of which ghee is commonly an ingredient are for sale and are prepared wholly or in part with a mixture with other articles contemplated in Rule 28 or with any oil or fat other than ghee, it is imperative

upon the person in charge of the hotel to exhibit in such hotel one or more notices specifying in the vernacular of the district that sweetmeats are not made of ghee. An infringement of this rule entails punishment under Rule 29.

It has been found as a fact that in the present case the "jilebi" seized contained ghee with 20 percent of fat, The evidence of P. W. 2 shows that no notice was published in the manner prescribed by rule 28-B to the effect that the "jilebi" was not prepared in ghee. The Sub Magistrate acquitted the accused, acting upon the decision of this court in *Crown Prosecutor* v. *Ramanatha Aiyar* [1]. where it was held that the ghee or oil or other fatty substance used for frying a sweatmeat is not an ingredient of sweet meat. That was a case of "jhangiri" which is not materially different from 'jilebi' If that decision had been in force, the acquittal awarded by the Magistrate would be perfectly correct. But to get over the effect of the decision of the Bench, the Provincial Government have altered the rule and have brought in an amendment which has been published in the Fort St. George Gazette dated the 15th January 1946. (G. O. No. 3097 dated the 30th November 1945 Education and Public Health Department (2), whereby they have enacted that where a sweetmeat is fried or otherwise cooked in ghee, such ghee for the purpose of Rule 28-B shall be deemed to be an ingredient of the sweet meat. This notification came into force on the 15th January 1946. The offence, the subject matter of this prosecution, was on the 25th February 1946. In consequence of the amended rule, it must be held that an offence has been committed under rule 28-B read with rule 29.

The order of acquittal is set aside and the accused is convicted under the rules and sentenced to pay a fine of Rs. 25.

*N T R*

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Criminal Appeal No. 7 of 1947.
*April* 9, 1947.

HORWILL & SHAHABUDDIN. JJ.

MUPPANNA APPANNA & others

*v.*

EMPEROR.

*Cr. P. C. (V of 1898), ss. 238 (2) & 269—Charge of offence triable with assessors—Conviction of offence triable with jury—Legality.*

*An offence punishable under s. 396 I. P. C. is triable by assessors whereas an offence punishable under s. 395 is triable by jury. The appellants were charged under s. 395 and tried with the aid of assessors. The trial judge acquitted the appellants of the offence with which they were charged, but acting under s. 238 Cr. P.C., convicted them of the minor offence under s. 395 I.P.C.*

Held, *that the conviction was not illegal.*

*There is nothing in any part of the Cr. P. C. which suggests that a person can be convicted in a trial by assessors only of an offence that is triable by assessors or that he can be convicted on trial by a jury only of an offence which is triable by a jury. S. 238 (2) Cr. P. C. empowers any court, whatever the nature of the tribunal may be, to convict a person of a minor offence. This interpretation of s. 238 has not the effect of overriding s. 269 Cr. P. C. S. 269 only specifies the tribunal that shall try persons on charges relating to certain classes of offence. It relates to the trial and not to the conviction, whereas s. 238(2) deals only with the conviction.*

Appeal against the Order of the Court of Session of the East Godavari Division in case No. 46 of the Calendar for 1946 on 25-11-1948.

*B. Jagannadha Dass* for accused.

*Assistant Public Prosecutor (A. S. Sivakaminathan)* for Crown.

JUDGMENT.

(HORWILL, J.)

The five appellants have been convicted by the Sessions Judge of East Godavari of an offence punishable under section 395 of the Indian Penal Code. Since death had resulted from an injury caused by the first appellant, he was sentenced to transportation for life. The other appellants were sentenced to ten years rigorous imprisonment each.

The deceased had been on bad terms with appellents 1 to 3 for some time; because the first appellant had abducted his daughter, Appayamma and after keeping her for some time had sent her back. The second appellant had abducted the niece of the deceased. and she too was sent back after some time. The first three appellants are brothers. The fourth and fifth appellants are friends and associates of the first appellant. On the night of the 25th/26th of June last, while the deceased, his wife (P. W. 7), his daughter (P. W. 10), and his son (P. W. 11), were sleeping outside near their house, the five

1. [1945] M.W.N. 636 : Cr. 130
2. 1946 M.W.N. Cr. Acts & Rules p. 18

appellants came there. P. W. 7 woke up and asked the man nearest her who he was and why he had come. That man was the first appellant. He immediately struck her on the left leg and left arm. She saw the other appellants standing there, the first appellant who had beaten her being armed with a crowbar and the others with sticks. Her cries attracted her husband, who came to her side. As soon as he arrived, he was attacked by the first appellant with the crowbar that was in his hand and struck on his left thigh and left upper arm. P.W. 10, the daughter of the deceased. came to his assistance and was also beaten. The appellants then began to break open the house, the first appellant using his crowbar and the other appellants assisting in various ways, the fourth and fifth appellants standing outside to keep people from entering the house. Two boxes that were inside were removed and opened and left not far away from the house. While the boxes were being removed, P. W. 11 the son of the deceased, came on the scene and was also beaten.

Information was given almost immediately to P. W. 9, the village munsif of Maruvada, who came, recorded a statement. Exhibit P. 9, from the deceased, and sent information to the police and sub-magistrate. He himself saw that the boxes that had been forcibly broken open. The complaint of the deceased made mention of the contents of the boxes. Later on another statement, Exhibit P. 13, was recorded, from the deceased by the head constable who came for investigation. Finally, when the deceased was admitted into the hospital and the doctor found that his condition was serious, the local submagistrate was sent for and a third statement, Exhibit P. 1, was taken from him. These statements were recorded on the 26th, 27th, and 28th June respectively.

The appellants were charged under section 396 of the Indian Penal Code with conjointly committing dacoity and that while doing so, one of their number the first accused) committed murder. The learned Judge came to the conclusion that since the injury to the deceased was not such as to make the person causing it guilty of murder, he acquitted the appellants of the offence with which they were charged, but invoking his powers under section 238 of the Code of Criminal Procedure, he found them guilty of the minor offence of dacoity. An offence punishable under section 396 of the Indian Penal Code is triable by assessors, whereas an offence punishable under section 395 of the Code is triable by a jury. It is argued that it was not open to the learned Sessions Judge to convict the appellants of an offence triable only by a jury.

There can be no doubt that the appellants were properly tried. They were charged with an offence punishable under section 396 of the Indian Penal Code. Section 269 of the Criminal Procedure Code, read with the consequent notification of Government, made it incumbent on the Judge to try the appellants with the aid of assessors. Since he did that the trial was in accordance with the directions of that section and was therefore legal. There is nothing in any part of the Code of Criminal Procedure, as far as we have seen, which suggests that a person can be convicted in a trial by assessors only of an offence that is triable by assessors or that he can be convicted on trial by a Jury only of an offence which is triable by a Jury. Section 238 (2) says that when a person is charged with an offence and the facts proved constitute only a minor offence, he may be convicted of the minor offence, although he is not charged with it. It therefore empowers any court, whatever the nature of the tribunal may be, to convict a person of a minor offence The only exception to the general rule laid down in sub-section (2) is found in sub-section (3), which prohibits the court from convicting an accused person of any offence referred to in Section 198 or section 199 of the Indian Penal Code when no complaint has been made as required by those sections. It is argued that if sectiod 238 (2) be given its natural interpretation, it would have the effect of overriding section 269, Code of Criminal Procedure. Section 269 only specifies the tribunal that shall try persons on charges relating to certain classes of offence. In other words, it relates to the trial and not to the conviction, whereas section 238 (2) deals only with the conviction. It is also argued that by trying the appellants with assessors, instead of by Jury—especially as the majority of the assessors were of the opinion that the appellants were not guilty—they lost their valuable right of being tried for an offence of which they would have been found not guilty by a Jury. That argument is irrelevant; if the law permits such a thing to be done, as we are satisfied that it does, we are not concerned with the effect of the law; but

we might say that the Code does not recognize any principle that a trial by Jury is more advantageous to the appellants than a trial by assessors. The more serious offences such as murder, are triable with the aid of assessors, whereas minor property offences are tried by jury. The opinions of assessors are no guide to the opinion they might have expressed if they had had the same advantage as a Jury of being charged by the Judge and deliberating together.

The only case to which we have been referred in which the present question directly arose is *Emperor* v. *Changouda* [1], in which the learned Judges held that the terms of section 238 of the Code of Criminal Procedure empowered the Judge to convict the accused of a minor offence, even though the accused would have been tried by a Jury and not by assessors if he had been charged with that minor offence. There are many cases in most of the High Courts in which learned Judges have affirmed the legality of a conviction of a minor offence triable with the aid of assessors where the trial was by Jury. In those cases, as in *Emperor* v. *Changouda* [1], reference was made with approval to the reasoning of Bashyam Aiyangar J. in *Pattikadan Ummaru* v. *Emperor* [2]. We also with great respect think that the matter could not be expressed more aptly than it was by Bashyam Aiyangar J. in the passage so frequently cited with approval. He said,

> "The effect of section 238 in my opinion is to invest a jury trying an offence triable by a jury with authority to find as an incident to such trial that certain facts only are proved in the trial which facts constitute a minor offence and return a verdict of guilty of such offence though such minor offence be not triable by a jury."

Benson. J., who also delivered a judgment in that case, based his decision on rather different grounds; and we find those same views expressed in a judgment of a Bench of this court of which he was a member, *Queen Empress* v. *Anga Valayah* [3]. The learned Judges were there dealing with a case in which the facts set out in the order of the committing magistrate showed that the offence commited was one punishable under section 396 of the Indian Penal Code. Yet the learned Sessions Judge framed a charge only under seetion 395 of the Indian Penal Code and then, as required on such a charge tried the accused by a Jury.

1. [1921] I.L.R. 45 Bom. 619.
2. [1903] I.L.R. 26 Mad. 243.
3. [1899] 22 Mad. 15.

The learned Judges were of the opinion that if the accused were not guilty under section 396 of the Indian Penal Code, they were not guilty of any offence at all. During the course of their judgment they said:

> "Had the circumstances been different, so as to give ground for supposing that the accused might be guilty of dacoity without being guilty also under section 396, then the Sessions Judge might properly have empanelled a jury, and, on the conclusion of the trial, he might under section 269. Criminal Procedure Code have asked their opinion as assessors as to the guilt of the accused under section 396, Indian Penal Code, and the Judge should then have found the accused guilty or not guilty under that section. It he found them guilty he should have proceeded to conclude the case by passing sentence. If, however, he found them not guilty, he should have then charged the jury with respect to the dacoity under section 395. Indian Penal Code, and should have taken their verdict thereon as a jury."

As we have pointed out, this was in accordance with the reasoning of Benson J. in *Pattikadan Ummaru* v. *Emperor* [2]. This reasoning did not however find favour in the cases which followed *Pattikadan Ummaru* v. *Emperor* [2]. The procedure suggested in *Queen Empress v. Anga Valayan* [3] seems cumbrous though correct and we are satisfied that that adopted by the learned Sessions Judge was lawful.

The eye witnesses to this offence were P. Ws. 7 and 10 to 12. P. Ws. 7 and 10 claimed to have witnessed the offence from the beginning. P. W. 11 came there a little later, as has been stated above. P. W. 12 lived in a house about 30 yards from the scene of offence and was awakened on the night in question by the loud cries proceeding from the house of the deceased. He ran to the house and arrived too late to see the beating of the deceased and P. Ws. 7 and 11, but he saw the boxes being carried away by the fourth and fifth appellants. When he tried to seize the fifth appellant, he was beaten on his knee by the fourth appellant.

The principal witnesses are P. Ws. 7 and 10; but the evidence of P. Ws. 11 and 12 cannot be ignored, because it affords valuable corroboration to the evidence of P. Ws. 7 and 10 and shows not only that all the appellants were present, but also that they were assisting in the removal of property from the house of the deceased and were attacking anybody who attempted to resist them. It has been argued at great length that P. W. 10's evidence should not be accepted. One reason is that in two of the three dying declarations of the deceased, P. W. 10 is not mentioned; but we find that it is in

Exhibit P. 13. It is undoubtedly true that she was injured and was taken by the Head-Constable together with the other injured persons to the hospital, where she seems to have told the doctor that the injuries had been caused by beating at about midnight. This indicates very clearly that she was present at the scene of office while the dacoity was being committed and received injuries at that time.

The other reason given for discrediting her testimony is that when the counsel asked for a copy of her statement to the police, they were given a copy which suggested that she went to her father's house later that night and was told by her father, mother and brother that they had been beaten by the appellants and that nobody had told her that the boxes had been stolen. If she really made that statement, then it would be pretty clear that she was not present while the beating was taking place and that she know nothing of what was deposed to by her. The learned Sessions judge accepted the explanation of the Public Prosecutor that the Killadamma (the name of P. W. 10) whose statement had been given to the appellants was not P. W. 10 but a sister of another name, who was familiarly know as Killadamma. P. W. 10's evidence however shows that the other Killadamma was not present in the vicinity that night and so could not have made the statement attributed to her. Moreover, it is very clear from a persual of the case diary of the Head Constable that the Killadamma examined by him was taken by him to the hospital the following day and that it was to her that the wound certificate was given and not to some other Killadamma; so that it is fairly clear that the learned Sessions Judge was labouring under some misapprehension. We have examined the case diary of the Head Constable in some detail and have come to the conclusion that the statement of which the appellants were given a copy was not the statement of anybody bearing the name of Killadamma, but was the statement of one Mahalakshmi, who has not been examined. It would appear from a perusal of the list of witnesses examined by the Head Constable that there was an interpolation of the name of Killadamma as P. W. 5; but the numbers against the statements of the witnesses were not then altered to correspond with the numbers in the 1st. Since Mahalakshmi's original number was five, a copy of Mahalakshmi's statement was given as the statement of Killadamma. Killadamma is now shown as having corroborated P. W. 2 though the use of the masculine singular shows that the remark applied originally only to P. W. 4 in the list. This alteration suggests that the case diary of the Head Constable cannot be accepted at its face value; but we are satisfied that the statement originally attributed to one Killadamma was not made by any one of that name. It seems most unlikely that P. W. 10 was not questioned that night, and the facts set out above would show that she must have been there. Even if we cannot be sure that P. W. 10's statement was noted by the Head Constable, it is clear that she was examined on the 29th by the Circle Inspector; and since we are satisfied, because of her injuries and the fact that she was taken by the Head Constable to the doctor on the following day, we find no reason for supposing that at any time she made a statement which was contrary to her evidence. If she was present and beaten, she could not possibly have said that she came there only after the accused had run away and was told of the incidents by her parents, sister, and brother.

Although certain discrepancies between the evidence of one witness and another and between one statement of a witness and another have been referred to, we do not find any discrepancies of such a nature as to lead us to doubt in any way the general accuracy of the evidence of P. Ws. 7 and 10 to 12.

It was next argued that it is very doubtful whether there was any theft at all. The motive given by the deceased was the ill-feeling between the appellants 1 to 3 on the one hand and him on the other with regard to seduction of two women of his family. We do not find this a sufficient reason for thinking that the appellants did not come with the intention of taking the property. The earliest information given by the deceased refers to the taking away of the two boxes; and a list was given of their contents. The statement of the deceased finds support from the detailed evidence of P. W. 10. P. W. 7 made a similar statement, though our attention had been drawn to an earlier statement made by her which perhaps suggests that because of her state of mind she did not pay any close attention to the removal of the property. The evidence of the village magistrate shows that two boxes had been forced open and were found empty near

the house. It is of course possible, as the learned advocate for the appellants suggests, that these boxes were empty when taken; but it seems to us unlikely that those boxes should have remained locked inside the house empty, especially since at the earliest opportunity, a list of their contents was given by the deceased, P. W. 10 and others.

The next contention is that even though there was a theft of property, there was no conjoint taking of the property such as is necessary to sustain a charge under section 395 of the I. P. Code. It is suggested that the object of the attack was to beat the deceased and that the taking of the property was merely incidental or by after thought. The intention of the appellants must however, be judged by their acts. They beat P. W. 7 because she challenged them. They beat the deceased because he came to the rescue of his wife. They then without hesitation began to break open the house. The very fact that the first appellant used a crowbar would perhaps suggest that he brought the crowbar because he thought that a crowbar was necessary, not for beating P. W. 7 and the deceased and others, but for breaking open the house. It was his act of thrusting the crowbar into the wall of the house that was responsible for unloosening the fastenings and which enabled him and the other accused to go inside the house. Appellants 1 to 3 removed the hasp of the door and then entered the house together. Appellants 1 to 4 stood outside to prevent other persons from entering. All the appellants then, according to the evidence of P.W. 10, helped to remove the boxes and, according to the evidence of P. W. 12, appellants 4 and 5 actually carried away the boxes. This evidence proves that the primary object of the accused—or at any rate one of their objects —was to break into the house and take the property. It is also clear from the evidence that injuries were caused in order to facilitate the entry of the appellants into the house to take the property. Had they not beaten P.W. 7 and the deceased and others who had come to their assistance, it would not have been possible for the appellants to peacefully open the house and take away the boxes. The appellants even beat P.W. 12 who arrived on the scene after the boxes had been taken away from the house, because he tried to prevent the boxes being carried away. The causing of the hurt and the taking of the goods were therefore parts of the same transaction and committed with the object of removing the boxes and taking their contents. The appellants were therefore guilty of committing dacoity.

Finally, it has been argued that the offence of dacoity has not been brought home to all the appellants. The principal part was played by the first appellant, who used his crowbar not only for beating those who cried out or resisted him, but also in breaking open the house. The second appellant struck P. W. 10 on the leg and was one of those who went inside the house to carry away the boxes. The third appellant struck P.W. 10 on the back and P.W. 11 on the leg. He, too, was one of the men who went inside to carry away the boxes. The fourth and fifth appellants did not go into the house, but stood at the doorway preventing people from approaching. The fifth appellant was then striking the eaves of the house in order to drown the cries of P. W. 10. We have no doubt on this evidence that all the five appellants participated in the dacoity.

There remains the question of sentence. The appellants were somewhat fortunate in not having been convicted under section 396 of the Indian Penal Code. The act of the first appellant in giving the deceased such a severe blow on the leg, fracturing his femur, and causing such a deep and extensive wound as to lead to septicaemia and death certainly merits the punishment awarded to him. The sentence of ten years rigorous impisonment on the other appellants might seem somewhat heavy; but the offence committed was a grave one, in which death was caused to one person and injuries to three others. We are unable to say that the sentences are so excessive as to warrant our interference in appeal.

The appeal is dismissed.

*N.T.R.* — *Appeal dismissed*

Criminal Miscellaneous Petition No. 1689 of 1946

*February 14, 1947.*

HAPPELL, & SHAHAB-UD-DIN, JJ.

M. S. MEHDI & OTHERS

*v.*

EMPEROR

*Military Stores (Unlawful Possession) Ordinance (XXXIII of 1943)—If in force—Government of India Act, 1935, Sch. IX, S. 72—India & Burma Emergency Provisions Act, 1940, S. 1 (3).*

*The India and Burma Emergency Provisions Act, 1940 conferred the power on the Governor General to make Ordinances unrestricted in duration for a certain period, a period thet ended on the 1st of April 1946. After the 1st of April 1946 any Ordinance made by the Governor General under S. 72 of Schedule IX of the Government of India Act again has effect for a space of six months only; but there is nothing in the India and Burma Act which says that the words 'for the space of not more than six months from its promulgation' when put back in S. 72 of Sch. IX will affect retrospectively Ordinances made during the period they were omitted. Therefore an Ordinance promulgated by the Governor-General before the 1st of April 1946, is by virtue of the provisions of the India and Burma (Emergency Provisions) Act, 1940, not restricted to six months, but will continue to have effect for the period provided in the Ordinance, or if no period is provided until the emergency is declared by the Governor General to have ceased to have effect.*

*The Military Stores (Unlawful Possession) Ordinance has not expired on 1st April 1946 and hence a prosecution for an offence in contravention of the Ordinance (commenced before the 1st of April 1946) can be continued after that date.*

Petition praying that in the circumstances stated in the affidavit field therewith the High Court will be pleased to quash the charge framed against the Petitioners herein accused in C. C. No. 2 of 1945 on the file of the Court of the Additional District Magistrate of Vizagapatam.

*B. Jagannadha Das & C. V. Dikshitulu* for accused.

*Advocate General (K. Rajah Iyer) & Asst. Public Prosecutor (A. S. Sivakaminathan)* for Crown.

ORDER

[HAPPELL J.]

The petitioners are being prosecuted for an offence in contravention of the Military Stores (Unlawful Possession) Ordinance (Ordinance 33 of 1943), and on the 12th January 1946 the Additional District Magistrate of Vizagapatam framed a charge aganist them under section (3) this Ordinance. The petition before us is brought to quash the charge. The ground on which the petition is supported is shortly that that the Ordinance has expired and that, as it contains no provision within itself for the continuation of proceedings, the proceedings commenced before its expiration have automatically determined.

By our order in Crl. M. Ps. Nos. 1569, 1578, 1581, 1584, 1587 and 1601 of 1946* my learned brother and I have recently held that criminal proceedings instituted under the Orders and Ordinances with which the petitions were concerned could be continued after their expiration. These Orders and Ordinances, however, were made under the Defence of India Act, and the grounds for our decision were (1) that where the Orders related to subjects enumerated in the Provincial Legislative list they could be continued by virtue of the provisions of section 102 sub-section (4) of the Government of India Act, and (2) that where they related to subjects enumerated in the Central Legislative list they could be continued by virtue of the amendment of section 2 of the Defence of India Act made by Ordinance No. 12 of 1946 which made specific provision for the continuance of proceedings instituted before the expiration of orders made under the Defence of India Act.

We agree with the learned counsel for the petitioners that the present petition does not fall within the scope of our order referred to above. The Military Stores Ordinance No. 33 of 1943 was not promulgated under the Defence of India Act but under section 72 of Schedule (9) of the Government of India Act 1935.

Section 72 of Schedule (9) of the Government of India Act provides that any Ordinance made by the Governor General under the section shall have the like force of law as an Act passed by the Indian Legislature "for the space of not more than six months from its promulgation". Section 1, sub section (3 of the India and Burma (Emergency Provisions Act, 1940, however enacted that section 72 of the Government of India Act shall as respects Ordinances made during the period specified in section 3 of the Act have effect as if the words "for the space of not more than six months from its promulgation" were omitted. Section 3 of the India and Burma (Emergency Provisions) Act, 1940 defines the period referred to in the preceding sections as "the period beginning with the date of passing of this Act and ending with such date as His Majesty may by Order in Council declare to be the end of the emergency which was the occasion of the passing of this Act." His Majesty by the India and Burma (Termination of Emergency Order 1946 declared the end of

* [1947] M.W.N. 45: Cr. 5

the emergency to be the 1st day of April 1946.

It is contended by learned Counsel for the petitioners that the effect of section 1, sub-section (3) of the India and Burma Act read with section 3 is that ordinances made during the period specified in section 3 terminated with the end of the emergency, viz., the 1st of April 1946 if by then they had been in force for six months or more or, if by that date they had been in force for less than six months, they would cease to have effect when a period of six months from the date of their promulgation expired. In our opinion his contention cannot be accepted. Sub-section 3 of section 1 does not provide that the ordinances made by the Governor-General shall have effect as if the words "for the space of not more than six months from its promulgation" were omitted from them, but that section 72 of the ninth schedule of the Government of India Act should have effect during the period as if these words were omitted. In short the India and Burma Act conferred the power on the Governor-General to make ordinance unrestricted in duration for a certain period, a period that ended on the 1st of April 1946. After the 1st of April 1946 any ordinance made by the Governor-General under sec. 72 of the 9th schedule of the Government of India Act again has effect for a space of six months only; but there is nothing in the India and Burma Act which says that the words "for the space of not more than six months from its promulgation" when put back in section 72 of schedule IX will affect retrospectively ordinances made during the period they were omitted. Learned counsel for the petitioners has referred us to an observation in the judgment of the Privy Council in *King-Emperor* v. *Benoari Lal Sarma* (1) where Lord Simon in his judgment referred to section 72 of the 9th schedule of the Government of India Act 1935 and observing that it must be read in the light of the India and Burma (Emergency Provisions) Act, 1940, remarked parenthetically, "Where under the operation of the words 'for the space of not more than six months from its promulgation' was suspended during the period therein specified." Learned Counsel emphasises the use of the word "suspended", but for the reasons given above this gives no support to the construction which he seeks to put on the relevant provisions of the India and Burma Act. The suspension of the operation of the words is not with reference to the Ordinances made during the period but with reference to section 72 of Schedule IX of the Government of India Act.

In our order in Cr. M. P. No. 1569 of 1946 etc., we observed that "No doubt an ordinance promulgated by the Governor-General before the 1st of April 1946, is by virtue of the provisions of the India and Burma (Emergency Provisions) Act, 1940, not restricted to six months, but willl continue to have effect for the period provided in the ordinance or, if no period is provided, until the emergency is declared by the Governor-General to have ceased to have effect". This observation was not necessary for the decision of the case and will not bind us; but, in our opinion, it correctly states the position. We are consequently of opinion that Ordinance No. 33 of 1943 is still in force : and, that being so, the Additional District Magistrate of Vizagapatam had jurisdiction to frame a charge against the petitioners under section 3 of the Ordinance.

The petition is dismissed.

(Leave is granted to appeal to the Federal Court.)

*N.T.R.* —— *Petition dismissed*

1. [1945] M.W.N. 41: Cr. 1; 1946 F.C.R., 161

Criminal Revision Case No. 9 of 1947

(Criminal Revision Petition No. 9 of 1947)

*January 9, 1947.*

YAHYA ALI, J.,

S. K. V. KRISHNAVATARAM.

*v*

EMPEROR

*Cr.P.C. (V of 1898), S. 144 (4)—Enquiry under.*

*When an application under s.* 144 (4), *Cr.P.C. is made and when the petitioner offers evidence to show cause against the continuance of the* ex parte *order against him, it is the obvious duty of the Magistrate to hold an enquiry and he cannot, without holding that enquiry, anticipate what the nature of the evidence would be and confirm his* ex parte, *order.*

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the District Magistrate, West Godavari at Ellore dated 23-12-1946 and made in M. C. No. 13 of 1946.

*V. V. Srinivasa Ayyangar, K. Krishnamurthi & M. Dwarakanath,* for petitioner.

*Public Prosecutor (V. L. Ethiraj)* for Crown.

ORDER.

The petitioner is the 45th respondent in M. C. No. 11 of 1946 before the District Magistrate, West Godavari and is an advocate practising at Ellore. Along with the rest he was served with an order dated 10-12-46 under section 144, Cr. P.C., passed *ex parte* prohibiting him *inter alia* from holding meetings and processions and doing picketing and other demonstrations to incite and provoke peaceful workers employed in the various organisations in the Ellore Municipal area and in the immediate vicinity. On 16—12—1946 an application was made by the petitioner to the District Magistrate to rescind the order after holding an enquiry and it is stated by Mr. V, V. Srinivasa Ayyangar for the petitioner that the petitioner had then at hand 8 witnesses to be examined. The District Magistrate refused to examine any witnesses and dismissed the petition. In his order dated 23rd December 1946 dismissing the petition the District Magistrate says that as his *ex parte* order was only two weeks old and as it was passed with a view to maintain law and order and, ensure public peace and tranquility, he considered it unsafe to rescind the order at that stage either wholly or even so far as it concerned a single respondent. He proceeded to observe that it would be easy for the petitioner to adduce evidence to show that he merely accepted innocent briefs in his professional capacity.

When an application under section 144 (4) Cr. P. C. is made and when the petitioner offers evidence to show cause against the continuance of the *ex parte* order against him, it is the obvious duty of the Magistrate to hold an enquiry and he cannot without holding that enquiry anticipate what the nature of the evidence would be and confirm his *ex parte* order The order of the District Magistrate dated the 23rd December, 1946, is set aside and the District Magistrate is directed to hold an enquiry on the petition dated 16th December, 1946, filed by the petitioner, the 45th respondent before him, after giving notice to the petitioner and affording him sufficient opportunity to show cause against the continuance of the *ex parte* order against him.

N.T.R.

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Criminal Revision Case No. 808 of 1946
(Criminal Revision Petiton No. 776 of 1946)
*March 26, 1947*

YAHYA ALI J

VENUGOPAL NAIDU

*v.*

EMPEROR.

*Madras Food Grains Control Order*, 1945—*Contravention of—Statement recorded by revenue officer—Admissibility—Cr. P. C. (V of 1898), s.* 162.

*Where in connection with the contravention of the provisions of the Madras Foodgrains Control Order*, 1945. *the Assistant Commercial Tax Officer and the Special Deputy Tahsildar for procurement of grain held inquiries and recorded from the accused statements,*

Held, *the statements were not inadmissible.*

Petition under sections 435 and 439 of the Code of Criminal Procedure 1898, praying the High Court to revise the Judgment of the Court of Session, Chingleput dated 25—2—1945 and passed in Criminal Appeal No. 1 of 1946 (C. C. No. 278 of 1945 on the file of the Court of the Sub Divisional Magistrate. Saidapet).

*M C. Rajagopalan*, for Petr.

*Public Prosecutor (V. L. Ethiraj)* for Crown.

ORDER.

This is an application to revise the order of conviction and sentence passed against the petitioner who was accused 2 in C. C. No. 278 of 1945 on the file of the Sub Divisional First Class Magistrate, Saidapet under clause 3 (1) of the Madras Food Grains Control Order read with rule 81 (4) of the Defence of India Rules. The trial Court found him guilty and sentenced him to pay a fine of Rs. 300, in default to six weeks' rigorous imprisonment. The conviction and sentence were confirmed in appeal by the Sessions Judge Chingleput. The petitioner was found actually transporting 8 carts containing 86 bags of paddy, each bag holding 64 Madras Measures along the public highway, without a permit as required under the Rules. P. W. 6, the Special Deputy Tahsildar for procurement of grain at Trivellore intercepted him on the spot, held an enquiry and recorded from the petitioner a statement marked as Ex. E. He also recorded similar statements (Ex-D) from the cart-drivers P. Ws. 4 and 5. He then forwarded them to the Assistant Commercial Tax Officer P.W. 1 who held another enquiry and recorded again a statement Ex. A. from the petitioner and another statement Ex. B from a person who was

the first accused in the case and who was said to be carrying on this business in partnership with the petitioner. The conviction of the appellant rests principally upon the statements recorded by P. W. 6 on 23—3—45 and by P. W. 1 on 24–3–45. Objection was taken to the admissibility of these statements on the ground that the Assistant Commercial Tax Officer, P. W. 1 was in the position of an investigating officer and that any statement recorded by him would have to be excluded under s. 162 Cr. P. C.; but this argument in any way does not apply to the statement recorded by P. W. 6. Even the contention that the statement recorded by the Assistant Commercial Tax Officer is not admissible in evidence is wholly untenable. In the Madras Foodgrains Control Order, 1943, there is no provision which clothes any officer or officers of the Commercial Tax Department with the powers of an officer in charge of a police station to investigate an offence. Reference was made in this connection to the decision of a Bench of this court in *Someshwar H. Shelat In re* [1]. That was a case no doubt of a statement recorded by a special officer of the Commercial Tax Department and it was held that that statement was not admissible but the statement recorded by that officer in that case was in the exercise of the power conferred upon him by sub-section (3) of section 12 of the Hoarding and Profiteering Prevention Ordinance which definitely states :—

> "The Officers empowered by the Central or Provincial Government shall within the respective areas for which they are appointed have power to investigate all offences punishable under this Ordinance and in conducting any such investigation shall, within the said areas, have all the powers, duties, privileges and liabilities of an officer in charge of a police station under the Code of Criminal Procedure, 1898, when investigating a cognizable offence within the limits of his station."

The learned judges were persuaded entirely by the language of this sub-section in coming to the conclusion that such an officer had the full status of a police officer and that his powers and duties must be limited to those of a police officer under the Criminal Procedure Code which means that when such a statement is reduced to writing it can only be used in accordance with the provisions of section 162 of the Code of Criminal Procedure or under section 27 of the Evidence Act. That decision has clearly no application to a case of this kind arising under the Madras Foodgrains Control Order which does not contain any provision even remotely analogous to sub section (3) of section 12 of the Hoarding and Profiteering Prevention Ordinance.

The second question that was raised was that these statements were not admissible because the Deputy Thasildar extorted the statement from the petitioner under duress. This allegation was rightly found against by both the courts below.

The last argument was that even according to the language of the statements themselves there was no admission that the petitioner was engaging in any undertaking which involves the sale in wholesale quantities of any food grains so as to attract the application of section 3 (1) of the Food-Grains Control Order. I have closely perused the statements and I have no doubt that they amount to saying that the paddy was being transported for the purpose of sale in connection with the business in which the petitioner as well as the first accused who was discharged had joint interest.

I find no substance in any of the contentions raised. The petition dismissed.

N.T.R. — *Petition dismissed*

1. [1946] M.W.N. 271 : Cr. 47 Cr 17

Cr. R. C. No. 1167 of 1946
(Cr. R. P. No. 1118 of 1946)
*April* 9, 1947

YAHYA ALI, J.

