

188 has not been established, and that the petitioners' conviction under that section should, accordingly, be set aside.

In the result, we make the Rule absolute, set aside the conviction of the petitioners under section 188 of the Indian Penal Code, and the sentences that have been passed on them all, and direct that the petitioners be acquitted and discharged.

E. H. M.

*Rule absolute.*

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### CRIMINAL REVISION.

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*Before Mukerji and Roy JJ.*

ALI MIA

v.

EMPEROR.\*

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*Conspiracy—Conspiracy to import, transport and possess opium without license—Consent of Local Government obtained before the framing of the charge—Cognizance, when taken by the Magistrate—Criminal Procedure Code (Act V of 1893), s. 196 A—Opium Act (I of 1878), s. 9.*

Where on an ambiguous report of an excise inspector alleging offences under s. 120B of the Penal Code read with s. 9 of the Opium Act (I of 1878), warrants were issued, on the 18th August 1925, against the absent accused under s. 9 of the Opium Act only, and the consent of the Bengal Government to the institution of a prosecution under s. 120B of the Penal Code, read with s. 9 of the Act, was given on the 12th September, and charges framed under s. 120B of the Penal Code read with s. 9 of the Act, and also for substantive offences under the latter section on the 13th December :—

*Held*, that the Magistrate did not take cognizance of the charge of conspiracy, till after the consent of the Bengal Government had been obtained, and that the conviction there for was not illegal under s. 196A of the Criminal Procedure Code.

\* Criminal Revision Nos. 493 and 494 of 1926, against the order of J. W. Nelson, Sessions Judge of Chittagong, dated May 4, 1926.

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The petitioner, Makhlas Rahman, was alleged to be the leader of a gang of opium smugglers in Chittagong, and to have carried on a joint smuggling business with the petitioner, Ali Mia. The other petitioners were members of the gang. On the 20th March 1925 one Hanif Ali and the petitioners, Ismail and Shafar Ali, left Chittagong for Bankura to purchase opium. They were joined at the latter place by the petitioner, Oliar Rahaman, and two others. The six persons proceeded to village Subarna, and purchased a quantity of opium there. On their return journey they buried five canisters of opium in a *chur*. Later on Hanif disclosed the details of their trip to the Inspector of Excise and Salt at Chittagong, and the latter went to the *chur* and recovered the opium.

The petitioners in *Rule No. 493*, Ali Mia and Ismail, were arrested and placed before S. C. Majumdar, the Sadar Subdivisional Magistrate of Chittagong, on the 18th August 1925, with a report from the excise inspector describing, under the heading "*Nature of the case*", the offences alleged as "*illicit importation, transport and possession of opium under Act 1 of 1878, s. 9, read with s. 120B of the Penal Code*", and praying for warrants against the petitioners in *Rule No. 494*. Warrants were issued against them under s. 9 of the Opium Act only. On the 12th September 1925 consent was given by the Bengal Government, under s. 196A of the Criminal Procedure Code, to the excise inspector to prosecute all the petitioners under s. 120B of the Penal Code read with s. 9 of the Act. During the hearing certain petitions were put in by the petitioners which showed that the trial was proceeding under s. 9 of the Act only. On the 18th December 1925 charges were framed against all the petitioners, under s. 120B of the Penal Code read with s. 9 of the Opium Act, of conspiracy to import into Bengal, transport

and possess, 2 mds. 18 seers of opium, and also under s. 9 (c) and (e) of the Act, against Ali Mia and Makhlas, and under s. 9 (c), (d) and (e) against the other five. They were all convicted of conspiracy, and the individual accused of the offences under the clauses of s. 9 charged against them. On appeal the convictions of Ali Mia and Makhlas under s. 9 (c) and (e) were set aside, but the convictions of the others were upheld in entirety. They then moved the High Court and obtained a rule on the ground that the convictions under s. 120B of the Penal Code, read with s. 9 of the Opium Act, were illegal under s. 196A of the Criminal Procedure Code.

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*Mr. Camell* (with him *Babu Paresh Chunder Sen*), for the petitioners in *Rule No. 493*. *Babu Paresh Chund Sen*, for the petitioners in *Rule No. 494*.

*Mr. A. K. Basu*, for the Crown in both the Rules.

