

CRIMINAL REVISION.

Before *Walmsley and Suhrawardy JJ.*

OZIULLAH

v.

BENI MADHAB CHOWDHURI.*

1922

June 28.

Sanction for Prosecution.—Additional District Magistrate, competency of, to take cognizance when he has reported the case for authority to prosecute—Order of the Local Government signed by a Deputy Secretary for the Chief Secretary—Legal proof of the order—Criminal Procedure Code, ss. 190 (1) (a), 196—Presumption—Evidence Act (I of 1872), s. 79.

Where a letter purporting to be issued from the Chief Secretary to the Government of Bengal was signed by a Deputy Secretary, not in his official capacity, but "for the Chief Secretary," it was *held* that there was no legal proof that the Local Government had ordered or authorized a prosecution under s. 196 of the Criminal Procedure Code. The presumption under s. 79 of the Evidence Act would have arisen if the letter had been signed by the Chief Secretary himself.

Apurba Krishna Bose v. Emperor (1), distinguished.

There is no bar to a Magistrate, who has reported the facts of an offence to the higher executive authorities, in order to obtain the requisite order under s. 196 of the Code, taking cognizance of such offence on complaint by a police officer, even though s. 556 may render him incompetent to try the case.

Lakhi Narayan Ghose v. Emperor (2), per Carnduff J., referred to.

THE facts of the case were as follows:—On 2nd November, 1921, the petitioner published in a local paper, called the *Jyoti*, a proposal to hold a lottery in the town of Chittagong. The police thereupon held an inquiry and searched his premises, and submitted a report in December. On receipt of the report Mr.

* Criminal Revision No. 327 of 1922, against the order of L. B. Burrows, Additional District Magistrate of Chittagong, dated March 28, 1922.

1922
 OZIULLAH
 v.
 BENI
 MADHAB
 CHOWDHURI.

Burrows, Additional District Magistrate of Chittagong, wrote to the Commissioner of the Chittagong Division stating that the petitioner had published the above proposal, that he had distributed leaflets, containing the same, and had sold several tickets. The letter was written with the view to obtain an order under s. 196 of the Criminal Procedure Code for the prosecution of the petitioner under s. 294A of the Penal Code. The Commissioner forwarded a copy of Mr. Burrows' letter to the Chief Secretary to the Government of Bengal, and received the following in reply:—

“GOVERNMENT OF BENGAL,
 Political Dept.

From—H. L. STEPHENSON, Chief Secretary to the Government of Bengal,

To—The Commissioner of the Chittagong Division.

Calcutta, the 9th January, 1922.

SIR,

I AM directed to refer to your letter, dated 22nd December 1921, submitting a copy of a letter from the Additional District Magistrate of Chittagong in which he reports that one Oziullah, son of Oscar Rahman, published a notice in the *Jyoti* informing the public of his intention of instituting a lottery. It is also reported that he distributed leaflets containing his proposals, and that he has since been selling tickets. In the circumstances the Governor in Council directs that a complaint be lodged under s. 294 A of the Penal Code for publishing proposals of a lottery not authorized by Government.

I have the honour to be,

SIR,

Your most obedient servant,

A. CASSELLS,

*For Chief Secretary to the Government
 of Bengal.”*

A copy of the above letter was sent from the Commissioner's Office to Mr. Burrows for information and necessary action. A complaint was then filed by one Beni Madhub Chowdhuri, a sub-inspector, before Mr. Burrows, who, after examining the complainant, summoned the petitioner under s. 294A of the Penal Code, and ultimately transferred the case to the Sub-divisional Magistrate for trial. The original letter of Mr. Cassells was not put on the record, but only a copy of it. The petitioner thereupon moved the High Court and obtained a rule on the grounds (1) that Mr. Burrows having in his executive capacity submitted a report against the petitioner, on which the Local Government had directed the prosecution, had no jurisdiction to entertain the complaint: and (2) that there was no legal authority under s. 196 of the Code on the record.

1922
 OZULLAE
 v.
 BENI
 MADHAB
 CHOWDHURI.

Babu Dasarathi Sanyal (with him *Babu Manmatha Nath Mukerjee*, *Babu Tarakeswar Pal Chaudhuri*, *Babu Jnan Chunder Roy* and *Babu Lolit Mohan Sanyal*), for the petitioner. The Additional District Magistrate had no jurisdiction to take cognizance as he took part in the initiation of the prosecution. If a Magistrate can in such circumstances take cognizance, the provisions of ss. 202 and 203 of the Code would be practically futile. There is no legal proof of the authority required under s. 196 of the Code. The order is signed by Mr. Cassells and not by the Chief Secretary himself: *Apurba Krishna Bose v. Emperor* (1), *Barindra Kumar Ghose v. Emperor* (2).

The Deputy Legal Remembrancer (Mr. Orr), for the Crown. The Magistrate merely reported the facts, on receipt of the police report. He did not institute

(1) (1907) I. L. R. 35 Calc. 141. (2) (1909) I. L. R. 37 Calc. 467.

9122

OZUULLAH
v.
BENI
MADHAB
CROWDHURI

the prosecution. He took cognizance on a complaint after inspecting the original letter

WALMSLEY J. The petitioner has been placed on his trial upon a charge under section 294A of the Indian Penal Code.

The police reported the facts upon which the charge is based, and Mr. Burrows as Additional District Magistrate submitted a report to Government for the purpose of obtaining the sanction required by section 196 of the Criminal Procedure Code, and the authority was conveyed in a letter issued from the Chief Secretary's office, and signed by Mr. A. Cassells for Chief Secretary. A police officer then made a complaint to Mr. Burrows, and the petitioner was summoned. On the day fixed for hearing Mr. Burrows transferred the case to another Magistrate.

