CRIMINAL REVISION.

Before Sanderson C. J. and Walmsley J.

PRAMATHA NATH BARAT

v.

P. C. LAHIRI.*

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March 17.

Wrongful Confinement—Detention of suspended police officer in lock-up under an illegal Circular order of the Commissioner of Police, published in the Calcutta Police Gazette—Mistake of fact and not of law—Good faith —Penal Code (Act XLV of 1860) ss. 76, 79 and 342—Revision of orders of acquittal—Criminal Procedure Code (Act V of 1898), ss. 423, 439.

Where a Deputy Commissioner of Police sent a head constable, placed under suspension, to the lock-up, without malice and in conformity with a Circular order of the Commissioner of Police, published in the *Calcutta Police Gazette*, the property of the Government of Bengal and the medium of communication of all orders, and regulations ordinarily having the sanction of law, issued by the Commissioner, for the guidance of police-officers and carried out by them, which Circular order had been consistently followed for 18 months, but was invalid, as not having been approved of by the Bengal Government, under section 9 of the Calcutta Police Act (Beng. IV of 1866), of which fact, however, the accused Deputy Commissioner was not aware :—

Held, that he was justified in assuming that the said Circular order had received the sanction of the Government of Bengal and that, as he, by reason of a mistake of fact and not of law, in good faith believed himself to be bound by law to obey the instructions of the Commissioner of Police, and to be justified by law in sending the head constable to such custody, he was protected by sections 76 and 79 of the Penal Code.

The High Court does not, on revision, interfere with an order of acquittal unless such interference is urgently demanded in the interest of public justice.

Faujdar Thakur v. *Kasi Chowdhury* (1) referred to.

*Criminal Revision No. 51 of 1920, against the order of D. Swinhoe, Chief Presidency Magistrate of Calcutta, dated July 2, 1919.

(1) (1914) I. L. R. 42 Calc 612, 616.

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The main facts of the case have been already reported in *Pramatha Nath Barat* v. *Lahiri* (1). It further appeared from the judgment of the Chief Presidency Magistrate, in the present case, that Provat (the petitioner's brother) was suspended on the 6th January, 1919, and kept at the Shampukur thana till the 8th and that he was sent to the Central Lock-up on the 9th. He petitioned the Commissioner of Police on the 3rd February. The petition was forwarded to the accused but no answer was returned to it.

On the 14th February, after Provat was released on bail by the Second Presidency Magistrate, one Manik Lal Sadhu, sub-inspector, Section A, put up the following note (Ex. 2) before the accused, as the Deputy Commissioner, North District :—

Provat Nath under suspension was placed before the Magistrate today. He was released on bail of Rs. 100 to appear on 26th February, 1919. Necessary orders solicited whether he may be sent to Lal Bazar quarters or allowed . . . home.

The accused, thereupon, passed the following order on the same day :—"At Lal Bazar." On the morning of the 15th Provat went to the thana and was sent by Manik Lal, under the above order of the accused, to the Lock-up. The petitioner's complaint to the Chief Presidency Magistrate on the 20th and its dismissal on the 25th have been mentioned in the previous report of the case. Provat was kept there till he was produced before Mr. Keays the next day. The case was adjourned and he was sent back to the Lock-up without order by any one. He remained there till the 8th March, when he was sent to hospital, and released thence on the 12th April.

On the 16th April he was discharged by Mr. Keays in connection with the charges against him, notwithstanding which, it was alleged in the petition to

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the High Court, further proceedings were drawn up against him by the accused (Ex. 16). The Chief Presidency Magistrate issued process under section 342 of the Penal Code, against the accused, on the 14th May, and ultimately framed a charge under sections $\frac{344}{109}$, I. P. C. relating to the confinement of Provat from 15th February to the 8th March in the Lock-up. He found that Provat was kept in illegal confinement for the whole of the period under the order and responsibility of the accused, but held that sections 76 and 79, I. P. C., applied, and acquitted him under section 258, Criminal Procedure Code.

On the 3rd September, 1919, the petitioner moved the High Court against the order of acquittal, but their Lordships (Sams-ul-Huda and Rankin JJ.) observed as follows to the petitioner's counsel :—

> "We allow you to withdraw the application, and give you an opportunity to move the Local Government. If the Local Government do not take any action in the matter, then we will hear your application."

