CRIMINAL REVISION.

Before Rankin C. J. and Mallik J.

LACHHMI DEVI

v.

EMPEROR.*

1930

Dec. 4, 8.

Procession—Power of Commissioner of Police to prohibit and license processions and public assemblies—Sanction of the Governor-in-Council—Effect of declaring offence under s. 188 of the Indian Penal Code, cognisable and non-bailable—Complaint, if dispensed with—Disobedience of a legal order, if offence in itself—Calcutta Police Act (Beng. IV of 1866), ss. 62, 62A, 62B, 102A—Calcutta and Suburban Police Act (Beng. II of 1866), s. 39A—Calcutta and Suburban Police Amendment Act (Beng. III of 1910), s. 16—Indian Penal Code (Act XLV of 1860), s. 188—Code of Criminal Procedure (Act V of 1898), s. 195—Ordinance No. V of 1930, s. 11.

An order under sub-section 4 of section 62A of the Calcutta Police Act does not require previous sanction of higher authority and need not be publicly promulgated or addressed to individuals; the mere existence of an order, in writing, is sufficient.

Leakat Hossein v. *Emperor* (1) followed.

But it is not contemplated by that sub-section that the Commissioner of Police should be able to issue an order in writing prohibiting all public processions in the city and suburbs of Calcutta, nor does the sub-section give any power to the Commissioner of Police to license or permit processions or public assemblies. He may prohibit particular processions, or processions upon a particular occasion, or having a particular character or object, which it is necessary to prohibit for the preservation of public peace or public safety.

Leakat Hossein v. *Emperor* (1) approved of.

The mere fact that the sanction of the Governor-in-Council was taken contemporaneously with the order of the Commissioner of Police does not make the order bad.

It is not possible to say that, merely by making the class of offence contemplated by section 188 of the Indian Penal Code cognisable and non-bailable, the necessity of having a complaint in such a case is dispensed with.

Under section 188 of the Indian Penal Code, mere disobedience of an order does not constitute an offence in itself, it must be shown that the disobedience has or tends to a certain consequence.

CRIMINAL RULE.

The facts appear sufficiently from the judgment.

*Criminal Revision, No. 1136 of 1930, against the order of H. K. De, Presidency Magistrate, Calcutta, dated Nov. 11, 1930.

(1) (1913) I. L. R. 40 Calc. 470.

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Santoshkumar Basu (*Sureshchandra Talukdar* and *Jyotishchandra Guha* with him) for the petitioners. The Commissioner of Police has no power to prohibit all processions for all time to come. He can issue orders prohibiting particular class of processions for a period of seven days. The word "any" in the Calcutta Police Act cannot mean "all." Under the present order even a funeral procession is prohibited.

The next objection to the order is that sanction of the Governor-in-Council was taken in advance. Surely, the legislature never intended that an extension should be granted in advance. The Governor must be satisfied that there is a good ground for the order before he sanctions an extension of the order.

In this case the conviction under section 188 of the Indian Penal Code is illegal as there was no evidence that the petitioners had any knowledge of the order. *Abdul* v. *King-Emperor* (1). In any event, there was no evidence justifying the magistrate coming to a finding that the disobedience of the order tended to cause an affray.

Lastly, in the absence of any complaint by the Commissioner of Police, the magistrate had no jurisdiction to take cognisance of the alleged offence under section 188. That is covered by section 190 of the Criminal Procedure Code.

Debendranarayan Bhattacharya for the Crown. Ordinance No. V of 1930 makes the offence under question cognisable and non-bailable and so it has done away with the necessity of a formal complaint.

As to the order of the Commissioner of Police, it was good, because it was based on the expressed opinion of the Commissioner that any procession would endanger public peace. The power given to the Commissioner under the Act was sufficiently wide. Further, the sub-section does not state that the sanction of the Governor must be obtained at the expiry of seven days.

(1) (1926) 31 C. W. N. 340.

