FULL BENCH.

Before Sanderson C. J, Woodroffe, Mookerjee, Teunon and Richardson JJ.

KHETRA MOHAN DAS

v.

EMPEROR.*

1920.

Dec. 20.

Sanction for Prosecution—Expiry of sanction before date of complaint—Plea of guilty at trial—Validity of conviction without sanction—Absence of failure of justice—Criminal Procedure Code (Act V of 1898), s. 537(b).

Section 537(*b*) of the Criminal Procedure Code applies equally to the case of an expired sanction as to one of a total want of it. A conviction of an offence mentioned in s 195 of the Code cannot be reversed or altered on appeal or revision on the ground that the sanction required by the section had expired when the prosecution was initiated, unless it is shown that the absence of sanction has in fact occasioned a failure of justice.

Where the accused pleaded guilty it was further *held* that there had been no failure of justice in the case.

Raj Chunder Mozumdar v. *Gour Chunder Mozumdar* (1) overruled.

Sunder Dasadh v. *Sital Mahto* (2) approved.

Perumalla Nayudu v. *Emperor* (3) referred to.

The petitioner was the identifier on the occasion of the service of summonses on Abbas Ali and his brothers, defendants in a civil suit before the Munsif of Habigunj, and was alleged to have sworn a false affidavit of service upon Abbas Ali, who was then in jail. On 8th April 1919 Abbas obtained sanction from the Munsif to prosecute the petitioner under ss. 181 and 193 of the Penal Code, which was upheld by the District Judge of Sylhet on the 19th September. He

*Full Bench Reference No. 1 of 1920 in Criminal Revision No. 767 of 1920.

(1) (1894) I. L. R. 22 Calc. 176. (2) (1900) I. L. R. 28 Calc. 217, 220.
(3) (1907) I. L. R. 31 Mad. 80.

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filed his complaint on the 2nd January 1920, when the sanction had already expired. The petitioner was summoned and put on trial and pleaded guilty, without objection taken on the ground of want of sanction, and was sentenced to imprisonment and fine. An appeal against the conviction was dismissed on the 22nd July. The petitioner then obtained the present Rule to set aside the conviction and sentence on the ground that the Magistrate had no jurisdiction to take cognizance of the complaint as the sanction was not then in force.

The Rule came on for hearing before Sanderson C.J. and Mookerjee J., who referred the case to a Full Bench in the following terms :—

"The facts material for the elucidation of the question of law raised before us are not in controversy and may be briefly stated.

On the 8th April, 1919, the Munsif of Habiganj granted sanction under section 195 of the Criminal Procedure Code to Abbas Ali, the complainant, to prosecute the petitioner, Khetra Mohun Das, for offences under sections 181 and 193 of the Indian Penal Code. The prosecution was not instituted till the 2nd January, 1920, that is, after the expiry of the period of six months mentioned in section 195 (6) of the Criminal Procedure Code. As no order had been obtained from this Court to extend the time, the sanction must be deemed to have lapsed before that date. No objection, however, was taken on behalf of the accused who pleaded guilty, was convicted under section 181 of the Indian Penal Code, and was sentenced to undergo rigorous imprisonment for three months and to pay a fine of Rs. 20, in default to undergo rigorous imprisonment for another month. An appeal was preferred to the Sessions Judge of Sylhet, who dismissed the appeal on the ground that the sentence awarded was neither illegal nor excessive. On the application of the accused, the present Rule was granted on the ground that the Court below had no jurisdiction to take cognizance of the complaint, as the sanction was not in force on the date of complaint. In support of the Rule, reliance has been placed upon the case of *Raj Chunder Mozumdar* v. *Gour Chunder Mozumdar* (1), where it was held that the provisions of section 537 of the Criminal Procedure Code were not intended to override the provisions of section 195. In the case of *In the matter of Abdur Rahman* (2) a doubt was expressed as to the correctness of this

(1) (1894) I. L. R. 22 Calc. 176. (2) (1900) I. L. R. 27 Calc. 839.

view, and the contrary opinion was actually adopted in *Sunder Dasadh* v. *Sital Mahto* (1). The decision in *Raj Chunder Mozumdar* v. *Gour Chunder Mozumdar* (2) has been dissented from in Madras [*Ismal Rowther* v. *Shunmugavelu Nadan* (3) and *Perumalla Nayudu* v. *Emperor* (4),] and also in Allahabad [*Mangar Ram* v. *Behari* (5), *King-Emperor* v. *Pancham* (6)]. We accordingly refer the following question for decision by a Full Bench.