The petitioner accordingly moved the Local Government by his petition, dated the 23rd October, but received a reply, on the 25th November, that Government was not prepared to appeal in the matter. The petitioner then obtained the present Rule from Chaudhuri and Newbould JJ.

Mr. Sen (with him *Mr. Chakravarti*, *Babu Dhirendra Nath Mookerjee*, and *Babu Pravat Chunder Dutt*), for the petitioner. Under section 10A of the Calcutta Police Act a police-officer is bound only by the lawful commands of his superiors. The Circular order in question has been held by this Court to be illegal. The mere command of a superior officer is not a ground of defence: see *Queen-Empress* v. *Latif-khan* (1). Refers to sections 76 and 79, I. P. C

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Ignorance of the law is no excuse : see *Queen-Empress* v. *Fischer* (1). The action of the accused was due to a mistake of law. He should not have kept the head constable in confinement after the 14th February. He acted maliciously. Detention under the Circular order No. 413 of 18th April, 1903, was limited to 15 days: here it exceeded that period, and amounted to wrongful confinement.

The Advocate-General (Mr. T. C P. Gibbons, K. C.) (with him *Mr. S. R. Das*, and *Babu Taruk Nath Sadhu*), for the Crown. The accused is protected by sections 76 and 79, I. P. C. Refers to the evidence of Mr. Shaw, Deputy Commissioner of Police, as to the official character of the *Calcutta Police Gazette.* The Circular order in question was promulgated in the official *Police Gazette* which contains all orders and regulations ordinarily having the sanction of law. The accused acted in good faith, by reason of a mistake of fact and not of law, as his mistake did not involve any error in the construction, or ignorance of the existence of any law, but ignorance that certain formalities had not been complied with.

Mr. Chakravarti replied. The accused should have ascertained whether the approbation of Govern_ment, under section 9 of the Calcutta Police Act, had been obtained before carrying out the Circular order. It was his duty under section 10A to see that the order was *lawful.* The accused did not act in "good faith." He did not forward the petition of Provat to the Commissioner of Police but put him up, instead, before Mr. Keays on unsustainable charges, and notwithstanding the release on bail, he directed him to be sent to the Lal Bazar Lock-up: and even after Provat's discharge by the Magistrate, the accused drew up further "proceedings" (Ex. 16). On the 25th February,

(1) (1891) I. L. R. 14 Mad. 342.

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the petitioner's pleader contended before the Chief Presidency Magistrate that the Circular order was *ultra vires*, and in his petition to the High Court, of 17th March, 1919, a copy of which was sent to the Commissioner of Police, he stated that the Circular order had not received the sanction of Government. Therefore the detention after the 25th February, or at least the 17th March, amounted to wrongful confinement.

Cur. adv. vult.

SANDERSON C. J. This was a Rule granted to show cause why the order complained of should not be set aside. The order complained of was an order of the learned Presidency Magistrate by which he acquitted the accused, Rai Bahadur Purna Chandra Lahiri, under section 258 of the Code of Criminal Procedure.

The facts which it seems to me are necessary for the purpose of my judgment are set out in the report of the case *Pramatha Nath Barat* v. *Purna Chandra Lahiri* (1) and I need not repeat them. That is a report of the hearing of a Rule which had been obtained by Pramatha Nath Barat on behalf of his brother Provat Nath Barat. The learned Chief Presidency Magistrate had dismissed the complaint made against the accused person, under section 203 of the Code. Then the Rule was obtained. Upon the hearing of the Rule, the learned Advocate-General said that he could not support the order, and further he found difficulty in supporting the contention that the Circular which was relied upon was authorized by law. Consequently, the learned Judges who heard the Rule directed that the matter be reheard by the learned Chief Presidency Magistrate. The complaint there-

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upon again came before the learned Chief Presidency Magistrate. The complaint was in respect of an alleged vexatious and wrongful detention of Provat Nath Barat, he being a head-constable in the Calcutta police force, and the accused being Deputy Commissioner. On this occasion the learned Chief Presidency Magistrate acquitted the accused under section 258 of the Code. Thereupon, this Court was again moved for a Rule, and the learned Judges who heard that Rule thought that an opportunity ought to be given to the petitioner to make an application to the Local Government. Consequently, the petitioner was allowed to withdraw the application, and the learned Judges said that if the Local Government did not take action in the matter, then they would hear the petitioner's application. Thereupon, the petitioner moved the Local Government, but on the 25th of November last year, the Local Government intimated that it was not prepared to move in the matter. Consequently, this application came before the High Court again and my learned brothers, Mr. Justice Chaudhuri and Mr. Justice Newbould, granted the Rule which I have now before me.