[RANKIN C. J. How could the magistrate come to the finding that the disobedience of the order would lead to an affray?]

The magistrate is competent to take judicial notice of the prevailing circumstances.

[RANKIN C. J. That may be the general intention of the order, but we have to find, as a fact, whether this disobedience did in fact tend to cause obstruction or affray.]

There is evidence that a large crowd assembled when the ladies were arrested.

Basu in reply. The Ordinance cannot dispense with the necessity of a complaint, as laid down in section 195 of the Criminal Procedure Code. The Ordinance certainly permits the police to arrest without warrant and it may also attract the application of Chapter XIV, of the Criminal Procedure Code, regarding information and investigation, *etc.* But section 173 makes it quite clear that the Ordinance does not repeal or in any way affect section 195, sub-section (*1*) of the Code of Criminal Procedure. The magistrate could take cognisance only on a complaint in writing of the public servant concerned or his superior, and in this case of the Commissioner of Police.

Cur. adv. vult.

RANKIN C. J. In this case, six women were found guilty of an offence under section 188, Indian Penal Code, and under section 62A (*4*) of the Calcutta Police Act (Beng. IV of 1866) and were sentenced each to simple imprisonment for four months under section 188, Indian Penal Code, no separate sentence being passed under the Police Act. It appears that the charge against them was that on Sunday, the 9th of November last, they were proceeding along a street singing a song and that, in this way, they constituted a procession—they having had no license from the Commissioner of Police to take out this procession. The defence of the accused persons before the Presidency Magistrate was that they were going along singing a *bhajan* song, that is to say, they were

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following one another at some distance in a certain amount of order, but not very much, and were engaged not in any political manifestation or anything harmful, but merely in singing *bhajan* songs. I understand that this sort of procession is not unknown and *bhajan* song has a sort of religious significance. The view taken by the Presidency Magistrate was, however, that the petitioners were not merely holding a kind of religious procession. He found that when they were stopped by the police and asked to desist, they not only refused to desist, but started shouting political cries, such as, "*Bande "Mâtaram*" and "*Gândhiki Jai*"; and they, having refused to discontinue what they were doing, were taken to the *thânâ*. Thereafter, they have been tried and convicted as I have already stated.

The learned advocate for the petitioners, at the time of obtaining this Rule, was asked by the Bench, of which I was a member, to ascertain whether, upon the question of bail, these petitioners would be willing to undertake to desist from singing this song or any other kind of song in procession until the question raised by the Rule could be determined. They having refused to give this undertaking, no order for bail was made at the time of the issue of the Rule. The petitioners have now been in prison for something under a period of one month.

At the hearing of the Rule, Mr. Basu for the petitioners took four points. First of all, he contended that the order which his clients were convicted of violating was an illegal order, not warranted by the enactments under which it purported to have been made, namely, section 62A of Bengal Act IV of 1866 and section 39A of Bengal Act II of 1866, sections which are in identical terms. He contended that that order was much wider than was contemplated by these statutes. The order is dated the 21st of April, 1930, and signed by the Commissioner of Police, Calcutta. It is as follows :—

To all to whom it may concern. Order under section 62A, Bengal Act IV of 1866, and section 39A, Bengal Act II of 1866. Whereas I consider that any procession or public assembly would at the present time seriously

endanger the public peace and public safety now, therefore, I, under the provisions of section 62A, clause (*d*) of Bengal Act IV of 1866 and section 39A, clause (*d*) of Bengal Act II of 1866 and with the sanction of the Governor-in-Council, do hereby prohibit any procession or public assembly within the town and suburbs of Calcutta, with effect from the date of this order and until further notice, except with the previous permission of the Commissioner of Police.