On these facts two objections are based. The first is that Mr. Burrows was not competent to take cognizance of the case at all, because he had taken a part in initiating the proceedings. The second is that the authority is defective because the letter is signed by Mr. Cassells, and not by the Chief Secretary himself.

I cannot see any merit in the first objection, save to the extent that Mr. Burrows would have been well advised to direct some other Magistrate to receive the complaint, instead of transferring the case for trial after issuing process.

The second objection is extremely technical, but I think that effect must be given to it.

Under section 196 of the Criminal Procedure Code, the complaint must be made by order of, or under authority from, the Local Government. The Evidence Act lays down the conditions under which the Court may accept a mere letter as proof that the order has been issued, or the authority conferred by the Local

Government. Under section 79 it must draw certain presumptions, and if Mr. Stephenson had himself signed the letter, the order would have been proved. When it was argued in the case of *Apurba Krishna Bose v. Emperor* (1) that the head of the Local Government, then the Lieutenant-Governor, ought to have signed the order, it was said that he "must necessarily, and ordinarily does, communicate his orders through his accredited and gazetted officers", but in that case the sanctions had been signed by the Chief Secretary. That decision, therefore, has no bearing on the present case, for here the letter is signed by Mr. Cassells for the Chief Secretary. Mr. Cassells was at the time Deputy Secretary, according to the Civil List, but he did not claim for himself any official position; he merely signed on behalf of the Chief Secretary. In these circumstances, I think, it must be held that there is no legal proof that the Local Government has ordered or authorised the prosecution. No presumption arises as to Mr. Cassells' capacity to sign the letter, and he could not certify the order on behalf of Mr. Stephenson, whose own capacity was that of a delegate.

The result is that the Rule is made absolute, and the proceedings quashed: the petitioner will be discharged from his bail.

SUHRAWARDY J. I agree. The first objection is that on general principles the Additional District Magistrate should not have taken cognizance of the case, as he had himself taken part in the initiation of the proceedings. It is argued that if a Magistrate in the position of the Additional District Magistrate takes cognizance of a case, the provisions of sections 202 and 203 of the Criminal Procedure Code, which empower a Magistrate to dismiss a complaint or enquire into

1922
 OZIULLAH
 v.
 BENI
 MADHAB
 CHOWDHURI.
 WALMSLEY
 J.

1922
 OZUULLAH
 v.
 BENI
 MADHAB
 CHOWDHURI.
 SUHRAWARDY
 J.

its truth, become futile and meaningless. I do not think there is any substance in this argument. As has been observed by Carnduff J. in the case of *Lakhi Narayan Ghose v. Emperor* (1), there is no bar prescribed by the Code of Criminal Procedure to a Magistrate in such a position receiving a complaint whereas section 556 may render him incompetent to try it. Moreover, section 190(c), of the Criminal Procedure Code gives express jurisdiction to a Magistrate to take cognizance of an offence even "upon his own knowledge," in which event, it is clear, sections 202 and 203 of the Criminal Procedure Code are of as little avail as in the present case.

With reference to the second ground I agree in holding that the sanction required by section 196 of the Criminal Procedure Code has not been properly proved in this case. That section demands a sanction by the Local Government. The sanction in this case is contained in a letter which is headed "From H. L. Stephenson, Esq., C.S.I., C.I.E., Chief Secretary to the Government of Bengal," and signed "A. Cassells, for Chief Secretary to the Government of Bengal". This order of the Government sanctioning the present prosecution has to be proved according to the provisions of section 78 of the Evidence Act, which requires that an order of the Local Government may be proved by the record certified by the head of that department. The original letter is not on the record but there is a copy which is defective and does not appear to be a certified copy under section 76 of the Evidence Act. Besides, the letter does not purport to have been signed or certified by the head of the department to attract the presumption arising under section 79 of the Act. Had Mr. Cassells issued the letter in the official capacity he held, I

doubt if it would not have then been in order, as all orders of the Government are issued through its accredited officers. We do not know and no evidence has been given to prove what authority Mr. Cassells had to sign for Mr. Stephenson. I am not sure if the prosecution cannot prove that proper sanction has been accorded by Government *dehors* the letter under consideration, but no such material being before us, we have no alternative but to quash the proceedings based on a document which does not satisfy the requirements of the law.

E. H. M.

Rule absolute.

1922
 OZIULLAH
 v.
 BENI
 MADHAB
 CHOWDHURI.
 SUHRAWARDY
 J.

ORIGINAL CIVIL.

Before Greaves J.

HARI NARAIN DAS (AN INFANT), *In re*.*

1922
 July 12.

*Minor—Guardian—Hindu, governed by Mitakshara School of Hindu Law—
 Undivided property—Jurisdiction.*

On an application by a Hindu, governed by Mitakshara School of Hindu Law, for being appointed guardian of his minor son and for leave to sell the minor's undivided share in the ancestral property :—

Held, that the High Court under its general jurisdiction and apart from the Guardians and Wards Act (VIII of 1890) had power to appoint a guardian.

In re Manilal Hurgovan (1) followed.

CHAMBER APPLICATION.

THIS was an *ex parte* application by one Laluram Das, a Hindu governed by the Mitakshara School of Hindu Law, for being appointed a guardian of the person and property of his infant son Hari Narain Das

* Application in Original Civil.

(1) (1900) I. L. R. 25 Bom. 353.