A. K. M. AHMAD NAINA MARACAIR
v.
EMPEROR

*Arms Act (XI of 1878), ss* 14, 21 & 29—*Licensee possessing more gun powder than permissible—Offence.*

*When a licensee possesses more gun powder than is mentioned in his gun licence, he commits an offence under s.* 14 *and not under s.* 21 *of the Arms Act; and a prosecution is not maintainable under section* 29 *without the sanction of the district magistrate.*

*The criterion to be applied in deciding whether s.* 14 *applies is whether the possession or control was not covered by a licence, or if it was covered by a licence, whether it was in the manner and to the extent permitted by the licence.*

*The word 'extent' in s.* 14 *does not relate only to territorial extent, but includes the quantity of ammunition permitted by the*

*licence. Possession or control of any quantity in excess of it must be deemed, apart from its not being covered by the licence, an offence under s.* 14 *read with s.* 19 *(f), because it is not according to the extent permitted by the licence.*

*S.* 21 *comes into play only where in violation of a condition, subject to which the licence has been granted, an act has been done which is not punishable under s.* 19.

Petition under Ss. 435 and 439 Crl. P. C. 1898, praying the High Court to revise the order of the Court of Session, East Tanjore division dated 20—9—1946 and passed in C.A. 70 of 1946, (C.C. 42 of 1946, Sub Divisional Magistrate, Negapatam.)

*K. V. Ramachandra Aiyar* for Petr.
*Public Prosecutor* (*V. L. Ethiraj*) for Crown.

JUDGMENT

The petitioner has been convicted by the Sub Divisional Magistrate, Negapatam under section 21 of the Indian Arms Act and sentenced to pay a fine of Rs. 100, in default rigorous imprisonment for one month. He appealed to the Sessions Judge, Negapatam, who confirmed the conviction but reduced the fine to Rs. 30.

The petitioner held a licence for an S. B. B. L. gun for the years 1944–46 and he was permitted by that licence to possess 50 cartridges or one pound of gun powder. He also possessed a licence under the Indian Explosives Act by which he was entitled to keep for sale 50 lbs. of gun powder at a particular place which was described in that licence. He applied for the renewal of the gun powder licence and in the ordinary course, the application went to the Taluk Magistrate, who on 5—4—46 inspected the site where the gun powder was stored. The Taluk Magistrate found that only 30 lbs. were in store at the place mentioned in the licence under the Indian Explosives Act; but in the shop there were besides the S. B. B. L. gun 1 7/8 lbs. of gun powder. The Taluk Magistrate reported the matter to the authorities and as a result the petitioner was prosecuted for being in possession of 7/8 lbs. of gun powder in excess of the quantity permitted by his gun licence. The prosecution was under section 21 of the Indian Arms Act and both the courts below have found the petitioner guilty under that section.

The defence was twofold. On the facts it was alleged that the excess of 7/8 lbs. was the gun powder that was removed from the cartridges and that possession of such gun powder did not constitute an offence. The more substantial objection was with reference to the provision of law that was applicable. Even on the assumption that the facts of the prosecution case were all true, it was contended in both the courts below as well as before me that the appropriate provision that was applicable to such a case was section 14 of the Indian Arms Act and that no contravention of that section can form the subject-matter of a prosecution by virtue of section 29 of the same Act without the previous sanction of the District Magistrate. It is admitted that there is no such sanction in the present case because the view upon which the prosecution has throughout acted is that section 21 of the Arms Act is applicable and not section 14 and for a prosecution under section 21 no such sanction is required. The question that falls to be decided in this case is whether when a licensee passesses more gun powder than is mentioned in his gun licence, he commits an offence under section 14 or under section 21 of the Indian Arms Act.

Section 14 runs thus :

"No person shall have in his possession or under his control any cannon or fire-arms, or any ammunition or military stores except under a license and in the manner and to the extent permitted thereby."

This has to be read with section 19 (f) which is the provision relating to punishment for the infringement of section 14 :

"Whoever commits any of the following offences (namely) :—(f) has in his possession or under his control any arms ammunition or military stores in contravention of the provisions of section 14 or section 15, shall be punished with imprisonment for a term which may extend to three years or with fine or with both."

Section 29 provides :

"Where an offence punishable under section 19, clause (i) has been committed within three months from the date on which this Act comes into force in any province, district or place to which section 32, clause 2 of Act XXXI of 1860 applies at such date or where such an offence has been committed in any part of British India not being such a district, province or place, no proceedings shall be instituted against any person in respect of such offence without the previous sanction of the magistrate of the district, or, in a presidency-town, of the Commissioner of Police.

Lastly section 21 is in these terms :—

"Whoever, in violation of a condition subject to which a licence has been granted, does or omits to do any act shall, when the doing or omitting to do such act is not punishable under Section 19 or S. 20,

be punished with imprisonment for a term which may extend to six months or with fine which may extend to five hundred rupees or with both.

The lower courts have in holding that this is a case falling within the purview of section 21, relied upon condition 3 of the licence which says that the licence is valid "to the extent specified in column 8" and column 8 is as follows: "Area within which the licence is valid—Tanjore District." It is, from this condition, argued that the expression "extent" is in its connotation restricted to territorial limit. The appellate court has also relied upon the second condition in the licence which is in these words:

"If (the licence) covers only the persons named, and the arms and ammunition described therein and such retainers (if any) as may be entered in column 5."

The learned Session Judge considered that this condition which also has been violated does not fall within the ambit of section 14 of the Arms Act and hence the offence would not be punishable under section 19 (f) as coming under section 14. Attention was further drawn to the first note at the bottom of the licence which is to the following effect:

"Any breach of the conditions of this licence is punishable with imprisonment for a term which may extend to six months or with fine which may extend to Rs. 500 or with both (Section 21 of the Indian Arms Act 1878)."

The criterion to be applied in deciding whether Section 14 applies is whether the possession or control was not covered by a licence or if it was covered by a licence whether it was in the manner and to the extent permitted by the licence. The prosecution case is definitely to the effect that so far as the excess quantity of gun power that is found in the shop is concerned, it is not covered by the licence. It was therefore a case of possession of 7/8 lbs, of gun powder without a licence. Condition 2 might also be applicable to such a case but it has to be noticed that Section 21 comes into play only where in violation of a condition subject to which the licence has been granted an act has been done which is not punishable under Section 19. Apart from this quite simple way of disposing of the matter, I have to deal with the second part of Section 14 which relates to the manner and extent permitted by the licence as there has been considerable discussion about it at the Bar and in the court below. Both the lower courts relied on the decision of the learned Chief Justice of the Oudh Chief Court sitting singly in *Ram Saromon Singh* v. *Emperor* [1] where it was held that the word "extent" in section 14 means territory in which the licence is valid but with regard to the word "manner" the learned Chief Justice was of the opinion that it should not be given a restricted meaning. We are not concerned in this case with the interpretation of the word "manner" but with reference to the meaning given in the Oudh case to the word "extent". I have to point out that the learned Chief Justice was under the impression that that word had not been construed in any case before and it is in that view that the interpretation was given that the word means only the territorial limits. Actually there is an earlier decision given by a Division Bench of the Calcutta High Court in *Malcolm* v. *Emperor* [2] directly on the question of the meaning of the word "extent" in section 14 of the Indian Arms Act and unfortunately this case was not cited before the learned Chief Justice in the Oudh Court. In the Calcutta case Jack and Ghose, JJ. rejected the argument that was raised before them that the word "extent" in section 14 relates only to territorial extent and construed the word "extent" to include the concept of limit of time or of the duration of the licence as well. There had been some delay in the renewal of the licence but at the time when the offence complained of was committed the weapon was not actually covered by a licence. Although it is usual not to prosecute persons who have applied for renewal before the expiry of the year allowing them a month's period of grace, the learned Judges held that that would not affect the provisions of section 19 which states that a person who has in his possession arms in contravention of the provisions of section 14 commits an offence and to such a case it was held that the word "extent" was applicable as the accused was in possession and control of the weapon after the expiry of the period of licence.

The learned Public Prosecutor tried to distinguish the Bench decision on the ground that that was a case where the licence had expired and at the time of the alleged sale of the weapon it was not actually covered by a subsisting licence. It was thus a case of

1. [1946] A.I.R. Oudh. 124
2. [1933] A.I.R. Cal. 218

possession without a licence and would come directly under the earlier portion of section 14 and it was not necessary to discuss the connotation of the word "extent" or its applicability to such a case. I have pointed out that the position is quite similar in the present case also as the excess quantity was held without a licence. The Calcutta case is certainly authority for the position that the word "extent" is not confined to territorial extent only but it has to be understood in its ordinary and natural sense. The meaning of the word "extent" according to Webster's New International Dictionary is, inter alia, "degree, measure, proportion" as can be gathered from the phrases in common use, "to a certain extent, to a great extent, to the full extent, and reaching the extent". In fact when one speaks of the extent of a person's wealth or liabilities or his gains or losses, it cannot be said that the use of the word "extent" in that context as implying the concept of quantity or bulk is inappropriate and there is no justification for holding, whatever the limited application of the word "extent" may be in condition 3 read with column 8 of the licence, that the word "extent" was used in section 14 as excluding the idea of quantity. Reference to the first foot note in the licence is also unprofitable as the conditions in the licence as to which section of the Act is applicable cannot be held to govern or control the provisions of the Act itself. It may be contended that upon such wide interpretation of section 14, section 21 would become a superfluous provision and such intention cannot be attributed to the Legislature. There can conceivably be several cases where section 21 would come into play, but I may for illustration mention the breach of condition 7 of the licence requiring the licensee to report the loss or theft of the weapon at the nearest police station. Such a violation will not fall under section 14 and would be rendered punishable under section 21 of the Act.

For the reasons, I am in agreement with the defence contention that the word "extent" in section 14 includes the quantity of ammunition permitted by the licence. Possession or control of any quantity in excess of it must be deemed apart from its not being covered by the licence, an offence under section 14 read with section 19 (f) because it is not according to the extent permitted by the licence. In this view it must be held that the prosecution of the petitioner was not maintainable under section 29 without the sanction of the District Magistrate. The petition is allowed and the conviction is set aside, the fine if paid will be refunded.

N.T.R. — *Conviction set aside.*

Cr. R. C. No. 451 of 1947
(Cr. R. P. No. 430 of 1947)

RAJAMANNAR J.

*June* 10, 1947.

UMMAL HASANATH
v.
EMPEROR

*Cr. P. C. (V of* 1898), *ss.* 205 & 353—*Presence of accused—Power to dispense with.*

*There is a difference between the stage contemplated by s* 205, *Cr. P. C. and that contemplated by s.* 353; *s.* 205 *deals with the initial appearance of the accused person before the magistrate, whereas s.* 353 *deals with the presence of the accused during the trial of the case or during enquiry.*

*S.* 205 *applies only to cases in which the magistrate has issued a summons in the first instance and not where the accused has been arrested without or after the issue of a warrant.*

*In other cases, s.* 353, *Cr. P. C. by necessary implication confers power on the presiding officer, whether he is a magistrate or a sessions Judge or a Judge of the High Court, to dispense with the personal attendance of an accused person. Even otherwise s* 561 *A of the Code is wide enough to confer such a power on the High Court.*

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the Hige Court to revise the order of the Court of the Sub-Magistrate of Karur dated 1—S—47 in P. R. C. No. 11 of 1947.

*V. T. Rangaswami Aiyangar* for Petr.

*Asst. Public Prosecutor (A. S. Sivakaminathan)* for Crown.

ORDER.

This case raises a point on which there is no direct authority. The petitioner is the first accused in P. R. C. No. 11 of 1947 in the court of the Sub-Magistrate, Karur. She was arrested without a warrant by the police and remanded in a sub-jail for a period of 13 days. The offence was one under section 302 of the Indian Penal Code. An application was made to the Magistrate, purporting to be under section 205 of the Code of Criminal Procedure, to dispense with her personal attendance and to permit her to appear by her advocate. The grounds on which the application was made were that the petitioner was a purdah Muslim lady belonging

to a respectable family and that she was a woman of poor health and frequently falling ill. The Sub-Magistrate rejected the application for two reasons: (1) that he had no jurisdiction to grant the application; and (2) that the accused might be required for identification purposes. The petitioner seeks to have this order of the Magistrate revised by this court.

The second reason does not appear to be tenable. It has been represented to me that the petitioner is a gosha lady and that none of the witnesses is likely to have seen her personally. It has also to be mentioned that most of the witnesses have since been examined and no necessity arose for identification; but assuming that an occasion arose for identification it would always be open to the Magistrate to direct her personal attendance.

The other reason raises an important question. The application was made under section 205 of the Code of Criminal Procedure and sub-section (1) of the section runs as follows:—

"Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused, and permit him, to appear by his pleader."

It is clear from the language of this sub-section that the power conferred upon a Magistrate to dispense with the personal attendance of the accused can be exercised only when he issues a summons. It may be that the case itself is a warrant case, but nevertheless the Magistrate might have issued a summons in the first instance in exercise of his discretion under section 204 of the Code of Criminal Procedure. Even then the Magistrate would have power under this provision (vide *Basumodi Adhikarini* v. *Budram Kalita* [1]). In the present case admittedly the Magistrate never issued a summons. The petitioner was arrested without a warrant. It was held in *Abdul Hamid* v. *King Emperor* [2] by a Division Bench of the Patna High Court that section 205 of the Code of Criminal Procedure applies only to cases in which the Magistrate has issued a summons in the first instance and not where the accused has been arrested without or after the issue of a warrant. This conclusion appears to be inevitable from the language of the section. I have come across only one case in which though the Magistrate issued a warrant yet it was held that the Magistrate could grant an application under section 205; but the circumstances were very peculiar. In that case (*Narayana Aiyar In re*, [3]) it was found that though the procedure to be followed was as in a summons case the Magistrate happened to issue a bailable warrant by mistake. Having made that mistake the Magistrate refused the application under s. 205 for exemption from personal attendance on the ground that a warrant had been issued. The learned Judge, Kuppuswami Aiyar J. held that the Magistrate was not justified in taking his stand on an incorrect order of his for refusing the application, I do not think that this decision helps me in any way.

The question then remains whether the Magistrate has the power to dispense with the personal attendance of the accused under any other provision of the Code. The learned advocate for the petitioner conceded that there was no other express provision. There is only a reference to exemption from personal attendance in section 353 of the Code of Criminal Procedure which runs as follows :—

"Except as otherwise expressly provided, all evidence taken under Chapters XVIII, XX, XXI, XXII and XXIII shall be taken in the presence of the accused or, when his personal attendance is dispensed with, in the presence of his pleader."

Courts have held that a power could be implied under this section to dispense with the attendance of an accused during his trial before the criminal sessions of the High Court or before the moffusil court of Session. In *Emperor* v. *C. W. King* [4], it was held that the High Court had power under the provisions of Section 353 to dispense with the attendance of an accused person during his trial before it in the Sessions on the ground of his ill-health. Devar J. observes as follows :

"Section 205 of the Code of Criminal Procedure empowers a Magistrate to dispense with the attendance of the accused in cases where he issues a summons and it seems to me that it could not have been the policy of the Legislature that the High Court should not have similar power in all proper cases."

In *in re Kandamani Devi* [5], Kumaraswami Sastri J. held that a Sessions Judge had power to dispense with the personal attendance of an accused and allow him to appear by a pleader during the Sessions trial.

I am inclined to take the view that section 353 by necessary implication confers power on the presiding officer whether he is a Magistrate or a Sessions Judge or a Judge

1. [1894] 21 Cal. 588
2. [1923] 2 Pat. 793
3. [1946] M. W. N. 480 : Cr. 97
4. [1912] 14 Bom. L. R. 236
5. [1922] M. W. N. 165 : 45 Mad. 359

of the High Court to dispense with the personal attendance of an accused person. Chapter XVIII would cover an enquiry before the committing Magistrate also. There appears to be a difference between the stage contemplated by section 205 and that contemplated by section 353. Section 205 deals with the initial appearance of the accused person before the Magistrate, whereas section 353 deals with the presence of the accused during the trial of the case or during enquiry. I therefore hold that the Magistrate had the power to entertain the application of the petitioner.

In any event I think that the language of section 561-A is wide enough to confer such power on this court.

This appears to be a case in which having regard to the fact that the petitioner is a gosha Muslim lady and alleged to be in poor health it would be in the interests of justice to dispense with the personal attendance of the petitioner. The Magistrate will of course have the power to direct the personal attendance of the petitioner whenever he thinks it becomes necessary.

The petition is therefore allowed.

N.T.R. — *Petition allowed.*

Cr. R. C. No. 67 of 1947
(Cr. R. P. No. 61 of 1947)
*April* 3, 1947,
YAHYA ABI J.

NATESA NAICKER
v.
MARI GRAMANI & another.

*Criminal Procedure Code (V of* 1898*), S.* 247 *—Summons case—Complainant absent—Acquittal imperative.*

*When in a summons case the complainant does not appear, it is imperative on the part of the magistrate to acquit the accused unless there is a proper reason for adjourning the hearing of the case.*

(1926) *M. W. N.* 928; 49 *Mad.* 833, followed.

Petition under sections 435 and 439 of the Code of Criminal Procedure 1898, praying the High Court to revise the order of the Court of Stationary Sub Magistrate of Chingleput dated 18—12—1946 and made in C. C. 2470 of 1946.

*S. Krishnamurthi & Vepa P. Sarathi* for Petr.
*V. Rajagopalachariar* for Respt.
*Public Prosecutor (V. L. Ethiraj)* for Crown.

ORDER.

This is an application to revise the order of acquittal passed by the Stationary Sub-Magistrate of Chingleput in C. C. No. 2470 of 1946 on his file under section 247 of the Code of Criminal Procedure. That case arose upon a complaint filed by the petitioner herein against the respondents alleging the commission of offences by the respondents under sections 447 and 446 of the Indian Penal Code. The case was posted first and heard on 6th December 1946. After the examination of the complainant, it was adjourned to 16th December 1946 for further evidence. On that day when the case was called, the complainant was not present either in person or by pleader and consequently the Sub-Magistrate acting under section 247 of the Code of Criminal Procedure, acquitted the respondents accused.

In the affidavit filed by the petitioner in this court in this case, it is alleged that on that day he and his witnesses were present in court from 10 A. M., that just before the case was called, the advocate appearing for the accused called him and asked him to fetch his vakil as the case was about to be called, that he immediately went to the civil court where his advocate was engaged and brought him before the Magistrate's court within a few minutes, but in the meantime the case had been called and the respondent had been acquitted. This version has been supported in the affidavits of the Village Munsif and of another person who is said to have been present for being examined as a witness by the complainant in his case. These allegations have, however, been refuted by the first respondent in his affidavit, in which he says that none of the witnesses were present, that the case was called at 1 P. M. and until then nobody had turned up, that the complainant gave up the case as he considered it futile to adduce any evidence. It is scarcely necessary to go into the merits of these averments as the legal position as to the applicability of section 247 of the Code of Criminal Procedure to the facts that transpired, is perfectly clear and free from doubt. Section 247 provides:

"If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day."

The proviso to the section is not material. It will be apparent from the language of the section that when in a summons case the complainant does not apper, it is imperative on the part of the Magistrate to acquit the accused, unless there is a proper reason for adjourning the hearing of the case. It is not the case of the complainant that there was

any such reason of which the Magistrate was aware at the time he called the case and the complainant was absent. In those circumstances, there was no discretion in the matter; the Magistrate was bound by the statute to acquit the accused. Where therefore, an order has been passed in conformity with statutory duty, it must be held to be a proper and correct order, and there can be no question of revising such an order merely because it would cause some hardship to the party.

In Criminal Revision Case No. 229 of 1925 Jackson J. had taken the view that the appearance of the complainant in any portion of the day is sufficient compliance with section 247 and that the Magistrate was bound to wait for the appearance of the complainant until the close of the day. This view which was contrary to the prevailing judicial opinion at that time was dissented from by a Division Bench of this court in *Tonkya* v. *Jaganna* [1]. In that case, it was held that section 247 makes it obligatory on the Magistrate to acquit the accused if the complainant does not appear, unless there was proper reason before the Magistrate for the adjournment of the hearing of the case, The learned Judges said:

"Though the Magistrate could very well have waited for a short time, it cannot be said that the order of the Magistrate is illegal. He acted within his powers and when the order is not illegal it would not be right for this court to interfere with it."

Considering the argument about hardship, which has also been repeated in this case, the learned Judges observed that the hardships that may be caused to complainant in construing the section cannot be considered, as no forced construction can be given to the very clear words of the section. This decision has been followed in a number of cases decided by single Judges, but it is not necessary to cite them. I must hold, following the Bench decision, that the order of the Sub-Magistrate is perfectly legal and competent and cannot be interfered with in revision.

The petition is dismissed.

N.T.R. — *Petition dismissed*

Criminal Revision Case No. 685 of 1946
(Criminal Revision Petition No. 655 of 1946)

*April* 18, 1947

YAHYA ALI, J.

VENKATASUBBIAH

v.

EMPEROR

*Penal Code (XLV of* 1860*), s.* 161—*Applicability.*

*A payment would be a bribe whether paid before the doing of the official act, or after the official act has been done or official favour has been shown.*

*A public servant on leave, where such leave counts as duty, is still a public servant and can be guilty of an offence under s.* 161 *Penal Code.*

1. [1926] M.W.N. 928; 49 Mad 833

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of Session, South Arcot dated 20—7—1946 in C. A. No 58 of 1946 preferred against the order of the Sub Divisional Magistrate, Tirukoilur dated 30—4—1946 in C. C. No. 137 of 1945.

*N. Somasundaram* for Petr.

*Public Prosecutor (V.L. Ethiraj)* for Crown.

JUDGMENT.

The petitioner was an assistant goods clerk in Chidambaram railway station. He is said to have received from P. W. 1 a sum of Rs. 15 as a reward for his having accepted and consigned some parcels. The defence was that that sum was received as a loan. That defence, being manifestly puerile, was rightly rejected by both the Courts below. P. W. 1's version has been corroborated by his master and other witnesses. There can therefore be no doubt that the sum of Rs. 15 was received by the petitioner as an illegal gratification for doing an official act.

Two ingenious arguments are raised by Mr. N. Somasundaram for the petitioner. The first is that the phrase, 'motive or reward' in section 161 of the Indian Penal Code, does not cover a case where the payment is made in respect of past favours. The term 'reward' in the phrase is manifestly intended to apply to a past service. What is forbidden generally is receiving any gratification as motive to do or a reward for having done any such thing as is described in the definition. Any other construction would lead to an absurdity. In that view the payment would be a bribe when paid before the doing of an official act but it would not be a bribe if paid after the official act has been done or official favour has been shown. It will be the easiest thing for a person in such a position to stipulate for the payment immediately after the doing of the official act or the showing of the official favour. Such a construction is not in keeping with either the language or the spirit of section 161 of the Indian Penal Code.

The second contention is that since the petitioner was on leave, he ceased to be a public servant and that consequently section 161 was not applicable to him. Such

leave counts as duty and so long as a person is on duty, he must be deemed to be a public servant.

I find no merit whatever in this petition and consequently I confirm the conviction.

With regard to the sentence, there are no particularly aggravating features in this case; and in my opinion, a sentence of six months' R. I. will meet the ends of justice. The sentence is reduced accordingly.

N.T.R. —

Cr. R. C. No. 545 of 1946
(Cr. R P. No. 523 of 1946)
*December* 19, 1946

KUPPUSWAMI AYYAR, J.

K C. MANIKYA MUDALIAR
v.
P. P. ANTONY

*Criminal Procedure Code (V of* 1898*) S.* 437 *Admitting complaint under some sections— Direction to treat as preliminary register case for another offence without notice— Validity.*

*A complaint was filed against the petitioners alleging that they entered the house of the complainant and stole some articles. The magistrate admitted the case under Ss.* 454 *and* 380 *I, P. C. When the case was pending, the Additional District Magistrate was moved and he directed that the case should be treated as a preliminary register case and proceeded with under S.* 395 *I P.C.*

Held, *when a complaint is made the trying magistrate need not admit the case in respect of all the offences mentioned in the complaint. If after inquiry he finds that a more serious offence has also been committed, he can frame a charge and proceed with the trial or commit the accused to trial. Therefore it could not be said that the order of the trying magistrate amounted to a dismissal of the complaint under S.* 395 *I.P.C. to justify the order passed by the Additional Magistrate. Nor could the prosecution for a more serious offence be ordered by the Appellate Court without notice to the accused and without hearing him.*

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Additional District Magistrate, Chittoor, dated 3—5—1946 in C. R. P. No. 15 of 1946 preferred against the order of the Stationary Sub Magistrate Tirupati dated 16—4—1946 in C. C. No. 486 of 1946.

*V. T. Rangaswami Ayyangar & G. Nataraja*n, for Petr.

*Public Prosecutor*, (*V. L. Ethiraj*), for Crown.

ORDER

The two accused in C. C. No. 486 of 1946 on the file of the Stationary Sub-Magistrate, Triupati seek to revise the order of the District Magistrate of Chittoor in Cr. R. P. No. 15 of 1946 directing the case to be treated as a preliminary register case under section 395 I. P. C. A complaint was filed against the petitioners alleging that they entered the house of the complainant and stole some cinema articles. The Magistrate admitted the the case under section 380 I.P.C. on receiving the complaint. When the case was pending, the Additional Magistrate was moved and he directed that the case should be treated as a preliminary register case and proceeded with under section 395 I.P.C.

It is stated that the Magistrate had no jurisdiction to pass an order like this without notice to the petitioners and secondly that he had no jurisdiction to pass such an order. In this case the order admitting the complaint for an offence under sections 454 and 380 I. P. C. is construed as an order dismissing the complaint for an offence under section 395 I. P. C. I do not think the Magistrate was justified in having so construed. When a complaint is made, the trying Magistrate need not admit the case in respect of all the offences mentioned in the complaint. If after enquiry he finds that a more serious offence has also been committed, he can frame a charge and proceed with the trial. Therefore it cannot be said that the order of the trying Magistrate amounted to dismissal of the complaint under section 395 I, P. C. to justify the order passed by the Additional District Magistrate; nor can it be said that in a case like this a prosecution for a more serious offence can be ordered by an appellate Court without notice to the accused and without hearing him. It is open to the trying Magistrate after the evidence to frame a charge on a graver offence if it was committed and then commit the accused to trial. All that is objected to is that the Additional District Magistrate should not have given the direction and that an order will have to be passed by the trying Magistrate himself and not by the appellate Magistrate. To this extent the argument has to be accepted.

The order directing the prosecution for an offence under section 395 I. P. C. is set aside and the matter will be left to be decided by the trial court after taking the necessary evidence.

N. T. R. —

FULL BENCH
C. M. P. No. 1270 of 1947
*July* 21, 1947

SIR FREDERICK WILLIAM GENTLE, C.J., PATANJALI SASTRI & GOVINDARAJACHARI, JJ.

IN THE MATTER OF A PLEADER

*Legal Practitioner—Readmission—Grounds.*

*In an application for reinstatement as a practitioner, the court has to be satisfied, amongst other things, that the applicant has rehabilitated himself in such a manner that he is fitted to be readmitted as a member of the honourable profession to which he belonged before he was displaced from it by reason of his conduct.*

*The success or otherwise of the application must depend upon his character, reputation and behaviour and other matters about the applicant after he had been displaced from his membership from the roll. It is no ground to support an application of this sort to state that the applicant had advised friends or clients on legal affairs. If, after ceasing to be qualified as a professional gentleman in legal matters, an individual nevertheless, to the utmost extent possible, continues to act for reward in legal matters and advises in such matters, that would be a very strong ground to refuse an application for reinstatement.*

**Petition under Sections 6 and 7 of the Legal Practitioners Act and Section 151 of Act V of 1908 praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to reconsider the order dated 25—11—1940 and made in Referred Case No 23 of 1940 by which the name of the petitioner was struck off the rolls of Pleaders and direct his reinstatement.**

*P. M. Srinivasa Ayyangar*, for Petr.
*Advocate General*, for Crown.

ORDER

SIR GENTLE, C. J.—This is an application by the petitioner who formerly was a pleader, for restoration of his sanad and reinstatement as pleader. He was first enrolled as a First Grade Pleader in 1925. Upon complaint by a client to the learned District Munsif of Sattur, an enquiry was held into the conduct of the petitioner who had obtained, on behalf of his client, a sum of Rs. 568-2-0 and accounted to the client only for Rs. 100. The learned District Munsif reported that the petitioner had misappropriated the balance Rs. 468–2–0. This court, upon considering the District Munsif's report, found that the petitioner had been guilty of professional misconduct and directed the cancellation of his sanad and he was removed from the roll of pleaders. That was on the 25th November 1940.

In support of the present application a number of affidavits have been filed to which a short reference is convenient. The petitioner, himself, expresses full regret and promises that, if his application is granted, there will never be further cause for complaint against him. He also says that the amount which he misappropriated has been restored to the injured party.

The affidavits of the petitioner and of other deponents set out that, following the order of this court in 1940, the pleader for a period of one year, 1940-1941, was employed in the office of Mr. D. Narasimhachari, a learned advocate in Madura; in the next year he was engaged at the Union Christian High School, Madura as a teacher in English; in the following year he was employed as lecturer in science in the Madura College; and for three years thereafter, until the present time, he has been acting and employed as manager of the Yarn Merchants Association in Madura. There are affidavits deposed to by the learned advocate, to whom reference has just been made; the Headmaster of the Union Christian High School; the Principal of the Madura College; and several gentlemen of position in Madura carrying on business as yarn merchants who have held office in the Yarn Merchants Association as Secretary, President and similar appointments. All the affidavits speak in high terms of the conduct of the petitioner. Those which deal with his employment during the last three years as Manager of the Yarn Merchants Association, testify to the honesty and integrity of the petitioner, that he has been entrusted with considerable sums of money for all of which he has accounted and that the books, which it was his duty to maintain, have been audited and have been found in every way to be correct and properly kept. These affidavits add that, in the opinion of the deponents, the petitioner has realized his position and has by his conduct, behaviour and integrity shown that he has regained the character which he lost when he was found guilty of misappropriation of moneys belonging to his client.

In an application of this nature, it has been pointed out in similar proceedings the Court has to be satisfied, amongst other things, that the applicant has rehabilitated himself in such a manner that he is fitted to be readmitted as a member of the honour-

able profession to which he belonged before he was displaced from it by reason of his conduct.

In the present instance I am satisfied that the petitioner has regained his lost character and has shown by his conduct that now he is fitted to be readmitted and again to become a member of the honourable profession to which he belonged prior to 1940 and in my view this application should succeed,

I desire however to make one or two further observations. In several of the affidavits which were filed on behalf of the petitioner, there are statements to the effect that the deponents or others availed themselves of the assistance in legal matters of the petitioner; he gave legal advice and assisted in legal affairs. When this application first came before this Court in April it was adjourned in order that further affidavits should be filed dealing with the question whether the applicant had been remunerated for his services in giving legal advice and helping in legal affairs. Further affidavits have now been filed from which it is clear that such service was gratuitous and no fee was demanded by the applicant nor paid by the persons who were advised by him. That being the position here, no further observation is required regarding the applicant. But I wish to say this: it is no ground to support an application of this sort to state that the applicant had advised friends or clients in legal affairs. The success or otherwise of an application of this sort must depend upon his character, reputation and behaviour and other matters regarding the applicant after he has been displaced from his membership as pleader from the roll. If, after ceasing to be qualified as a professional gentleman in legal matters, an individual nevertheless to the utmost extent possible, continues to act for reward in legal matters and advises in such matters, that would be a very strong ground to refuse an application for reinstatement. It is clear that having been ordered by the Court to cease to be a member of the legal profession, such individual cannot appear in Court he could, of course, advise on law; but if he did so for reward, in other words, to the fullest extent possible he continued to act in a professional capacity, in my view that would be a strong ground to refuse to entertain an application for reinstatement.

For reasons I have given, in my view, this application should succeed and an order made as sought in the application.

PATANJALI SASTRI, J: I agree.

GOVINDARAJACHARI, J: I agree.

N.T.R.

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Cr. R. C. No. 1087 of 1946
(Cr. R P. No. 1040 of 1946)
*July* 22, 1947

CHANDRASEKHARA IYER, J.

ALLURI VENKATA SURYANARAYANARAJU & others
v.
PAKALAPATI SUNDARA RAMACHANDRARAJU

*Cr. P. C. (V of* 1898), *Ss.* 145 (4) *&* 146—*Possession—What consitutes.*

*Possession of a fugitive, scrappy or recent character is not the possession that is contemplated under sub. cl.* (4) *of s.* 145, *Cr. P. C. as the possession which should be maintained by the magistrate subject to the result of the Civil Court.*

*Where there has been a scramble for possession between two parties and neither side has effective possession, the proper order to make is one under s.* 146.

Petition under Sections 435 and 439 Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the Additional First Class Magistrate of Rajamundry in M. C. No. 1 of 1946 dated 5—10—46.

*K. S. Jayarama Ayyar & P. Satyanarayana Raju*, for Petrs.

*V. T. Rangaswami Ayyangar for P. A Raju*, for Respt.

*Public Prosecutor* (*V. L. Ethiraj*, for Crown.

ORDER

This is a revision directed against the order of the Additional First Class Magistrate, Rajamundry, in M. C. No. 1 of 1946 holding that the property in dispute called Perugu Lanka was in the possession of the 'A' party, namely, Pakalapati Sundara Ramachandraraju, and that "his possession shall continue" until he is evicted therefrom in due course of law. There is a direction that the attachment made on 24–4–1946 be raised and that the 'A' party should be put in possession of the land in dispute.