Upon that, Mr. Basu contended that these enactments did not justify any general prohibition of processions within the town and suburbs of Calcutta, but were intended to authorise the Commissioner of Police to prohibit some particular procession or type of procession apprehended as likely to take place. In the second place, he contended that, when an order is made by the Commissioner of Police, it is no doubt within the power of the Governor-in-Council to extend the period of seven days during which the order can be effective under the Act, but that it is not open to the Commissioner of Police, with the previous sanction of the Governor-in-Council, to make an order, indefinite as to time, of the character, which has been made. The third point taken by Mr. Basu was that, for a prosecution under section 188, Indian Penal Code, it is necessary that there should be a complaint either by the public servant making the order or by some superior officer of his and that, in the present case, what happened was that the petitioners were sent before a Presidency Magistrate merely upon a police report. Mr. Basu contended, therefore, that the provisions of section 195, Criminal Procedure Code, had not been complied with. In answer to this criticism, Mr. Debendranarayan Bhattacharya, who appeared for the Crown, referred us to an Ordinance, being Ordinance No. V of 1930, which by its 11th Article provides that—

The Local Government may, by notification in the local official gazette, declare that any offence punishable under section 188 of the Indian Penal Code, or any offence of criminal intimidation, when committed in any area specified in the notification, shall, notwithstanding anything contained in the Code of Criminal Procedure, 1898, be cognisable and non-bailable, and thereupon the said Code shall, while such notification remains in force, be deemed to be amended accordingly.

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Upon this, we were referred to a notification issued by the Government of Bengal, stating that—

> In exercise of the power conferred by section 11 of the Ordinance V of 1930, the Governor-in-Council is pleased to declare that any offence punishable under section 188, Indian Penal Code, and any offence of criminal intimidation, when committed within the areas specified in the Government of Bengal notifications Nos. 826 P.—D. and 830 P.—D., dated the 16th June, 1930, shall, notwithstanding anything contained in the Code of Criminal Procedure, 1898, be cognisable and non-bailable.

In the fourth place, Mr. Basu contended that, upon the evidence in this case, the Presidency Magistrate had no materials or no sufficient materials before him for holding that the disobedience of the order caused or tended to cause a riot or affray and that, consequently, he was not empowered, in any event, to sentence the petitioners to four months' imprisonment and also that, even if he came to the conclusion that there had been disobedience of a lawful order which caused or tended to cause obstruction to any person lawfully employed, the limit of punishment was one month's simple imprisonment or a fine which might extend to Rs. 200 or both.

It will be convenient for purposes of exposition to say that the second of the four objections which I have mentioned does not seem to me to be insuperable. I think it is true that the Calcutta Police Act contemplates that an order may be made by the Commissioner of Police which will subsist for seven days without further sanction and I think it contemplates that, at or before the end of the seven days, the Governor-in-Council may, by his action, extend the period. Further, if the Governor-in-Council does extend the period, there is authority for saying that the period may be extended in the manner which is now before us, namely, by extending it until further order. *Emperor* v. *Bhure Mal* (1). I am, however, not of opinion that there is any objection to the sanction of the Governor-in-Council being taken at the time of the making of the order. It is not necessary, but I see nothing from the language of the statute or from the subject matter to make me think

(1) (1923) I. L. R. 45 All. 526.

that the mere fact that action by the Governor-in-Council was taken contemporaneously with the making of the order would make that order bad. That objection cannot, therefore, be sustained.

I come now to the main point in the case, which I have stated as being the first of the points taken by Mr. Basu. Let us put aside any question of extension of the original order by the action of the Governor-in-Council and let us consider whether such an order, as we have before us, can be made under the Act by the Commissioner of Police. If it can be made, it will last only for seven days, and, at the end of that period, no doubt it can be extended upon proper steps being taken by the Governor-in-Council. Now, for this purpose, it is necessary to study carefully the sections of the Calcutta Police Act of 1866.

