CRIMINAL REVISION.

Before Lort-Williams and S. K. Ghose JJ.

RAMENDRACHANDRA RAY

v.

EMPEROR.*

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Feb. 5, 11.

Charge—Defect, if can be cured by s. 537, Criminal Procedure Code—"Execution of law" in s. 147, I. P. C., meaning of—Complaint by public servant, if necessary for prosecution under s. 147, I. P. C., for offence under s. 188—Indian Penal Code (Act XLV of 1860), ss. 143, 147, 188—Code of Criminal Procedure (Act V of 1898), ss. 195, 225, 232, 537—Calcutta Police Act (Beng. IV of 1866), s. 62A.

Where the accused was charged under sections 143 and 147 of the Indian Penal Code, with being a member of an unlawful assembly, with the common object of committing a breach of a lawful order of the Police Commissioner, prohibiting processions in Calcutta and its suburbs on a particular day, which was described as an offence under the Calcutta Police Act, not punishable with imprisonment for six months or upwards,

held that such description was not a complete description; alternatively it was supererogatory, and the said breach, being also an offence under section 188 of the Indian Penal Code, the defect in the charge was curable under sections 225, 232 and 537 of the Code of Criminal Procedure;

held, further, that the accused was properly convicted under section 147 of the Indian Penal Code.

An accused cannot be said to be misled in his defence when he refuses to defend himself or to recognise the jurisdiction of the court.

When an order is lawfully made under the provisions of a statute, that order is law, and resistance to the execution of that law is an offence under section 147 (2) of the Indian Penal Code.

Section 195 of the Code of Criminal Procedure has no application, when the offence charged is not one under section 188 of the Indian Penal Code, but one under section 147.

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The material facts appear from the judgment.

The Officiating Deputy Legal Remembrancer, Debendranarayan Bhattacharya, in showing cause for the Crown, took a preliminary objection. The High Court has never interfered in any case in which the party, in whose favour it was sought, clearly told the court that he did not want such interference. In such a case, the High Court should not entertain an

*Criminal Revision, No. 135 of 1931, against the order of T. J. Y. Roxburgh, Chief Presidency Magistrate of Calcutta, dated Jan. 27, 1931.

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application at the instance of a third party, because it may ultimately result in the enhancement of sentence of the accused or a retrial on a graver charge, placing him in jeopardy, the responsibility of which has been repudiated by him and cannot very well be taken by a third party. Under these circumstances, the court will not entertain technical objections and will decline to interfere unless there is a grave miscarriage of justice. *Re: Narayan Prasad Nigam* (1).

With regard to the merits, the defect is purely technical due to the accused's own conduct. Read the explanation of the magistrate. If the accused was merely charged with the common object of committing an offence under section 62A (*6*) (*ii*) of the Calcutta Police Act, then there might be something in the objection. But here the charge clearly stated that the common object was to commit a breach of the lawful order of the Police Commissioner. That act would be an offence, both under the local law as well as under section 188 of the Penal Code. The mentioning of one statute was merely giving an incomplete description. It might not have been mentioned at all. The accused knew perfectly well what he was charged with and no question of prejudice arises, specially when he did not defend himself. Such defect was curable under sections 225, 232 and 537 of the Code of Criminal Procedure. Moreover, the act would be an offence under section 141 (*2*) of the Indian Penal Code. The order passed by the Police Commissioner, by virtue of the authority vested in him by a statute, namely, the Calcutta Police Act, became law for the time being and resistance to the execution of that law by the police officer was an offence under section 147. *King-Emperor* v. *Abdul Hamid* (2). There has been no miscarriage of justice and the Rule should be discharged.

Narendrakumar Basu (with him *Santoshkumar Basu* and *Dineshchandra Ray*) for the petitioner.

(1) (1922) I. L. R. 45 All. 128. (2) (1922) I. L. R. 2 Pat. 134.

There is no substance in the explanation of the magistrate. If the accused does not choose to defend himself, the trying magistrate is not entitled to do whatever he chooses, without conforming to the procedure laid down by law. It would have been no part of the duty of the lawyer for the defence, if the accused defended himself, to cure the magistrate's defect in the charge. It was the magistrate's own duty. The defect was not a mere technical error. Here the learned magistrate charged the accused with something, which was no offence at all under section 141 read with section 40 of the Indian Penal Code, and section 537 of the Criminal Procedure Code was never meant for such defects. It rendered the trial void. It was like charging a person for being a member of an unlawful assembly with the common object of garlanding the Chief Presidency Magistrate and then trying him for shooting at some officers of the Government. Section 141 (*2*) has also no application. An order lawfully promulgated under the authority of a legislative enactment is something different from law, otherwise there would be no distinction between rules made under a statute and law proper. The correct view is that taken in the dissentient judgment of Das J. in the case of *King-Emperor* v. *Abdul Hamid* (1). Section 188 of the Indian Penal Code cannot help the Crown, as that would require a complaint in writing by the Police Commissioner, who promulgated the order. There has been a failure of justice and the conviction should be quashed.