It is apparent from the order itself that the possession on which reliance has been placed by the Magistrate for coming to the conclusion that the 'A' party was in such possession, commenced only in February 1946. This is what he says:—

"The indication of possession is, not the raising of bunds last year, but the raising of bunds and the erection of cattle shed this year in February 1946."

The jurisdiction of the magistrate under

section 145, Criminal Proceduae Code was invoked by a report of the Circle Inspector of Police dated 23-2-1946, and the report states that the cattle-shed and the bunds which each party claims as having been brought into existence on the land were only a week or ten days old. This statement of the Circle Inspector of Police is confirmed as correct by the Additional First Class Magistrate. If this is the truth, then there is no gainsaying the fact that apparently there has been a scramble for possession between the two parties and that in this scramble some kind of work here and some kind of work there might have been done by one side or the other to lend support to their pleas of possession. Such possession of a fugitive, scrappy or recent character is not the possession that is contemplated under sub-clause 4 of section 145 as the possession which should be maintained by the Magistrate subject to the result of the decision of a Civil Court. Neither side has effective possession and under such circumstances the proper order to make was one under section 146, namely, that the property be attached until a competent court determines the rights of the parties or determines who is the person entitled to possession. The order of the lower court is hence set aside and such an order will be substituted in its place. The First Class Magistrate is directed to appoint forthwith a Receiver to take possession of the property pending final adjudication on the rights of the parties in a civil court.

N.T.R.

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Cr. R. C. No. 93 of 1947
(C. R. No. 7 of 1947)
Cr. R. C. No. 303 of 1947
(Taken up No. 1 of 1947)
*April* 1, 1947

YAHYA ALI, J.

ABDUL KAREEM
v.
EMPEROR

*Cr.P.C. (V of 1898) S. 562—Conviction and reference under S. 562 — Appeal against conviction.*

*An appeal lies against the (preliminary) conviction by a magistrate who is not competent to act under S. 562 (1) (a) Cr. P. C. and who has therefore farwarded the case to a magistrate competent to do so.*

*A right of appeal is given in the Code against a conviction and it cannot be said the conviction is incomplete without a sentence for the purpose of exercising the right of appeal.*

Case referred for the orders of the High Court, under s. 438 of the Criminal Procedure Code, by the District Magistrate of Vizagapatam in his letter dated 20—1—1947 in R. C. No. 140 of 1947 and Case taken up by the High Court on perusal of the Calender and in Criminal Appeal No, 7 of 1946 on the file of the Court of the Sub-Divisional Magistrate of Vizagapatam (in C. C. No. 1895 of 1945 on the file of the Stationary Sub-Magistrate of Vizagapatam).

*Public Prosecutor, (V. L. Ethiraj),* for Crown.

ORDER

This is a reference by the District Magistrate of Vizagapatam made in the following circumstances. One Abdul Kareem, a clerk in the Fleet Mail Office, Vizagapatam was charged with having committed theft under section 381 I. P. C. He was tried in C. C. No. 1895 of 1945 on the file of the Stationary Sub-Magistrate Vizagapatam and convicted of that offence. The Magistrate was of the opinion that since the accused was a young man without any previous conviction, it would be proper to release him under section 562 (1)(a) of the Code of Criminal Procedure instead of awarding him a sentence. Since he was not empowered under that section he forwarded the accused under section 380 Cr. P. C. to the Additional First Class Magistrate, Vizagapatam, for taking appropriate action, if he considered it fit, under section 562 Cr. P. C. Before the Additional First Class Magistrate could dispose of the matter on the reference under section 380, Abdul Kareem preferred an appeal against his conviction by the Stationary Sub-Magistrate. The appeal was heard by the Sub Divisional Magistrate, Vizagapatam who dismissed it *in limine* on the ground that it was premature and that there was no provision of law under which such an appeal could be filed. The learned Sub-Divisional Magistrate took the view that without a sentence a conviction is not complete and since no sentence had been passed in the case an appeal against a mere conviction not accompanied by a sentence is not maintainable. In this view he did not enter on the merits of the case.

The District Magistrate in his reference requests to be informed "whether an appeal lies against the preliminary conviction by a Magistrate who is not competent to act under section 562 (1) (a) Cr. P. C. and who has, therefore, forwarded the case to a Magistrate competent to do so." His own opinion is that no appeal lay at all before the Sub-Divisional Magistrate at the stage at which it was filed and that the conviction by the Stationary Sub-Magistrate was not a convic-

tion in law as the case has now been taken on file by the Additional First Class Magistrate who, on his appreciation of the evidence may very well discharge or acquit the accused. He considers that the proper course for the accused was to await the decision of the Additional First Class Magistrate and if he was convicted to prefer an appeal to the Court of Session.

The point raised in the reference is one of first impressions, and is not altogether free from difficulty. Having bestowed attention to all the aspects of the matter, however, I have come to the conclusion that the appeal preferred by Abdul Karim to the Sub-Divisional Magistrate against the conviction in C. C. 1895 of 1945 was not incompetent. As the District Magistrate has himself pointed out a right of appeal is given in the Criminal Procedure Code against a conviction under Section 381 I. P. C. I am not in a position to agree with the argument that the conviction is incomplete without a sentence for the purpose of exercising the right of appeal. In order to be able to deal with the matter effectually I have *suo motu* taken up in revision C. A. 7 of 1946 on the file of the Sub-Divisional Magistrate, Vizagapatam. I have not considered it necessary to give notice to the accused as the order that I propose to make is favourable to him. The order of the Sub-Divisional Magistrate in C. A. 7 of 1946 dismissing the appeal is set aside and the appeal is restored to his file for being heard and disposed of according to law. If on hearing both sides in the appeal the Sub Divisional Magistrate comes to the conclusion that the accused should be acquitted altogether the reference made under section 562 Cr. P. C. to the Additional First Class Magistrate by the Stationary Sub-Magistrate becomes otiose. If on the other hand, the Sub Divisional Magistrate convicts the accused, it will be open to him to consider whether the conviction should be followed by a sentence or whether action should be taken by him under section 562 Cr. P. C. In either case, the reference to the Additional First Class Magistrate would become infructuous.

The reference is answered accordingly and the papers will be returned to the District Magistrate.

The Sub-Divisional Magistrate, Vizagapatam will be directed to restore C. A. 7 of 1946 to his file and dispose of it on the merits in the light of the observations made in this judgment.

N.T.R.

Cr. R. C. No. 561 of 1947
(Cr. R. P. No. 457 of 1947)
*July* 28, 1947

RAJAMANNAR, J.

K. VENKATA REDDI,
v.
EMPEROR

*Evidence Act (I of 1872) s. 25—Prohibition Act — Prohibition Sub Inspector — Statement before—Admissibility.*

*A Prohibition Sub Inspector cannot be deemed to be a police officer within the meaning of s. 25 Evidence Act and a confessional statement made to him is not inadmissible in evidence.*

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of Stationery Sub Magistrate' Pulivendla dated 26—5—47 and made in C. C. 353 of 47.

*B. Jagannadha Das & C. V. Dikshitalu*, for Petr.

*Public Prosecutor* (*V. L. Ethiraj*) for Crown.

ORDER.

The only question which arises in this revision petition is whether a confessional statement recorded by a Prohibition Sub-Inspector is not admissible in evidence because it is a confession made to a Police Officer. The decision turns upon whether a Prohibition Sub-Inspector can be deemed to be a "Police Officer" within the meaning of section 25 of the Indian Evidence Act. The Stationary Sub-Magistrate, Pulivendla, has held that he is not and therefore the statement of the accused recorded by him is admissible.

Mr. Jagannadha Das for the petitioner took me through all the relevant provisions of the Madras Prohibition Act. In particular he stressed upon the following provisions. Section 15 declares that all offences under the Act shall be cognizable and the provisions of the Code of Criminal Procedure, 1898, with respect to cognizable offences shall apply to them. Section 38 provides how a person arrested under the provisions of sections 28, 29, 32 or 33 has to be dealt with. Sub-section (3) of that section says that on the arrested person being brought in custody before a Prohibition or Police Officer, such officer shall hold such enquiry as he may think necessary. He relied particularly on these two provisions and G. O. No. 475, Mis. 2056, Revenue dated 21st September 1946 which declared every prohibi-

tion station house to be a police station. This G. O. is apparently issued in accordance with the definition in section 3 sub-section (13) which says that "police station" includes any place which the provincial Government may, by notification, declare to be a police station for the purpose of this Act.

Learned advocate for the petitioner contended that the term "police officer" which has not been defined in the Evidence Act should not be understood in a restricted sense to comprise only officers regularly employed in the police department but it should include officers invested with powers to detect offences and to investigate into them. He relied upon the Full Bench decisions in *Ameer Sharif* v. *Emperor* [1] and *Nannoo* v. *Emperor* [2]. He however admitted that the decision in *Radhakishnun Marwari* v. *Emperor* [3] takes a different view. This decision was itself discussed in the Calcutta Full Bench decision [1]

The Madras High Court has, in a series of cases, taken the view that an Excise Officer under the Madras Abkari Act is not a police officer within the meaning of section 25 of the Evidence Act. Sundaram Chetti J. in *Mahalakshmayya* v. *Emperor* [4] Bardswell J. in *Duraisami Nadar* v *Emperor* [5] Horwill J. in *Public Prosecutor* v. *Marimuthu Goundan* [6] and very recently Yahya Ali J. in *Mayilvahanam in re* [7] have taken this view in spite of the fact that Excise Officers are invested with several powers similar to and of the nature of police powers. I find it difficult to distinguish these cases from the present case and I find nothing in the Prohibition Act which warrants my so doing.

The Calcutta and the Bombay cases must be read with the respective provisions of the Acts with which they dealt. In *Ameen Sharif* v. *Emperor* [1] the relevant provision was section 74, sub section (3) of the Bengal Excise Act, which declared the area to which an Excise officer empowered under section 73(2) is appointed shall be deemed to be a police station and such officer shall be deemed to be the officer in charge of such station. The Bombay Full Bench decision [51 Bom. 78] must be read along with section 41 of the Bombay Abkari Act which provides *inter alia*, that every officer in the conduct of investigation of all offences punishable under the Act shall exercise powers conferred by the Code of Criminal Procedure on an officer in charge of the police station for the investigation of a cognizable offence. That an identical conclusion would be reached if there is a similar provision in any other enactment is evident from the decision of a Division Bench of this court in *Someshwar H. Shelat in re* [8]. It was therefore pointed out that a special officer of the Commercial Tax Department invested by the Provincial Government with the powers under section 12 (3) of the Hoarding and Profiteering Prevention Ordinance is a "police officer" within the meaning of section 162 of the Code of Criminal Procedure and section 25 of the Indian Evidence Act because sub-section (3) of section 12 of that Ordinance enacted that in conducting the investigation the officer shall have all the powers, duties, privileges and liabilities of an officer in charge of a police station under the Code of Criminal Procedure, 1898, when investigating a cognizable offence within the limits of his station.

It is true that the G. O. referred to by Mr. Jagannadha Das declares a prohibition station house to be a police station within the meaning of the Prohibition Act, but it does not make the prohibition officer or an officer in charge of a prohibition station a "police officer". To my mind a very important fact which must be taken into account in coming to a decision on this question is that throughout the Act in more than one section "police officer" mentioned in contra distinction to a "prohibition officer" (Vide sections 32, 41, 42 43, 46, 47, 48 and 49.)

It is not permissible to decide the question on an anxiety to escape what is pointed out as an anomaly. It is impossible to avoid it and as an instance one can refer to the fact that a confession made before a Village Munsif is admissible in evidence but a confession made before the District Superintendent of Police is not.

I therefore agree with the Magistrate that the statement of the accused made to the Prohibition Sub Inspector is not inadmissible in evidence under section 25 of the Indian Evidence Act. The petition is therefore dismissed.

N.T.R. — *Petition dismissed*

1. [1934] 61 Cal. 607
2. [1927] 51 Bom. 78
3. [1933] 12 Pat. 46
4. [1932] M.W.N. 453; Cr. 69
5. [1934] M.W.N. 394; Cr. 67
6. [1938] M.W.N. 95; Cr. 23
7. [1946] M.W.N. 766; Cr. 144
8. [1946] M.W.N. 271; Cr, 47

Cr. M. P. No. 299 of 1947.
*March* 10, 1947
HORWILL & BELL, JJ.
M. R. VENKATARAMAN & others
v.
EMPEROR

*Cr. P. C. (V of* 1898), *ss.* 167 & 344—*Remand of undertrial prisoner—Custody—Accused to be produced.*

*Whenever a prisoner is brought before the court and the court issues an order of remand, the Magistrate has complete freedom to remand him to whatever custody he thinks fit. The magistrate has the same freedom with regard to the custody to which he commits the accused after a charge sheet has been filed as he had before a charge sheet was filed.*

*S.* 29 *Prisnors Act does not apply to an under trial prisoner.*

*It is illegal for a magistrate to issue an order of remand without having the prisoners produced before him and asking them whether they wished anybody to represent their cause and giving them an opportunity of showing cause why they should not be further remanded.*

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue directions of the nature of Habeas Corpus directing that the petitioners who are now illegally confined in the Trichinopoly Central Jail, within the limits of the Appellate Jurisdiction of this Court be brought up before this Court and set at liberty.

*N. Rajagopalan for Row & Reddy* for Petrs.
*Public Prosecutor* (*V.L. Ethiraj*) for Crown.

ORDER
[HORWILL, J.]

Seven persons have filed a joint application that this court should issue directions in the nature of *Habeas corpus* under Section 491 of the Code of Criminal Procedure to produce the petitioners before this Court and to set them at liberty.

Although the evidence adduced by the petitioner is very unsatisfactory, in that they have filed only one affidavit, and that by a person who had no acquaintance with the facts to which he has sworn, yet two allegations relied on by the petitioners seem to be true and are not denied by the learned Public Prosecutor. The first is that they were remanded to the Central Jail, Trichinopoly, instead of to the Central Jail, Madura, which is the Jail to which prisoners are normally remanded when under trial in the Courts of the Madura District, including that of the stationary Sub Magistrate Madura, in whose court the petitioners were being tried. The other complaint of the petitioners is that the provisions of sections 167 and 344 of the Code of Criminal Procedure were not complied with, in that they were not brought to court when the Magistrate issued fresh orders for the remand of the petitioners to custody.

On the first point, it seems to us that no illegality or irregularity was committed. Section 167 empowers a Magistrate having jurisdiction to remand a prisoner to such custody as he thinks fit. Section 344 does not use the words "as he thinks fit" with regard to the order of remand; but there is nothing in the section which suggests that after a charge sheet has been filed, the Magistrate has not the same freedom with regard to the custody to which he commits the accused as he had before a charge sheet was filed. The learned advocate for the petitioners has referred to the wording of section 29 of the Prisoners' Act, as indicating that the only person who can transfer a prisoner from one Jail to another within the same Province is the Inspector-General of Prisons; but by its very wording section 29 of the Prisoners' Act does not apply to an under trial prisoner; nor are we dealing with a transfer of a prisoner. Whenever an accused is brought before the court and the court issues an order of remand, the Magistrate has complete freedom, as far as we can see, to remand the accused to whatever custody he thinks fit.

On the second point, it does seem certain that an illegality was committed by the Magistrate in issuing an order of remand without having the prisoners produced before him and asking them whether they wished anybody to represent their cause and giving them an opportunity of showing cause why they should not be further remanded. We trust that the Sub Magistrate issued this order through oversight and because, as he later said, the prisoners were at Trichinopoly and he did not have much notice that a request for a further remand would be made. However that may be, we agree with the learned Counsel for the petitioners that an illegality involving a breach of the provisions of the Code of the Criminal Procedure was committed; and we trust that our order will serve as a warning to the Magistrate not to repeat this illegality.

The only point that remains to be considered is what order, if any, it is necessary

for us to pass. The learned Counsel for the petitioners finds himself unable to give any reason why the prisoners should be released on account of the Magistrate's omission. The Magistrate has posted the cases to this day: and he has specifically ordered that the petitioners and their co accused should be produced before him. Now that the Magistrate is fully aware of what is required of him under the law, we have no doubt that his order on this occasion will be a legal one. If it is not, the petitioners have the same freedom as before to approch this Court to set the illegality right,

The petition is dismissed

N.T.R. — *Petition dismissed*

Cr. M. P. No. 802 of 1947.
*June* 17, 1947
RAJAMANNAR J

P. VENKATARAMANIAH CHETTY
v.
PAPPAMAH.

*Criminal Procedure Code (V of* 1898) *s.* 491—*Application under to recover wife—Maintainability.*

*A husband seeking to recover custody of his wife illegally detained by others is entitled to proceed under Section* 491 *Criminal Procedure Code and the respondent cannot be heard to say that there is another remedy provided for under the law.*

1929 *M. W. N.* 689; *Cr.* 137; 53 *Mad.* 72 *followed.*

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue as order of the nature of Habeas corpus directing the respondent to produce her daughter by name Kamalammah wife of the petitioner before the Court and direct her to restore the minor girl to the lawful custody of the petitioner as he is the lawful guardian according to the Hindu Law.

*P Sitarama Pantulu* for Petr.

*S. Amudachari* for Respt.

ORDER.

This is an application under section 491 of the Criminal Procedure Code in which the petitioner seeks to obtain a direction from this court calling upon the respondent to produce a girl named Kamalamma to be restored to his lawful custody. It is common ground that Kamalamma is a minor though there is a dispute as regards her age. The petitioner alleges that the girl was married to him about eleven months before the date of the petition and was staying with him for some days. The respondent is her mother. The petitioner alleges that on 21st April 1947 the respondent took her daughter to her house promising to send her back on 26th April 1947 but failed to do so Further the respondent went away with the girl to a village near Meenjur and according to the petitioner the respondent is contemplating to leave for Rangoon.

The respondent admits that her daugther Kamalamma was duly married to the petitioner. The main allegations in her counter-affidavit are that after her daughter came of age on 7th March 1947 she took her to her house and her daughter has been remaining with her since that time. She says, that the girl is now aged only 13 years and is not in a fit condition for consummation. Apart from her young age she is also in poor health and undergoing medical treatment. She therefore prays in the interests of the minor that immediate custody of her daughter should not be directed to be given to the petitioner.

It was contended before me by the learned Counsel for the respondent that the remedy of the petitioner is by way of proceedings under the Guardian and Wards Act and an application under section 491 of the Criminal Procedure Code is not maintainable when there is another remedy. It is sufficient to refer to the ruling of a Division Bench of this court in *Subbuswami Goundan* v. *Kamakshi Ammal* [1] to overrule his contention. It was there held that a husband seeking to recover custody of his minor wife illegally detained by others is entitled to proceed under section 491 of the Criminal Procedure Code and the respondent cannot be heard to say that there is another remedy provided for under the law.

Undoubtedly after the marriage the petitioner would be the lawful guardian of his minor wife Kamalamma and therefore entitled to her custody. Even if the girl desires to stay with her mother, the respondent, that would not confer a right on the respondent to detain her. The petitioner will therefore be in the ordinary course entitled to an order in his favour.

At the same time as the girl is admittedly a minor this court should have, as the paramount consideration, her interest and welfare. The respondent's fear that the petitioner requires the custody of her daughter in order that the consummation of the marriage should take place is, I think, not unfounded. But I am glad to find the petitioner making the following statement in his reply affidavit.

1. [1929] M.W.N. 689: Cr. 137 : 53 Mad 72

"If the Honourable Court is of opinion that the consummation may be postponed, the minor may be ordered to be kept in the custody of some public institution such as Sevasadhan and not with the respondent for a reasonable period and I am prepared to meet the expenses."

I therefore direct the respondent to surrender her minor daughter to the petitioner forthwith on condition that the petitioner should arrange to have the minor girl Kamalamma kept in the custody of some public institution for the period of one year and incur the necessary expenses for the purpose.

In the circumstances of this case, and having regard to the attitude of the respondent which I cannot say is wholly unreasonable, I make no order as to costs.

N.T.R.

—

Criminal Appeal No. 131 of 1941

*July* 30, 1947

CHANDRASEKHARA AIYAR, J.

THE PUBLIC PROSECUTOR

v.

R. T. NARASIMHA REDDY

*General Sales Tax Act (X of* 1939*) Ss.* 6, 10 & 15—*Agent without licence—Failure to pay tax—Prosecution—Defence of being an agent.*

*Although an agent can protect himself by getting a licence under S.* 8 *General Sales Tax Act, it is open to an agent who has not obtained a licence and who is prosecuted for failure to pay the sales tax, to establish that he is merely an agent and not a 'dealer' within the meaning of the Act and therefoer is not liable to assessment.*

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid Respondent (accused) by the Additional 1st class Magistrate of Chittoor in C. C. No. 185 of 1946 on his file.

*Assistant Public Prosecutor* (*A. S. Sivakaminathan*, for Applt.

*B. Jagannadha Das*, for Respt.

JUDGMENT

This appeal has been preferred by the Public Prosecutor against an order acquitting the accused (respondent) of a charge for failure to pay the sales tax due from him within the time allowed, an offence punishable under section 15 of the Madras General Sales Tax Act, 1939 read with section 10.

The accused was assessed on a turnover of Rs. 1,25,000 during the year 1944–45 and the notice calling upon him to pay the tax was received by the accused on 3—1—46. He was given 21 days' time for payment. On failure to pay, this prosecution was initiated against him by the Assistant Commercial Tax officer, Chittoor.

The plea of the accused was that he transacted the business in question only in the capacity of an agent and not as "dealer" and that therefore he was not liable to pay the tax. This plea was accepted by the Additional First Class Magistrate who held that the accused only acted as broker or commission agent who brought the seller and the buyer together. The Government has preferred this appeal primarily to get a decision from this court whether the view taken by the Additional First Class Magistrate is the right one.

There can be little doubt that when the Act defines 'dealer' in sub clause (b) of section 2 as "any person who carries on the business of buying or selling goods" it is referring to one who buys or sells goods on his own behalf. This is clear from explanation 2 to the sub-clause which expressly provides that

"the agent of a person resident outside the Province who carries on the business of buying or selling goods in the Province shall be deemed to be the dealer in respect of such business for the purposes of this Act"

This explanation implies that otherwise, such an agent would not be regarded as the "dealer". The tax is assessed on the turnover of a business and the word 'turn over' is defined in sub-clause (1) of section 2 with a long explanation. The word "turn over" as defined is not appropriate to what is done by an agent in the way of bringing together a buyer and a seller for brokerage or a commission. So far as he is concerned, there is nothing like a "turnover". It is no doubt true that an agent can protect himself by getting a licence under section 8, but to argue from this that if a man obtains no such licence he must be regarded "a dealer" and punishable for not complying with the demand for payment of the tax within the time required is to ignore what is really meant by 'dealer' in the Act. A person in the position of the accused undoubtedly runs the risk of being called upon to pay the tax and becoming liable for prosecution if he does not take the precaution of obtaining a licence under section 8. But surely it is open to him to establish that he is merely an agent and not "a dealer", within the meaning of the Act, with a turnover in the business of purchasing and selling goods. It has been found by the Magistrate in this case that the respondent is an agent and not a

principal, and I agree with him that he is not liable. He was properly acquitted of the charge.

The appeal is dismissed.

N.T.R. — *Appeal dismissed.*

## PRIVY COUNCIL.
(From Patna)

LORD THANKERTON, LORD UTHWATT LORD DU PARCQ & SIR JOHN BEAUMONT.

SRINIVAS MALL BAIROLIYA & another
v.
KING EMPEROR

*Defence of India Rules*, 1939, *Rr.* 81 (2), (4), 119 (1) & 130 (1)—*Price control—Sale in excess of maximum price by servant—Liability of master and servant—Scope of rr.* 119 (1) *and* 130 (1)—*Evidence of similar transaction to prove intention—Admissibility—Evidence Act (I of* 1872), *ss.* 14, 114 & 133—*Corroboration of accomplice.*

*First appellant was acting as salt agent for part of a district and second appellant was employed by him and entrusted with the duty of allotting appropriate quantity of salt to each retail dealer.*

*The power to control price at which salt may be sold had been delegated to district magistrates. Reports containing the recommendations of the price control officer as to the price to be fixed were submitted to the district magistrate 'for orders' and the district magistrate had written at the foot 'I agree throughout' and 'approved' and had appended his signature. Printed price lists with the name of the district magistrate also in print were circulated among merchants including appellant; but no price list was produced bearing the magistrate's signature.*

*The second appellant with the knowledge and approval of the first appellant demanded and received from retail dealers an additional sum of money over the maximum price.*

*The price control officer made a report which stated in a summary way and without naming the complainants or proposed witnesses, that the 1st and 2nd appellants had made excessive charges for bags of salt on four named dates; the report also stated that the price control officer had examined a number of retail dealers and found that there was sufficient ground for presuming that the allegation was correct.*

*The appellants were charged with having sold salt at a price exceeding the maximum price which had been fixed by order of the district magistrate.*

Held, *(i) the fact that the 2nd appellant exacted the excessive charge made him guilty, whatever name be given to the sum which he exacted in addition to the lawful price, as it was only by paying it that the retail dealers could obtain delivery of the salt;*

*(ii) if the 1st appellant knew and connived at what his servant was doing, he could not avoid all responsibility for the offence by the plea that he allowed the servant to retain the excess amount paid*

*(iii) the main object of r.* 130 (1) *Defence of India Rules is to protect persons against charges made by private individuals who might be irresponsible or malicious. It would not be right to interpret it as demanding a detailed formulation of charges with names of witnesses. In many cases more specific allegations would be desirable but in the particular circumstances of this case the price control officer with information of a series of offences before him sufficiently complied with the rule by reporting the result of his information tested as it had been by the examination of a number of witnesses;*

*(iv) that the district magistrate intended to make and in fact made 'orders' when he signed the documents which were submitted to him 'for orders' by the price control officer. The rule does not require that orders should be in any particular form, and indeed r.* 119 (1) *seems to contemplate that they may be made orally;*

*(v) that in considering whether notice of the orders was duly published, it is legitimate to have recourse to s.* 114, *Evidence Act;*

*When once the making of an order has been proved, there may well be a presumption that it has been duly promulgated, and there may of course be evidence from which such promulgation may be inferred, but the fact that a person has acted as he might have acted if an order had been in existence, and if he had been minded to disobey it, cannot be conclusive to show either that an order had been duly made or that he has had notice of it.*

*(vi) evidence of dealers who spoke of transactions, not the subject of any charge, which*

*they had had with the appellants during or shortly before or after, the period covered by the dates of the offences charged, was admissible under s. 14 Evidence Act against the first appellant on the charge of abetting, to prove that he knew of the 2nd appellant's illegal exactions and connived at them;*

*(vii) if the first appellant had not been proved to have known of the unlawful acts of the 2nd appellant, he would not be liable for the offence;*

*Offences against those of the Defence of India Rules here in question are not within the limited and exceptional classes of offences which can be held to be committed without a guilty mind. Offences which are within that class are usually of a comparatively minor character.*

*It is of the utmost importance for the protection of the liberty of the subject that the court should always bear in mind that, unless the statute, either clearly or by necessary implication, rules out* mens rea *as a constitutent part of a crime, defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind.*

*(viii) while no doubt the evidence of accomplices ought as a rule to be regarded with suspicion, the degree of suspicion which will attach to it must however vary according to the extent and nature of the complicity. Sometimes the accomplice is not a willing participant in the offence but a victim of it.*

Appeal from a decision of the High Court of Judicature at Patna.

*W. W. K. Page, U. Sen-Gupta & R. Ritson,* for Applts.

*B. J. Mackenna,* for Respt.

JUDGMENT

LORD DU PARCQ:—The appellants were convicted on November 4, 1943, by the Deputy Magistrate of Darbhanga, under the Defence of India Rules relating to the control of prices and were sentenced to terms of imprisonment. The Sessions Judge confirmed the convictions and the sentences. Applications to the High Court of Patna for the revision of the judgment of the Sessions Judge were dismissed. The appellants obtained special leave to appeal from the judgment of the High Court to His Majesty in Council.

Srinivas Mall Bairoliya (hereafter called the 1st appellant) was at the material time acting as Salt Agent for part of the district of Darbhanga. He had been appointed to this office in October 1942, by the District Magistrate. It was his duty to sell to licensed retail dealers the supplies of salt which were allocated by the central Government to his part of the Darbhanga district. Sitaram Prasad, who will be referred to hereafter as the 2nd appellant, was employed by the 1st appellant, who had entrusted him with the duty of allotting the appropriate quantity of salt to each retail dealer, and noting on the buyer's licence the quantity which he had bought and received.

The proper performance of these duties was essential to the due enforcement of orders made under the Defence of India Rules. By Rule 81 (2) of these Rules, the validity of which is not in question, Provincial Governments were empowered to make orders to provide for controlling the prices at which articles or things of any description whatsoever might be sold. The Defence of India Act, 1939, under which the Rules were made, empowered the Provincial Governments to delegate the exercise of their powers to certain officers, and the power to provide by order for controlling the prices at which various articles (among them salt) might be sold otherwise than in a primary wholesale market had been in fact delegated to District Magistrates. Rule 81 (4) of the Rules provided for the punishment of persons guilty of contravening any such order.

Both the appellants were jointly charged with having sold salt on three days in July 1943, to three named traders, in each case at a price exceeding the maximum price which had been fixed by order of the District Magistrate. The salt mentioned in the charges was of two kinds, Sambhar and rock salt, the controlled price of the former being Rs. 3–2–0 per maund, and of the latter Rs. 3–5–6. The 1st appellant was also separately charged, in respect of the same sales, with having abetted the 2nd appellant's contravention of the order. The Deputy Magistrate acquitted the 1st appellant of the substantive offences, but convicted him on the three charges of abetting. He convicted the 2nd appellant on each of the three charges made against him. Both appellants were sentenced to undergo rigorous imprisonment, the 1st appellant for a term of 18 months, the 2nd for 12 months: they were also fined Rs. 1,000 and Rs. 500 respectively.

In addition to the Price Control Officer (Mr. A. Karim) and his clerk, twelve persons were called as witnesses at the trial, three of whom were the dealers named in the charges. The other nine were also dealers who had bought salt from the 1st appellant, and had had to deal with the 2nd appellant. The evidence of the twelve dealer witnesses is summarized in the appellant's case as follows:—

That upon their application on various dates in the month of July, 1943, to appellant No. 2 for the supply of a stated number of bags of salt, he refused to supply the required quantity unless the dealer paid to him a sum of Re. 1 in respect of each bag of Sambhar salt and Rs. 2 in respect of each bag of rock salt; that they paid the sums so demanded; that appellant No. 2 thereupon entered on their licences the number of bags of salt which they required and remitted Re. 1 or Rs. 2 of the amount so paid; that the demand of such payments was made with the knowledge and approval of appellant No. 1; and that, upon such payments being made, they presented their licences so endorsed to Satyanarin (another employee of the 1st appellant) "who upon payment of the price of the quantity required by them, namely, Rs. 3—2—0 per maund of Sambhar salt and Rs. 3—5—6 of rock salt, authorised delivery of the amount of salt so purchased which they duly obtained.

It appears that the 2nd appellant allowed each purchaser to take one bag without levying an additional charge for it. This accounts for the "remission" of Re. 1 or Rs. 2 of total amount paid in respect of the full number of bags bought.

It was contended on behalf of both appellants that, even assuming that all these facts were proved and that there was no other valid reason for reversing the decision of the High Court, their appeals should succeed because the evidence did not establish that a larger price had been demanded or paid than that which was alleged to have been fixed by the District Magistrate's order. Most of the dealers who gave evidence agreed in cross examination that they had regarded the payment levied by the second appellant as an "Illegal gratification" and the argument was that it was merely a bribe, which went into 2nd appellant's own pocket and formed no part of the purchase price. This argument was rejected by all the courts in India, and in their Lordships' opinion it deserved no better fate. Whatever name may be given to the sum which the 2nd appellant exacted in addition to the lawful price, it was only by paying it that the retail dealers could obtain delivery of the salt. It can make no difference that it was paid separately, and not to the same employee who received that part of the sum demanded from the buyer which, if no more had been paid, would have been a lawful charge. Nor is it material that the excess charge may, for all that appears, have remained in the 2nd appellant's pocket. The fact that he exacted the excessive charge would make him guilty, and if the 1st appellant knew, and connived at what his servant was doing, he cannot avoid all responsibility for the offence by the plea that he allowed the servant to retain part of the amount paid in exchange for delivery of the salt, or, in other words, part of the purchase price.

Their Lordships now proceed to deal with the other submissions which were made on the appellants' behalf. One question raised touches the jurisdiction of the court. Rule 130 (1) of the Defence of India Rules provides that "no court or tribunal shall take cognizance of any alleged contravention of these Rules, except on a report in writing of the facts constituting such contravention, made by a public servant." It is not in dispute that Mr. A. Karim, the Price Control Officer who has been mentioned already, was a "public servant", and it was proved that on August 16, 1943, he made a report in writing to the District Magistrate which was produced at the trial and was before their Lordships. This report stated in a summay way, and without naming the complainants or proposed witnesses, that the 1st and 2nd appellant, as well as two other employees of the 1st appellant who, in the result were acquitted, had made excessive charges for bags of salt on four named dates in July "and on other dates". These charges were said to have been exacted from retail salt dealers of the rural area which it was the 1st appellant's business to supply. The report stated that the Price Control Officer had examined a number of these dealers and found that there was sufficient ground for presuming that the allegation was correct. It appeared at the trial that at the date of the report he had examined two of the three buyers named in the charges, but not the third, a man named Jangal Mian. The question is whether, in the circumstances, the court was justified in taking cognizance of the contraventions alleged in this report.

