CRIMINAL REFERENCE

Before Sharfuddin and Teunon JJ.

1914

March 1.

DEDAR BUKSH

v.

SYAMAPADA DAS MALAKAR.*

Complaint—Complaint by husband of minor wife against certain persons of offences against her—Preliminary inquiry by Magistrate—Withdrawal of complaint by husband—Refusal by Magistrate to dismiss complaint—Examination of wife and other prosecution witnesses at inquiry—Cognizance against persons not named in the complaint on evidence taken at such inquiry—Cognizance on complaint or information—Criminal Procedure Code (Act V of 1898) ss. 190(1), (a), (c), 202, 203—Practice.

A Magistrate taking cognizance of an offence upon a complaint against certain specified persons, is competent to proceed against others not named therein but who are disclosed by the prosecution evidence, taken on a preliminary inquiry under s. 202 of the Criminal Procedure Code, to have been concerned in the offence.

Charu Chandra Das v. *Narendra Krishna Chakravarti* (1), *Raghab Acharjee* v. *Empress* (2) followed.

Khudiram Mookerjea v. *Empress* (3) not followed.

Jagat Chandra Mozumdar v. *Queen-Empress*(4) distinguished.

Where a complaint was made under ss. 342 and 363 of the Penal Code, against four persons, by the husband of a girl aged 11, whereupon the Magistrate, after examining him on oath, ordered him to prove his case, and two days later he presented a petition for the withdrawal of the complaint and its dismissal as untrue, but the Magistrate proceeded, on the date fixed for the preliminary inquiry, to summon the witnesses, and thereafter examined the girl and some other prosecution witnesses and found that, though there was no satisfactory evidence against the original accused, there was sufficient evidence against other persons, and, treating

* Criminal Reference No. 45 of 1914 by B. C. Mitra, Sessions Judge of Hooghly, dated Feb. 27, 1914.

(1) (1900) 4 C.W.N. 67.
(2) (1899) 3 C.W.N. clxxix.
(3) (1896) 1 C.W.N. 105.
(4) (1899) I.L.R. 26 Calc. 786.

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the girl as the real complainant, issued processes against them for offences under ss. 342, 352 and 363 of the Penal Code :—

Held, that the Magistrate was right in ordering the examination of the witnesses to ascertain if there was any substance in the petition of withdrawal and in the complaint.

Held, further, that he took cognizance against the persons not named in the complaint under cl. (*a*) and not cl. (*c*) of s. 190(1) of the Criminal Procedure Code.

On the 15th September 1913, one Syamapada Das Malakar filed a written complaint, before Babu S. C. Sen, Deputy Magistrate of Hooghly, under ss. 342 and 363 of the Penal Code, against Moulvi Mazaharul Anwar, a local pleader, his wife and two daughters, charging them with wrongful confinement and kidnapping of his wife, Sidheswari Debi, aged 11 years. The Magistrate thereupon examined the complainant on oath, and ordered him to prove his case, under s. 202 of the Code, on the 30th instant. The substance of the complaint and the terms of the order are stated in the judgment of the High Court. On the 17th, the complainant presented a petition to the same Magistrate, praying for withdrawal of the complaint and its dismissal as untrue, and explaining his reasons therefor. The Magistrate directed the petition to be put up on the date fixed. On that date he refused to drop the case, but ordered the witnesses to be summoned. On the 20th November 1913, he examined the complainant's wife and other prosecution witnesses at the preliminary inquiry, and issued processes against the petitioners under ss. 342, 352 and 363 of the Penal Code by an order set forth in the High Court's judgment. It appeared that the Magistrate was not empowered by the Local Government to take cognizance under s. 190 (*1*) (*c*) of the Code.

The petitioners thereupon moved the Sessions Judge of Hooghly who referred the case to the High Court under s. 438 of the Criminal Procedure Code.