Debendranarayan Bhattacharya, in reply. Complaint by the Police Commissioner would have been necessary, if the prosecution was one under section 188 of the Indian Penal Code. There is no authority for the proposition that such a complaint was necessary when the prosecution was under section 147, although the common object was to commit an offence under section 188.

Cur. adv. vult.

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LORT-WILLIAMS J. This case has come before us in a somewhat unusual way.

The petitioner applied to the Court as a resident and taxpayer of the city of Calcutta, and as such interested in the liberty of one Subhas Chandra Bose, who is described as the Mayor of Calcutta, and a friend of the petitioner. The petitioner stated facts which showed *prima facie* that the conviction and sentence of imprisonment passed upon the said S. C. Bose were technically invalid. Upon this, a Rule was issued.

Thereupon, the prisoner wrote a letter to the Court saying that the application had been made without his knowledge or consent, that he did not intend to take any part in the proceedings, that any one who moved the High Court on his behalf was not his friend, and that such action was likely to do him harm. We have been informed that the prisoner has pursued this course, on principle, because he refuses to recognise the jurisdiction of the courts in India.

Ordinarily, in such circumstances, the Court will not interfere, where it appears that the prisoner, as in the present case, is of age, educated and sane, unless the Court is satisfied that there has been a miscarriage of justice. Otherwise, the Court would not be justified in spending time upon the consideration of such a case, in preference to the large number of cases of prisoners and other accused persons which are much earlier in date and which await the decision of the Court.

Even, where there has been a miscarriage of justice, the Court, in the interest of the prisoner himself, where he himself prefers to abide by the decision already given, must be careful to avoid taking any action which may place him in other and perhaps greater jeopardy, while seeking to remove the stigma of illegality from the administration of the law. On the other hand, the Court cannot allow any such alleged miscarriage to be used to gratify a desire for

self-advertisement or pretended martyrdom, at the expense of the Court's reputation for impartiality and justice.

Turning to the facts of the present case—on the 24th of January, the Commissioner of Police made an order under section 62A, sub-section (4) of the Calcutta Police Act, 1866, and section 39A of the Calcutta Suburban Police Act, 1866, prohibiting, within the town and suburbs of Calcutta, any procession or public assembly in any way connected with what is termed Independence Day, namely, on the 26th of January, 1931. This order was duly published by means of newspaper advertisements and leaflets, and a copy was served personally upon the prisoner.

The Commissioner is responsible immediately for law and order, and for the regulation of traffic in Calcutta, and we must assume that he considered that his order forbidding processions on that day was necessary for the fulfilment of his duties. The decision in such matters, obviously, must be left to him, so long as he is held responsible, and has to answer for the consequences of any breach of public order or dislocation of traffic.

Calcutta is a commercial city, and those who have work to do and business to transact ought not to be hindered unnecessarily in pursuing their various callings, or endangered in their lives or property, by the actions of those more fortunately placed, who enjoy the leisure and the means necessary to enable them to take part in processions, which may and often do lead to serious breaches of the peace and dislocation of traffic.

With full knowledge of this order, and in deliberate and intentional defiance of it, the prisoner set out with a procession of some 400 to 500 people, which increased in numbers as it approached the *maidân*. At the crossing of Corporation Street with Chowringhee, it came into contact with police forces placed there for the purpose of enforcing the order, and the officer-in-charge spoke to the prisoner, and

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again drew his attention, and those of his supporters who gathered round, to the terms of the order and asked them to desist. The prisoner refused to obey and led the procession forward, whereupon, the police took steps necessary to enforce the order, brick-bats were thrown at them by persons in the crowd which had assembled, and the prisoner was arrested.

Subsequently, he was charged with and convicted of offences under sections 143, 147 and 149 read with section 336 of the Indian Penal Code. He was sentenced, under section 147, to undergo rigorous imprisonment for six months. No separate sentences were passed under the other sections.

The charges under sections 143 and 147 were as follows:—

(1) That you, Subhas Chandra Bose, on or about the 26th day of January 1931, in the town of Calcutta, along with others, numbering more than five, names unknown, were members of an unlawful assembly, the common object of which was to commit an offence, *viz.*, to commit a breach of the lawful order issued by the Commissioner of Police, Calcutta, dated the 24th January, 1931, under section 62A, clause (*1*) of the Calcutta Police Act, an offence under section 62A, (6) (*ii*) and, thereby, you, the said Subhas Chandra Bose, committed an offence punishable under section 143 of the Indian Penal Code and within my cognizance.