Their Lordships are of opinion that the main object of Rule 130 (1) is, on the face of it, obvious. It was to protect persons against charges made by private individuals,

who might be irresponsible or malicious. It would not be right to interpret it as demanding a detailed formulation of charges with the names of witnesses. In many cases more specific allegations would be desirable, but in the particular circumstances of this case the Price Control Officer, with information of a series of offences before him, sufficiently complied with the rule by reporting the result of his information, tested as it had been by the examination of a number of witnesses. Although he had not examined Jangal Main, he may well have had information with regard to the offence to which that dealer subsequently testified. It is to be observed that one of the dates specified in the Report is July 21, and that the transaction with Jangal Mian was the only one of that date which was alleged in the charge made. In the circumstances it may be presumed that the Price Control Officer had some knowledge of this transaction when he made his Report, and on this view of the matter their Lordships are of opinion that the court was entitled to "take cognizance" of all the offences charged against the appellants. It was submitted on behalf of the respondent that Rule 130 (1) was directory only, and that an omission to satisfy its provisions would not affect the jurisdiction of the court. Their Lordships do not find it necessary to express any opinion on this point.

It was further contended on behalf of both appellants that no satisfactory evidence had been adduced to prove that any orders had been made, and alternatively, that it had not been proved that proper notice of the order or orders alleged had been given, so as to comply with the provisions of Rule 119 (1) of the Defence of India Rules. The material words of this Rule are as follows :—

> Save as otherwise expressly provided in these Rules, every authority, officer or person who makes any order in writing in pursuance of any of these Rules shall, in the case of an order of a general nature or affecting a class of persons, publish notice of such order in such manner as may in the opinion of such authority, officer or person, be best adapted for informing persons whom the order concerns . . . . and thereupon, the persons . . . . concerned shall be deemed to have been duly informed of the order.

It is unnecessary to quote the rest of the Rule, which refers to orders, "affecting an individual person".

The facts bearing on these contentions which were proved at the trial are as follows. Two documents were produced which bore the signature of Mr. G P. Varma (who was Mr. Karim's predecessor as Price Control Officer) and were in the form of reports by him to the District Magistrate. They contained the Price Control Officer's recommendations as to the prices to be fixed for salt in the Durbhanga district. These reports had been submitted to the District Magistrate with the words "For Orders" immediately above the signature of Mr. Varma. The District Magistrate had written at the foot of one of these documents the words "I agree throughout", at the foot of the other the word "Approved", and in each case had appended his own signature. After the word "Approved" on the latter document there appear the words "Take action immediately", signed by Mr. Varma. As these were clearly addressed to Mr. Varma's subordinates they are important as an indication that the approval signified by the District Magistrate was intended to be acted upon without any further direction from him The dates on which the District Magistrate (Mr. C. L. Bryson) affixed his signature to these documents were January 28 and February 1, 1943. There was no other documentary evidence of any order, but Mr. Karim produced three printed price lists, dated June 19, July 20 and August 9, 1943, with the name of the District Magistrate, Mr. Bryson, itself also in print, at the foot of each of them. No price lists were produced bearing Mr. Bryson's written signature, and there was no evidence that he had in fact signed any such lists, or that the printed lists produced were copies of signed originals. The latest in date of the documents could have no direct relevance to any of the charges, which, it will be observed, all relate to earlier dates. The others have no evidential value in themselves. Mr. Karim, however, said in his evidence when he produced them "The price lists are distributed among the merchants through the peons", and a clerk in his office deposed that the rates fixed were printed and were distributed among the members of the Price Control Committee, of which (he said) the 1st appellant was a member, and the shopkeepers. The lists produced may therefore be regarded as specimen of the printed papers which were so distributed.

The High Court agreed with the appellant's contention that no orders had been proved, but held that in all the circumstances the making of an order could be presumed since the appellants had been "careful to make it appear as though no more than the controlled prices had been charged" and

their conduct thus showed them to have been aware of the orders made. With all respect to the High Court, their Lordships cannot regard this reasonings as satisfactory. When once the making of an order has been proved, there may well be a presumption that it has been duly promulgated, and there may of course be evidence from which such promulgation may be inferred, but the fact that a person has acted as he might have acted if an order had been in existence, and if he had been minded to disobey it, cannot be conclusive to show either, that an order has been duly made or that he has had notice of it. Their Lordships are clearly of opinion, however, that the District Magistrate intended to make, and in fact made, "orders" when he signed the documents which were submitted to him "for orders" by the Price Control Officer. The Rules do not require that orders should be in any particular form, and indeed Rule 119 (1) seems to contemplate that they may be made orally.

It remains to consider whether notice of the orders was duly published. At this stage it is legitimate to have recourse to section 114 of the Indian Evidence Act, and to presume that the District Magistrate did what he is likely to have done, "regard being had to the common course of .... public business". See illustration (e) which gives as an instance a presumption that "Official acts have been regularly performed". Apart from the presumption, there was, as has been said, some evidence of a practice by which price lists founded on orders previously made were circulated among interested persons, including the 1st appellant. It seems highly probable that the District Magistrate thought the method of giving notice which would thus appear to have been employed "best adapted for informing persons" affected by his orders, which in their Lordships' opinion were plainly orders "affecting a class of persons". No doubt such a presumption as existed here might easily have been rebutted, and the slight evidence given might readily have been displaced, if in fact the orders had not been brought to the notice of the appellants or atleast duly promulgated. Far from its being rebutted, however, the presumption is much strengthened when it is seen that the written statements of the appellants do not suggest that they were ignorant of the controlled rate, and that the objection that it had not been proved that due notice of the order had been given appeared for the first time in the appellants' notice of application to the High Court. Their Lordships are satisfied that the point is without substance, and even if it had any technical justification it would be impossible to say in these circumstances that a miscarriage of justice had resulted.

The appellants' remaining submissions may be disposed of shortly. A number of dealers were called who spoke of transactions, not the subject of any charge, which they had had with the appellants during or shortly before or after, the period covered by the dates of the offences charged. This evidence, if accepted, proved beyond doubt that the 1st appellant knew of the 2nd appellant's illegal exactions and connived at them. The High Court thought that this evidence was admissible only on the principal charge, and was not relevant to the charge of abetting, on which alone the 1st appellant was convicted. In their Lordships' opinion the evidence was admissible and was relevant to both charges. "A person abets the doing of a thing.....intentionally aids, by any act or illegal omission, the doing of that thing" (Indian Penal Code, section 107) It may well be that the learned Deputy Magistrate, having found as he did that the 1st appellant knew what was being done, ought to have convicted him as a principal. The 1st appellant can derive no benefit from this error, if error there were. The evidence was relevant to the charge of abetting, because it showed an intention to aid the commission of the offence and an intentional omission to put a stop to an illegal practice, which, it need hardly be added was an "illegal omission." The evidence was thus admissible to prove intention, under section 14 of the Indian Evidence Act.

The High Court took the view that even if the 1st appellant had not been proved to have known of the unlawful act of the 2nd appellant, he would still be liable, on the ground that "where there is an absolute prohibition and no question of *mens rea* arises, the master is criminally liable for the acts of his servant." With due respect to the High Court, their Lordships think it necessary to express their dissent from this view. They see no ground for saying that offences against those of the Defence of India Rules here in question are within the limited and exceptional class of offences

which can be held to be committed without a guilty mind. See the judgment of Wright, J. in *Sherras* v. *De Rutzen* [1]. Offences which are within that class are usually of a comparatively minor character, and it would be a surprising result of this delegated legislation if a person who was normally innocent of blame could be held vicariously liable for a servant's crime and so punishable "with imprisonment for a term which may extend to three years." Their Lordships agree with the view which was recently expressed by the Lord Chief Justice of England, when he said, "It is in my opinion of the utmost importance for the protection of the liberty of the subject that the court should always bear in mind that, unless the statute either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind" (*Brend* v. *Wood* [2]).

Some complaint was made that the Deputy Magistrate had paid attention to recorded statements of persons who were not called to give evidence before him. It will suffice to say as to this that if those statements are wholly left out of account there was still ample evidence to justify the Deputy Magistrate's decision. (See s. 167 of the Indian Evidence Act).

Finally, it was urged that reliance had been placed on the uncorroborated evidence of accomplices. S. 133 of the Indian Evidence Act expressly provides that "an accomplice shall be a competent witness against an accused person" and that "a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice." No doubt the evidence of accomplices ought as a rule to be regarded with suspicion. The degree of suspicion which will attach to it must however vary according to the extent and nature of the complicity: Sometimes, as was said by Sir John Beaumont, C. J. in *Papa Kamalkhan* v. *Emperor* [3] the accomplice is "not a willing Participant in the offence but a victim of it." There is ground for saying that the accomplices in this case acted under a form of pressure which it would have required some firmness to resist.

In the result their Lordships find no sufficient reason for reversing the decision of the Courts in India, and they will humbly advise His Majesty that the appeal should be dismissed.

— *Appeal dismissed.*

1. [1895] 1 Q.B. 918 at 921
2. 110 J.P. 317 at 318
3. [1935] I.L.R. 59 Bom. 488

Cr. R. C. No. 622 of 1947
(Cr. R. P. No. 517 of 1947)
*August* 7, 1947
RAJAMANNAR, J.

SANGIAH
v.
EMPEROR

*Criminal Procedure Code (V of* 1898*)—Identification parade—If accused can demand. There is no provision in the Criminal Procedue Code which entitles an accused to demand that an identification parade should be held at or before the enquiry or at the trial. An identification parade belongs to the stage of investigation by the police. Identification parades are held not for the purpose of giving defence advocates material to work on, but in order to satisfy investigating officers of the bona fides of the prosecution witnesses.*

*A. I. R.* 1943 *Lah.* 303 *diss.*

*Observations in A. I. R.* 1945 *Lah.* 48 held obiter.

1932 *M. W. N.* 427 : *Cr* 59 *explained.*

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Special Second Class Magistrate of Madura, dated 24—6—47 in R. C. No. 8 of 1947.

*N. Rajogopalan for Row & Reddy* for Petrs.
*Public Prosecutor (V L. Ethiraj)*, for Crown

ORDER.

This is an application by the first accused in R. C. No. 8 of 1947 pending enquiry before the Special Second Class Magistrate, Madura, to revise the order of the Magistrate rejecting the application made by him and other accused in the case requesting the Magistrate to hold an identification parade in respect of the identity and names of the accused. The petitioner and others were accused of the offence of murder.

The enquiry had not commenced and no witness had been examined when the application was made by a memorandum filed on behalf of the accused by their advocate. It was stated in the memorandum that neither the first information Report nor the Inquest Report mentioned the names of any of the accused in the case and that none of the witnesses knew them either by name or by identity and that in the interest of justice it was necessary that an identification parade

should be held in respect of both the identity and names of the fifteen accused mentioned therein by the eight witnesses also mentioned therein. The Magistrate rejected the application on the ground that there was no provision for holding a parade at that stage of the case and under similar circumstances.

It was contended before me by Mr. N. Rajagopalan that it was an elementary right of the accused to insist upon proper identification and it was necessary in the interests of justice that an identification parade should be directed when the accused disputed the ability of the prosecution witnesses to identify them either by name or by recognition. He relied on the decisions of the Lahore High Court in *Amar Singh* v. *Emperor* [1] and *Sajjan Singh* v. *Emperor* [2] Reference was also made by him to the judgment of Kuppuswami Ayyar, J. in Cr. R. C. No. 1318 of 1946.

I am unable to find any provision in the Code which entitles an accused to demand that an identification parade should be held at or before the enquiry or the trial. An identification parade belongs to the stage of investigation by the police. The question whether a witness has or has not identified the accused during the investigation is not one which is in itself relevant at the trial. The actual evidence regarding identification is that which is given by the witnesses in court. The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in court. If a witness has not identified the accused at a parade or otherwise during the investigation the fact may be relied on by the accused, but I find nothing in the provisions of the Code which confers a right on the accused to demand that the investigation should be conducted in a particular way. As the learned Judges pointed out in *Public Prosecutor* v. *Sankarapandia Nadar* [3] "identification parades are held not for the purpose of giving defence advocates material to work on, but in order to satisfy investigating officers of the bona fides of the prosecution witnesses"

In *Amar Singh* v. *Emperor* [1] Blacker, J. held that,

"Whenever an accused person disputes the ability of the prosecution witnesses to identify him, the Court should direct an identification parade to be held save in the most exceptional circumstances."

With great respect to the learned Judge I am unable to find any provision of law which compells the court to so direct a parade. It is not clear from the judgment whether the court making the enquiry or holding the trial should itself hold the parade or if the court should stay its proceedings and direct the parade to be held before another Magistrate. In my opinion it does not take into account the important fact that an identification parade is a part of the investigation and once the case has reached the stage of an enquiry before the Magistrate the investigation is at an end and all that takes place thereafter should take place in court and form part of the record of the case.

Now it is quite clear that statements made at an identification parade are not substantive evidence at the trial. It must be very embarassing to the Magistrate making an enquiry to listen to statements made by the witnesses at an identification parade which will not be evidence at the enquiry. Further it is not incumbent on the prosecution to examine all the witnesses cited by them and all those who took part in the identification parade. It will then mean that the Magistrate has heard the statements of witnesses who will not be examined at the enquiry. If on the other hand it is suggested that a different Magistrate should hold the identification parade it appears to me that there is no provision whatever for such a course when a particular Magistrate is seized of the case. The observations in *Sajjan Singh* v. *Emperor* [2] are really *obiter* because that case dealt with a regular appeal against the conviction by a court of session. In that case the Magistrate who made the enquiry refused an application by the accused to arrange for an identification parade on the following grounds, viz. that the witnesses knew the accused before and that the application was made only for the purpose of delay. The learned Judges held that the reasons given by the magistrate were not sound. It is true that they went on to observe that should any serious question of identity arise during the course of the trial the ability of the witnesses to identify the accused may be put to test before the trial. With great respect I do not agree. If a case is posted for trial any test as to the ability or credibility of the witnesses should be decided only in court and not by means of an

1. [1943] A.I.R. Lah. 303
2. [1945] A.I.R. Lah. 48
3. [1932] M.W.N. 427 : Cr. 59

identification parade, the proceedings at which will not form part of the record of the court.

The order of Kuppuswami Aiyar J. in Cr. R. C. No. 1318 of 1946 was made in quite different circumstances. That case dealt with proceedings in court. There was an application on behalf of the accused that two accused in the case may be reshuffled with some others and that the witnesses who had been examined for the prosecution should then be permitted to be cross examined by the counsel for the accused. This application was rejected by the Magistrate. In revision Kuppuswami Aiyar J. passed an order as follows:—

"The lower Court was not justified in refusing to shuffle the parties and arrange them in a different order so that the accused may have a chance of knowing whether the witness is able to identify him or not. This is a common right which every litigant is entitled to claim. The learned Magistrate was not justified in dismissing the application of the accused for this purpose. The revision is allowed and a further opportunity will be given to the witness to identify the accused after reshuffling."

This case obviously dealt with an identification of the accused in court by a witness who was being exmined for the prosecution. If a similar request is made in the present case also at the time of the exmination in court of any of the prosecution witnesses, I am sure, the Magistrate will accede to such a request.

In my opinion the Magistrate was right in holding that the accused were not entitled as of right to demand that an identification parade should be held at which the witnesses mentioned by them should be called upon to identify the accused.

The revision case is therefore dismissed.

N.T.K. — *Petition dismissed*

Cr. R. C. No. 756 of 1946
(Cr. R. P. 725 of 1946)
*July* 24, 1947

RAJAMANNAR, J.

DADEKULA DABAKKA OF KURLAPALLE
v.
D. PADDA VARADAPPA OF KURLAPALLE.

*Cr. P. C., Ss.* 439, 537 & 539 *(B)—Memo of inspection not recorded—No failure of justice—Trial not vitiated.*

*Although under S.* 539 *(B) Cr. P. C, a magistrate should record a memorandum of the relevant facts if any observed by him at a local inspection and such memorandum should form part of the record of the case, failure of the magistrate to make the notes of inspection is only an irregularity and where there is ample evidence on record to support the magistrate's conclusion and there has not been failure of justice on account of this irregularity, the High Court will not interfere in revision.*

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Taluk Magistrate, Dharmavaram dated 17—4—46 and made in C. C. No 1 of 1946.

*E. Subramaniam*, for Petr.
*Public Prosecutor (V. L. Ethiraj)*, for Crown

ORDER

This is an application to revise the order of the Taluk Magistrate Dharmavaram acquitting the accused in C. C. No. 1 of 1946 on his file of an offence under section 354, I. P. C. with which he was charged.

The only point raised in this case on behalf of the complainant is that after the entire evidence was recorded the Magistrate inspected the alleged scene of offence and imported the impressions which he received from such inspection in the consideration and appreciation of the evidence and that his conclusion is vitiated by this irregularity. No doubt under section 539 (B), Cr.P.C. the Magistrate should have recorded a memorandum of the relevant facts, if any, observed by him at such inspection and such a memorandum should form part of the record of the case and a copy of it should be furnished to the Public Prosecutor, complainant or the accused on application. It has not been shown that the Magistrate in this case made notes of inspection and that a copy of the notes was not supplied to the complainant. I do not agree that merely because there was this irregularity the order of the Magistrate should be revised. I am not convinced that on account of this irregularity there has been a failure of justice.

The Magistrate takes into account several circumstances for coming to the conclusion that the prosecution evidence is highly interested and thoroughly unreliable. Almost all the circumstances relied on by him are based on the evidence in the case. The facts which may be said to have been gathered by the Magistrate from the personal inspection and referred to by him are that the place looked a busy locality and that the fencing put up near Nallagundlu to the garden land of the accused was low and could be easily scaled over; but in my opinion, the decision in the case did not turn upon the fact whether there was a high fence or a low fence to the garden land of the accused. The

point was that it was most improbable that the accused should, instead of getting into his adjoining garden unnoticed, have run in another direction from which P. Ws. 2 and 3 were coming. There was ample evidence in the case that the garden of the accused adjoined the alleged scene of offence. It is only the Magistrate that mentions about the fence, but the existence of a fence was not even elicited on behalf of the complainant, as properly pointed out by the learned Public Prosecutor. The point made by the Magistrate that it was inexplicable why the accused should go the way in which he is alleged to have gone instead of going into his garden is based on the evidence in the case, and there is no necessity to resort to any impression gathered at the personal inspection

The learned advocates for the complainant relied upon the decision of Devadoss, J: reported in *Kadar Batcha Saheb In re* [1]. In that case the whole question turned upon there being an entrance or not, and the impression that the Magistrate received at the inspection was that the entrance was an old one, and the learned Judge thought that this view of the impression received by the Magistrate influenced him in accepting the evidence for the prosecution as true. Nothing like this can be found in the present case. I am convinced that the complainant has not been prejudiced in any way by the irregularity commited by the Magistrate.

The revision petition fails and is dismissed.

N.T.R. — *Petition dismissed*

Criminal Appeal No. 256 of 1946
*April* 23, 1947

LAKSHMANA RAO & YAHYA ALI, JJ.

THE CROWN PROSECUTOR

v.

KRISHNAN ALIAS KARIKARA KRISHNAN & OTHERS

*Criminal Procedure Code (V of* 1898) *S.* 411-*A Appeal under—Scope of—Penal Code (XLV of* 1860) *S.* 34—*Liability under.*

*The test to be applied in considering an appeal under S.* 411-*A, Cr. P. C. is whether the verdict is upon the evidence, right or wrong, and not whether the verdict is perverse or unreasonable in order to entitle the court to interfere with it.*

*Where what each person did are clearly individual acts done of their own accord rather than acts done in furtherance of a pre-arranged or pre-conceived plan or arrangement amongst them the liability of each accused can be in respect of his own individual acts and not the joint liability contemplated by S.* 34 *I. P. C.*

Appeal under Section 411-A (2) of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid Respondents (accused) by the High Court Crown Side. in C. C No. 6 of 1946 of the First Criminal Sessions on 21—2—46.

*Crown Prosecutor*, for Crown.

*T. V. Ramanathan, T. S. Venkataraman & T. C. Raghavan*, for Respts.

JUDGMENT

[YAHYA ALI, J.]

This is an appeal under section 411-A (2) Criminal Procedure Code from the acquittal of the three respondents of the murder of Nammalwar and of other offences comprised in the charge. The three respondents were tried in Sessions Case No. 6 of 1946 of the First Criminal Sessions of this court and six charges were framed against them. The first charge was one of murder against all the accused read with section 34, I. P. C. The second charge was under section 326, I. P. C. against the first accused. The third and fourth charges were under section 326 read with section 114, I. P. C. against the second and third accused. The fifth charge related to the simple hurt committed by the second accused, and the sixth charge was under section 323 read with section 114, I. P. C. against the third accused. The Jury by a majority of 7 to 2 found the first and second accused not guilty in respect of all the charges against them, and by a verdict which was unanimous found the third accused not guilty of any of the charges. The learned Judge who presided had directed the Jury to return a verdict of not guilty so far as the third accused was concerned in relation to the first charge. The learned Judge "accepted" (presumably agreed with) the verdict of the Jury in respect of the charges, and he acquitted the three accused of all the charges against them and directed them to be set at liberty.

An application was made by the Crown Prosecutor for a certificate under section 411-A, clause (b) that this is a fit case for appeal against the acquittal on the ground that the verdict of the Jury was perverse. The learned Judge granted leave considering that there was evidence let in by the prosecution on which the Jury might well have returned a verdict of guilty, except as to the third accused in regard to the charge against him under section 302 read with section 34 I.P.C. Upon this certificate the appeal has

1. [1928] M.W.N. 69

come before us, and in deciding such an appeal the principle will have to be applied, which was recently enunciated in the judgment of the Judicial Committee delivered on 27th March 1947 in *Thiagaraja Bhagavathar* v. *King Emperor* [1]. Their Lordships have after discussing the decisions of this court and of the Bombay High Court bearing upon this question pointed out that

"a Judge hearing an application for leave to appeal on the facts has an absolute discretion to grant or withold such leave, but it is a discretion to be exercised judicially"

Their Lordships observed that a Judge

"is bound to consider any special features in the particular case, but he cannot ignore the effect which the granting of leave to appeal without due discrimination may have upon the whole system of trial by jury in the High Court."

Then the following principle was laid down, which is of direct application in this case:—

"Leave once having been granted however, the matter is at large, and the Court of Appeal must dispose of the appeal upon the merits paying due regard however to the principles on which Courts of Appeal always act in such cases."

After enunciating this criterion their Lordships referred to the decision of the Board in *Sheo Swarup* v. *The King Emperor* [2] where the Privy Council had laid down the matters to which proper weight and consideration should be given in exercising the power conferred by the Code on a Court of Appeal. As modified in the judgment in *Thiagaraja Bhagavathar* v. *The King Emperor* [1] referred to above, the considerations applicable to appeals under s. 411-A Criminal Procedure Code are the following: (1) the views of the Jury implicit in their verdict as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. It is manifest from this pronouncement of the Judicial Committee that subject to the considerations which a Court of Appeal bears in mind in dealing with such matters the whole matter is at large before us except in respect of the charge against the third accused under section 302 read with section 34 I.P.C.

We may also point out that the test that was hitherto applied, namely, whether the verdict of the Jury is perverse or unreasonable in order to entitle the court to interfere with it has now been definitely discorded and the test to be applied is whether the verdict, is upon the evidence, right or wrong.

The incident which is the subject-matter of this case arose out of what appears to be a gambling brawl. Gambling on an extensive scale more or less in an open manner seems to have been carried on in the open spaces near the Radio Park and My Lady's Garden in Peoples Park, Madras, in spite of the fact that there is a police station in close vicinity. It is also in evidence that some military personnel had not only been taking part in the gambling but were supplying cards on hire or for price. The gambling in card goes on under the trees. The gamblers assemble in separate groups which are distinguished by the amount of stakes for which they play. People who come join one group or the other according to their capacity. On the day of occurence, 7th November 1945, in the morning, gambling as usual was in progress. The first accused, third accused and Natarajan were playing in one group at about 11 a. m. Nammalwar, the deceased was also playing in that group, and it would appear that except Nammalwar all the rest were losing and the first accused among them was losing particularly heavily while the whole time the deceased was winning. The first accused having lost his money asked the deceased for money. It is immaterial whether it was by way of loan or on any other footing. The request was refused by Nammalwar who continued to play. Thereupon the first accused and Natarajan rose and went a short distance to the place where two boys were sitting and from those boys they brought two knives. The deceased observed them coming with knives and hastily collected all his money and ran away. A little while afterwards the first accused and Natarajan went away from the place, but the third accused continued the gambling. This marked the first episode. The deceased appears to have gone home and had a hurried meal. He returned soon afterwards to the same place at about 1-30 p. m. and joined the group in which the third accused was playing. Four persons, namely, the first accused, the second accused, one Charlie and Karuvatu Krishnan turned up at about 2 p. m. Among them the first accused and Charlie were armed with knives. In the crowd there were Perumal (P. W. 4) and

1. [1947] M.W.N. 330; Cr. 70 P.C.
2. [1934] M.W.N. 1017; Cr. 193: 61 I. A. 398

Nondi Kuppan *alias* Kuppuswami (P. W. 5). They had evidently come for gambling and had lost and were watching. Seeing the four persons coming, P. Ws. 4 and 5 warned the deceased saying that his enemies were coming, but curiously the deceased paid no heed whatever to the warning in spite of his experience in the forenoon, but continued playing. P. Ws. 4 and 5 however could not bear the sight of these four persons coming in the direction of the group in that manner and they left the scene. They saw nothing more. The four assailants approached the deceased and among them, Charlie alone stayed behind the deceased and stabbed him with the knife (called patta knife) on the back. This blow caused the injury which is described as the first wound in the post-mortem certificate. It is a penetrating stab wound with clean cut edges on the left side of the back measuring 7/8 inch by 1/4 inch and had cut the muscles and gone through the gap between the left 6th and 7th ribs slicing the upper margin of 7th rib and then penetrated through the left lung completely through the pericardium and ended on the left ventricle of the heart. According to the opinion of the doctor who held the autopsy this was definitely the fatal injury.

At the time when Charlie attacked the deceased, none of the other assailants appear to have done anything. The deceased after receiving this blow had sufficient presence of mind and strength to collect all his moneys and things and to get up and walk a few paces and he was allowed to do so. After he had walked a few paces it is said that the first accused inflicted a cut on him with the knife on the face. The deceased moved forward unmolested about 100 to 150 paces and reached a tree which is marked in the plan. There according to the prosecution, the third accused, who had been playing the whole time and who had to leave the place because the whole crowd dispersed after this disturbance, went and caught hold of the deceased from behind and as he did that, the first accused and Charlie cut the deceased with knives on the face and on the other parts of the body. and the second accused and Karuvatu Krishnan fisted him. The deceased fell down, and the assailants ran in different directions. The third accused ran in the direction of the Moore Market while the four others ran in the direction of the wicket gate leading up to Sydenham's Road.

At that juncture Senjimuthu who was coming in the opposite direction found the third accused running and caught him, and just at the moment Kannan, an employee in the P.W.D. office who was also passing along the road, helped Senjimuthu in apprehending the third accused. Senjimuthu was in a position before he chased and caught the third accused to see the last phase of the attack, namely, the deceased being caught by the third accused and his being beaten and cut by others. After the third accused was caught, Senjimuthu went to the place where the deceased was lying and tried to administer some tea to him which was brought from a tea vendor, but since the fluid did not go down the throat of the deceased he sent the deceased in a rickshaw to the hospital along with Manavalan and Dhanapal who were there and to whose presence we shall advert presently. They took the deceased to the hospital but there he was pronounced to be dead, and the body was taken to the police station. In the meantime Senjimuthu and Kannan had taken the third accused to the police station and had mentioned to the police officer there all that they knew. Before the complaint, Exhibit P-2 was recorded, Manavalan and Dhanapal also arrived with the body of the deceased. The complaint which was given by Senjimuthu was attested by Kannan and Dhanapal, and although Manavalan was present, his signature was not taken because he was illiterate. This is, in brief, the prosecution case.

The main story from the commencement until the production of the third accused at the police station is spoken to by Manavalan. It receives support in certain portions from other witnesses. P.Ws. 4 and 5 speak to that part of the incident which related to the coming of the four persons, namely, the first and second accused, Charlie and Karuvatu Krishnan to the scene, the warning given to the deceased and Perumal and Nondi Kuppan (P. Ws. 4 and 5) leaving the scene immediately. Dhanapal and Senjimuthu corroborate that portion of the story which relates to what happened near the tree where the third accused went and caught hold of the deceased and the deceased was cut and beaten by the other assailants. They also speak to the running of the assailants, the apprehension of the third accused, and the other events that followed. Kannan speaks virtually to the very last phase of the incident. He only knew

about Senjimuthu catching hold of the third accused while he was running away, and he helped him in doing so. He saw the other four assailants running away. He also speaks to what transpired later.

The main criticism with regard to the evidence so far as Manavalan is concerned is that it is exceedingly improbable. It is said that he is a gambler and that his version that he was there from 11 O'clock in the the morning till 8 in the evening is to a degree incredible. Reference is made to the circumstance that although he is said to have been present at the time of the making of the complaint his name does not appear even as an attestor in the complaint. If his evidence stood by itself wholly uncorroborated by any other testimony or circumstance there might have been some force in this contention. It was apparently a notorious place of gambling and certain sets of persons used to frequent it during their leisure hours whenever they had little spare money, partly in the hope of winning more money and partly in view of their interest in the game. It is therefore difficult to reject the evidence of Manavalan on the ground that he is a gambler or that he happened to stay so long. He was at the scene only from 11 a.m. until the actual incident was over before 3 p.m. Afterwards he was asked by Senjimuthu to take the deceased in a rickshaw to the hospital. He brought back the body and he was required at the police station until the proceedings there were over and he then went home.

Nothing has been shown by way of animosity against any of the other witnesses, namely, Perumal, Nondi Kuppan, Dhanapal, Senjimuthu and Kannan. They come from different places, belong to different communities and do not appear to have any interest in common or personal motive against any of the accused. The version given by each of these witnesses appears to be natural. There is no attempt on their part, except to a little extent with regard to Senjimuthu, either to embellish or to exaggerate their version. With regard to Senjimuthu, the learned Judge has observed that he is of an imaginative temperament. That cannot be said with regard to the other witnesses, particularly Dhanapal who corroborates him. There are no serious discrepancies in their evidence, and we do not find that the evidence is in any manner opposed to the probabilities. Another important circumstance is that within less than an hour after the occurrence the complaint was made at the police station, and according to the complaint it is clear that most of these witnesses were present at the time of the occurence. The complaint was given at 2-45 p. m. and it establishes that at the tree where the deceased was finally attacked he was held by the third accused and stabbed with knives by others and beaten and thereafter the assailants ran away, and one of them was caught by Senjimuthu and Kannan and taken to the police station. The cumulative effect of the entire evidence leaves a definite impression on our minds that the version as given out by Manavalan and as supported by the respective witnesses is substantially true. We have come to this conclusion having due regard to the considerations set out in *Sheo Swarup* v. *The King Emperor* [2] as well as in the recent decision of the Judicial Committee, which we have already cited.

Coming to the specific charges, we have at the outset the question of common intention under section 34, I. P. C. which forms the subject matter of the first charge against all the accused. We have bestowed close attention upon all the circumstances appearing in the evidence and having regard to certain outstanding features we are unable to find the existence of a common intention animating all the assailants to murder or to cause any kind of hurt to the deceased Namalwar either at the stage when Charlie first attacked him when he was sitting and playing cards or when the deceased was subsequently held by the third accused and attacked by the rest near the tree. To start with there was no kind of enmity whatever between any of the accused and the deceased. The only provocation that appears to have been given according to the evidence is that in the forenoon after the first accused had lost heavily he asked the deceased for some money and it was refused. Nothing more transpired then The first accused went and brought some knives from two boys there and the deceased went away. He was permitted to go away unscathed. The deceased himself did not take any serious notice of this intended attack, because soon after he returned to the same place evidently apprehending no further trouble. As regards the second episode also, even when the four persons were coming, two of them armed with knives, and even though P. Ws.

4 and 5 warned the deceased he took no serious note of it. If all the four persons were inspired by a common intention to kill the deceased, the most appropriate occasion was when the first onslaught was made by Charlie in the most fatal manner by stabbing the deceased on the back with the knife and inflicting the blow which pierced into the heart. The other persons did not move their little finger at that time but permitted the deceased to collect all the money, and move away. The real attack took place only near the tree. There they found that the man who had escaped and about whom apparently they took no further notice was caught hold of by the third accused. We shall presently examine with what motive the third accused caught hold of the deceased, but the fact was that the deceased who was going away was held up by the third accused. It was then that the assailants appear to have gone to the place and inflicted injuries on him which resulted in the deceased falling down on the spot. By that time the deceased had moved 100 to 150 paces. All these circumstances appear to be inconsistent with the existence of a common intention on the part of the five persons to cause the death of the deceased or in furtherance of that intention to inflict injuries on him.