Where a person has been sentenced upon a conviction for an offence mentioned in section 195 of the Criminal Procedure Code, is the sentence liable to be reversed or altered on appeal or revision on the ground that the sanction required by section 195 was not in force at the time when the prosecution was instituted, unless it is established that this has in fact occasioned a failure of justice within the meaning of section 537 of the Criminal Procedure Code."

Babu Panchanan Ghose, for the petitioner. There is a distinction between irregularity and illegality. If a Magistrate takes cognizance after the sanction has expired, there is an illegality in the proceedings Refers to *Subrahmania Ayyar* v. *King-Emperor* (7) and Monnier's Article "*Irregularity* and *Illegality*" in 6 C. W. N. XLVI. The words "want of sanction" in s. 537(*b*) do not include the case of an expired sanction. A fresh sanction cannot be given after the lapse of a previous one, and no fresh prosecution can be taken; whereas, if no sanction was granted at all, a fresh prosecution can be taken after it has been given. Want of sanction is, therefore, a mere irregularity, but a proceeding after the lapse of sanction is an illegality. The decision in *Raj Chunder Mozumdar* v. *Gour Chunder Mozumdar* (2) is right, though the construction put there on the opening words of s. 537 may be wrong. The cases cited in the Order of Reference related only to absence of sanction, and not to expired sanctions.

(1) (1900) I. L. R. 28 Calc. 217, 220.
(2) (1894) I. L. R. 22 Calc. 176.
(3) (1905) I. L. R. 29 Mad. 149.
(4) (1907) I. L. R. 31 Mad. 80.
(5) (1896) I. L. R. 18 All. 358.
(6) (1802) A. W. N. 151.
(7) (1901) I. L. R. 25 Mad. 61.

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No one appeared for the opposite party.

SANDERSON C.J. In this Reference the material facts, which it is necessary for me to state for the purpose of my judgment, are set out at the beginning of the Reference, and they are as follows. On the 8th April, 1919, the Munsif of Habigunj granted sanction under section 195 of the Criminal Procedure Code to Abbas Ali, the complainant, to prosecute the petitioner, Khetra Mohan Das, for offences under sections 181 and 193 of the Indian Penal Code. The prosecution was not instituted till the 2nd January, 1920, that is, after the expiry of the period of six months mentioned in section 195 (*6*) of the Criminal Procedure Code. As no order had been obtained from this Court to extend the time, the sanction must be deemed to have lapsed before that date. No objection, however, was taken on behalf of the accused who pleaded guilty, and who was convicted under section 181 of the Indian Penal Code, and was sentenced to undergo rigorous imprisonment for three months and to pay a fine of Rs. 20, in default to undergo rigorous imprisonment for another month. An appeal was preferred to the Sessions Judge of Sylhet, who dismissed the appeal on the ground that the sentence awarded was neither illegal nor excessive. On the application of the accused, the present Rule was granted on the ground that the Court below had no jurisdiction to take cognizance of the complaint, as the sanction was not in force on the date of complaint.