(2) That you, the said Subhas Chandra Bose, at the time and place aforesaid, along with others numbering more than five, names unknown, were members of an unlawful assembly, and, in prosecution of the common object of such assembly, namely, committing the said offence to wit, the breach of the lawful order issued by the Commissioner of Police, Calcutta, dated the 24th January, 1931, under section 62A, clause (*1*) of the Calcutta Police Act, force and violence was used by members thereof and the offence of rioting was committed and thereby you the said Subhas Chandra Bose committed an offence punishable under section 147 of the Indian Penal Code and within my cognizance.

It has been argued on behalf of the petitioner that, inasmuch as the common object charged was the commission of an offence under section 62A (*6*) (*ii*) of the Calcutta Police Act, which is a local law within the definition given in section 42 of the Indian Penal Code and as that offence is not punishable with imprisonment for a term of six months and upwards as provided in section 40, therefore, it is not an offence within the meaning of section 141, clause (*3*) of the Code. Consequently, the prisoner cannot be

convicted of rioting in prosecution of the common object of an unlawful assembly under section 147, Indian Penal Code.

The answer to this argument is that the common object charged was, substantially, that of committing a breach of the lawful order issued by the Commissioner of Police. This is an offence under section 188 of the Indian Penal Code, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of such, to any persons lawfully employed, or causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray.

There can be no doubt, and the contrary has not been argued, that the prisoner's acts come within the provisions of this section.

It is true that the offence of disobeying the lawful order of the Commissioner of Police is described in the charge sheet as being an offence under section 62A (*b*) (*ii*) of the Calcutta Police Act. But it is also an offence under section 188 of the Indian Penal Code. The description given is not a complete description, alternatively it is supererogatory.

This being the position, the provisions of sections 225, 232 and 537 of the Code of Criminal Procedure apply. Because it is clear that the prisoner was not misled by any error or omission in the charge, nor has any such error or omission occasioned a failure of justice as provided in section 225. Nor has he been misled in his defence as provided in section 232, because he refused to defend himself or to recognise the jurisdiction of the court.

There is no doubt, and the contrary has not been seriously argued, that the order was lawful. It was not a general order prohibiting all processions for an indefinite period, but an order prohibiting processions within a particular place, namely the town and suburbs of Calcutta, on a particular occasion, namely, on what is termed Independence Day, the 26th day of January, 1931.

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This being the view which we take, it becomes unnecessary to consider whether the prisoner's conduct amounted to resistance to the execution of any law within the meaning of section 141, clause (*2*) of the Indian Penal Code. But, in our opinion, when an order is lawfully made under the provisions of a statute that order is law, and when the police were trying to execute that law by preventing the procession from proceeding, the resistance of the prisoner and his supporters brought him and them within the provisions of this part of the section also.

There remain two minor points to be decided. No complaint under section 195 of the Code of Criminal Procedure was necessary, because the prisoner was not charged with an offence under section 188 of the Indian Penal Code, but with an offence under section 147.

We accept the contention that it is necessary to prove that at least five persons had knowledge of the order which, it is alleged, it was their common object to disobey. This fact, however, may be inferred from the facts and circumstances of the case. Bearing in mind that the order had been published in several newspapers and by distribution of leaflets, and that the prisoner had been personally served with a copy of it, and that the police officer again drew his attention to it in the presence and hearing of his supporters and of those members of the procession who crowded round him when he reached the *maidân*, the inference cannot be said to be drawn unreasonably.

There has been no failure of justice. The objections raised by the petitioner are technical and do not touch the merits. It is obvious that there are no merits in the prisoner's case, and that, doubtless, is one reason why he does not dispute the legality of his conviction. He is fully aware that he has been guilty of lawlessness, though he may disapprove strongly of the law. If such disapproval were to be accepted as an excuse for breaking the law, every

criminal would be able to avail himself of such a plea. All lawlessness is of the same quality though its evil consequences may differ widely in degree.

And it is incumbent upon all reasonable men to remember that the intentional lawlessness of otherwise well-balanced people, the direct consequences of which are of minor importance, may encourage indirectly such a disrespect for law and order as to induce others, less educated and less well-balanced, to commit those generally detested crimes of violence, which continue to disfigure the history of India.

If we were to send this case back to be retried, we should be placing the prisoner in jeopardy of being punished more severely, and this, in view of the wish which he has expressed, would, in our opinion, be unfair. The Rule therefore is discharged.

GHOSE J. I agree.

Rule discharged.

A. C. R. C.