What each person did, that is to say, what Charlie did when the deceased was sitting and playing cards, what the first and second accused did near the tree are clearly individual acts done of their own accord rather than acts done in furtherance of a prearranged or pre-conceived plan or arrangement between them. In this view it follows that the liability of each accused can be in respect of his own individual act and not the joint liability contemplated in section 34 I. P. C.

In this view it becomes necessary to examine the evidence with regard to the acts of each of the respondents.

The first respondent is said to have been armed with a knife and caused the injuries on the face of Nammalwar both when he was on his way to the tree and at the tree after he was held up by the third accused. The injury on the face is mentioned as the second wound in the post-mortem certificate, and is described as "four cut wounds with clean cut edges on the left side of the face and head measuring 7 inches by 1 inch, 3, 3/8 inches by 3/4 inch, 2, 1/2 inches by 3/8 inch and 3 1/4 inches by 1/4 inch and making cuts on left molar bone and left side of frontal bone." It is evident that there is no fracture involved. Further it is not possible on the evidence to attribute all these injuries to the first accused alone, because the evidence consistently of the witnesses who speak to the incident is that both Charlie and the first accused cut the deceased on his face with knives. It is not possible therefore to attribute all the four injuries on the face to the first accused. The other injuries in the post-mortem certificate are relatively minor. The doctor who was examined in the case (P. W. 18) stated that the other injuries, besides the first one, were not necessarily fatal and with regard to the second injury he said that it could be said to be grievous. He also stated that if the first injury was not there and the rest were present there were chances of his living.

The first respondent is charged under the first and second charges under section 302 read with section 34 I. P. C. and under section 326 I. P. C. For the reasons we have given, he must be acquitted of the charge of murder because he cannot be held responsible for the stab inflicted by Charlie. With regard to the second charge under section 326 I. P. C. it is clear from the foregoing discussions that no grievous hurt within the meaning of section 322 I. P. C. was caused by reason of the cuts that he is said to have inflicted with the knife. There was no fracture and there was no endangering of life. Life had been endangered and death had resulted wholly on account of the first injury inflicted by Charlie. In these circumstances the first accused can be held to be guilty only of an offence under section 324 I. P. C. of causing simple hurt with a deadly weapon. The second accused has been charged under the first, third and fifth charges under section 302 I. P. C., under section 326 read with section 114 I. P. C. and under section 323 I. P. C. For the reasons we have mentioned with reference to the first accused, the second accused cannot also be held to be guilty under section 302 or under section 326 read with section 114 I. P. C. The only act attributed to him is that he fisted the deceased when he was held up by the third accused. He can be held guilty under section 323 I. P. C. under the fifth charge and he must be acquitted of the other charges.

The case of the third accused hinges upon the sole circumstance that he held the de-

ceased near the tree when he was trying to get away and when he had moved about 150 paces from the place where he was first attacked by Charlie, and this afforded the opportunity to the first and second accused to again come and attack the deceased. He is charged for murder under the first charge, under sections 326 and 114 I. P. C. on the fourth charge and under section 323 read with section 114 I. P. C. on the sixth charge. As we have indicated before, the learned sessions Judge directed the Jury to return a verdict of not guilty against A3 on the 1st charge, he did not grant leave to appeal against his acquittal under section 302 read with section 34 I. P. C. For reasons already given, the 3rd accused cannot be held guilty under section 326 read with section 114 I. P. C. The only question that remains is whether he is guilty on the 6th charge of abetting the causing of simple hurt by the act of holding the deceased. There are in the evidence a host of circumstances which negative the existence of any criminal intention on his part. The third accused was interested in the gambling to such an extent that he was there throughout. Even when the first and second accused and the deceased went away before noon he contined to play. He was there until the second episode occured. He left the place only when as a result of the disturbance the whole crowd broke up. Then he was going away. He did not ask for money and he did not mix up with any of the other accused at any stage. He did not even run with the other assailants but ran in a different direction. All that is said against him is that he went up to the deceased and held him up by putting his hands under the arm-pits round his body. Just when he did it, within a very short space of time, possibly in less than a minute or two, the others had come and inflicted injuries on the deceased. There is no other circumstance from which it could be inferred that this accused held the deceased in order to enable the other accused to come and attack the deceased. There was no necessity for him to do so nor had he any interest in the matter. Presumably, he found the deceased tottering on the way as he had already received a fatal injury, and as he must have got completely exhausted on account of the distance of 100 to 150 paces he had walked and as he was not able to move on steadily the third accused wanted to enable him to stand up and walk. Taking advantage of this, however, the assailants attacked the deceased. In these circumstances we do not feel justified in holding that the only possible conclusion is that the third accused abetted the causing of the simple hurt by the other assailants by enabling the deceased to stand up and holding him up round his arms. The third accused is, in our opinion, entitled to acquittal on all the charges.

We would in the result allow the appeal only to the following extent. The first accused will be convicted under s. 324 I.P.C. and the second accused will be convicted under s. 323 I. P. C., and in other respects the appeal will be dismissed. The first accused is sentenced to rigorous imprisonment for two years under s. 324 I. P. C. and the second accused to rigorous imprisonment for six months under s. 323 I. P. C.

N T.R.

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Cr. App. No. 784 of 1946
Cr. R. C. No. 624 of 1947
(Taken up No. 4 of 1947)
*July* 8, 1947

YAHYA ALI, J.

VODDE NAGAPPA & others
v.
KING EMPEROR

*Evidence Act* (*I of* 1872) *s.* 27—*Confession—Admissibility.*

*In a confessional statement the first accused is said to have implicated himself as the person who decoyed the deceased to the rickyard and assisted in the murder of the deceased by holding the legs and confessed that after the murder he and others carried the dead body and buried it in the burial ground. The lower court convicted the first accused on the basis of this confession and the second and third accused under s.* 201 *I. P. C. In appeal.*

Held, *that the confessional statement except the portion in which it is stated that the body was buried in a particular place was inadmissible in evidence and that by itself does not in any manner incriminate the accused in the absence of other evidence.*

Appeal against the order of the Court of the Session of the Kurnool division in C. C. No. 24 of 1946 on 31—10—46.

*Accused not represented.*

*Public Prosecutor* (*V.L. Ethiraj*), for Crown.

ORDER

The Sessions Judge of Kurnool has convicted accused 1, 2 and 3 before him acquitting the remaining four accused who were tried for various offences. The first accused appellant was convicted under s. 364 of

the Indian Penal Code and sentenced to five years rigorous imprisonment and under Sec. 201 of the Indian Penal Code he was further convicted and sentenced to a concurrent period of five years rigorous imprisonment. The 2nd and 3rd accused were convicted under Sec. 201 of the Indian Penal Code and sentenced to two years rigorous imprisonment each. In the view I have taken of the case, I have taken up the case so far as the second and third accused also are concerned though they have not preferred any appeal against their convictions and sentences and I do not consider it necessary to direct notice in view of the order I propose to make.

It is not necessary to set out the facts of the case and the evidence. It appears from the judgment that the conviction of the appellant was based exclusively upon his confessional statement, Ex. P-5. In that statement he is said to have implicated him self as the person who decoyed Nagi Reddi (the deceased) to the rickyard and assisted in the murder of Nagi Reddi by holding the legs and that after the murder he and others carried the dead body and buried it in the burial ground. The learned Judge points out in paragraph 18 of the judgment that the conviction of this appellant is based in respect of practically all the charges on this confessional statement. I have seen the confessional statement and having regard to the recent Privy Council decision in *Pulukuri Kotayya* v. *King Emperor* [1] practically the entire confessional statement will have to be excluded from the evidence except that protion in which it is stated that the body was buried at a particular place and that by itself does not in any manner incriminate either the appellant or the accused 2 and 3. In addition to that, there are some circumstances mentioned by the learned Judge but none of them establishes any connection between the appellant and the occurrence.

With regard to accused 2 and 3, the convictions of both of them are based exclusively on the confession of the first appellant as a co-accused. When the conviction of the original confessor goes out, there is no legal basis whatever to sustain the conviction of the other two accused.

The appeal is allowed and the conviction and sentence of the appellant are set aside. The conviction and sentence of accused 2 and 3 Boya Sankanna *alias* Erranna and Madiga Mookanna *alias* Chinna Hanumanna are also set aside and they are acquitted and directed to be set at liberty forthwith.

N.T.R. — *Appeal allowed*

1. [1947] M.W.N. 217; Cr. 45

Cr. R. C. No. 1077 of 1946
(Cr. R. P. No. 1031 of 1946)
*July* 24, 1947

CHANDRASEKHARA AIYAR J.

AKULA PADDAYYA NAIDU
v.
EMPEROR

*General Sales Tax Act (IX of* 1939*), s.* 15 *(b) —Service of notice on firm—Liability of partners.*

*A demand notice addressed to the firm and served on one of the partners is sufficient notice to the firm and to all the partners and any partner could be made liable under S.* 15 *(b), General Sales Tax Act for failure to pay the tax within the time allowed.*

Petition under Sections 435 and 439, Criminal Procedure Code praying the High Court, to revise the judgment of the Court of Session of West Godaveri division at Ellore dated 29—7—46 and passed in C. A. No. 74 of 1946 (C. C. No. 3 of 46, Additional First Class Magistrate's Court, Tanuku).

*V. T. Rangaswami Aiyangar & J. Sitamahalakshmi* for Petr.

*Public Prosecutor (V. L. Ethiraj)* for Crown.

ORDER.

The second accused who is the petitioner in this criminal revision case was convicted under section 15 (b) of the Madras General Sales-tax Act, 1939, for failure to pay the tax due from him within the time allowed and sentenced to pay a fine of Rs. 100. There was another accused in the case who was similarly convicted and fined, but he is not before us.

The demand notice in Form No. B for the sales-tax due by the firm called Siddareddi Acharyulu and Sons was served on the first accused on 11-11-1945. It is Ex. P. 2. Though the second accused pleaded that he had nothing to do with the firm, it has now been found that he was a partner of the firm along with the first accused. This finding has not been challenged.

What is urged on behalf of the petitioner is that as the demand notice was not served on him personally, he cannot be held liable under section 15 (b). As already stated, the demand notice Ex. P. 2 was addressed to the firm and served on the first accused, the other partner.

The firm is "a dealer" within the meaning of the Act under Explanation (1) of sub-clause (b) of section 2. The fact that the firm is a dealer and can be proceeded against as a firm does not appear to me to be a bar to proceedings being initiated against the partners of the firm. The partners are bound by the notice to submit the return and to pay the tax, and if there is failure on their part to do so, the penal consequences provided in section 15 follow. There is no provision either in the Act or under the rules framed thereunder requiring that the demand notice shall be served personally on the man sought to be proceeded against. The notice in the present case was served on the partner of the firm, and this is sufficient notice to the firm and to all the partners who are jointly and severally liable for the payment. If the service was good as against the firm it is good as against the partners composing the firm, and the petitioner must be deemed to have had notice of the time allowed for payment. He comes directly within the description of "a person who fails to pay the tax due from him within the time allowed", as it cannot be denied for a moment that the tax was due from him as a partner of the firm and on which firm the demand was made through the other partner.

The revision petition is dismissed.

N.T.R. — *Petition dismissed.*

Cr. R. C. No. 705 of 1946
(Cr. R. P. No. 674 of 1946).
*March* 12, 1947

MRS. GRISILDA TITUS
v.
MR. LOUIS TITUS.

*Cr. P. C. (V of 1898) s. 489 (2)—Duty of criminal court under.*

*On an application filed under s. 489 (2), Cr. P. C, it is the duty of the court to consider whether a decision of the civil court leads to the consequences that the order passed by the criminal court under s. 488 should be cancelled or varied. There is no question of the criminal court considering whether the decision of the civil court has altered the circumstances of the case. If the consequence of the decision of the civil court is that it should be varied or cancelled, effect must be given to it by cancelling the order or varying it accordingly.*

**Petition under sections 435 and 439 Cr. P. C., 1898 praying the High Court to revise the order of the Court of the Joint Magistrate Coonoor, dated 29—3—1946 and made in M. C. 11 of 46.**

*C. S. Swaminathan* for Petr.
*V. T. Rangaswami Ayyangar* for Resp.
*Asst Public Prosecutor* for Crown.

ORDER.

The Joint Magistrate has completely ignored in this case the provisions of section 489 (2) of the Criminal Procedure Code. On an application filed under this section it is the duty of the court to consider whether a decision of the civil court leads to the consequence that the order passed by the criminal court under section 488 should be cancelled or varied. There is no question of his considering whether the decision of the civil court has altered the circumstances of the case as the Magistrate has found. For the purpose of Section 489 (2) the criminal court should take the decision as it stands and consider the necessary effect of it upon the order passed by the Criminal Court. If the consequence is that it should be varied or cancelled, effect must be given to it by cancelling the order or varying it accordingly. The discretion that is given in that sub-section to the criminal court is only for this limited purpose. In this case the Magistrate has taken upon himself to completely ignore the decision of the civil court and has not chosen to consider whether in consequence of that decision his order should be cancelled or varied. That he was not competent to do.

The learned District Judge has found that the alleged adultery of the wife with Alphonso was not proved to be true by any cogent or reliable evidence and consequently he dismissed the suit that had been brought by the husband impleading her and the said Alphonso as the co-respondent. The only consequence of this decison is that the order passed by the Magistrate in M. C. No. 32 of 1944 cancelling the maintenance allowance that had been granted to the petitioner in the prior proceeding in M. C. No. 13 of 1943 and 17 of 1944 should have no effect and the prior orders granting her maintenance should be restored.

The petition is allowed and the maintenance granted to the petitioner in M. C. No. 13 of 1943 and 17 of 1944 will be restored. The restoration will take effect as from the date when she filed M. C. No. 11 of 1946 in the court of the Joint Magistrate, Coonoor having regard to the principle contained in the proviso to section 488 (3) of the Code of Criminal Procedure.

N.T.R. — *Petition allowed*

Criminal Revision Case No. 729 of 1947
(Criminal Revision Petition No. 623 of 1947)
and Criminal Miscellaneous Petition
No. 1199 of 1947
*August* 4, 1947
RAJAMANNAR, J.

K. GOVINDASWAMI CHETTIAR
v.
EMPEROR

*Criminal Procedure Code (V of 1898)—Charge sheet before Sub-divisional magistrate—Transfer to Sub-magistrate—Case triable by First class magistrate—Quashing of charge—Effect.*

*The Sub-divisional magistrate took on file a case against the petitioner under s 409 I.P.C. Subsequently the charge was altered to one under s. 408 and the case was transferred to the stationary Sub-magistrate, for disposal, who took the case on his file and framed a charge under s. 408 I. P. C. Then the High Court granted the petitioner's application to quash the charge on the ground that the offence alleged really amounted to an offence under s. 409 I.P.C. which the sub-magistrate had no jurisdiction to try. Thereupon the magistrate submitted the records to the Sub-divisional magistrate who took the case on his file The accused contended that the order of the High Court quashing the proceedings on the file of the Sub-magistrate wiped out the whole proceedings.*

Held, *the effect of the order of the High Court was to render the transfer of the case by the Sub-divisional magistrate, invalid and to continue the case on the file of the sub-divisional magistrate who can proceed with the case which is properly before him. The sending of the record by the Sub-magistrate of the case which had ceased to be on his file was not anything judicial but something purely administrative.*

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate of Tiruvannamalai dated 2—7—47 and passed in C. C. No. 123 of 1947.

and Petition under sections 439 and 561-A of the Code of Criminal Procedure, 1898, praying that in the circumstances stated therein the High Court will be pleased to quash the proceedings before the court of the Sub-Divisional Magistrate of Tiruvannamalai in the said C. C. No. 123 of 1947.

*M. Srinivasagopalan*, for Petr.

*Public Prosecutor (V.L. Ethiraj)*, for Crown

ORDER

The Petitioner in this case was accused of an offence of criminal breach of trust and a charge sheet was laid by the sub Inspecter of Railway Police, Villupuram. The case was taken on file by the sub-divisional magistate, Tiruvannamalai. The original charge sheet was under section 409 I. P. C. but subsequently the police put in a petition for an alteration of the section to 408 I. P, C. The Section was accordingly altered and the case was then transferred from the file of the Sub divisional magistrate, Tiruvannamalai to the file of the stationary sub magistrate, Tiruvannamalai for disposal according to law. The latter magistrate took the case on his file as C. C. No. 18 of 1946 and framed a charge under section 408 I. P. C. on 27th July 1946. There was then an application to this court by the accused to quash the charge on the ground that the offence alleged really amounted to an offence under section 409 I. P. C. which the magistrate had no jurisdiction to try. This court agreed with the petitioner, allowed his application and quashed the proceedings in C. C. No. 18 of 1946 on the file of the second class magistrate of Tiruvannamalai by an order dated 10th April 1947. Thereupon that Magistrate submitted the case records to the sub-divisional magistrate for necessary orders and the sub-divisional magistrate took the case on file as C. C. No. 123 of 1947. Objection was taken on behalf of the accused that the sub divisional magistrate had no power to proceed with the case because the order of the High Court quashing the proceedings in C. C. No. 18 of 1946 on the file of the second class magistrate Tiruvannamalai, wiped out, so to say, even the first information report and the charge sheet. His objection was overruled.

The accused seeks in this petition to revise the order of the sub-divisional magistrate refusing to drop the proceedings. He has also prayed in another application to quash the proceedings in C. C. No. 123 of 1947 on the file of the sub-divisional Magistrate.

The first point taken by the learned advocate for the petitioner is that under section 530 (p) of the Criminal Procedure Code "If any magistrate, not being empowered by law in this behalf tries an offender his proceedings shall be void". I do not however see how this provision applies to this case at this stage. No doubt at an earlier stage this court found that the second class magistrate, Tiruvannamalai was not empowered by law

to try the offence with which the accused stood charged. That was why this court quashed the proceedings on his file. The order of this court leaves untouched any other proceeding. No authority has been shown to me that the first information report or the charge sheet originally filed in the court of the sub divisional magistrate, Tiruvannamalai have also become null and void.

The learned advocate referred me to three cases of the Culcutta High Court namely *Golapady Sheikh* v. *Queen Empress* [1], *Radhaballav Ray* v. *Benode Behari Chatterjee* [2] and *Ajab Lal Khirker* v. *Emperor* [3]. None of these cases has any application to the facts of the present case. In none of those cases we find the proceedings on the file of the magistrate to whom the case had been transferred being declared void by the High Court. In the first two of the cases the case was validily pending before the Magistrate to whom the case had been transferred and it was held that the court which made the order of transfer had no power to pass any order in respect of the proceedings before the magistrate to whom the case had been sent. In *Ajab Lal Khirker* v. *Emperor* [3] the facts were no doubt different but there again it had not been declared that the Magistrate to whom the case had been transferred had no jurisdiction to entertain or try the case. Actually he had finished with the trial, convicted same of the accused and though no order had been passed in respect of the other accused his order was construed to be an order discharging those who had not been convicted. In any event I do not see how the decision in that case can have any bearing on the present case.

The learned advocate referred me to sections 5, 346, and 528 of the Criminal Procedure Code. His contention evidently was that except under the provisions of section 346 the magistrate had no power to make a report to a superior magistrate on the ground that the evidence appeared to him to warrant a presumption that the case ought to be tried or committed for trial by some other magistrate. I agree but this is not what has been done. There can be no question here of the sub-magistrate, Tiruvannamalai purporting to do any such thing. Section 528 enacts that:

1. [1900] 27 cal. 979
2. [1903] 30 cal. 449
3. [1905] 32 cal. 783

"Any 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."

It is contended that the sub-divisional magistrate has not passed any order withdrawing or recalling the case which is made over to the sub-magistrate, Tiruvannamalai. But in my opinion there is a fallacy underlying this contention. Section 528 too will in my opinion only apply when there is a case validly pending before any magistrate subordinate to the superior magistrate. There must first be a case, which means a case properly on the file of a magistrate subordinate to him, before the superior magistrate can purport to withdraw that case or recall it from the file of the subordinate magistrate to inquire or try it himself or to post it before any other magistrate. In this case the sub-divisional magistrate cannot be called upon to act under this sub-section because this Court has quashed the entire proceedings before the sub-magistrate, Tiruvannamalai, which means that there is no case before the sub-magistrate to be withdrawn or recalled.

What the sub-magistrate has done in this case really amounts to this. This court had quashed the proceedings before the sub-magistrate but there were certain records which pertained to that case remaining with him. The effect of the order of this court was to render even the transfer of the case by the sub-divisional magistrate to the sub-magistrate invalid because the offence alleged was an offence which a second class magistrate could not try and therefore the sub-divisional magistrate should not have transferred the case to the sub-magistrate even originally. The result is that in effect the case has continued on the file of the sub-divisional magistrate though it might not have received a number. What the sub-divisional magistrate has now done is to proceed with the case which had been properly laid before him by the complaint and what the sub-magistrate did was not anything judicial but something purely administrative in the sending of the records of a case which had ceased to be on his file. He simply returned the records which had been sent to him by his superior magistrate. I therefore do not consider that there is any merit in any of the technical points raised in this application and it is dismissed.

The other application to quash the proceedings is also dismissed.

N.T.R. — *Petition dismissed.*

Cr. R. C. No. 473 of 1946
(Cr. R. P. No. 454 of 1946)
*July* 14, 1947

RAJAMANNAR, J.

K. KELU NAIR
v.
T. S. THIRUMAMPU & others

*Penal Code, s.* 499, *Exceptions* 2 & 9—*Newspaper article—Allegations against Potal of village—"Good Faith".*

*The first accused wrote an article on the affairs of a certain village which was published in a Malayalam newspaper published by the second accused and printed by the third accused. The Potal of the village alleged that the article contained defamatory matter consisting of imputations which would harm his reputation. The lower court found that none of the accused were actuated by any malice or ill-will towards the complainant. All the imputations and allegations in the article were based upon what was related to the first accused by the villagers and the article was published after enquiries had been made. The first accused had also sent a petition containing almost the same allegations to the Collector. The Collector on such enquiry as he chose to make came to the conclusion that the allegations had not been proved, but without waiting for the Collector's reply published the article.*

Held, *that the first accused did exercise due care and attention before he expressed his opinion respecting the conduct and character of the complainant in the discharge of his public functions and his action must be held to be done in good faith. Neither the fact that the Collector came to the conclusion that the allegations have not been proved nor the fact that the accused did not wait for the Collector's reply negatived good faith.*

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Additional I Class Magistrate, South Kanara dated 25—3—46 and made in C. C. No 112 of 1945.

*P. Govinda Menon & M. Santhosh,* for Petr.
*M. Srinivasagopalan & T. K. Rajagopala Ayyangar,* for Respts.
*Public Prosecutor (V.L. Ethiraj),* for Crown.

ORDER

This case arises out of a complaint filed by the petitioner one Kelu Nair charging the first and the second accused with an offence punishable under section 500 Indian Penal Code and the third accused with an offence punishable under section 501 Indian Penal Code. The second accused is the publisher and the third accused is the printer of a Malayalam newspaper called "Desabimani" printed and published at Calicut. The first accused is the writer of an article published in that paper in its issue dated 25th March 1945 under the caption, "Panathadi Village of Kasaragod Taluk—The dancing ground of repression". The petitioner alleged that the said article contained defamatory matter consisting of imputations which would harm his reputation. To the charge as framed by the Additional First Class Magistrate, South Kanara, on this complaint was appended an extract from the said article of five passages. These passages according to the petitioner, maliciously and falsely made scurrilous attacks against him in the discharge of his duties as the Potal of Panathady. The magistrate acquitted all the accused of the offences with which they were charged on the ground that the article was written and published in circumstances which would bring it within the ninth exception of section 499 Indian Penal Code. The complainant seeks to revise this order of acquittal.

Undoubtedly the article in question contained matter defamatory of the petitioner. Inter alia it alleged that he as potal was guilty of acts of oppression against the villagers in discharging his duties and in particular in the matter of procurement of grain. It was also alleged in the article that the petitioner had been taking bribes. The sole question therefore is whether the accused are entitled to the benefit of any of the exceptions to section 499 of the Indian Penal Code. The Magistrate considered that the ninth exception applied to the case. In revision learned advocate for the petitioner Mr. P. Govinda Menon suggested that the second exception, if any was the more appropriate to the facts of the case. This exception enacts that "it is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character so far as his character appears in that conduct, and no further." The ninth exception on the other hand enacts that: "It is not defamation to make an imputation of the character of another, provided that the imputation be made in good faith for the protection of the interest of the

person making it, or of any other person, or for the public good". The article which is fairly lengthy in form appears to be a descriptive account of a tour undertaken by the writer, that is the first accused to Panathady. The article describes the plight of the villagers and in several places gives an apparently verbatim reproduction of the complaints made to the writer by some of the villagers who were the victims of the petitioner's oppressions. After giving an account of what the villagers told him, the writer winds up by saying that the poor people could not file a complaint in a court of law and seek justice and that he has written to the Collector asking him to conduct an enquiry into the state of affairs existing in the village and to punish the persons guilty of oppression. There is very little in the article which can be described as the opinion of the writer, respecting the conduct of the petitioner. The incidents related need no comment if true. I do not think it, however, very material in this case to decide which of the two exceptions, whether, the second or the ninth, is the more appropriate. The only material question which falls for decision is whether the expression of opinion or the making of the imputation by the accused was "in good faith". If it was, the lower court was certainly right in acquitting the accused.

The learned advocate for the petitioner contended that the writer could not be said to have acted "in good faith" because on the 17th March 1945 he had sent up a petition to the Collector of South Kanara containing almost the same allegations as in the article and without awaiting for a reply from the Collector he proceeded to publish the article on the 25th March 1945. It was also urged by him that ultimately the Collector, after an enquiry, came to the conclusion that the allegations made by the first accused against the petitioner were false. The order of the Collector on the petition of the first accused is dated the 28th May 1945, long after the date of the article in question. In determining the question of bona fides it was contended that the opinion of the superior Government Officer who dealt with the allegations made by the first accused and who made an enquiry should be a decisive factor. I do not agree. The fact that the Collector, on such enquiry as he chose to make, came to the conclusion that the allegations had not been proved does not mean that the allegations were not made "in good faith", i. e. that they were made without due care and attention. It is for the court to determine whether the first accused acted without due care and attention in making the allegations against the petitioner in his article. Nor do I think the fact, that the first accused did not wait till he received a reply from the Collector, negatives good faith. In matters like this a strong public opinion is as effective as departmental action.

The question remains whether the action of the first accused can be said to have been done "in good faith". The magistrate found that none of the accused were actuated by any malice or illwill towards the petitioner. All the imputations and allegations in the article were, as appears from the article, themselves, based upon what was related to the first accused by the villagers. Whether the villagers were speaking the truth or not, it does not appear to have been suggested that the first accused never went to the village to collect information. No less than ten defence witnesses were examined to prove that proper enquiries had been made on the facts contained in the article and that only after being satisfied that there was an element of truth in the statements that the article in question was published. The magistrate even goes to the length of holding that it cannot be definitely held that all the imputations are wholly false or unjustifiable. It is therefore clear that the first accused did exercise due care and attention before he expressed his opinion respecting the conduct and character of the petitioner in the discharge of his public functions. I agree with the magistrate, even assuming the ninth exception to section 499 I. P. C., applied to the case, that the imputations were made in good faith for the public good. There is therefore no reason to interfere with the order of acquittal.

The revision petition is therefore dismissed.

N. R. — *Petition dismissed*

Cr. A. No. 114 of 1947

*March* 12, 1947

YAHYA ALI J.

RAMANUJULU NAIDU

v.

EMPEROR.

*Penal Code (XLV of* 1860*) S.* 73—*Solitary confinement—When ordered.*

*Solitary confinement should not be ordered unless there are special features appearing in the commission of the offence.*

Appeal against the sentence passed by the Special Honorary Presidency Magistrate of the Court of Presidency Magistrates Egmore. Madras dated 27—1—1947 in case No 3 of the Calendar for 1947.

*Crown Prosecutor (P. Govinda Menon)* for Crown.

JUDGMENT.

I have given notice of this appeal to the Crown Prosecutor and heard him.

The appellant has been convicted by the Special Honorary Presidency Magistrate under sections 379 and 75 of the Penal Code and sentenced to rigorous imprisonment for two years. The Magistrate has further directed under section 73 I.P.C., that out of the above period of imprisonment, three months should be passed in solitary confinement.

The conviction is undoubtedly warranted by the evidence. When P. W. 1 after shopping with his wife and another person boarded a tram, the appellant and another person boarded the same tram. The appellant pushed P. W. 1 forcibly and in that act snatched away a pocket watch with a rolled gold chain which was in the possession of P. W. 1. The appellant swiftly passed on the watch and the chain to the other person. P. W. 1 and others present immediately caught hold of the appellant and handed him over to the police.

Before the Magistrate, the appellant admitted the offence and also the previous convictions. Looking at the list of previous convictions, it is clear that he commenced his career as a habitual thief as early as 1921 and his last conviction was by this Court in S.C. No. 13 of 1943 in third criminal sessions in which he was convicted under sections 380 and 75 I. P. C. and sentenced to four years' rigorous imprisonment. I would therefore confirm the conviction and the sentence of rigorous imprisonment for two years. But the direction that three months out of the period should be served in solitary confinement is not necessary. There are no exceptionally aggravating circumstances in the case to warrant such a direction. In fact when the provision in section 73 I. P. C., was introduced there was a similar provision in the corresponding English Act but even in those days the power to impose solitary punishment was very rarely exercised by a criminal Court by way of sentence. Even that provision was done away with during the reign of Queen Victoria. Solitary confinement should not be ordered unless there are special features appearing in the evidence such as extreme violence or brutality in the commission of the offence. The only reason given by the Magistrate is that the "sanctity of home life has become to him (the appellant) a mere mockery and the desire to take what he wants regardless of ownership is not in him," This can be said of every person convicted under section 379 of the Penal Code and I do not consider that to be a circumstance justifying the passing of an order of solitary confinement, The direction regarding solitary confinement will be deleted. In other respects the appeal is dismissed.

N.T.R.

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Criminal Appeal No. 136 of 1947

*March* 18, 1947

YAHYA ALI, J.

MUNUSWAMY

v.

EMPEROR

*Penal Code (XLV of* 1860*), s.* 75*—Previous conviction—Enhanced punishment—Solitary confinement—When to be given.*

*Although the fact of previous convictions is an element in determining the sentence, essential regard should be had to the facts of the case, the gravity of the offence and the circumstances in which it was committed, in assessing the punishment: and the mere circumstance that there were previous convictions should not result in the infliction of a sentence that is far out of proportion to the merits of the main case.*

*The sentence of solitary confinement, must if ever, be given in the most exceptional cases of unparalleled atrocity or brutality.*

Appeal against the sentence passed by the Special Honorary Presidency Magistrate, Egmore, of the Court of the Presidency Magistrate, Egmore, Madras on 6—2—47 in C. C. No. 230 of 1947.

Accused not represented.

*Crown Prosecutor*, for Crown.

JUDGMENT

The appellant has been convicted by a Special Honorary Presidency Magistrate under section 379 read with section 75 of the Indian Penal Code and sentenced to two years rigorous imprisonment. The Magistrate has further directed that out of that period, one month should be passed in solitary confinement.

This is a simple case of theft. P. W. 1, a weaver in the Buckingham and Carnatic Mills was, after receiving his pay, coming home. On the way he stopped at a shop and bargained for a ready made shirt. At that place the appellant is said to have removed from P. W. 1's pocket some currency notes which represented his salary. He was im-

mediately caught and handed over to the police with the currency notes.

The appellant admitted the offence and pleaded guilty to the charge under section 379 as well as to the charge under section 75 of the Penal Code. The only question therefore is as to the sentence. In a case of this kind which does not contain any circumstances whatever of an aggravating nature the ordinary sentence would have been indeed very light. There is however the fact that the appellant has been convicted under section 379 of the Indian Penal Code, on several occasions before and the last conviction was on the 4th January 1945 when he was sentenced to undergo rigorous imprisonment for two years. It has been held in a number of decisions by this court that although the fact of previous convictions is an element in determining the sentence, essential regard should be had to the facts of the case, the gravity of the offence and the circumstances in which it was committed in assessing the punishment and the mere circumstance that there were previous convictions should not result in the infliction of a sentence that is far out of proportion to the merits of the main case. In the present case taking into account all the previous convictions and the circumstances of the cases, I am definitely of the view that a sentence of rigorous imprisonment for one year would more than meet the ends of justice.

As regards the sentence relating to solitary confinement, the attention of the Magistrate is invited to my judgment in *Criminal Appeal No. 114 of 1947**. As pointed out in that judgment, although the imposition of the sentence of solitary confinement was legal, under the Larceny Act of 1861 (24 and 25 Vict Chapter 96) the power was very rarely exercised by a criminal court. By enacting 56 and 57 Vict. Chapter 54, on 22nd September 1893, the provisions in the Larceny Act relating to solitary confinement, which had become obsolete for several decades by that date were formally repealed. A century of experience has thus led to its abandonment in the United Kindom and at the present day it stands condemned and has generally given place to work in association during the day and confinement in cell for the night, in cases where isolation at night is considered necessary for a brief time for particular prisoners and exclusively for the maintenance of prison discipline. Although in the medieval times under the influence of the ecclesiastics it was considered that cellular confinement was a means of promoting reflection and penitence, it came since to be realised that this kind of treatment leads to a morbid state of mind and not infrequently to mental derangement and as a form of torture it fails in its effect on the public. It must, therefore, so long as it is part of the Indian Penal Code be administered, if ever, in the most exceptional cases of unparalleled atrocity or brutality. The sentence of rigorous imprisonment is reduced to one year and the sentence of solitary confinement is set aside.