The sections with which we are concerned, namely, sections 62, 62A and 62B were substituted for the section which stood as section 62 in the original Act. I mention this merely to show that we are dealing not with the language of the Act of 1866, but with the language of section 16 of the Act of 1910 which was the date of the amending Act—the Calcutta and Suburban Police Amending Act, Bengal Act III of 1910. Now, looking to section 62, we find a power in the Commissioner of Police to make rules for the regulations of certain matters with the previous sanction of the Lieutenant-Governor, now the Governor-in-Council. Among the things, which may be regulated in this way, is "regulating traffic of all "kinds in streets and public places". Section 62 (*3*) says "every rule and alteration of a rule under this "section * * * * shall be published in the *Calcutta* "*Gazette* and in the manner prescribed by this Act for "the publication of public notices". That has reference to a clause—section 102A of the Calcutta Police Act, as it now stands. The next section 62A deals with various matters. First of all come certain powers given to the Commissioner of Police and, subject to his orders, to every police officer of a rank not inferior to that of Sub-Inspector. With a view to

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securing the public safety or convenience, any such police officer may give directions for securing, among other things, the orderly conduct of persons constituting processions and assemblies in streets. He may also prescribe the routes by which and the times at which any such procession may or may not pass. In the same way, he may regulate and control music, the beating of drums and other instruments, the blowing of horns or other noisy instruments in any street or public place. That is a power given to any police officer, not inferior to a Sub-Inspector, to give direction when he considers that such direction is necessary to secure public safety or convenience. In sub-section (*2*), we find a group of powers which the Commissioner of Police may, subject to the control of the Governor-in-Council, exercise, whenever he may consider it necessary to do so for the preservation of the public peace or public safety. These powers are all powers of prohibition under the control of the Governor-in-Council. The Commissioner of Police, by this section, may prohibit the carrying of swords or other offensive weapons in a public place, the collection or preparation of stones or missiles, the exhibition of figures or effigies in any public place, the public utterance of cries, singing of songs or playing of music. It is to be observed that, in making these prohibitions, not only is the Commissioner of Police subject to the control of the Governor-in-Council, but that the sub-section very carefully provides that these prohibitions are to be made by notification to be promulgated or addressed to individuals. This brings me to the third sub-section. Again, the power is given subject to the control of the Governor-in-Council; again the prohibitions to be made by the Commissioner are to be made by notification publicly promulgated or addressed to individuals; and, under this sub-section, the Commissioner may, in that way, prohibit the delivery of public harangues, the use of gestures or mimetic representations and the exhibition of pictures and certain things. He may do this whenever and for such time as he may consider necessary. The fourth

sub-section is the one with which we are immediately concerned.

> The Commissioner of Police may, also, by order in writing, prohibit any procession or public assembly, whenever and for so long as he considers such prohibition to be necessary for the preservation of the public peace or public safety : provided that no such prohibition shall remain in force for more than seven days without the sanction of the Governor-in-Council.

By sub-section (*5*), the Commissioner of Police, subject to the order of the Governor-in Council, may, by public notice, temporarily reserve for any public purpose any street or public place, and prohibit persons from entering the area, so reserved, save under conditions. Sub-section (*6*) makes a person liable to penalty according as he offends against the prohibition of one character or another as mentioned in the previous sub-sections. If the prohibition is made under sub-section (*4*), then the person contravening the order is liable to imprisonment, with or without hard labour, for a term which may extend to one month or to fine which may extend to one hundred rupees or to both. The only other matter, which need be noticed is that, under section 62B, in the case of certain offences, any magistrate or any police officer may require any person acting or about to act "contrary thereto" to desist or abstain from such action and, in case of refusal or disobedience, may arrest such person. The present case would come under clause (*b*), because it is provided that "in the "case of a notification issued under clause (*iv*) of the "said sub-section (*2*) * * * * or in the case of an order "issued under the said sub-section (*4*), any magistrate "or any police officer of or above the rank of Sub-"Inspector"—not any magistrate or any police officer —"may require any person acting or about to act "contrary thereto to desist" and so forth.