The material portions of the Letter of Reference were as follows:—

"This order of the 20th November 1913 is recommended for revision for the reasons given below :—

The Magistrate says he has taken cognizance of the case under section 190 (*a*) of the Criminal Procedure Code, that is, on a complaint, and wanted the complainant to prove his case. The complainant said that he could not prove the case, and that the persons complained against were innocent. After this, in a case taken cognizance of on a complaint, there was nothing less to do than to dismiss the complaint, under section 203. The order of the 30th September was without jurisdiction in a complaint case, as the complainant declined to prove his case, which he admitted was not true. The seriousness of the allegations made, and the position of the persons involved in them, might perhaps have made a further inquiry desirable, but that, I apprehend, could not be done as a continuation of the complaint case. It appears that there was a police inquiry into the matter, but nothing came out of it. And the only way in which such further action, as might be considered to be desirable in the ends of justice, could be taken would be, so far as I understand the scheme of the Criminal Procedure Code, on the own motion of the Magistrate under section 190 (*1*) (*c*), a power which the present Magistrate does not possess. In his explanation the learned Magistrate takes up a position which seems to show that he was thinking of *Charu Chandra Das* v. *Narendra Krishna Chakravarti*(1). But the facts are different here. There it was a case on a police report, of which the Magistrate had full seisin; it was not a case on a complaint, governed by sections 202 and 203 of the Criminal Procedure Code, and what is more pertinent there was no repudiation of the complaint before even the preliminary inquiry was held, and before any process had issued. I recommend that the whole proceeding be quashed and the complaint dismissed under section 203, Criminal Procedure Code."

Babu Dasarathi Sanyal (with him *Babu Debendra Narain Bhuttacharjee*), for the petitioners. When the petition of withdrawal was filed by the complainant, stating that the complaint was not true, the Magistrate should have dismissed it under s. 203 of the Code, and not proceeded further. There was no complaint against the petitioners, and the Magistrate

(1) (1900) 4 C. W. N. 367.

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took cognizance against them under s. 190 (*1*) (*c*) which he was not empowered to do: *Khudiram Mookerjea* v. *Empress* (1), *Raghab Acharjee* v. *Empress* (2).

The Deputy Legal Remembrancer (*Mr. Orr*), for the Crown. The order of the Magistrate is right. He has taken cognizance under cl. (*a*) and not (*c*): *Charu Chandra Das* v. *Narendra Krishna Chakravarti* (3), *Jagat Chandra Mozumdar* v. *Queen-Empress* (4).

Cur. adv. vult.

SHARFUDDIN AND TEUNON JJ. This is a reference made to this Court by the Sessions Judge of Hooghly. The facts which have led to the present reference are these: One Syamapada Das Malakar complained to the Magistrate against four persons, namely, the Hon'ble Moulvi Mazaharal Anwar, his wife and his two daughters, under sections 342 and 363 of the Indian Penal Code. His complaint was that his eleven-years old wife, named Sidheswari Dassi, was missing from the middle of the month of Assar, that is to say, the latter end of June or beginning of July 1913, that she returned on the 13th September 1913 and told him that, while she was near the house of Moulvi Mazaharal Anwar, he made a sign to her, took her to his house, made her a Mahomedan, and further made her eat food forbidden to a Hindu, and kept her confined in the house. On the filing of this complaint the Magistrate passed the following order "The charge is a serious one and is against a highly respectable inhabitant of this town. The complainant has got back his wife who is said to be only 11 years of age. Complainant will prove his case on the 30th instant."

(1) (1896) 1 C. W. N. 105.
(2) (1899) 3 C. W. N. ccl[illegible]xix.
(3) (1900) 4 C. W. N. 367.
(4) (1899) I. L. R. 26 Calc. 786.