N.T.R. —

Criminal Revn. Cases Nos. 647 to 654 of 1946
Cr. Revn. Petitions Nos. 620 to 627 of 1946.

*February* 5, 1947

YAHYA ALI, J.

PUBLIC PROSECUTOR
v.
ATCHAMMA & OTHERS

*Penal Code (XLV of 1860) S. 193 — Two contradictory statements — Prosecution — Criminal Procedure Code (V of 1898) S. 236, illustration (b).*

*Even if it cannot be proved which of the contradictory statements is false, a person may be charged and convicted in the alternative of intentionally giving false evidence at one stage or another.*

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgments of the court of Session of Cuddapah Division dated 19—3—46 and passed in Cr. Appeals Nos. 19 to 26 of 1946 respectively (P. R. C. No. 4 of 1945 on the file of the court of the Sub-Divisional Magistrate, Cuddapah).

*Public Prosecutor (V. L. Ethiraj)*, for Petr.

*B. Jagannadha Das* for Respts.

ORDER.

This batch of revision petitions involves a common point which can be disposed of by one judgment. Two sets of statements are said to have been made by the respective respondents in all these cases which are contradictory and the trial Magistrate directed the making of a complaint by means of an order under section 476, Cr. P.C. That order was reversed on appeal by the Sessions Judge, Cuddapah. The learned Sessions Judge came to the conclusion on a scrutiny of all the facts in evidence that it is not expedient in the interests of justice to prosecute the respondents for the alleged offence of giving false evidence. With that

* [1947] M.W.N. 608 : Cr. 144

finding based as it is on evidence I entirely agree.

The learned Public Prosecutor points out that in the course of the judgment the learned Sessions Judge has committed two errors of law which in the interest of the administration of justice should not be allowed to remain unrectified. The first question relates to the conclusion of the learned Judge that since there was no express finding of the trial Court that one of the two statements was false the complaint was vitiated. I agree with the Public Prosecutor that this view of the law is contrary to the provisions of section 236 Cr. P. C. and the principles underlying prosecutions under section 193 I P. C. In fact illustration (b) to section 236 Cr.P.C. shows that even if it cannot be proved which of the contradictory statements is false a person may be charged and convicted in the alternative of intentionally giving false evidence at one stage or another.

The second point mentioned by the learned Public Prosecutor is based upon the view propounded by the learned Judge relying upon the decision in *Hari Charan Singh* v. *Emperor* [1] that the sub-divisional magistrate was not then competent to administer an oath to the respondent when he recorded the first set of statements. The learned Judge's argument in that the information was collected with a view to taking action under section 190 (1) (c) Cr. P. C. and that no evidence could be recorded unless the requisite intimation had been given under section 191 Cr.P.C. to the accused that he was entitled to have the case tried by another court. *Hari Charan Singh* v. *Emperor* [1] is a case where the person examined was the accused and perhaps the case may be distinguishable on that ground, but I do not consider it necessary to decide this point as I agree with the finding of the learned Judge that it is not expedient in the interests of justice to make a complaint against the respondents.

The revision petitions are dismissed.

N.T.R. — *Petition dismissed.*

Cr. R. C. No. 719 of 1946
(Cr. R. P. No. 688 of 1946)
*April* 23, 1947

YAHYA ALI, J.

Sri Vidyarathna Thirtha Swamiar of SRI KRISHNAPUR MUTT, UDUPI
v.
EMPEROR

1. [1900] 27 Cal. 455

*Madras Rationing Order*, 1943, *cl.* 3-*A*—*Offence under by mutt*—*Liability.*

*Under cl.* 3-*A of the Madras Rationing Order*, 1943, *every person other than an authorized wholesale distributor is liable, if it is found that he imported rice within the rationed area contrary to the prohibition contained in that section. Where rice is imported into a mutt, whether it was done by the principal or agent, the head of the mutt is liable under cl.* 3-*A.*

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the court of Session, South Kanara Division, dated 16-4-46 and passed in Cr. Appeal No 14 of 1946 preferred against the judgment of the court of the Sub-Divisional Magistrate, Coondapur dated 3-1-1946 in C. C. No 111 of 1945.

*V. T. Rengaswami Ayyangar & K. P. Adiga* for Petr.

*Public Prosecutor* (*V. L. Ethiraj*) for Crown.

ORDER.

The petitioner was convicted by the Sub-Divisional First Class Magistrate, Coondapur, of offences under clause 3-A of the Madras Rationing Order 1943 and clause 19 (b) of the same order and sentenced to pay a fine of Rs. 1000 on each of the two counts. On appeal, the Sessions Judge of South Kanara confirmed the conviction under clause 3-A and set aside the conviction under clause 19 (b).

The contention raised by Mr. V. T. Rangaswami Ayyangar is that having regard to the reasoning employed by the learned Sessions Judge in acquitting the petitioner of the offence under clause 19 (b) of the Order he ought to have acquitted the petitioner under clause 3-A, also. The point made by the learned Sessions Judge in acquitting him under clause 19 (b) was that it appeared from the evidence that to attend to the secular matters concerning the mutt and its properties the petitioner who is the head of the mutt had appointed a manager who was signing the necessary returns and keeping the accounts and that he was the "authorised establishment" within the meaning of clause 19. The definition of "authorised establishment" in clause 2 (3) of the Madras Rationing Order includes a person in charge of an establishment authorized under the provisions of sub-clause (a) of clause 3. In view of these provisions it was held that a manager was a person in charge of the authorized establishment and he alone could be prosecuted and

not the petitioner. The language of clause 3-A is however different. It reads thus :—

"No person other than an authorized wholesale distributor shall on or after the rationing date import into or export outside any rationed area any rationed article except under and in accordance with the provisions prescribed by or under this order."

According to the language and spirit of this provision every person other than an authorized wholesale distributor is prohibited from importing into a rationed area any rationed article. The charge against the petitioner was that he imported 229-1/2 muras of rice between the 23rd April 1944 and 14th May 1944 into Udipi which became a rationed area on the 12th March, 1944. The argument of Mr. Rangaswami Ayyangar is that the word used in section 3-A is "person" and that word should be understood as meaning a "person in charge of an authorized establishment" within the meaning of that expression as defined in clause 2 (3) and that being so, having regard to the finding of the learned Judge that the manager was the person in charge of the authorised establishment and not the petitioner, the same finding should have been given with reference to the count under clause 3-A. For this purpose he relies upon the charge framed under clause 3-A that he, (the petitioner) being the head and in charge of Sri Krishnapur mutt, which is an authorised establishment as per ration authoriation No. 92 imported etc. Obviously the description given of the petitioner in the charge is a superfluity as no such description is contemplated or required under clause 3-A though such a a description was necessary with reference to clause 19 (b). Under clause 3-A there can be no doubt that every person other than an authorized wholesale distributor is liable if it is fouud that he imported rice within the rationed area contrary to the prohibition contained in that section. In the present case there is evidence that rice was imported into the mutt and whether it was done by the principal or by his agent, the manager, the petitioner is liable as the head of the mutt under clause 3-A. The conviction under clause 3-A is confirmed. The sentence of Rs. 1,000 appears to be excessive. The contravention of the rule appears to have been committed more by the manager than by the head of the mutt and having regard to the course that the proceedings have taken (the mutt having also come to this court at same stage previousiy) it is in my opinion sufficient in the interests of justice to reduce the fine to Rs. 100 in default to suffer simple imprisonment for one month. The excess fine if paid will be refunded.

N.T.R.

—

Cr. A. No. 47 of 1947

*July* 17, 1947

RAJAMANNAR, J.

K. J. MADHAVAN

v.

EMPEROR

*Cr.P.C., (V of* 1898)—*Appealable sentence—Evidence not recorded—Effect.*

*Where an appealable sentence is awarded it is incumbent on the magistrate under s.* 362 (1) *Cr. P. C. to take down the evidence of the witnesses and the failure of the magistrate to do so vitiates the trial.*

Appeal against the order of the court of the Chief Presidency Magistrate of the court of the Presidency Magistrates. Egmore. Madras. dated 13—11—46 in M. V. C. No. 866 of the Calendar for 1946.

*V. L. Ethiraj for C. K. Venkatanarasimham* for Applt.

*Crown Prosecutor*, for Crown.

ORDER.

An appealable sentence has been awarded in this case. In such a case under section 362 (1) of the Criminal Procedure Code the learned Magistrate shall take down the evidence of the witnesses and such evidence shall form part of the record. But evidently this procedure was not followed and when an application was made by the advocate for the accused for copy of the evidence he was informed that the evidence was not recorded as the case was being heard summarily. The notes taken down by the learned Magistrate were not evidently intended to be a record of evidence as contemplated by section 362(1) of the Criminal Procedure Code because some of the statements are in the third person. No endorsement is made with respect to P. W. 3's evidence if there was any cross examination.

In these circumstances the trial was bad. The conviction and sentence are set aside and the case is sent back for trial *de novo* by the Second Presidency Magistrate, George Town, Madras.

N.T.R. — *Conviction set aside.*

Cr. A. Nos. 98, 99 and 100 of 1947.
*August* 28, 1947.
LAKSHMANA RAO & GOVINDA MENON JJ.
THE PUBLIC PROSECUTOR
v.
BADULLA SAHEB & others.

*Defence of India Rules*, 1939, *R.* 119—*Publication under—Proof—Madras Silk Control Order*. 1943.

*When the Provincial Government publishes an order made under the Defence of India Rules in the official gazette, it must be presumed that it was a valid publication as contemplated by law and the authority making the publication must be deemed to have considered that that was the best form adapted for making the same known to the persons concerned. It is not necessary that the publication of the order should be preceded by a memorandum to the effect that in the opinion of the Governor the requisite method best adapted for informing the persons concerned is a publication in the gazette. It can be assumed that unless the Provincial Government is satisfied that a publication in the official gazette is the proper mode by which the order can be made known to the public, that course would not have been taken.*

1945 *M. W. N.* 114: *Cr.* 36 distinguished.
*I. L. R.* 24 *Pat* 781 & *A I. R.* 1947 *All.* 191, followed.

Appeals under Section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid Respondents (Accused) by the Court of Sessions of the Chittoor Division in C. A. Nos. 51, 52 and 53 of 1946 respectively preferred against the order of the Additional First Class Magistrate of Madanapalle in C. C. Nos. 1, 2 and 3 of 1946 respectively.

*Assistant Public Prosecutor* for Appellant.
*V. Rajagopalachari*: for respondent (Accused)

JUDGMENT.

[GOVINDA MENON J.]

*Cr. Appeal No.* 98 *of* 1947. The Public Prosecutor, Madras, appeals against the acquittal of the respondent (accused) by the learned Sessions Judge of Chittoor of an offence under clause 3-A of the Madras Silk Control Order, 1943, read with rule 81 (4) of the Defence of India Rules.

The facts are not in dispute. On 20-4-1945, between 3-30 a. m. and 4-30 a. m. at Kotha kota, when the house of the respondent was searched by the Inspector of Police, Madanappalle, he was found in possession of raw silk in bags weighing 734 lbs. and two palams without a licence for such possession as required by the Madras Silk Control Order 1943. He was prosecuted before the Additional First Class Magistrate of Madanapalle and was convicted for contravening the provisions of clause 3-A of the Madras Silk Control Order, 1943, and sentenced to imprisonment till the rising of the court and to pay a fine of Rs. 1,000 and in default to rigorous imprisonment for 9 months. The quantity of silk was ordered to be confiscated to the Government.

On appeal before the learned Sessions Judge of Chittoor the main point urged was a pure question of law viz., that the Madras Silk Control Order, 1943, was not properly published as required under rule 119 of the Defence of India Rules and therefore the respondent not being aware of the order did not have a licence. The learned Judge accepted the contention and acquitted the respondent. It is against that order of acquittal that the Provincial Government now appeals.

The sole question for consideration is whether the provisions of rule 119 of the Defence of India Rules have been properly complied with. The Madras Silk Control Order, 1943 was published in a Gazette Extraordinary on the 3rd October 1943 and the preamble to the publication reads as follows :—

"In exercise of the powers conferred by sub-rule 2 of rule 81 of the Defence of India Rules His Excellency the Governor of Madras is pleased to make the following order."

Clause 1 (ii) (a) lays down that it shall come into force in the Kollegal taluk of the Coimbatore District and Hosur taluk, Salem District, on the 15th October 1943. Clause 1 (ii) (b) lays down that it shall come into force in any other part of the Province of Madras on such date as the Government may by notification appoint. Accordingly, by an order dated 25th January 1945 and published in the Fort St. George Gazette Part I, page 95 dated 6—2—1945, it was declared that the 15th day of February 1945 is the date on which the provisions of the Madras Silk Control Order, 1943, shall come into force in the districts of North Arcot * * Chittoor * * It cannot for a moment be doubted that the notification extending the Madras Silk Control Order to the District of Chittoor is in accordance with clause 1 (ii) (b). But the main argument of Mr. Rajagopalachari for the respondent is that the Control Order itself was not duly published as the publication of that Order does not state that in the opinion of the authority making the order

the best form adopted for informing the persons whom the Order concerns is the publication in the Provincial gazette. Reliance is placed for this contention on a decision of Chandrasekhara Aiyar, J. reported in *Public Prosecutor* v. *Narayana Reddy* [1]. In that case the question was whether certain provisions of the Food Grains Control Order were violated. The said Order was published in the District Gazette and the learned Judge was of opinion that before the prosecution can rely upon the prohibitory order it should prove that there was publication of the order in accordance with what the authority, officer or person issuing it considered was best adapted for conveying the information to the persons whom the order concerns; and since there was no declaration by the Collector that in his opinion the notification in the District Gazette was the best method adapted for conveying the information to the person concerned it was held that there was no proper publication. His decision was distinguished by Kuppuswami Iyer, J. in *Ramaseshayya* v. *Emperor* [2] wherein the learned Judge held that where the person who is said to have directed the notification is also the person who had signed the notification, the manner of publication can be presumed to be the manner which, in his opinion, was best adapted for informing the person to whom it may concern. The learned Judge also relied upon the presumption under section 114 of the Evidence Act and held that the publication was proper. There is another decision of Chandrasekara Aiyar, J. passed in Cr. R. C. No. 342 of 1945 wherein he affirmed his earlier decision.

In this connection reference has to be made to rule 2, sub-rule (3) of the Defence of India Rules where "notified" and "notification" have been defined respectively as "notified" and "notification" in the official gazette. In our opinion, when the Provincial government publishes an order made under the Defence of India Rules in the official gazette, it must be presumed that it was a valid publication as contemplated by law and the authority making the publication must be deemed to have considered that that was the best form adapted for making the same known to the persons concerned. That the official gazette is the proper channel through which official orders are made known cannot be questioned. In *Public Prosecutor* v. *Narayana Reddy* [1] the publication was not in the Provincial gazettee and therefore it is distinguishable from the present case. The self same question came up for consideration before a Full Bench of the Patna High Court in *Mahadeo Pd.* v. *King Emperor* [3] and it was held that where an order of a general nature made by the Central or Provincial Government under the Defence of India Rules has been notified in an official gazette where all statutoty rules and orders are normally and usually published and it appears that the order has been so published because its publication is essential under rule 119, it may be presumed that the publication was made not merely in partial compliance with rule 119 but in compliance with all its provisions including the provision as to the determination of the most suitable form of publicatign. In the judgement of Fazl Ali C. J. at page 790, a distinction is made between the orders made by the authority of the Central or the Provincial Government and by a subordinate officer or authority with regard to such publication. In the case of the order made by the Central or Provincial Government, the Gazette of India or the Provincial gazette is the proper channel of publication; whereas when orders are made by subordinate officers the question will have to be considered as to whether the publication was made by the authority in compliance with the provisions of rule 119 including the provision as to his determining the most suitable form of publication. If the court is convinced that the subordinate officer has not considered the most suitable form of publication, it will have to be held that the order has not been properly published. The other learned Judges agreed with the decision of the learned Chief Justice and therefore we have the opinion of five judges of the Patna High Court on this matter. To the same effect is another decision of the same court—*Province of Behar* v. *Bhim* [4]. A Full Bench decision of the Allahabad High Court reported in *Debi Prasad* v. *Emperor* [5] is also to the same affect and there it is pointed out that rule 119 provides something in the nature of an exception to the general rule *ignorantia legis non excusat* and therefore when once the order is published, the persons whom it concerns shall be deemed to have

1. [1945] M.W.N. 184 : Cr. 36
2. [1946] M W.N. 474 (1) : Cr. 69
3. [1945] I.L.R. 24 Pat. 781
4. [1946] 25 Pat. 539
5. [1947] A.I.R. All. 191

been informed of the order. It is further pointed out that rule 119 is procedural. As against these decisions, the two decisions of the Bombay High Court reported in *Leslie Gwilt* v. *Emperor* [6] and *Mhatarju Patil* v. *Emperor* [7] are relied upon. In the former, the order was not a general one but applies to a class of persons on a particular day and therefore it may be said that the authority should have exercised his mind and stated as to what the best form of publication was. No doubt the decision in *Raghunath Krishna* v. *Emperor* [8] relates to a general order, but we are of opinion that the correct view is that taken by the Allahabad and Patna High Courts. Mr. Rajagopalachari further relied upon a decision of the Nagpur High Court in *Shakoor* v. *King Emperor* [9] where the impugned publication related to an order of a District Magistrate and it was not published in any official provincial gazette at all. The decision in *Babulal Rajoolal* v. *Emperor* [10] also proceeds on the same reasoning but we prefer to follow the judgment of the learned Chief Justice of the Patna High Court in which four of his colleagues have concurred and the Full Bench of the Allahabad High Court in preference to the Nagpur and Bombay courts.

The publication of Madras Silk Control Order 1943, in the Fort St. George Gazette on the 3rd October 1943 was done under the authority of the Governor in whom the administration of the Province vested under the Government of India Act 1935. We are opinion that it is not necessary that the publication of the order should be preceded by a memorandum to the effect that in the opinion of the Governor the requisite method best adapted for informing the persons concerned is a publication in the gazette. It can be assumed that unless the Provincial Government is satisfied that a publication in the official gazette is the proper mode by which the order can be made known to the public, that course would not have been taken. None of the cases cited on behalf of the respondent go the extreme length of stating that a proper publication in the official gazette of the Province is by itself not sufficient. Even though the Official Gazettes Act XXXI of 1863 has been repealed by the Orders in Council made under the Government of India Act, 1935, still the Central Government and the Provinces have laid down that the Gazette of India and the respective official Gazettes of the Provinces are their official channel of publication. Agreeing with the view taken by the Full Bench of the Patna High Court that the rule does not say that the authority should declare or state in writing that in its opinion the manner of publication decided upon in a particular case was best adapted for informing the persons concerned of the provisions of the order, we are of opinion that the order of acquittal of the respondent by the lower appellate court is wrong. The appeal is therefore allowed and the order of acquittal set aside. The respondent is convicted of an offence under clause 3-A of the Madras Silk Control Order, 1943, read with rule 81 (4) of the Defence of India Rules. The sentence awarded by the trial court is restored. We do not consider it is necessary to restore the order of confiscation of the silk. The respondent is entitled to the bags of silk seized from him or their value if they have been sold.

Criminal Appeals Nos. 99 and 100 of 1947. Following the judgment just now delivered in C. A. No. 98 of 1947, these appeals are allowed. The orders of acquittal of the the respondents by the lower appellate court are set aside and the respondents are convicted of an offence punishable under clause 3-A of the Madras Silk Control Order 1943, read with rule 81 (4) of the Defence of India Rules. The sentence awarded by the trail court on each respondent is restored. The orders of confiscation of the goods passed by the trial court are set aside and each respondent is entitled to the bags of silk seized from him or their value if they have been sold.

N.T.R. — *Appeal allowed*

6. [1945] A.I.R. Bom. 368
7. [1945] A.I.R. Bom. 389
8. [1947] A.I.R. Bom. 239
9. [1944] I.L.R. Nag. 150
10. [1945] A.I.R. Nag. 218

Cr. R. C. No. 1342 of 1946
Cr. R. P. No. 1280 of 1946
*August* 29, 1947

RAJAMANNAR, J.

KARUMURI CHINA MALLAYYA
v.
EMPEROR

*Evidence Act* (*I of* 1872), *s.* 24—*Textile control officer asking accused to 'tell truth'—Statement—Admissibility—Cr. P. C.* (*V of* 1898), *s.* 436—*Order of discharge—Interference with.*

*Where with reference to a contravention of cl.* 4 *of the Madars Cloth Dealers Control Order,* 1944, *the textile officer asked the ac-*

*cused to tell the truth and the accused made a statement,*

Held, *the statement could not be said to have been made as the result of inducement or threat by the textile control officer within s.* 24 *Evidence Act and was not inadmissible.*

*I.L.R.* 15 *Lah* 856 distinguished.

1935 *M.W.N.* 824: *Cr.* 151, followed.

*There is no general rule as to when interference in revision with an order of discharge is justifiable which can be applied in every case without reference to the facts of the particular case.*

*Where the magistrate thought there was no legal evidence from which the contravention could be inferred, and discharged the accused but there was legal evidence, it is permissible, and even necessary, for the Sessions Judge to set aside the order of discharge and direct further enquiry.*

Petition under Sections 435 and 439 Cr. P. C., 1898 praying the High Court to revise the order of the Court of Session of East Godavari division, dated 21—10—46 in Crl. R. P. 14 of 46 preferred against the order of the Sub Divisional Magistrate of Rajahmundry in C. C. No. 165 of 1946.

*G. Balaparameswari Rao*, for Petr.

*Public Prosecutor (V. L. Ethiraj)*, for Crown.

ORDER

The charge against the petitioner was that on 25th October 1945 he was found storing large quantities of mill made cloth for sale without a licence in contravention of clause 4 of the Madras Cloth (Dealers) Control Order, 1944. The Sub Divisional Magistrate, Rajahmundry, discharged the petitioner under section 233 (1) of the Code of Criminal Procedure on the ground that there was no "legal evidence on record", justifying the presumption that the cloth found with the accused was stored for sale. There was an application by the Crown to revise the order of discharge and the learned Sessions Judge set aside the order and directed the District Magistrate by himself or by any other subordinate Magistrate to make a further enquiry into the case of the accused The petitioner seeks to revise the order of the learned Sessions Judge.

There can be no doubt that on 25th October 1945 at about 6 p m. the Textile Control Officer, Rajahmundry seized a large quantity of cloth from the accused. The Textile Control Officer then examined the accused and recorded a statement from him, Ex. C. and he further took down another statement on the next day, Ex. C. 1. According to these statements it is clear that the cloth was purchased and stored by the accused with the intention of selling. The prosecution relied upon (1) the statements made by the accused above referred to Exs. C, and C. I, (2) on the quantity of cloth found which was beyond the ordinary household requirements and (3) on the deposition of P. W. 5 who is a licensed dealer in cloth and who deposed that a commission agent brought a dealer to the accused and offered to arrange for the sale of the cloth stored by the accused. The Sub-Divisional Magistrate rejected the evidence of P. W. 5 as unreliable. Though he did not reject Exs. C and C. 1 completely from evidence he refused to attach any importance to them. He appeared to be satisfied with the explanation of the accused that the large quantity of cloth was stored in anticipation of marriages in his house. He, therefore, thought that there was no legal evidence from which it could be inferred that the cloth stored was for sale.

The learned Sessions Judge agreed with the trial Magistrate that P. W. 5 was not a reliable witness but he came to the conclusion that there was legal evidence which rendered the order of discharge unrersonable and improper. He relied in particular on the statements, Exs. C and C. 1 and the quantity and nature of the cloth seized.

It was contended by the learned advocate for the petitioner that the statements Exs. C and C. 1 would be inadmissible in evidence because they must be held to have been caused by inducement, threat or promise having reference to the charge against the accused person proceeding from a person in authority within the meaning of section 24 of the Indian Evidence Act. This contention was based entirely on the statements in cross-examination of P. W. 1, the Textile Control officer, namely,

"I asked him to tell me the truth. I was putting questions off and on while he was making the statement, to elicit information."

It may also be mentioned that the officer definitely denied that he promised to help the accused before he recorded the statements, Exs. C and C 1. The learned advocate relied upon a ruling in *Hashmat Khan* v. *Crown* [1]. It is very difficult to derive any assistance from decisions which are based upon the evidence and the circumstances of the particular case in applying them to the facts of the case on hand. Actually in the Lahore case the words used were *"Achha*

1. [1934] 15 Lah. 856

*hoga afar sach bataoge"* These do not correspond in any sense with the words "I asked him to tell me the truth." On the other hand the learned Public Prosecutor has drawn my attention to a ruling of this court in *The Public Prosecutor* v. *Boya Obigadu and others* [2]. The village munsif in that case said to the accused "There has been a burglary. I suspect you. Tell the truth." It was held that these words did not amount to a threat or inducement within the meaning of section 24 of the Evidence Act to make a confession by the accused to the village munsif inadmissible.

There is no independent evidence of the circumstances under which these statements were recorded nor does it appear that the accused himself made any statement alleging that the confessions were the result of inducement or threat by the Textile Control Officer. I am, therefore, unable to accept the contention that Ex. C and C 1 are inadmissible. What value should be attached to them in the final determination of the guilt of the accused it is not necessary for me to state at this stage.

It was next contended by Mr. Balaparameswari Rao for the petitioner that the learned Sessions Judge ought not to have interferred in revision with the order of discharge passed by the Sub-Divisional Magistrate. He tried to support his contention by relying on certain observations in *Parshram Bhike* v. *Emperor* [3] and *Kumaraswami Mudaliar and another* v. *Kaliammal* [4]. But I do not find anything in either decision which can be said to lay down a general rule or rule of thumb to apply in each case and decide automatically whether a revision is justified of not. In *Parashram Bhike* v. *Emperor* [3], the learned Judges held that an order of discharge made after hearing all the prosecution evidence should not be set aside unless it could be said that the order was perverse or manifestly unreasonable and inconsistent with an honest appreciation of the evidence before the court and that the criterion was not whether a revising court agreed with the order of discharge but whether it was rational in the sense that it could not be fairly described as perverse or manifestly contrary to the evidence. The criterion certainly reduces the whole question to a question of fact depending upon the circumstances and evidence in each case.

In *Kumaraswami Mudali* v. *Kaliammal*, [4] Pandrang Row, J, concluded his judgment thus:

"The learned Sessions Judge ought in my opinion to have declined to interfere in these circumstances. Though it cannot be laid down as a general rule that there should be no revision of an order of discharge where there has been only misappreciation of evidence in the present case there are not such misappreciation of the evidence as required a further enquiry by another Magistrate."

In other words it means that there is no general rule which can be applied in every case without reference to the facts of the particular case (vide the case reported in *Harichandra Reddi* v. *Syed Khasim Sahib* [5].

In this case the Sub Divisional Magistrte thought that there was no legal evidence on record from which it could be inferred that the large quantity found with the accused was stored for sale. The learned Sessions Judge in his order pointed out that certainly there was legal evidence from which it could be inferred that the cloth stored was for sale. In these circumstances it was certainty permissible, I would even go further and add that it was necessaay for the learned Sessions Judge to have set aside the order of discharge and to have directed further enquiry. There is no reason, whatever, to interfere with his order. The criminal revision petition is dismissed.

N.T.R. — *Petition dismissed.*

2. [1935] M.W.N, 524 : Cr. 151
3. [1933] I.L.R. 57 Bom. 430
4. [1937] M.W.N. 332 : Cr. 60

Cr. R. C. Nos. 635 and 636 of 1946
(Cr. R. P. Nos. 608 & 609 of 1946)
*August* 26, 1947

YAHYA ALI, J.

RAVIPUDI VENKANNA & others
v.
EMPEROR

*Evidence Act ([ of* 1872), *ss.* 27 & 114— *Statement leading to discovery of certain articles—Inference of guilt.*

*On a charge under ss.* 454 *and* 380, *Penal Code, the accused made statements which led to the discovery of currency notes and jewels. As a result of information said to have been given by accused* 1, 3 *and* 5 *some currency notes alone were found. The currency notes found in pursuance of information given by accused* 5 *were found wrapped in a bag, which was identified as the property stolen from the complainant's house. In pursuance of information given by accused* 2, *jewels were found in his sister's house and it was not established that*

5. [1937] M.W.N. 1240; Cr. 256

*the second accused had anything to do with that house.*

Held, (i) *that accused* 1, 2 *and* 3 *could not be held to have been proved to have committed an offence under ss.* 454 *and* 380, *Penal Code; or even alternatively under s.* 411;

*(ii) that as against accused* 5 *the presumption under s.* 114 *Evidence Act would apply and he must be held to be guilty of having committed an offence either under S.* 454, 380 *or* 411, *Penal Code.*

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the orders of the Court of Session of Guntur dated 5—7—46 in C. A. Nos 45 and 46 of 46 respectively preferred against the order of the Additional First Class Magistrate Bapatla, in C. C. No. 267 of 1945.

*K. Krishnaswami Ayyangar & N.C. Raghavachari* for Petr.

*Public Prosecutor (V. L. Ethiraj)* for Crown.

ORDER.

There were five accused in this case. They were convicted by the Additional First Class Magistrate, Bapatla under section 454 and 380 of the Indian Penal Code and sentenced to four months rigorous imprisonment and also fined Rs. 100 each under each of the counts. The convictions were confirmed by the Sessions Judge, Guntur, on appeal. The fourth accused has not preferred a revision against the order of the appellate Judge. The revision case filed by accused 1 to 3 is Cr. R. C. No. 635 of 1946 and the case filed by the fifth accused is Cr. R. C. No. 636 of 1946. The convictions of the petitioners rested mainly on confessional statements made by the petitioners and on the evidence relating to the identification of the property which was discovered in pursuance of that confession. The property consisted of currency notes and ornaments. Applying the principle laid down by the Privy Council in *Pulukuri Kottayya* v. *Emperor* [1] all the four confessional statements have to be in toto excluded from the evidence except to the extent to which it was mentioned therein that the respective confessors stated that they would produce the property. Their Lordships pointed out in that judgment that such a statement leads to the discovery of the fact that the property is concealed in the house mentioned to the knowledge of the person making the confession and if the property is proved to have been connected with the offence the fact discovered would become relevant. Here as a result of the information said to have been given by accused 1, 3 and 5 some currency notes alone were found; no jewels were found. While with regard to the currency notes found on the information given by accused 1 and 3 it is to be pointed out that they could not possibly be identified it has to be mentioned with reference to the currency notes found in pursuance of information given by accused 5 that they were found wrapped in a bag which bore the initials K. M. L. which are the initials of P. W. 1. The bag has been identified by P. Ws. 1 and 2 and they stated that they kept the currency notes in that bag. This evidence is sufficient, in my opinion, to establish the identity of the stolen property. Next with regard to the second accused in pursuance of the information given by him jewels were found in his sister's house. It is not established by any admissible evidence that the second accused had anything to do with that house. All that the circumstances of the discovery of the jewels, assuming it to be stolen property, establish is that the second accused was aware of the fact of the concealment of those jewels in his sister's house. That is the utmost the evidence can be said to have established against the second accused but that is not by any means sufficient even with the aid of the presumption under Section 114 of the Evidence Act to establish that the second accused was guilty of an offence under Sections 454 and 380 of the Indian Penal Code or even alternatively under Section 411 of the Indian Penal Code.

The result is that in Criminal Revision Case 635 of 1946 none of the accused can be held on legal admissible evidence to have been proved to have committed an offence under Sections 454 and 380 of the Indian Penal Code. Their conviction and sentence must therefore be set aside and the fine levied on them if paid shall be refunded. In Crl. R. C. No. 636 of 1946 which is the petition filed by the fifth accused I have already held that he was found to be in possession, to his knowledge, of currency notes wrapped in a bag which was identified as the property stolen from the complainant's house. Here is a case where a presumption under section 114 would apply and the fifth accused must be held to be guilty of having committed an offence either under section 454, 380 or 411 of the Indian Penal Code. His conviction and sentences are confirmed and Cr. R. C. No. 636 of 1946 is dismissed.

N.T.R. —

1. [1947] M.W.N. 217 : Cr. 43 P.C.

Cr. R. C. No. 226 of 1947
(Cr. R. P. No. 215 of 1947)
*April* 11, 1947
YAHYA ALI, J.
LAKSHMANA NADAR & others
v.
EMPEROR

*Criminal Procedure Code (V of* 1898*), s.* 195 (1) *(b)—Penal Code (XLV of* 1860*), ss.* 395 & 206—*Prosecution under s.* 395, *I. P. C.—Sanction.*

*Certain cattle belonging to some of the accused were attached before judgment in a small cause suit and left in the custody of sureties. The accused along with others (five) were alleged to have gone in a body and committed dacoity armed with deadly weapons and forcibly removed the cattle and were charged under s.* 395, *I. P. C. The accused pleaded that the facts disclosed an offence under s.* 206, *I. P. C. and a written complaint under s.* 195 (1) *(b) is necessary.*

Held *both the offences were not more or less identical; that the offence under s.* 395, *I. P. C. was not only a much graver offence but certain additional features existed which did not form the ingredients of an offence under s.* 206, *I. P. C. and that therefore the sanction of the Civil Court was not necessary for prosecution for the offence under s.* 395, *I. P. C.*

Petition under Sections 435 and 439 of the Code or Criminal Procedure. 1898 praying the High Court to revise the order of the Court of the Second Class Magistrate. Ambasamudram. dated 22-2-1947 and passed in Preliminary Register Case. No. 1 of 1947.