The Rule was granted on the authority of the case, *Raj Chunder Mozumdar* v. *Gour Chunder Mozumdar* (1). In that case the sanction which had been granted under section 195 of the Code of Criminal Procedure was no longer in force, as the limit of six

(1) (1894) I. L. R. 22 Calc. 176.

months provided by that section had expired before the commencement of the prosecution. The judgment of the learned Chief Justice and Mr. Justice Beverly, dealing with section 537 of the Code, was as follows: "Mr. Leith has drawn our attention to the provisions "of section 537 of the Code, but that section is expressly "made 'subject to the provisions herein before con-"tained,' and we cannot, therefore, suppose that it was "intended to override the provisions of section 195." The learned vakil, who has argued this case on behalf of the accused, has asked us to interpret that judgment as applicable to the particular facts of the case which the learned Judges were considering, and his argument has proceeded upon the basis that, although section 537(*b*) would apply to a case where no sanction had ever been granted, it would not apply to a case where sanction had been granted, but the sanction had lapsed before the proceedings were commenced. In my opinion the words of the judgment, which I have quoted, are wide enough to cover both cases, the case where no sanction has been granted and the case where sanction has been granted, and has lapsed before the proceedings began, and the question is whether we are prepared to follow that decision. It was pointed out in the Reference that that decision has been questioned in a considerable number of cases both in the Madras High Court and the Allahabad High Court, and a contrary opinion was adopted in one case in this Court, *Sunder Dasadh* v. *Sital Mahto* (1), where Mr. Justice Prinsep in delivering judgment said as follows, "No doubt sanction to the prosecution should have "been given before the Magistrate took cognizance of "that offence, but, unless the want of such sanction has, "in fact, occasioned a failure of justice (section 537, Code "of Criminal Procedure), the conviction is not bad only

(1) (1900) I. L. R. 28 Calc. 217, 220.

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"on that account." In one of the cases, which was decided by the Madras High Court, *Perumalla Nayudu* v. *Emperor* (1), the learned Judges in deliveriug judgment said this, "The words 'subject to the provisions "hereinbefore contained,' which occur at the beginning "of section 537, cannot be construed in such a way "as to nullify the express provision of the latter "part of the section, which in clause (*b*) enacts that "no sentence passed by a Court of competent juris-"diction shall be reversed on appeal for want of any "sanction required by section 195." To this should be "added "unless such want has in fact occasioned a "failure of justice." In my judgment, without expressing any opinion as to whether the words "subject to "the provisions hereinbefore contained" refer to the provisions contained in any previous part of the Code or whether they refer only to the provisions contained in Chapter XLV, they cannot be construed in such a manner as to nullify the express provisions of section 537 (*b*). Consequently, in my judgment, section 537 (*b*) applies just as much to a case in which sanction has been granted under section 195 and the sanction has lapsed, owing to the period of six months having expired before the commencement of the proceedings as it does to a case in which no sanction has been granted at all. In my judgment, in this case there was, on the date of the institution of the proceedings, a want of sanction. Consequently, I answer the question which has been referred to this Bench in this way: where a person has been sentenced upon a conviction for an offence mentioned in section 195 of the Criminal Procedure Code, the sentence is *not* liable to be reversed or altered on appeal, or revision, on the ground that the sanction required by section 195 was not in force at the time when the prosecution was

(1) (1907) I. L. R. 31 Mad. 80.

instituted, unless it is established that this has in fact occasioned a failure of justice within the meaning of section 537 of the Criminal Procedure Code. My learned brother, Mr. Justice Woodroffe, drew my attention to the fact that my learned brother, Mr. Justice Mookerjee, and I did not expressly find that there was no failure of justice in this case. In that view it is desirable to point out that the accused person, when he was charged with the offence, pleaded guilty: and, in the Explanation which the learned Magistrate has submitted in answer to the Rule, he said this, "The "accused cannot say that he has been unfairly affected "in his defence on the merits, since he pleaded guilty "in unmistakable terms and prayed for mercy." Consequently, in my judgment, there has been no failure of justice.

WOODROFFE J. My answer to the question referred to us is in the negative, and I hold also that there has been no failure of justice.

MOOKERJEE J. I agree with the learned Chief Justice.

TEUNON J. I also agree with the learned Chief Justice.

RICHARDSON J. I also agree with the learned Chief Justice.

E. H. M.