In my judgment, the whole question depends upon whether the Deputy Commissioner Lahiri is protected by the provisions of section 76 or the provisions of section 79 of the Indian Penal Code. The learned counsel, who appears to support this Rule, has urged that there would be a grave danger to the public if it were held that a man was entitled to take shelter and receive protection for his illegal acts under a plea of ignorance of the law. I do not intend by anything I say to whittle away the principle which has been for a long time accepted with regard to that matter. It is not really necessary in this case to say anything about it, for the learned Advocate-General

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has not disputed that principle. I only mention it, because the learned counsel for the petitioner referred to it in his reply.

The learned Advocate-General has shown cause against this Rule on the ground that the Deputy Commissioner Lahiri was not guilty of any offence, because by reason of a mistake of fact and in good faith he believed himself to be bound by law to obey the instructions of the Commissioner of Police and to make the order of the 14th of February, 1919. He further urged that the Deputy Commissioner had not committed any offence because by reason of a mistake of fact and in good faith he believed himself to be justified in making the order which he did on the 14th of February, 1919.

Now, as regards the good faith of the Deputy Commissioner, in the learned Presidency Magistrate's Court there was an allegation that the Deputy Commissioner had acted maliciously. The learned Magistrate, however, found as a fact that there was nothing in that allegation. To use his own words, he said, "I find there is no evidence of malice in the accused's "action, nor was it suggested by Barat that any such "motive existed."

As regards the alleged mistake of fact, the order in question was contained in the *Calcutta Police Gazette* of the date of the 9th of June, 1917, and it purported to be by way of cancelling a previous order which was published in the *Calcutta Police Gazette* of the 20th of February, 1917. The previous order was :—

"All constables and head-constables placed under suspension are to "be ordered to report themselves to the Central Lock-up Guard."

The order published in the *Calcutta Gazette* of the 9th of June, 1917 was in the following terms :—

"Officers of all ranks when placed under suspension are subject to the "same rules, regulations and discipline as when not suspended."

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"All head-constables and constables placed under suspension are to be "ordered to report themselves to the Superintendent, Headquarters Force. "They will be confined to quarters and are not to be allowed to leave the "Lal Bazar compound without specific permission of the Superintendent, "Headquarters Force, or any other officer detailed by him for the purpose"

The *Calcutta Police Gazette* on the face of it purports to be the property of the Government of Bengal. It was stated in evidence that the above-mentioned order had been consistently obeyed and followed from the time it was published in June, 1917. The events which form the basis of this case occurred in January, 1919, so that the order had been in force for about 18 months. It was conceded by the learned counsel, who supported this Rule and who opened the argument, that if the order published in the *Police Gazette* had received the approbation of the Government of Bengal, he would have had nothing to say. But it is contended (and it is admitted) that the order in question had not in fact received the approbation of the Government of Bengal within the meaning of section 9 of the Calcutta Police Act of 1866, and consequently it was argued by him, and admitted by the learned Advocate-General, that it was in fact an invalid order.

In my judgment, having regard to the facts which I have mentioned, and having regard to the further fact that it was proved that the *Calcutta Police Gazette* was the medium through which the Commissioner of Police communicates all orders and regulations issued by him, ordinarily having the sanction of law, for the guidance of police-officers and which orders have to be obeyed and carried out by all police-officers, and having regard to the fact that this order had been in force for about 18 months and had been consistently acted upon and obeyed, the Deputy Commissioner was justified in assuming that the order had received the

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approbation of the Government of Bengal. The Deputy Commissioner was labouring under a mistake of fact, and was not labouring under a mistake of law. The learned Chief Presidency Magistrate said, "His, "the accused's, mistake was not one of law inasmuch as "it did not involve any mistake in the construction, "or ignorance of the existence of any enactment, but "involved ignorance that certain requisites and for-"malities had not been complied with," that is to say, that in fact the Government of Bengal had not given its approbation to the regulation or order which had been published in the *Calcutta Police Gazette* of the 9th of June, 1917. Consequently, subject to what I have to say with regard to the further point which was raised by Mr. Chakravarti, I agree with the learned Chief Presidency Magistrate that the Deputy Commissioner Lahiri, in respect of the making the order of the 14th of February, was protected by the provisions of section 76, and by the provisions of section 79. In my judgment, he was labouring under a mistake of fact, and he in good faith believed himself bound by law to obey the order, which was published in the *Calcutta Police Gazette* of the 9th of June, 1917, and to make the order of the 14th February, 1919. Further, in my judgment, by reason of a mistake of fact and in good faith, he believed himself to be justified by law in making the order of the 14th February, 1919.