*S. Krishnamurthi,* for Petr.
*Public Prosecutor (V.L. Ethiraj),* for Crown.

JUDGMENT

This is an application to quash the charge and proceedings in P. R. C. No. 1 of 1947 on the file of the Second Class Magistrate, Ambasamudram. Two contentions are raised by Mr. Krishnamurthy. The first is that, as the facts of the complaint disclose an offence under section 206, I. P. C., there should be a written complaint by the District Munsif's Court, Ambasamudram, under section 195 (1) (b), Criminal Procedure Code and that in the absence of such a complaint, an enquiry even into the charge of dacoity which forms the subject-matter of this case cannot proceed. The second objection is that on the showing of the complaint itself there was no dishonest intention on the part of the petitioners and that therefore a charge under section 395, I. P. C. cannot stand.

Some cattle belonging to the second and third petitioners were attached before judgment by the complainant P. W. 2 as the plaintiff in Small Cause Suit No. 494 of 1946 in the District Munsif's court Ambasamudram. After attachment the cattle were left in the custody P. Ws. 1 and 2 as sureties. The case against the petitioners is that while the cattle were in the custody of the sureties they along with others went in a body and committed dacoity armed with deadly weapons and forcibly removed the cattle and thus committed an offence under section 395 I.P.C. The argument is that since the cattle had been left in the sureties' custody under orders of a court of justice their fraudulent removal constituted an offence under section 206 I. P. C. and that the requirements of section 195 (1) (b) cannot be circumvented by prosecuting the offenders under a graver charge under section 395 I. P. C. Such a contention would have had some force if the elements constituting both the offences were more or less identical, but in the present case section 395 I. P. C. is not only a much graver offence, but certain additional features exist which do not form the ingredients of section 206 I. P. C. viz, that the petitioners were alleged to have been armed with deadly weapons that they were five in number and that they conjointly committed the offence with a dishonest intention. These elements distinguish the offence under section 395 from one under 206 I. P. C. and it cannot be said that for such an offence the sanction of the civil court is necessary for prosecuting the petitioners.

Coming to the second objection it must be noticed that the preliminary objection as to the want of sanction was raised at an initial stage. It will be open to the petitioners if the prosecution fails to establish dishonest intention on the part of the accused, to contend at the appropriate stage that the essential requirement of section 395 I. P. C. has not been fulfilled.

The petition is dismissed.

N.T.R. — *Petition dismissed*

Cr. R. C. No. 617 of 1947
(Cr. R. P. No. 512 of 1947)
*July* 31, 1947
RAJAMANNAR, J.
GADALA SANYASI & others
v.
EMPEROR

*Cr. P. C. (V of* 1898*), S.* 413—*Two accused sentenced to fine of Rs.* 40 *each and four accused sentenced to fine of Rs.* 30 *each under each of Ss.* 147 *and* 323—*Appeal.*

*Accused* 1 *and* 3 *were sentenced to pay a fine of Rs.* 40 *each in respect of each of the offences under Ss.* 148 *and* 324, *I. P. C. respectively. Accused* 2, 4, 5 *and* 6 *were sentenced to pay a fine of Rs.* 30 *each under each of the sections* 147 *and* 323, *I. P. C. The six accused filed an appeal.*

Held *the first and third accused were sentenced to a total fine of Rs.* 80 *each, while the rest of the accused were each sentenced to a total fine of Rs.* 60 *and the case therefore fell outside S.* 413, *Cr. P. C. and that the appeal was maintainable.*

Petition under Sections 435 & 439 Cr. P. C. 1898 praying the High Court to revise the Judgment of the Court of the Sessions Judge of West Godavari at Ellore dated 29th day of March 1947 and made in C.A. No. 10 of 47 (C.C. No. 40 of 1946 on the file of the Additional 1st Class Magistrate at Tanuku.)

*P. Satyanarayana Raju* for Petr.

*Public Prosecutor* (*V. L. Ethiraj*) for Crown.

ORDER

In C. C. No. 40 of 1946 on the file of the additional First Class Magistrate, Tanuku, accused 1 & 3 were sentenced to pay a fine of Rs. 40 each in respect of each of the offences under Section 148 and 324 I. P. C. respectively. Accused 2, 4, 5 and 6 were sentenced to pay a fine of Rs. 30 each under each of the sections 147 and 323 I. P. C. The six accused filed an appeal to the Sessions Judge, West Godaveri. The learned Sessions Judge held that the appeal was not maintainable because there was no sentence of fine exceeding Rs. 50 and applied the provision of section 413 Cr. P. C. The learned Sessions Judge made a reference to two decisions of this court in *In Re P. Venkataramayya* [1] and *Public Prosecutor* v. *Dasapai* [2] which dealt with the constuction of section 415 Cr. P. C. But I think it is unnecessary to refer either to that section or to the two decisions for the purpose of this revision petition.

Section 413 says that * * * there shall be no appeal by a convicted person in cases in which * * * a court of Sessions or District Magistrate or other Magistrate of the First class passes a sentence of fine not exceeding Rs. 50 only. This is really in the nature of a limitation on the general right of appeal given to a convicted person under section 408 of the code. It is therefore necessary to see if in this case it can be said that the trial Magistrate passed a sentence of fine not exceeding Rs. 50 only. Actually taking the individual accused it cannot be said that any of the accused has been sentenced to a fine not exceeding Rs. 50, because the first accused and third accused were sentenced to a total fine of Rs. 80 each, while the rest of the accused were each sentenced to a total fine of Rs. 60. The case therefore clearly falls outside section 413, Cr. P. C. which restricts the right of appeal. The result is that under section 408, Cr. P. C. the accused in the case would have a right of appeal to the Court of Session.

The order of the lower court dismissing the appeal is set aside. The learned Sessions Judge shall restore the appeal to his file and dispose of it in accordance with law.

N.T.R.

1. [1939] MWN 1039: Cr. 163: ILR [1939] Mad. 1035

2. [1936] MWN 213: Cr. 37

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Cr. R. C. No. 1135 of 1946
(Cr. R. P No. 1087 of 1946)
*August* 12, 1947
RAJAMANNAR, J.
PREM RAJ SOWCAR
v.
EMPEROR

*Pawn-brokers' Act* (*Madras Act XXIII of* 1943) *s.* 3 (1)—*Scope of—Casual instances of receiving pledge.*

*The Pawn-brokers' Act contemplates a person being engaged in the business of taking goods and chattels in pawn for a loan and it is not in the contemplation of the Act to bring within the mischief of its provisions any person who casually may take on pledge any article.*

Petition under sections 435 & 439 Cr. P. C. 1898, praying the High Court to revise the order of the Chief Presidency Magistrate, Egmore. Madras dated 22—8—46 & made in C. C. 1843 of 46.

*G. Ramakrishna Aiyar*, for Petr.

*Public Prosecutor* (*V.L. Ethiraj*), for Crown.

ORDER

The petitioner was convicted by the learned Chief Presidency Magistrate of an offence under sections 3 (1) and 18 (1) of the Pawnbrokers' Act XXIII of 1943. The evidence on which the conviction was based was that on the 24th February 1946. P. W. 2 went to the shop of the accused and wanted money on a silver waist cord. The accused said he would buy it outright for Rs. 5 but P. W. 2 refused to sell it and he was prepared only to pledge it. The accused accepted the article on pledge for Rs. 5 for a month on an interest of Re. 0—8—0. This is all the evidence in the case. There is no evidence that the accused took any other article on pledge.

Section 3(1) of the Act says "No person shall carry on or continue to carry on the business as a pawnbroker unless he has obtained a pawnbroker's licence under the Act." "Pawnbroker" is defined as a person who carries on the business of taking goods and chattels in pawn for the loan. In my opinion the Act clearly contemplates a person being engaged in the *business* of taking goods and chattels in pawn for a loan and it would not have been in the contemplation of the Act to bring within the mischief of its provisions any person who casually may take on pledge any article. There is no evidence that the instance of which there was evidence was anything but a stray instance. The prosecution, therefore, did not establish either that the accused was a pawnbroker or that he carried on business as a pawnbroker. The conviction was therefore clearly unsustainable. I set aside the conviction and acquit the accused. The fine, if collected, will be refunded.

N.T.R. — *Conviction set aside*

Cr. R. C. No. 1331 of 1946
(Cr. R. P. No. 1270 of 1946)

*August* 21, 1947

RAJAMANNAR, J.

SOMASUNDARAM CHETTIAR & OTHERS
v.
EMPEROR

*Gaming Act (Mad Act III of* 1930), *S.* 3—*Common gaming house — Person playing cards for stakes at a club—Offence—'Club' —A person.*

*The accused* 1 *to* 7 *were playing a game of cards called "three cards" in the precincts of a Club and A.* 18 *was found present at the game and had with him Rs.* 175 *collected from the players. It was in evidence that a charge was made for every sitting from each player which after making due allowance for the cost of the playing cards proved a source of income for the club; and that there was a resolution of the Club by which the secretary was authorised to collect sitting fees and the stake amounts from the card players and distribute them.*

*Held that the premises of the Club was a common gaming house and the conviction of accused* 1 *to* 7 *for gaming under s.* 9, *Madras Gaming Act and the clerk and secretary under s.* 8 *for keeping or permiting the club to be a common gaming house was proper.*

*A Club is a person within the meaning of s* 3, *Madras Gaming Act and where the club derives any profit or gain by way of a charge for the use of instruments of gaming or of the house or room it would fall within the definition of a common gaming house. It is not necessary that the members of the Club should make a profit and it is sufficient if the Club as a 'person' occupying or using or keeping the house or room makes a profit or gain.*

*Where the premises satisfies the conditions found in s.* 2 *Madras Gaming Act it does not cease to be a 'common gaming house' because the Club also provides for games like tennis.*

Petition under ss. 435 and 439 Cr.P.C. 1898, praying the High Court to revise the order of the Sub-Divisional Magistrate, Devakottah dated 26—8—1946 and made in C. A. No. 36 of 1946 preferred against the order of the Additional Sub-Magistrate Tirupattur in C.C. No. 146 of 1946.

*K.V. Ramachandra Ayyar & S. Tyagaraja Ayyar* for petrs.

*Public Prosecutor (V.L. Ethiraj)* for Crown.

ORDER

Nineteen accused were tried by the Additional Sub Magistrate, Tirupattur, for offences under the Madras Gaming Act, 1930. Accused 1 to 17 were convicted under section 9 of the Act for being found gaming, or present for the purpose of gaming, in a common gaming house and accused 18 and 19 were convicted under section 8 of the Act for keeping, or permitting to be used, a "common gaming house". On appeal, the Sub-Divisional Magistrate, Devakottah, set aside the conviction against accused 8 to 17 but confirmed the conviction against the rest of the accused. Accused 1 to 7, 18 and 19 are the petitioners in this court.

It has now been found — and it is not disputed—that at 5-15 p.m. on 31st January

1946, accused 1 to 7 were actually playing a game of cards called 'three cards' in the precincts of the Lakshmi Club at Karaikudi. Accused 8 to 17 were found merely watching the gaming and they were acquitted by the appellate magistrate on the ground that it could not be concluded that they were there for gaming purposes only. Accused 18 is the clerk of the Club and was found present at the game by the Sub Inspector of Police, Karaikudi, who made a raid of the Club premises on the day. He had with him a sum of Rs. 175 collected from the players. Accused 19 is the Secretary of the Club who was however absent at the time when the raid was made.

The most important question which arises for decision in the case is whether the premises of the Lakshmi Club, and in particular the room in which the play was going on, is a "common gaming house" within the meaning of section 3 of the Madras Gaming Act of 1930. The definition of a "common gaming house" in that section so far as it is relevent to this case is as follows—

"Common gaminghouse' means any house, room ...or any place whatsoever in which cards dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owning occupying, using or keeping such house room. . . . or place, whether by way of charge for the use of instruments of gaming or of the house, room . . or place or otherwise howsoever: and includes any house, room, . . .or place, opened, kept or used, or permitted to be opened, kept or used, for the purpose of gaming.

Both the trial and the appellate magistrates have held that the precincts of the Lakshmi Club would fall within the definition. Mr. K.V. Ramachandra Ayyar, the learned advocate for the petitioners, attacked the conclusion of the lower courts in several ways. He first contended that the Club was not a "person" within the meaning of section 3 but did not try to support his contention by any authority or argument. It appears to me to be impossible to contend that the Club is not a "person". *Prima facie* the word "person" includes a natural person as well as an artificial person like a corporation. (See *The Parmaceutical Society* v. *The London & Provincial Supply Association, Limited* [1]) Apart from the prima facie meaning, section 3 sub section (22) of the Madras General Clauses Act which applies to the Madras Gaming Act defines a "person" thus—

"Person" shall include any company or association of individuals, whether incorporated or not."

That this is a familiar legal conception even for purposes of penal provisions is clear from section 11 of the Indian Penal Code according to which the word "person" includes any company or association or body of persons, whether incorporated or not. The Lakshmi Club is admittedly a society registered under Act XXI of 1860. A society registered under that Act becomes a corporate body. The property, movable and immovable, belonging to a society as registered, if not vested in trustees shall be deemed to be vested for the time being in the governing body of such Society. Such Society may sue or be sued in the name of the president, chairman or principal secretary, or trustees as shall be determined by the rules and regulations of the Society, and, in default of such determination, in the name of such person as shall be appointed by the governing body for the occasion. It cannot be contended that a corporate body like the Lakshmi Club registered under the Societies Registration Act is not a "person" within the meaning of section 3 of the Madras Gaming Act.

It was next contended that the Club cannot be said to have kept or used the card, tables etc., for profit or gain, In dealing with this contention it should be noted that the profit or gain according to the definition should be to the person owning, occupying, using or keeping the house or room. As I have already held that the Club is a "person" the question is whether the Club derives any profit or gain either by way of a charge for the use of the instrument of gaming or of the house or room, etc. Mr. Ramachandra Ayyar attempted to contend that the condition required according to section 3 is not satisfied because no individual member is entitled to receive any profits from the Society. He also relied upon the provisions embodied in section 14 of the Societies Registration Act that upon the dissolution of any Society registered under the Act, the surplus assets shall not be paid to, or distributed among the members of the Society, but shall be given to some other Society. This contention involves mixing up the Club as an entity with its members who have an individual existence apart from the Society. The rele-

1. 5 A.C. 857

vant question is not whether any member of the Club makes a profit but whether the Club as a 'person' occupying, or using or keeping the house or room, makes a profit or gain.

This question is essentially a question of fact, and both the lower courts have found that the premises of the Club were utilised for gaming purposes for the profit of the Club. There is ample evidence to support this finding. It is in evidence that a charge of Re. 1 or Rs. 2 (there is some conflict about this) was made for every sitting from each player. Ex. P-10 shows that there were two sittings and the Club collected Rs. 14. Ex. P. 9 shows that sitting fees of an amount of Rs. 14 was collected from seven players. It is in the evidence of P. W. 1 who was a former President of the Club that the expenditure of the Club will be about Re. 1 in respect of card packets. Mr. Ramachandra Ayyar suggested that the amount of Re. 1 or Rs. 2 collected from each player represented the cost of the playing cards but not only is that suggestion not borne out by the evidence but it is controverted by the evidence of P. W. 1. It is impossible to accept the suggestion that one or two card packets cost anything like Rs. 14 in 1946. The petitioners should have shown, by producing the accounts of the Club, the expenditure incurred by the Club on account of the cards playing and the income from the sitting fees. Though the prosecution summoned the accounts of the Club, they were not produced and an allegation was made that the Sub Inspector seized all the accounts. This allegation was, as observed by the trial Magistrate, made recklessly because when P. W. 2 the Assistant Commercial Tax officer and P. W. 6, the Sub Inspector of Police who made the raid, were being examined they were not asked if the accounts of the Club had not been seized by them. In the absence of the accounts, there is no reason not to act upon the evidence of P. W. 1 and on the general probabilities. There was also evidence that besides the members, outsiders were allowed to participate as guests. Even from them the sitting fee was collected, vide Ex. P-10 and Ex. P-11. The Club derives enormous income by the collection of sitting fees and this income, after making due allowance for the cost of the playing cards, must be taken to be the profit or gain made by the club. In fact the real income of the club appears to be this profit. It was faintly suggested by Mr. Ramachandra Ayyar that the fee collected from each player is in return for the amenities of the club which the player enjoys; but he was unable to point any basis for this contention in the evidence. Mr. Ramachandra Ayyar stressed on the fact that the club was intended for ordinary recreation purposes just like other clubs and it also provided card games with stakes and as it was a *bona fide* club intended for the recreation of its members, it could not fall within the category of a "common gaming house". I am unable to see how it follows logically that because the club also provides for games like tennis, it ceases to be a "common gaming house", if it otherwise satisfies the conditions found in section 3 of the Act. The conclusion of the lower court is therefore right.

On the finding that the premises of the club is a "common gaming house" the conviction of accused 1 to 7 must stand. Accused 18 is the clerk who was left in charge of the Club in the absence of the secretary. He was, as already mentioned, found with an amount of Rs. 175 which had been collected from the members. He must therefore be held to have assisted in conducting the business of a "common gaming house". He may also be said to have permitted the Club to be used as a "common gaming house" as in the absence of the Secretary he was the person who was in charge of the Club premises. Accused 19, the secretary himself, would certainly be liable under section 8 of the Act as a person who permitted the Club to be used as a "common gaming house". There is in evidence a resolution of the Club by which the Secretary is authorised to collect sitting fees and the stake amount from the card players and distribute them. No doubt it is arguable that a mere servant or attender may not be punishable under any section of the Act if he is not actually taking part in gaming but a clerk and secretary would not fall within that class of servants. The convictions of accused 18 and 19 also must stand.

The revision petition is dismissed.

*N. T. R.* —— *Petition dismissed*

Cr. R. C. No. 865 of 1946
(Cr. R. P. No. 832 of 1946)
*March* 12, 1947

YAHYA ALI, J.

PAKKIRISWAMI PILLAI

v.

EMPEROR

*Cr. P. C. (V of* 1898*) S.* 476—*Finding as to expediency of prosecution essential.*

*The absence of a finding by the Court that the prosecution is expedient in the interests of justice is an incurable defect in an order under S. 476, Cr. P. C.*

*Facts*: The First Class Magistrate directed the filing of a complaint against the petitioner for offences under Ss. 205, 419, 466 & 468 I. P. C. On appeal the Sessions Judge said: "That the learned Magistrate did not specifically record that the prosecution was necessary in the interests of justice does not vitiate the order. It is obvious that such was the opinion of the Magistrate who sanctioned the filing of the complaint". Against this order the revision was filed.

Petition under Ss. 435 and 439 Cr. P. C. 1898, praying the High Court to revise the judgment of the Court of Session of Madura dated 3-7-46 and passed in C. A. No. 86 of 1946 preferred against the judgment of the Court of the First Class Bench of Magistrates, Madura, in S. C. No.2739 of 1946.

*P. Radhakrishnayya* for Petr.

*Assistant Public Prosecutor*, for Crown.

ORDER

There is no finding given by the Magistrates that the prosecution is expedient in the interests of justice. This is an incurable defect in the order made by the Magistrates under section 476 of the Code of Criminal Procedure. The petition is allowed. The complaint filed will be withdrawn.

*N. T. R.* — *Petition allowed*

Criminal Miscellaneous Petition No. 483 of 1947
*July* 21, 1947

CHANDRASEKARA AIYAR, J.

INAS RODRIGUES
v.
SANTHAN SOUZA

*Cr. P. C. (V of 1898), S. 520—Disposal of property—Appeal—Forum.*

*An Additional District Magistrate's Court is not a Court of appeal having jurisdiction to entertain an appeal under s. 520, Cr. P.C. against an order relating to disposal of property.*

*The facts were as follows*: The accused was charge sheeted for offences under sections 379 or 411 I. P. C. for the alleged theft of a she buffalo which was said to belong to the compalaint. The sub divisional Magistrate came to the conclusion that the prosecution had not established the guilt of the accused person He therefore acquitted the accused but directed that the buffalo be returned to the complaint. Against this order accused appealed to the Additional District Magistrate under S. 520 Cr. P. C. to set aside the order regarding disposal of the buffalo, who set aside the order and restored the buffalo to the accused. from whom it was taken by the the police The present petition was filed by the complainant on the ground that the Additional District Magistrate had no jurisdiction to entertain an appeal under S. 520 Cr. P. C.

Petition praying that in the circumstances stated therein the High Court will be pleased to set aside the order of the Additional District Magistrate, South Kanara dated 7—12—1946 in C. M. P. No. 19 of 1946 and to restore the property involved in C.C. No. 112 of 1946 on the file of the Stationery Sub Magistrate, Karkal to the Petitioner.

*G. Gopalaswami* for Petr.

*Public Prosecutor (V. L. Ethiraj)* for Crown.

S. *Ramayya Nayak*, for Respt.

ORDER

If I may say so with respect, there is much force in the view taken by the Full Bench in *Maria Pillai* v. *Ramanathan Chettiar* [1] that the only court that can interfere with an order like the one we have before us in this case is the High Court in revision. But the Full Bench was prepared to hold in accordance with the procedure that had been followed in this court for several years that an appeal from an order under section 517 can be taken to the District Magistrate, which is described by the Code as the Court of Appeal. We are concerned only with an appeal against an order relating to disposal of property and not an appeal from the main case itself, in which event the court which hears the appeal can pass appropriate orders regarding the disposal.

The Additional District Magistrate's court cannot be regarded as a court of appeal. He is not straightaway and by reason of his appointment as Additional District Magistrate vested with all or any of the powers of a District Magistrate under the Code, for section 10 (2) provides that the powers that he shall exercise shall be those powers that may be conferred upon him by the Provincial Government. Section 407 (2) indicates his subordination to the District Magistrate whose court is regarded as the court of appeal.

The order made by the Additional District Magistrate in this case was therefore without jurisdiction and is set aside, the result being that the order of the Sub Magistrate will stand restored.

N. T. R.

1. [1928] M.W.N. 557

Cr. R. C. No. 1068 of 1946
Cr. R. P. No. 1022 of 1946
Cr. M. P. No. 1925 of 1946
*September* 6, 1947

RAJAMANNAR, J.

AR. L. S. V. L. SEVUGAN CHETTIAR
v.
KARAIKUDI MUNICIPALITY, REPRESENTED BY ITS COMMISSIONER

*District Municipalities Act (Mad. Act V of 1920), Ss.* 345 *&* 347—*Failure to pay tax—Prosecution—Limitation.*

*The proper section providing limitation applicable to a prosecution in respect of tax due to the municipal council under the Act is section* 345 *and not section* 347 *of the District Municipalities Act.*

*Section* 347 *would apply to all cases where an offence is committed against the provisions of the Act or any rule or by law made under it, except where the prosecution is in respect of any sum due to the Municipal Council. There are several sections in the Act and several rules in the schedules, a contravention of one or other of which is made an offence. Section* 347 *would apply to all such offences. One point of difference between the cases to which section* 345 *would apply and the cases to which section* 347 *would apply is that in cases falling under section* 345 *a specific sum of money would be due to the Municipal Council under the provisions of the Act even before the date of the prosecution; whereas, under section* 347 *there is no condition that there should be an amount due to the Municipality before the date of the prosecution.*

Petition under Ss. 435 and 439 Cr. P. C. 1898 praying the High Court to revise the judgment of the Court of the Sub Divisional First Class Magistrate of Devakottah dated 8—6—46 and passed in C. A. 22 of 46 (S. T. C. No. 242 of 1945, Bench of Second Class Magistrate's Court Karaikudi).

*R. Gopalaswami Ayyangar*, for Petr.
*K. Kuttikrishnana Menon*, for Respt.
*C. Balasubramaniam*, for Public Prosecutor for Crown.

ORDER

The petitioner as the managing trustee of the Iluppakudi devasthanam was convicted under r. 30 (2) read with rule 36 of Schedule IV of the Madras District Municipalities Act for wilful omission to pay the property tax due to the Karaikudi Municipality for the first half year 1944-45, amounting to Rs. 795-6-3, and sentenced to pay a fine of Rs. 10 or two days' simple imprisonment in default. He was also directed to pay the property tax of Rs. 696—15—0. On appeal to the sub Divisional Magistrate of Devakottah, the conviction and sentence were confirmed.

The learned advocate for the petitioner raised several interesting points of law; but, I do not propose to express my opinion on any of those points, excepting one, namely, the point of limitation. This is because, admittedly, these points were not raised in the lower courts and I consider that the points cannot be satisfactorily disposed of without further facts. It is common ground that there is another prosecution pending in respect of property tax due to the Municipality for a subsequent period; and in fact, there is now before me an application; Cr.M.P. No. 1925 of 1946, to quash proceedings in S.T.C. No. 524 of 1946. It would be proper and advisable that the points now sought to be raised in revision should be raised before the lower court in that case, that is, S. T. C. No. 524 of 1946, and the decision of the court below obtained after a full investigation into the facts necessary for their proper disposal.

The point of limitation, however, can be disposed of on facts now appearing on the record, of which there can be no dispute, and the only question to be decided is a pure question of law. The date of the complaint in this case was 16th March 1945, and according to the complaint, the date of the commission of the offence was 1st October 1944. The date, namely, 1st October 1944, is arrived at by application of the provisions of rule 30 of schedule IV to the District Municipalities Act, which gives a period of 15 days from the service of notice of the demand for the payment of the amount due. It is only thereafter that under sub-rule 2 of rule 30 if for any reason the distraint, or a sufficient distraint, of the defaulter's property is impracticable, the executive authority may prosecute the defaulter before a Magistrate. The learned advocate for the petitioner contends that the prosecution is barred, because the complaint was made more than three months after the date of the commission of the offence. He relies on section 347 of the Act, the material part of which is as follows:

"No person shall be tried for any offence against the provisions of this Act, or of any rule, or by-law made under it unless complaint is made by the police, or the executive authority or by a person expressly authorised in this behalf by the Council or the executive authority within three months of the commission of the offence"

The learned Government Pleader, appearing for the Karaikudi Municipality, on the other hand, contends that the proper section ap-

plicable to the case is not section 347, but section 345, which is as follows:

"No distraint shall be made, no suit shall be instituted and no prosecution shall be commenced in respect of any sum due to the municipal council under this Act after the expiration of a period of three years from the date on which distraint might first have been made, a suit might have been instituted or prosecution might have been commenced, as the case may be, in respect of such sum."

I agree with the learned Government Pleader.

*Prima facie* Section 345 of the Act would apply to this case, because the prosecution is in respect of a sum due to the Municipal Council under the Act, that is, the property tax. There are various provisions of the Act, under which sums become payable and due to the Municipal Council either by way of tax or compensation and several methods of recovery are also indicated in the Act and in the schedules. A prosecution is one such method of recovery. Section 345 therefore would apply just as it would apply to a suit for the recovery of the sum and also to a distraint in respect of the sum. The rules of schedule IV which are the rules applicable to the recovery of the property tax make it clear that if the amout due for property tax is not paid, the executive authority may proceed to recover it in one of three ways: (1) by distraint; (2) by a prosecution and (3) by a suit in a civil court (vide rule 30 (1) (2) and (3).) Rule 36 (2) specifically provides:

Wherever any person is convicted of an offence under sub-rule (1) the Magistrate shall in addition to any fine which may be imposed recover summarily and pay over to the Municipal Council the amounts, if any, due under the heads specified in clause (a) and (b) of sub-rule (1)."

Section 347, on the other hand, would apply to all cases where an offence is committed against the provisions of the Act or any rule or by-law made under it, except where the prosecution is in respect of any sum due to the Municipal Council. There are several sections in the Act and several rules in the schedules, a contravention of one or other of which is made an offence. Section 347 would apply to all such offences. One point of difference between the cases to which section 345 would apply and the cases to which section 347 would apply is that in cases falling under section 345 a specific sum of money would be due to the Municipal Council under the provisions of the Act even before the date of the prosecution; whereas, under section 347 there is no condition that there should be an amount due to the municipality before the date of the prosecution. The learned advocate for the petitioner has contended that section 345 has some application to the fines that may be imposed in accordance with the provisions of section 313. I am really surprised at the contention. Under section 313 any person who is convicted of an offence, is on conviction, to be punished with a fine. Even if the fine is treated as an amount due to the municipality, which conception itself I do not agree with, it cannot be said that the prosecution is for the amount of fine which has to be imposed after a conviction as a result of the prosecution. Section 345 obviously relates to the proceedings either by way of distraint or by way of suit or by way of prosecution in respect of sums already due to the Municipal Council under one or the other of the provisions of the Act.

I find that this is the view taken of these two sections by Lakshmana Rao, J. in Cr.R.C. No. 565 of 1937 and I respectfully agree with the decision in that case. The same reasoning, more or less, is also to be found in the judgment of Horwill J. in *Panchayat Board, Sivaganga* v. *Pallathian Servai* [1] which, however, dealt with the corresponding provisions of the Madras Local Boards Act.

I have therefore no hesitation in holding that the section applicable is section 345 of the Act and obviously the prosecution was launched well within the time allowed by that section.

The criminal revision case and the application (Cr. M. P. No. 1925 of 1946) to quash proceedings in S. T. C. No. 524 of 2946 are dismissed.

N.T.R. — *Petition dismissed*

Criminal Appeal No. 6 of 1947

*August* 11, 1947

HORWILL & SATYANARAYANA RAO, JJ.

E. K. KRISHNAN

v.

EMPEROR

*Penal Code (XLV of* 1860*), S.* 415*—Issue of motor licence—Certificates forged—Offence. The appellant who was assistant to the traffic head constable received a sum of money and procured driving licences without the applicants undergoing any test. Thus he arranged everything for applicants for driving licences, filled in the forms, got certificates attached to the application forged, filled them in as if the tests had been completed, himself made an entry in what is known as the test register and then got the applications sent to the various officials in*

1. [1937] M.W.N. 50; Cr. 10

*the office upon which the licence was in due course granted.*

Held *when the appellant took the money promising to procure licences he derived an advantage and so his act in procuring the licence was a fraudulent one and that he was guilty of an offence under the first part of s.* 415, *I.P.C.*

*Fraud is committed if any advantage is expected to the person who causes the deceit.*

*Licence was property. Any object that is of value to one person does not cease to be property because it passes into the hands of a person who has no use for it. Nor can it be said that an object becomes property only when it comes into the hands of some person who has an actual use for it.*

Appeal against the order of the Chief Presidency Magistrate, Court of the Presidency Magistrates, Egmore, Madras, in C. C. No. 1993 of 46 dated 17—12—46.

*B.T.Sundararajan*, for accused.

*Assistant Public Prosecutor*, for Crown.

JUDGMENT

[ HORWILL, J. ]

The appellant has been convicted by the Chief Presidency Magistrate, Egmore, of an offence punishable under s. 420 of the Indian Penal Code, on three separate counts; and on each count, he has been sentenced to one year's rigorous imprisonment and a fine of Rs. 100, the sentences of imprisonment to run concurrently.

The charge relates to three offences committed within the course of a year, from the 11th December 1945 to the 16th April 1946, all of the same description. The gravamen of the charge is that the appellant used to approach persons desirous of obtaining licences for the driving of cars and other vehicles and promise them that if they would give him a sum of money, (Rs. 35 in one case) he would procure them licences without the necessity of their undergoing any test. The customary procedure to be adopted in a genuine application would be for the applicant to obtain a challan for Rs. 2 and submit an application with that challan, photograph, and a medical certificate, for a licence. If the application is in proper form, the applicant will have to submit to a test which would be carried out by the Motor Vehicles Inspecpector who, if he is satisfied with the applicant's skill, will send the application back to the office of the Deputy Commissioner, Traffic Department. The applicant will then have to pay another Rs. 5, whereupon an order for the issue of a licence will be made. The evidence is to the effect that this procedure was not adopted in the cases under charge and that the appellant, who was an assistant to the Traffic Head Constable, arranged everything for the applicant, filled in his form, got a certificate attached to the application forged, filled it in as if the test had been completed himself made an entry in what is known as the Test Register and then got the application sent to the various officials in the office upon which the licence was in due course granted.

No less than 7 drivers were examined, who all deposed that they were approached by the appellant, who took from them various sums of money and promised to secure licences for them. The requisite entries in the Test Register were made by the appellant; and with the exception of one case, the signature in the certificates purporting to be granted by the Motor Vehicles Inspectors were forged. P. W. 16, an Additional Motor Vehicles Inspector, and P.W. 17, a Traffic Inspector who was officiating as a Motor Vehicles Inspector, also deposed with the one exception above referred to, the signatures purporting to be theirs on the certificate were not theirs. It is argued that the evidence of the drivers is not worthy of credence, because they were in some measure accomplices. The statements made by them, however, were against their own interests; and it is most unlikely that if they had been duly examined and found to be fit to drive, they would be willing to depose that they had not been submitted to a test. Moreover, their evidence is supported by the evidence of P.Ws 16 and 17, that the certificates were not in fact signed by them. We are therefore satisfied that their evidence is true. It is true that evidence has not been produced to speak to every one of the steps between the preparation of the application and the granting of the licence; but in view of the proved part played by the appellant, there can be little doubt that he was responsible for the preparation of false certificates to the applicants and after entry had been made in the Test Register by himself, he had put the application in the necessary place in order that they might be dealt with in due course by the officials concerned. Once an application showed that the applicant had been tested, that his photograph and a medical certificate were attached, that he had paid everything that is necessary, and that his

application was in order, a certificate would necessarily follow.