*Mr. Camell*. The Magistrate took cognizance, in this case, on the 18th August when he issued process on the report of the excise sub-inspector. The report describes the offence as illicit importation, transport and possession of opium under Act I of 1873, s. 9, read with s. 120B of the Penal Code. At the time the former took cognizance, the consent of the Local Government had not been obtained. S. 196A requires such consent before cognizance is taken, as a condition precedent.

*Mr. A. K. Basu*. The Magistrate did not take cognizance of an offence under s. 120B when he issued process. He could not legally take cognizance of such offence at that time. Refers to *Lalit Chandra Chanda Chrowdhury* (1) and *Birco Sardar v. Ariff* (2). He issued warrants against the absent accused under the Opium Act only. Refers to the petitions of the accused

(1) (1911) I. L. R. 39 Calc. 119. (2) (1924) 26 Cr. L. J. 302.

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showing that the trial was then proceeding under the Act. He took cognizance of the offence of conspiracy only when he framed charges thereof, and the necessary consent had then been given. The trial was not, therefore, bad.

MUKERJI AND ROY JJ. *Rule No. 493* has been issued at the instance of two persons, Ali Mia and Ismail. *Rule No. 494* has been obtained by five persons, Makhlas Rahaman, Oliar Rahaman, Sbfarali, Mofizulla and Nizamali. These seven persons were tried by the Sadar Subdivisional Magistrate of Chittagong. He convicted all these seven accused persons under section 9 of the Opium Act read with section 120B of the Penal Code, and he also convicted two of them *viz.*, Ali Mia and Makhlas Rahman under clauses (c) and (e) of section 9 of the Opium Act and the remaining five, *viz.*, Ismail, Oliar Rahman, Sbfarali, Mofizulla and Nizamali, under clauses (c), (d) and (e) of that section. The Sessions Judge, on appeal, has upheld the convictions of Ali Mia and Makhlas Rahman under section 9 of the Opium Act read with section 120B of the Penal Code, but set aside their convictions under the Opium Act, and he has upheld the convictions of the other accused persons. He has, however, modified the sentences passed on all the petitioners.

The contention involved in the Rules is that the trial of the petitioners was void as cognizance of the offence under section 120B of the Indian Penal Code, read with section 9 of the Opium Act, was taken in contravention of the provisions of section 196A of the Code of Criminal Procedure.

The proceedings before the Court were started upon a report made by the Inspector in charge of

Excise and Salt, Chittagong, and dated the 14th August 1925. In the column in which the "Nature of Case" has to be set out, the following was what was stated :—"Illicit import, transport and possession of opium under section 9, Act I of 1878, read with section 120B of the Indian Penal Code." Warrants of arrest were prayed for against five of the accused, two of them being produced in Court. The report, it must be said, was somewhat ambiguous, as it is not clear whether a case of conspiracy only was intended to be started or a case relating to substantive offences under the Opium Act. The question, however, is immaterial, for, in point of fact, the warrants that were issued, on the 18th August 1925, upon the said report against the five persons who were not before the Court, specified only an offence under section 9 of the Opium Act. From the numerous petitions, etc., that were filed in the course of the trial by all the seven accused persons also it is clear that the proceedings went on as being under section 9 of the Opium Act, and not in relation to an offence under section 120B of the Penal Code. Whether there were sufficient materials in the aforesaid report to justify cognizance of a substantive offence under section 9 of the Opium Act being taken is a question which does not now arise. Witnesses for the prosecution were examined on the 25th November 1925, and the 26th November 1925; and on the last mentioned date the Excise Superintendent of Chittagong, when being examined as witness No. 9 for the prosecution, produced an order of the Government of Bengal consenting to the initiation of proceedings under section 120B of the Penal Code read with section 9 of the Opium Act. This order bears date the 12th September 1925, and it was marked as Ex. (6) in the case. The charge under section 120B, read

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with section 9 of the Opium Act, was framed against the accused persons on the 18th December 1925.

From these facts it is clear that the Magistrate did not take cognizance of the offence of conspiracy until after the order consenting to the initiation of the proceedings for that offence was passed by the Local Government, and as far as may be gathered from the record he took cognizance of that offence only when he framed the charges on the 18th December 1925. Under section 196A, clause (2) of the Criminal Procedure Code it is only the existence of such an order that is necessary to enable a Court to assume jurisdiction.

There is no substance, therefore, in the contention urged on behalf of the petitioners, and the Rules must accordingly be discharged. The petitioners should now surrender to their bail to serve out the unexpired portions of their sentences

E. H. M.

*Rules discharged.*