On the 17th September, long before the date fixed for the inquiry, the complainant made a petition for the withdrawal of the case saying that he had come to know on inquiry that his wife had made untrue statements through fear, that he would not be able to prove the truth of the complaint, that the accused were innocent, and that he did not want to prosecute the case which should be dismissed. This application was ordered to be put up on the date fixed, which was the 30th September. On the 30th September 1913, the following order was passed—"The complainant is present. He applied before, saying he was unwilling to proceed with the case. This is a serious charge. The witnesses must be examined. Summon them and fix the case for the 3rd October next." On the 20th November 1913 the following order was passed by the Magistrate. "Read police papers and the evidence. The real complainant in this case is the girl herself, named Sidheswari Dassi. From her statement and the statement of other witnesses it appears that there is no satisfactory evidence against the persons complained against. There is, however, evidence against one Dedar Buksh, who is said to have made the girl a Mahomedan, and another woman, a maid servant named Bason. These two persons, Dedar Buksh and Bason, will be summoned under section 342 of the Indian Penal Code and section 363 of the Indian Penal Code and section 352 of the Indian Penal Code. Fix the case for the 2nd December next." It is this order that has been referred to us for revision. The question is whether the Magistrate took cognizance of the case under section 190 cl. (*1*) (*a*) or under cl. (*1*) (*c*) of that section. If he took cognizance of the case under cl. (*1*) (*c*) of the section, he should have proceeded to observe the formalities provided in section 191 of the Criminal Procedure Code. If he took cognizance

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under cl. (*1*) (*a*) the Magistrate had jurisdiction to try Dedar Buksh and Bason against whom he issued processes. The Magistrate in question, we may observe, is not empowered by the Local Government to take cognizance under cl. (*c*) of section 190 of the Criminal Procedure Code. The original complaint was, no doubt, not against Dedar Buksh and Bason Bibi. But the Magistrate had already taken cognizance of the offence mentioned in the complaint. From the evidence before him he came to the conclusion that there was not satisfactory evidence against the four persons mentioned in the complaint, but there was evidence against Dedar Buksh and Bason Bibi of offences under sections 342, 352 and 363 of the Indian Penal Code. The offences under the two former sections are compoundable, while the offence under the last is not compoundable. The complaint was of very serious offences. And this complaint was soon followed by a petition of withdrawal by the complainant and not by the girl against whom the offences were said to have been committed. We are of opinion that the Magistrate was right in ordering examination of witnesses in order to ascertain if there was any substance in the petition of withdrawal and in the complaint.

Now, the next question is whether the Magistrate could take cognizance of the offence against Dedar Buksh and Bason Bibi which came to light in the evidence given by the witnesses. The Magistrate in his explanation has relied on the case of *Charu Chandra Das* v. *Nagendra Krishna Chakravarti* (1). The learned Sessions Judge, however, in his letter tries to distinguish the facts of this reported case from those of the present case by pointing out that the reported case was on a police report of which

(1) (1900) 4 C.W.N. 367.

the Magistrate had full seisin, and that there was no repudiation of the complaint in that case. The present case, however, is on a written complaint by the husband of the girl Sidheswari. The expression "complaint" has been defined in cl. (*h*) sub-section (*l*) of section 4 of the Criminal Procedure Code. It is clear from the definition that it is not necessary that the complainant should always be the party directly aggrieved by the commission of the offence. The really aggrieved party is the complainant's wife. But according to the definition the husband is a competent person to apply to the Magistrate with a view to his taking action under the Code.

In the above reported case, the complainant had lodged his complaint before a railway police officer against four Babus. At the time of the police enquiry the complainant had identified one Bhut Nath Mookerjee as one of the accused. This accused was sent up for trial and was convicted and sentenced. At the trial it appeared upon the evidence of one of the witnesses, that Charu Chandra Das and Atul Krishna were concerned in the crime. The Deputy Magistrate issued summonses, and instituted proceedings against these two. Against this a Rule was obtained from this Court. It was held that the Magistrate did not act without jurisdiction. It was also held in that case that the Magistrate had cognizance of the offence. The case having been duly referred to him, and having cognizance of the offence, it was his duty to proceed to deal with the evidence brought before him and to see that justice was done in regard to any person who might be proved by the evidence to be concerned in that offence. No doubt in the reported case the complaint was made to a police officer who made a report. The present case was upon a complaint. In the reported case, as well