Cheating is defined in s. 415 of the Indian Penal Code in these words.—

'Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person or to consent that any person shall retain any property, or intentionally, induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property is said to 'cheat'."

It is seen from this definition that there are two principal ways in which the offence may be committed. The first is by fraudulently inducing a person to deliver property, and the second is by intentionally inducing a person to do or omit to do anything which he would not do or omit if he had not been so deceived and which act or omission is likely to cause damage or harm to that person in body, mind, reputation or property. It is not necessary to say very much with regard to the second class of cheating. Mr. Sivakaminathan for the Crown Prosecutor argues that the act of granting a licence was likely to cause damage to the reputation of the licensing officer and to harm the public through the grant of a licence to a person who had not been found fit to drive. Although this argument derives some support from an obiter dictum of Benson J. in *Kotamraju Venkatarayudu* v. *Emperor* [1] we are of opinion that the possible injury to the licencing officer's reputation and the possible harm to the public are causes too remote to be taken account of.

There remains for consideration the definition of the first class of cheating. Before the appellant can be found guilty under this part of section 415, it is necessary to prove, first ly, that the licensing officer was fraudulently or dishonestly induced to part with the licence and secondly, that the licence is property. We agree with Mr. Sundararajan that "fraudulently" and "dishonestly" imply some idea of wrongful loss to a person or wrongful gain; but we are satisfied that the act done was fraudulent in that it procured an advantage to the appellant. It is not necessary that the appellant should directly gain financially by inducing the licensing officer to part with the licence, although we think that he did. In the case above referred to, *Kotamaraju Venkatarayudu* v. *Emperor* [1], the learned Judges considered at considerable length what has to be proved to establish that an act was done fraudulently. They quoted with approval a passage from Sir James Stephen's "History of the Criminal Law of England", Volume II page 121 in which we find :

"A practically conclusive test of the fraudulent character of a deception for criminal purposes is this: Did the author of the deceit derive any advantage from it which could not have been had if the truth had been known? If so, it is hardly possible that the advantage should not have had an equivalent in loss or risk of loss to some one else, and, if so, there was fraud".

They also refer with approval to a dictum of Banerji J. in *Queen Empress* v. *Mohamed Saeed Khan* [2], to the same effect and to a passage in *Haycraft* v. *Craesy* [3], accepted by the Bombay High Court in *Queen Empress* v *Vithal Narayan* [4], where fraud is defined thus :

"by fraud is meant an intention to deceive whether it be from any expectation of advantage to the party himself or from illwill is immaterial".

It is clear from this and from other cases which have considered the meaning of fraud that fraud is committed if any advantage is expected to the person who causes the deceit. It is argued here that the appellant did not get any advantage from his deceit, because he had already received illegal gratification from the licensee and he received no further benefit from the issue of the licence. The act of granting the licence cannot however be divorced from what went before. The appellant entered into an agreement with the licensee to give him a certificate if the licensee gave him a sum of money. In order to fulfil his agreement it was necessary for the appellant to obtain a license from the licensing authority. He procured that licence from the licensing authority and was thereby enabled to fulfil his agreement. It seems to us that it was an advantage to the appellant to be able to fulfil his agreement; for if he had not done so, it is unlikely that the would-be licensee would have taken no further steps. The appellant could not, with impunity, have taken from different people sums of money, promising to procure licences for them, and taken no steps to acquire them. If he took the money and in order to fulfil the agreement deceived the licensing authorities and obtained licences, It seems to us that he derived an advantage,

1. [1905] 28 Mad. 90

2. [1899] 21 All 113
3. [1801] 2 East 92
4. [1889] 13 Bom 515 (Note)

and so his act in procuring the licence was a fraudulent one.

The further question is whether the licence was property. It is not denied that the licence was property in the hands of the licensee. It is argued that it did not become property until it reached the hands of the licensee and that when it was in the possession of the licencing officer as well as when it was in the possession of the appellant it was not property but merely a worthless piece of paper. We are prepared to agree that not every tangible object may be property. A piece of discarded rubbish thrown away in the street is perhaps not property; but we do not think that a licence can be placed in the same category. It is true that it had no monetary value to the licensing authority; but apart from the intrinsic value of the paper on which it was written it had a substantial potential value. As soon as the licence reached the hands of the licensee, it had an actual value; but even before it reached his hands, it was of value to the appellant; because without that licence he would have been unable to fulfil his agreement and to have retained the money that was given to him. It seems to us that any object that is of value to one person cannot cease to be property becase it passes into the hands of a person who has no use for it. Nor can it be said that an object becomes property only when it comes into the hands of some person who has an actual use for it. For example, if A were to make out a cheque in favour of B and keep it in his drawer with the intention of giving it to B when he met him, could it be said that the cheque was not the property of A while it was in his drawer, merely because it was of no value to A as long as he retained it? The licencing authority was not willing to part with the licence except to the person in whose name it was issued and he was parting with it for valuable consideration paid by the licensee. We do not therefore think that because to the licensing authority the licence was of little or no actual value it was not property.

It is pleaded on behalf of the appellant that the sentence should be reduced in view of the circumstance that the appellant has lost his employment. We however cannot lose sight of the fact that the appellant, as a public servant, had a special responsibility to the public. We do not therefore find sufficient reason for interfering with the discretion exercised by the Chief Presidency Magistrate.

The appeal is dismissed.

N.T.R. — *Appeal dismissed*

Cr. R. C. No. 1032 of 1946
(Cr. R. P. No. 987 of 1946.)

*August 1, 1947*

RAJAMANNAR J.

A. K. GOPALAN NAMBIAR alias A. K. GOPALAN

v.

EMPEROR

*Police Incitement to Disaffection Act (XXII of 1922), S. 3—Speech taken down in parts —Conviction on—If speech should be addressed to police.*

*When the whole of a speech is not taken down by the reporter but only portions, and there is nothing to show that such portions as are taken down were taken down incorrectly or that the excerpts of the speech are not a fair representation of the general drift of the speech, a conviction under s 3 of the Police (Incitement to Disaffection) Act, could be based on the speech taken down in parts.*

*It is not necessary that the speech should be addressed directly to the members of the police to attract the application of s. 3 of the Police (Incitement to Disaffection) Act,*

Petition under Ss. 435 and 439 Cr. P. C. 1898 praying the High Court to revise the judgment of the Court of Session, North Malabar Division dated 23—9—1946 and passed in C. A. No. 21 of 1946 (C. C No. 67 of 1946 on the file of the Court of Sub-Divisional Magistrate, Tellicherry.)

*A. Rumachandran of Messrs Row & Reddy & P. Chandra Reddy* for Petrs

*Public Prosecutor (V. L. Ethiraj)* for Crown.

ORDER

The petitioner was convicted of an offence punishable under section 3 of the Police (Incitement to Disaffection) Act, 1922 and sentenced to rigorous imprisonment for four months by the Sub-Divisional Magistrate, Tellicherry. On appeal the convtction was confirmed but the sentence was reduced to three months rigorous imprisonment. The charge was based on a speech delivered by him at a public meeting held on 30th April 1946 at Taliparamba Road. Section 3 of the Police (Incitement to Disaffection) Act, 1922, runs as follows :—

"Whoever intentionally causes or attempts to cause or does any act which he knows is likely to cause, disaffection towards His Majesty or the Government established by law in British India amongst the members of a police-force, or induces

or attempts to induce or does any act which he knows is likely to induce any member of a police force to withhold his services or to commit a breach of discipline shall be punished with imprisonment which may extend to six months or with fine which may extend to two hundred rupees, or with both."

The particular passages which according to the lower courts fall within this section are the following :-

"It is the good for nothing persons and idiots who join the police service . . . . Most of the present day police officials are erstwhile table cleaners in hotels and tea shops. They beat with lathis for the sake of Rs. 18. . . None with honour or family greatness would join the police force. Today a policeman does not get enough food to fill his belly. He gets ration only like an ordinary man. Then why should he beat the people of the country? . . . If it is for their belly let them throw away the lathis and turbans and come to our Union office and join as Volunteers. We would give them Rs. 20 or 25 as salary. . . . The life of a police man is very pitiable. He does not get a living wage: no food and clothing. Such is his life . . . . It is because they have realised the falsehood of the British Imperialism. In many places where strikes for amenities of life have commenced the policemen and Military refuse to open fire. Such a realisation has not dawned on the Malabar police . . . . The policeman should not molest poor country men hearing the words of the Circle Inspector, the District Superintendent of Police, the Deputy Superintendent of Police etc. . . . In the event of the police of Malabar striking work, we will help to the best of our ability by calling public meetings wherein myself will be speaking and by collecting money make the strike a success."

The learned advocate for the petitioner first contended that the conviction was bad because the report of the speech by P. W. 1. the police constable who took it down, was not full and adequate. Reference was made to the admission of the constable that he noted down only portions of the speech which he considered necessary for his purpose. P. W. 1 did not know shorthand and he admitted that he could not write down a speech in its entirety as it was being delivered. The learned advocate for the appellant relied on the observations in *Sachen Das* v. *Emperor [1] Bal Gangadhar Tilak* v. *Emperor [2]* and *Niharendu* v. *Emperor* [3]. No help can be derived from any of these decisions on the question raised by him All these decisions say that the speech must be read as a whole. Undoubtedly so in the sense that a sentence or two should not be torn out of context and a conviction based purely on that part of the speech completely disregarding the tenor of the speech in its entirety. On this point I am inclined to adopt the view taken by Dalip Singh J. in *Sant Ram* v. *Emperor* [4] in dealing with a contention such as is raised in the present case, viz., that the whole of the speech had not been taken down. It was held by that learned Judge that when the whole of the speech was not taken down by the reporter but only portions and there was nothing to show that such portions as were taken down were taken down incorrectly or that the excerpts of the speech were not a fair representation of the general drift of the speech, a conviction could be based on the speech so taken down in parts. In this case we have not only the report as taken down by the police constable P. W. 1 but we have also his own evidence as to the general drift of the speech. It has not been proved that there were any serious omissions which could have given a completely different aspect to the speech. While I am anxious not to be understood to encourage a mutilated reporting of a speech to be used to support a conviction, I do not consider that it will be in the interests of justice not to support a conviction merely because every word uttered by the speaker has not been taken dowan verbatim.

Another point pressed before me was that the speech was not addressed to the members of the police force and the evidence shows that the only policeman present was P. W. 1 who was in mufti. In my opinion it is not necessary that the words should be addressed directly to the members of the police to attract the application of section 3 of Act XXII of 1922. No doubt it will be a clear case when the address is directed to them. A simillar contention was negatived by Horridge J. in *Rex* v. *Boman and others* [5]. It is obvious that the speaker must have intended that his words should reach the members of the police force so that they may act according to his appeal.

There can be no doubt that the general trend of the speech was not only an attack on the police but was also calculated to create disaffection among them against the Government and also to incite them to go on strike. The speech would therefore fall within section 3 of Act XXII of 1922. The accused was therefore rightly convicted and the sentence as reduced by the learned Sessions Judge cannot be said to be severe in the circumstances.

The revision petition is dismissed.

N.T.R. — *Petition dismissed*

1 [1936] A I R Cal. 524 (526)
2 [1917] 38 I C 807
3. [1942] M W N 417
4. [1930] 123 I C 672
5. 22 Cox's Criminal Law Cases 729

Criminal Appeal No. 206 of 1947

*August 11, 1947*

RAJAMANNAR, J.

PUBLIC PROSECUTOR

v.

A. V. HARIHARA IYER

*Local Boards Act (XIV of 1920), ss. 159 (1) & 62—Notification under s. 62—If can vest road in district board itself—Encroachment being masonry structure—Prosecution of occupier—Legality—Proof of notice to remove encroachment—Misdescription of offence—Effect.*

*A prosecution under s. 159 (1) read with s. 207 (1), Madras Local Boards Act directed against the occupier and not the owner in respect of an alleged encroachment (which consisted of a tiled shed and a masonry arch) is not illegal.*

*Where the accused did not dispute that a notice to vacate the encorachment was served on him and there was on record a purported reply of the accused thereto, the prosecution does not fail because the notice is not proved and filed as an exhibit for the prosecution.*

*Nor could the fact that the offence was described in the complaint as failure to 'vacate' the encroachment instead of failure to remove the encroachment, vitiate the trial, especially, where the accused had not been misled or prejudiced thereby.*

*The words 'any other local board' in s. 62 does not exclude the district board, and therefore under that section a district board can declare that a street vested in a panchayat board in the district should vest in itself.*

*The fact that the encroachment was not very recent can be taken into account in awarding sentence.*

**Appeal under S. 417 Cr. P. C. 1898, against the acquittal of the aforesaid Respondent (Accused) by the court of the Sub Divisional Magistrate of Ariyalur in Criminal Appeal No 46 of 1946 on his file dated 28—9—1946 (C. C. No. 198 of 1946 on the file of the Sub Magistrate of Ariyalur)**

*Public Prosecutor (V.L. Ethiraj)* for Applt.

*A. V. Narayanaswami Ayyar* for Respt.

JUDGMENT

The Sub Magistrate, Ariyalur, convicted the respondent who was the accused in C. C. 198 of 1946 on his file of an offence under section 159 (1) of the Madras Local Boards Act punishable under section 207 (1) of the Madras Local Boards Act and sentenced him to pay a fine of Rs. 100; in default to suffer simple imprisonment for two weeks. There was an appeal to the Sub-Divisional Magistrate, Ariyalur and he set aside the conviction and sentence and acquitted the accused. The Crown appeals.

The prosecution was in respect of an alleged encroachment on a street called Vellala Street in Ariyalur town. The encroachment was in the shape of a tiled shed and a big masonry arch. These were part of the house of which the accused was an occupier. The grounds on which the Sub-Divisional Magistrate acquitted the accused were ;—

(1) that as there was an owner residing in the town the action of the District Board in prosecuting the occupier ,'cannot be regarded as being consistent with the spirit of the provisions of law applicable to the case";

(2) the prosecution failed to file the survey sketch in proof of encroachment;

(3) the notice requiring the accused to vacate was not proved or filed as an exhibit for the prosecution.

It is impossible to support ground No. (1) of the Sub Divisional Magistrate. The section is unambiguous in its terms as it enacts that the Local Board may by notice require "the owner or occupier of any premises to remove or alter any projection, encroachment or obstruction". The Magistrate was apparently aware that the Act gives the option to the President of the Local Board to charge either the owner or the occupier. Having found that it was so, he was not warranted in trying to resort to what in his opinion was the spirit of the provisions of law. It was contended by the learned advocate for the accused that you should so construe the section as to mean that the Local Board should prosecute either the owner or the occupier according to whoever is found to be the person making the encroachment or obstruction in question. There is nothing in the terms of the enactment which compels me to adopt this construction. The prosecution was certainly not illegal, because it was directed against the occupier.

I am surprised that the Sub Divisional Magistrate should have observed that the fact that a survey sketch was not filed weakened the prosecution case. There was a sketch filed by P. W. 1, the Local Fund Overseer, Ariyalur showing the encroachments and containing the relevant measurements. (Ex-

hibit P-2). The trial Magistrate says as follows :—

**"The correctness of the sketch or its measurements had not been challenged by the accused and nothing can be said against it".**

I do not see therefore anything in this point that the prosecution has failed to prove that there was an encroachment; nor do I see any reason why the original survey sketch should have been filed if the plan (Exhibit P 2) prepared by the Overseer is proved by the Overseer himself and its accuracy was not challenged at the trial.

The third ground is that the notice had not been proved and exhibited in the case. I am again surprised that this ground should have found favour with the Sub Divisional Magistrate. I am unable to find anything in the record to cast any doubt in the matter. It is not disputed that there was a notice served on the accused and in fact it cannot be, because we have on record Exhibit P-4 which purports to be a reply on behalf of the accused to the notice served on him in respect of the encroachment in question. P. W. 2 deposed that a registered notice was issued to the accused. No ground was taken by the accused in his memorandum of appeal to the Sub Divisional Magistrate that he was not in receipt of a notice under section 159 (1).

None of the three grounds therefore on which the Sub Divisional Magistrate found the accused not guilty can be sustained.

In this court Mr. A. V. Narayanaswamy Ayyar the learned advocate for the accused raised two further points. The first was that in the complaint the offence was described to be that the accused had not vacated the encroachment and not that he had not removed the encroachment and on account of this flaw the prosecution must fail. There can be no doubt whatever that the prosecution and the accused as well as the court, all understood what the case was about. The case for the prosecution cannot be more accurately summed up than in Ground No. 2 of the grounds of appeal on behalf of the accused in the lower court thus :—

**"The case for the prosecution is that the appellant failed to remove an alleged encroachment in spite of notice under section 159 (1) of the Local Boards Act, XIV of 1920 . . . ".**

The fact that the word "vacate" has been used in parts of the evidence and in the complaint could not have misled and I find did not mislead the accused or the court in any manner. To demonstrate that this is so it is enough to refer to the examination-in-chief of P. W. 2 the Local Fund Inspector. He says that he issued a notice asking the accused to vacate the tiled shed and the concrete *koradu* and winds up by saying "The encroachments are still existing. They have not yet been removed". It is also clear that this point was never made even in the lower appellate court. I find no substance whatever in this contention and I find that the accused has not been prejudiced in any way by this possibly inartistic use of the word "vacate".

The other point pressed by Mr. Narayanaswami Ayyar on behalf of the accused was that the District Board could not validly launch any prosecution because the street in question did not vest in the District Board. On behalf of the prosecution Exhibit P-1, a notification purporting to be under section 62 of the Local Boards Act, 1920 was filed. According to that notification the street in question was one of the streets which was declared to vest in the District Board, Trichinopoly from 1st April 1936. This along with other streets mentioned in the notification had vested previous to the notification in the Panchayat Board, Ariyalur. The contention of the learned advocate for the accused was that under section 62 the District Board could not declare that any property vested in any Local Board in the same district shall vest in itself; that is to say, the District Board may declare that a street vested in a particular panchayat shall vest in another panchayat in the same district and not that the street shall vest in the District Board itself, but I do not see any warrant for so restricting the meaning of the words "any other local board" as to exclude the District Board which would certainly be a local board in the same district from the operation of the section. I do not agree therefore in this contention raised on behalf of the accused.

The conviction of the accused by the Sub Magistrate was proper and ought not to have been set aside by the Sub Divisional Magistrate. The appeal is therefore allowed and the acquittal of the accused is set aside. I convict the accused of an offence under section 159 (1) read with section 207 (1) of the Madras Local Boards Act, XIV of 1920. So far as the sentence is concerned it does appear that the encroachment was not very

recent and though this fact may not render the accused less guilty, I take this fact into account. I sentence him to pay a fine of Rs. 50 in default to undergo one week's simple imprisonment.

N.T.R. — *Appeal allowed.*

Cr. R. C. No. 838 of 1946
(Cr. R. P. No. 805 of 1946)
*September 5, 1947*
YAHYA ALI, J.

SUBBAMMAL
v.
ALAMELU AMMAL

*Cr. P. C. (V of 1898), s. 552—"Unlawful"—Meaning of.*

*The word "unlawful" occurring in s. 552, Cr. P. C. has the same meaning as the word "illegal" occurring in the Penal Code. If the detention was one which furnished a ground for a civil action it would be illegal within s. 552.*

*Hence, the detention of a minorgirl by her step mother refusing to hand her over to the girl's mother is unlawful and the mother is entitled to the restoration of her daughter under s. 552, Cr. P. C.*

**Petition under Ss. 435 & 439 Cr. P. C. 1898, praying the High Court to revise the order of the Court of the Second Presidency Magistrate, G. T., Madras, dated 31—5—1946 and made in M. P. No. 47 of 1946.**

*S. S. Bharadwaj*, for Petr.
*Assistant Public Prosecutor*, for Crown.
*W. S. Krishnaswami Naidu*, for Respt.

ORDER

One Govinda Chetti had two wives, Subbammal the petitioner and Alamelu Ammal, the counter-petitioner. By the former he had a daughter Saraswathi aged 7 years. After his death, the two wives and the little girl were living together. Subbammal's case is that when she went to some village temporarily and returned, Alamelu Ammal refused to hand over custody of Saraswathi to her. She filed the application under Sec. 552 of the Code of Criminal Procedure to compel restoration of Saraswathi to her. The senior widow stated in the Magistrate's Court that the conduct of Subbammal was immoral, that she had eloped with one Elumalai and that Govinda Chetty, before his death, had entrusted to her the custody of the child in view of Subbammal's immoral conduct. Evidence was adduced on both sides but the Magistrate did not give any findings on any of these points. Subbammal stated in her application that the intention of Alamelu Ammal in detaining the girl was to get her married to a relation of Alamelu. The Magistrate found that no unlawful purpose had been established and dismissed the application. In coming to that conclusion I apprehend that the Magistrate took a very narrow view of the meaning of the word "unlawful" occurring in Sec. 552 of the Code of Criminal Procedure. The expression "unlawful" has not been defined in the Code of Criminal Procedure but it has the same meaning as the word "illegal" occurring in the Indian Penal Code. In the Code of Criminal Procedure, after setting out the definitions, it is stated at the end of Sec. 4 that all words and expressions used in this Code and defined in the Indian Penal Code, and not hereinbefore defined, shall be deemed to have the meanings respectively attributed to them by the Indian Penal Code. In the Indian Penal Code the words "illegal" is defined in Sec. 43 as applicable to everything which is an offence, or which is prohibited by law, or which furnishes ground for a civil action. Under section 552 of the Code of Criminal Procedure what has to be established is that the detention of the child was unlawful and that the purpose of the detention was unlawful. If the detention was one which furnished a ground for a civil action it would be illegal within the meaning of that definition. In the present case there can be no doubt that the natural mother is the legal gurdian and is entitled to the custody of the child. The step mother has no right whatever to that custody unless she gets herself appointed by Court as a guardian under the Guardians and Wards Act. The act of the person, who is not entitled to custody, of detaining the child is one which entitles the natural guardian to take civil action. The detention is therefore clearly unlawful. It must also be held in the circumstances that the purpose was unlawful, as it has not been proved that Alamelu Ammal was entitled in any manner to keep the child in her custody and to dispose of her as she pleases. That is a matter which she will have to establish in appropriate civil proceedings and until she does so, she is not entitled to keep the child away from the custody of her natural mother. The petition is allowed. The order of the Magistrate is set aside and under Sec. 552 of the Code of Criminal Procedure Alamelu Ammal is directed to restore Saraswathi immediately to the custody of Subbammal.

N.T.R. — *Petition allowed.*

Cr. R. C. No. 1266 of 1946
(Cr. R. P. No. 1996 of 1946)
*August* 14, 1947
RAJAMANNAR, J.

GOPAL NAIDU & OTHERS
v.
EMPEROR

*Defence of India Rules (1939), rr. 81 (4), 121 & 130 (3)—Order under r. 81 (4)—Attempt to contravene—Triable by Second Class Magistrate.*

*An attempt to contravene an order made under r. 81 (4), Defence of India Rules amounts to a contravention of the order itself under r. 121, Defence Rules and is triable by a Second Class Magistrate under sub-rule (3) of rule 130.*

**Petition under ss. 435 & 439, Cr. P. C, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Namakkal dated 26—8—1946 and passed in C. A. No. 41 of 1946 (C. C. No. 37 of 1946) on the file of the the Court of the Second Class Magistrate, Sankari).**

*M. Srinivasagopalan*, for Petrs
*Public Prosecutor (V. L. Ethiraj)*, for Crown.

JUDGMENT

Accused 1, 3 and 4 who are the petitioners were convicted by the Second Class Magistrate of Sankari under rule 81 (4) of the Defence of India Rules read with rule 121 of the Defence of India Rules for attempting to transport rice bran and fried bengal gram outside the district without a permit. Accused No 1 was sentenced to undergo rigorous imprisonment for two months and accused 3 and 4 to pay a fine of Rs. 200 each, in default to suffer rigorous imprisonment for six weeks. The first accused is the owner of the lorry in which the commodities were attempted to be transported. Accused 3 is the driver of the lorry and accused 4 is the cleaner and brother of accused 1. On appeal the Sub-Divisional Magistrate, Namakkal confirmed the convictions and sentences of the lower court.

There is nothing that can be said in favour of the petitioners on the merits. But the learned advocate for them raised a point as to the jurisdiction of the Second Class Magistrate to try the case. The decision turns on the Defence of India Act read with the rules thereunder. Section 2, sub-section 3 of the Act says:

**"(3) 'The rules made under sub-section (1) may further:**

**(1) provide for the arrest and trial of persons contravening any of the rules.**

**(2) provide that any contravention of or any attempt to contravene and any abetment of or attempt to abet, the contravention of any of the provisions of the rules or any order issued under any such provision, shall be punishable with imprisonment for a term which may extend to seven years or with fine or with both."**

Section 14 says—

**"Save as otherwise expressly provided by or under this Act, the ordinary criminal and civil courts shall continue to exercise jurisdiction."**

Sub-rule 3 of rule 130 of the Rules framed under the Act says:

**"Notwithstanding anything contained in schedule II to the Code of Criminal Procedure, 1898 a contravention of . . . and a contravention of any order made under rule 56 (a) (or under sub-rule 2 of rule 81) shall be triable by a Court of a Session, a Presidency Magistrate or a Magistrate of First Class or Second Class."**

Under rule 121 any person who attempts to contravene or abets or attempts to abet or does any act preparatory to, a contravention of, any of the provisions of these rules or any order made thereunder shall be deemed to have contravened that provision or as the case may be, that order.

In the present case the material order was made under rule 81 (2) of the Rules. The attempt to contravene this order would amount to a contravention of the order itself, under rule 121 of the Defence of India Rules. The offence of contravention of the order is triable by a Second Class Magistrate also under sub-rule 3 of rule 130.

The contention raised on behalf of the petitioners is that section 2, sub-section 3 of the Act mentions only the arrest and trial of persons contravening any of the rules. It does not indicate that the rules may provide for the trial of persons attempting to contravene any of the rules. But in my opinion the combined result of rules 81 (2) and 121 which are the relevant rules for the purpose of this case is to make a person charged with the offence of attempting to contravene any of the orders made under rule 81 (2), a person contravening the rules. There is, therefore, no scope for invoking the general jurisdiction under Criminal Procedure Code in this case. I overrule the objection taken on behalf of the petitioners on the ground that the Magistrate had no jurisdiction to try this case.

The petitioners' advocate submitted that the sentence so far as the first accused is concerned may be reduced to the period of imprisonment already undergone by him. The exact period so undergone is not known but it seems that it is less than

a week. The attempt was certainly serious having regard to the object of the order in question. The first accused taking advantage of the fact that he owned a lorry attempted to use it to transport prohibited commodities outside the district. There is no reason to deal with such an offence leniently. It cannot be said that the sentence imposed namely two months' rigorous imprisonment is severe. The criminal revision petition is, therefore, dismissed.

N.T.R. — *Petition dismissed*

Criminal Appeals Nos. 108 & 109 of 1947

*July 28, 1947*

RAJAMANNAR, J.

BOREDDI KUNDAMMA

*v.*

EMPEROR

*Penal Code (XLV of 1860), Ss. 301 & 307—Attempt to poison A—B poisoned—Offence.*

*Second accused procured poison and gave it to the first accused so that the latter may administer the poison to P.W. 1 in order to kill her in furtherance of a common intention. The poison mixed in buttermilk was given to P. W. 1, but it was drunk by her relative, who died as a result thereof. The accused were charged with an offence under ss. 302/34 Penal Code, but were found guilty under s. 307 read with s. 34.*

Held, *that the offence fell under s. 301 Penal Code; that the attempt to murder was on P.W. 1 and that the accused could not be convicted under s. 307 of the attempt to murder P. W. 1 without a charge being framed to that effect.*

**Appeal against the order of the court of the session of the Cuddappah Division in C.C. No. 47 of 1946 on 27—1—1947.**

***Public Prosecutor*** **(*V.L. Ethiraj*), for Crown.**

JUDGMENT

These two appeals arise out of S. C. No. 47 of 1946 in the court of session, Cuddappah. C.A. No. 108 of 1947 is at the instance of the first accused, and C.A. No. 109 of 1947 at the instance of the second accused. Both are from jail. Both the accused were charged for the murder of one Vuttanna, by the second accused procuring oleander seeds and giving them to the first accused so that the latter might administer the poison to one Venkatamma in order to kill her in furtherance of a common intention.

The first accused crushed an oleander seed and mixed it and aresenic in buttermilk and gave the buttermilk to Venkatamma but the said buttermilk was drunk by Venkatamma's relative Vuttanna and he died as a result thereof. Both the accused were charged for an offence punishable under section 302 read with section 34, I.P.C.

The learned sessions Judge found on the evidence that it was clear that the second accused wanted to kill Venkatamma (P.W. 1.) by poisoning her and that the first accused co-operated with her in carrying out that intention and that in furtherance of this common intention a deliberate attempt was made to administer to P. W. 1 the oleander poison sufficient to cause her death. He also found that there was no room for doubting that the death of Vuttanna was due to the poison administered by the accused in buttermilk. On these findings the learned judge found both the accused not guilty under section 302 but found them guilty under section 307 read with section 34, I. P. C. and sentenced them to rigorous imprisonment for ten years.

It is difficult to follow the decision of the learned judge. Taking first the offence with which the accused were charged, one under s. 302 read with section 34, I. P. C. on the findings arrived at by him the case clearly fell within the provision of section 301 I. P. C. As however there is no appeal against the acquittal of the accused before me I do not desire to interfere with the order of acquittal passed by the learned sessions judge.

So far as the conviction under section 307 is concerned, obviously the learned judge was referring to the attempt of the accused to murder P.W. 1. It that were so, it must be pointed out that there was no such charge which the accused were called upon to meet. The case will have to go back and the learned sessions judge is directed to frame a proper charge under section 307 read with section 34 I P.C. for the attempt to murder P.W.1.

*N.T.R,* —

Cr. R. C. No. 190 of 1947
Cr. R. P. No. 152 of 1947
*July* 8, 1947

LAKSKMANA RAO, J.

THE CROWN PROSECUTOR
v.
MRS. ELIZA RENCONTRE

*Madras Firewood Rationing Order, Cls. 2(10) & 6—Applicability.*

*The application of Cl. 6 of the Madras Firewood Rationing Order is not confined to authorised dealers in firewood alone.*

*Where a neem tree was sold and purchased for making rafters for constructing a house and it was not in evidence that such kind of wood was ordinarily used as fuel.*

*Held, the wood was not firewood within the meaning of cl. 2 (10).*

*Facts*: — The prosecution case was that the accused on 30-4-46 sold a neem tree that was standing in the compound of her bungalow and allowed the purchaser to cut the tree and transport it to Chingleput district, without the knowledge or permission of the Commissioner of Civil Supplies in contravention of cls. 6 and 12 (2) of the Madras Firewood Rationing Order and thereby committed an offence punishable under clause 81 (4) of the Defence of India Rules. The accused stated that the tree was sold on the purchaser's representation that he required the tree for making rafters out of it to be used in the construction of a roof. The Magistrate held that "timber used for construction purposes though it can be used as fuel is not really used as fuel and so it cannot be called firewood" and that therefore "what the accused sold was a tree to be used for construction purposes and not firewood,"

He further held that clause 6 of the order only applies to dealers and not to individual householders to whom only s. 12 (2) would apply. "A householder does not supply because the term 'supply' indicates a series of transactions involved in regular business and so it is used only in connection with dealers and therefore cl. 6 does not apply to householders," The Magistrate discharged the accused under s. 253 (2), Cr. P. C. The present revision was filed on behalf of the Provincial Government against the order of discharge.

**Petition under sections 435 and 439, Cr. P C 1898, praying the High Court to revise the order of the Fourth Presidency Magistrate, G T Madras, dated 13—11—46 in C C No. 2321 of 1946 discharging the accused therein.**

*Petitioner in person.*
*J. S. Vedamanickam*, for Respt.

ORDER

The view of the magistrate that clause 6 of the Madras Firewood Rationing Order, 1945 is applicable only to authorised dealers in firewood is obviously wrong and the question is whether the cut pieces of the neem tree seized in this case are "firewood" within the meaning of clause 2 (10) of that Order. "Firewood" as defined in clause 2 (10) means all kinds of wood other than twigs not exceeding two inches in circumfrence "used as fuel" and the evidence of P.W. 1 is that the neem tree was purchased by him for making rafters for constructing a house, The wood seized is not before the Court nor is it in evidence that such kind of wood is ordinarily used as fuel. Under the circumstances the Magistrate was right in holding that the wood seized was not firewood within the meaning of clause 2 (10) of the Madras Firewood Rationing Order, 1945 and it follows that the order of discharge is correct. The revision is therefore dismissed.

*N.T.R.* — *Petition dismissed*

THE END

# General Index—1947

*First number denotes pages of The Madras Weekly Notes Full Series*