Now, it appears to me that it is most important, in order to arrive at a proper construction of sub-section (*4*), to notice, in the first place, that the power given by sub-section (*4*) is a power to be exercised when it is necessary for the preservation of the public peace or safety. Secondly, that the Commissioner of Police does not require the previous sanction of higher

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authority, and thirdly, and this is more important, that whereas sub-section (*2*) and sub-section (*3*) expressly provide for notification publicly promulgated or addressed to individuals, sub-section (*4*) merely requires the existence of an order of the Commissioner of Police so long as it is an order in writing. In a case, to which we were referred, namely, the case of *Leakat Hossein* v. *Emperor* (1), it was expressly pointed out by the Division Bench that there was no necessity for the publication or promulgation of the order in writing under sub-section (*4*). The clause, now in question, "requires that an order made "thereunder should be in writing; but it does not "require that public notice should be given of it." Now, interpreting sub-section (*4*), with the light to be derived from its context in the section, we have to ask ourselves whether it is contemplated by sub-section (*4*) that the Commissioner of Police should be able to issue an order in writing holding good for seven days prohibiting all public processions in the city and suburbs of Calcutta. I am of opinion that the sub-section gives him no such power and that the phrase "The Commissioner of Police may by order in writing "prohibit any procession or public assembly" has reference to some particular procession or to processions upon a particular occasion or having a particular character or object which it is necessary to prohibit for the preservation of the public peace or public safety. It is to be observed that processions and public assemblies are dealt with in the same breath. If it is open to the Commissioner of Police to make an order in writing prohibiting any procession in Calcutta, it is equally open to him to make an order in writing prohibiting any public assembly in Calcutta. It is open to him to do so of his own accord. He does not require to publish his order; he has merely to make the order. In my judgment, no such power was contemplated by the statute. Apart altogether from harmless processions, such as processions at a funeral, harmless public assemblies, such as the

(1) (1913) I. L. R. 40 Calc. 470.

ordinary service on a Sunday morning in a church, and so forth, one would not expect to find an order prohibiting all processions or prohibiting all public assemblies to be made in writing, for which there is no provision that it should be promulgated to the public. I have no doubt, therefore, that the order, which has been made in this case was in excess of the power conferred by the statute and not in conformity therewith. A closer examination of the order itself confirms me in this opinion. It will be observed that the order recites that the Commissioner of Police considers that any processions or public assembly would at the present time seriously endanger the public peace and public safety and that, having gone on to prohibit any procession or public assembly within the town of Calcutta and the suburbs of Calcutta, it concludes with the words "except with the previous "permission of the Commissioner of Police." It would, therefore, seem that, in some cases, it is contemplated that a procession or public assembly can be permitted within the town or suburbs of Calcutta without danger to public peace and safety. But the terms of this prohibition show that in purporting to follow the *ipsissima verba* of sub-section (*4*), the Commissioner of Police has, in effect, substituted a system of license or permission. Now, a system of license or permission is familiar in certain circumstances under the Indian Police Act of 1861, but there is no possible construction of the sub-section before us, namely, sub-section (*4*) of section 62A of the Act of 1866, which can be read as giving a power to the Commissioner of Police to license or permit processions or public assemblies. In my judgment, therefore, the first point taken by Mr. Basu is correct and the order which is the basis of this prosecution is altogether bad.

I will guard myself against any misapprehension that may arise from the circumstance that, until a procession is formed or begun, it is difficult to identify it or regard it as a particular procession. I have no doubt that the order which was held good in the case

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of *Leakat Hossein* (1), already referred to, was in substance such an order as is contemplated by sub-section (*4*). The point is that the sub-section is dealing with a prohibition upon particular occasions —the circumstances being such as to make it necessary for that occasion to prohibit the procession and I do not want it to be thought that this sub-section can be evaded by people who might merely say that of several or many people who intend to take out for a particular occasion a procession or processions, the Commissioner of Police is obliged to pick out one or more of them and prohibit his procession leaving the others unaffected. This sub-section is to be interpreted in a practical and reasonable way and I express no hesitation at all in saying that the type of order that was supported in *Leakat Hossein's* case (1) does not appear to me to be *ultra vires.*