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as in the present case, cognizance of the offence was taken on the evidence produced on behalf of prosecution. If the Magistrate had received information from any person other than a police officer, or on his own knowledge or suspicion, he could not take cognizance of the offence as he would undoubtedly be barred by cl. (*c*) of section 190 of the Code. Clause (*c*) deals with cases where there has been neither a formal complaint nor a police report, and independently of these the Magistrate takes the initiative upon information received from any person other than a police officer or upon his own knowledge or suspicion. In the present case he took the initiative on a complaint, and in the reported case on a police report; and in both the cases the Magistrate issued processes against the person whose names transpired in the prosecution evidence during the trial. We are, therefore, of opinion that the decision on this point in the reported case is equally applicable to the present case.

We have been referred to an unreported case, *Raghab Acharjee* v. *Empress* (1), as an authority showing that whenever a Magistrate takes cognizance of an offence which comes to light only on the evidence recorded by him he takes such cognizance under cl. (*c*) of section 190. In this unreported case one Bonomali was the accused. But from the evidence given by the witnesses for the defence of Bonomali it appeared that another person named Raghab was concerned in the same transaction or offence. The Deputy Commissioner proceeded against Raghab and examined witnesses who had been already examined in the trial of Bonomali as witnesses for the prosecution against Raghab. It was held "although, as it has been held, the Magistrate is competent at the

(1) (1899) 3 C.W.N. cclxxix.

trial against one person to proceed against another who may appear upon the evidence taken to be concerned in that offence, and that in doing so it cannot properly be regarded that he is acting within the terms of section 190, cl. (*c*), so as to enable the accused person to object to that Magistrate proceeding further in the case, still in laying down this view of the law it was contemplated that the two persons should be on trial together in the same case or for the same offence. It was never intended that this rule should be applied to a case when the trial of the second accused was not for the same offence for which the first accused was tried but on other evidence adduced on behalf of the defence of the first accused." It was further held that such proceeding cannot be regarded as a proceeding upon a complaint or any other foundation upon which the case originally proceeded. It must be regarded as being within the terms of section 190 cl. (*1*) (*c*). It is clear, therefore, on the authority of this unreported case also that a Magistrate having taken cognizance of a complaint can also proceed against another person who, although not mentioned in the complaint, appears on the evidence for the prosecution to have been concerned in the commission of the offence. In this unreported case it was held that the Magistrate had taken cognizance under section 190 cl. (*c*) not because Raghab was not mentioned in the complaint but because his name did not transpire in the evidence for the prosecution. His name in connection with the offence came to light in the statements of witnesses on behalf of Bonomali the other accused. This case, therefore, also supports the view taken in the case reported in ***Charu Chandra Das*** v. ***Narendra Krishna Chakravarti*** (1). There is, however, the case of ***Khudiram Mookerjea*** v.

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Empress (1). In this case one Khudiram had been summoned before a Deputy Magistrate as a witness for the prosecution in a case instituted against one Kurso, and the Magistrate, in the course of the trial upon the fact disclosed by the evidence of another witness for the prosecution implicating Khudiram in the commission of the offence complained of, placed him on trial along with the accused in that case. It was held that the Magistrate had taken cognizance under section 191 cl. (*c*) now section 190 cl. (*1*) (*c*). We have also been referred to the case of *Jagat Chandra Mozumdar* v. *Queen-Empress* (2). On a perusal of this case we find that the question involved in the present case was not decided.

On a full consideration of the law and authorities placed before us, we are of opinion that in the present case the Magistrate took cognizance under cl. (*1*) (*a*) of section 190 of the Code. We are supported in this view by the first two authorities mentioned above. For the above reasons, we cannot accept the recommendation of the learned Sessions Judge, and we decline to interfere. Let the record be returned.

E.H.M.

(1) (1896) 1 C.W.N. 105. (2) (1899) I.L.R. 26 Calc. 786.