But it was urged by Mr. Chakravarti, in reply, that whatever may have been the position of the Deputy Commissioner, on the 14th of February, when he made the order of that date, he cannot be protected by sections 76 and 79 in respect of the detention which was subsequent to the 20th of February, 1919; and the learned counsel referred us to the petition which was presented to the learned Chief Presidency Magistrate, on behalf of Provat Nath Barat on that date, in which

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it was contended that the detention of the Head-constable Provat Nath Barat was illegal. Certain reasons were set out in the petition as showing that the detention was illegal. There was no specific allegation in the petition that the order published in the *Police Gazette* on the 9th of June, 1917, had not received the approbation of the Government of Bengal, but the learned counsel stated (I have no doubt correctly) that on that date the learned pleader who was appearing for the head-constable had stated in Court that that was one of the points on which he relied. As I intimated to the learned counsel during the course of the argument, I am not satisfied that the Deputy Commissioner Lahiri was responsible for the detention after the 20th of February, 1919. I find that the learned Chief Presidency Magistrate referred the matter of the petition to the Commissioner of Police and the Commissioner made a report to the Chief Presidency Magistrate, and I am by no means satisfied that the Deputy Commissioner Lahiri was responsible for the detention after that date. This point does not seem to have been specifically taken in the Chief Presidency Magistrate's Court. It must be remembered that this is a case in which the accused person has been acquitted, and we are asked to make the Rule absolute, and set aside that order of acquittal, and the rule is that this Court on revision does not exercise its jurisdiction to set aside an order of acquittal, unless it is of opinion that "it is urgently demanded in the interest of public justice" [*Faujdar Thakur* v. *Kasi Chowdhury* (1)], and, having regard to the fact that the materials before me do not satisfy me that the Deputy Commissioner Lahiri was directly responsible after the 20th of February, 1919,

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for the detention of the head-constable Provat Nath Barat, in my judgment it would not be right for this Court to make this Rule absolute. For these reasons, in my judgment, the Rule should be discharged.

WALMSLEY, J. I agree.

E. H. M. *Rule discharged.*

APPEAL FROM ORIGINAL CIVIL.

Before Mookerjee and Fletcher JJ.

1920

March 23.

JACOB AND COMPANY

v.

RASH BEHARI GHOSE.*

Counsel—Instructions direct from lay client—Professional usage and etiquette—Judge, formerly a counsel for one of the parties.

Mr. X, a counsel, on direct instructions from client, inserted a ground in the memorandum of appeal which constituted a libel on the Judge in the Court below :—

Held, that the conduct of Mr. X was highly improper.

Doe d. Bennet v. *Hale* (1). *Hobart* v. *Butler* (2), *Gobindo* v. *Hendry* (3) and *Moran* v. *Dewan Ali* (4) referred to.

It is no disqualification for a Judge trying a case that before his appointment he was counsel in other matters for one of the parties to the case.

Thelluson v. *Rendlesham* (5), *Tatham* v. *Wright* (6), *Phillips* v. *Headlam* (7), *Lewis* v. *Branthwaite* (8), *Townsend* v. *Hughes* (9) and *Carr* v. *Fife* (10) referred to.

* Appeal from Original Civil, No. 98 of 1919, in Suit No. 1197 of 1917.

(1) (1850) 15 Q. B. 171.
(2) (1859) 9 Ir. C. L. R. 157, 172.
(3) (1875) 14 B. L. R. 12 (App.).
(4) (1872) 8 B. L. R. 418.
(5) (1858) 7 H. L. C. 429.
(6) (1831) 2 Russ. & M. 1.
(7) (1831) 2 B. & Ad. 380, 385.
(8) (1831) 2 B. & Ad. 437, 445.
(9) (1676) 2 Mod. 150, 151.
(10) (1895) 156 U. S. 494.