On this view, it is strictly speaking, unnecessary to refer to the two remaining points which were made by Mr. Basu, but I think it desirable nevertheless to refer to them both. I fail to see that the Ordinance, to which we have been referred, *viz.*, Ordinance No. V of 1930 and the notification thereunder, making the offence under section 188, Indian Penal Code, cognisable and not bailable, gets rid of the requirements imposed by section 195 of the Code of Criminal Procedure. It has to be remembered that section 190 of the Code does not now stand exactly as it stood before 1923; and, if we follow out the consequences of making an offence under section 188 cognisable and non-bailable, we find that a police officer can arrest without warrant and we find that a police investigation may be commenced in respect of the offence. That brings us up to the point which is represented by section 173, Code of Criminal Procedure. When the investigation is completed, the officer-in-charge of the police station, by virtue of section 173, is to forward to a magistrate, empowered to take cognisance of the offence on a police report, a report in a certain form. An offence, which is within the terms of section 195,

(1) (1913) I. L. R. 40 Calc. 470.

is not an offence which any magistrate is empowered to take cognizance of upon a police report. By section 195, sub-section (*1*), clause (*a*), no court shall take cognizance of any offence punishable under sections 172 to 188, Indian Penal Code, except on the complaint in writing of the public servant concerned, or of some other public servant to whom he is subordinate. Now, as section 190 stood before 1923, there was a doctrine to the effect that a report by the police in a non-cognizable case was not a police report within the meaning of clause (*b*) of section 190, sub-section (*1*) and the definition of complaint in the Indian Penal Code, which excluded from the category of complaint a report by a police officer, was held not to prevent a report in a non-cognizable case from being regarded as a complaint. That state of the law has been materially altered and it seems to me that it is not now possible to say that merely by making this class of offence cognizable and non-bailable, the necessity has been dispensed with of having a complaint, in such a case as this, by the superior of the public servant whose order has been disobeyed.

The last point with which I deal is that, in the present case, the magistrate has said that the offence of these petitioners tended to cause an affray. The reasons for this conclusion have to be sought, however, in the evidence. It would appear in this case that these women were going down a street at a not very busy time and were not conducting themselves in any way which, apart from the prohibition of processions, would have been regarded as an offence to the public or to any political party or to any other section of the public. It is true that when they were asked to desist, they appear, from the magistrate's finding, to have been singularly unreasonable. It is true also that, when they were invited in this Court to forego singing in procession until it could be determined whether the prohibition of such conduct was lawful, they took the somewhat curious course of insisting either on being kept in jail or on acting on the footing that the order of the Commissioner of Police was bad.

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Still there must be some definite evidence under section 188, Indian Penal Code, to justify the magistrate in classifying them under one group or another of the cases with which section 188 deals. It is to be observed that under section 188 mere disobedience of an order does not constitute an offence in itself. There must be a disobedience of the order and then it must be shown that the disobedience has a certain consequence or tends to some result. If it merely tends to cause obstruction, though simple obstruction, then a month's simple imprisonment may be given. If it tends to cause affray, the imprisonment may extend to six months. The magistrate in this case proceeds upon this consideration. "I came to the "conclusion," he says in his explanation, "that the "disobedience of the order tended to cause an affray "as there were people at the time and there was a "likelihood of a conflict between the police and the "public as has often happened in the present times" * * * Even if we have regard, for this purpose, to what was likely to happen when the petitioners were arrested, I cannot think that it can be right under section 188, Indian Penal Code, to classify them in the graver category, merely upon the general consideration that nowadays if any one is arrested it may lead to a riot or affray. I do not think that this part of the decision of the magistrate is properly based upon the evidence.

The result is that this Rule is made absolute and the applicants before us must be acquitted and discharged from imprisonment.

MALLIK J. I entirely agree.

Rule absolute.

S. M.