APPELLATE CRIMINAL.

Before Suhrawardy and Costello JJ.

FAZLAR RAHAMAN

v.

EMPEROR.*

1930

May 2, 5.

Discharge—Discharge, if competent before recording evidence—Preliminary enquiry under s. 476, Cr. P. C., if must be by court—Complainant, if must be given an opportunity to prove his case—Code of Criminal Procedure (Act V of 1898), ss. 253 (2), 476—Indian Penal Code (Act XLV of 1860), s. 211.

In a warrant case, a magistrate is competent to discharge the accused under section 253 of the Code of Criminal Procedure at any stage, even before recording any evidence or in the course of recording evidence, if he is of opinion that the charge is groundless, although, where there is reasonable ground for believing that an offence has been committed, the magistrate should not dismiss the case, because the complainant is absent. In such a case, once the machinery of law has been set in motion, the right of arresting its progress rests with the State alone.

Maung Thu Daw v. *U Po Nyun* (1), *Govinda Dass* v. *Dulall Dass* (2), *Sheriff Sahib* v. *Abdul Karim Sahib* (3) and *V. R. Alexander* v. *R. W Connors* (4) referred to.

Before ordering the prosecution of a complainant under section 211 of the Indian Penal Code, his complaint should be finally and judicially disposed of. But where the magistrate has held that the case against the accused is groundless and has before him the report of the police in support of his view, it is not necessary that he should again ask the complainant to prove his case which the magistrate has disbelieved even before he examines the complainant and his witnesses.

Lalji Gope v. *Giridhari Chaudhury* (5) distinguished.

The "preliminary enquiry" referred to in section 476, cl. (*l*) of the Code of Criminal Procedure need not necessarily be by the court itself. The nature, extent and method of this enquiry is in the discretion of the court. A magistrate making a complaint may ask the police or the Criminal Investigation Department to enquire and report.

Chamari Singh v. *Public Prosecutor of Gaya* (6), *Emperor* v. *Waman Dinkar Kelkar* (7), *Raja Rao* v. *King-Emperor* (8), *Sakhi Rai* v. *Emperor* (9) and *Shabbir Hasan* v. *Emperor* (10) referred to.

*Criminal Appeals, Nos. 934 and 935 of 1929, and Criminal Revision, No. 29 of 1930, against the order of T. Roxburgh, Chief Presidency Magistrate of Calcutta, dated Nov. 8, 1929.

(1) (1927) I. L. R. 5 Ran. 136.
(2) (1883) I. L. R. 10 Calc. 67.
(3) (1927) I. L. R. 51 Mad. 185.
(4) (1916) 20 C. W. N. 698.
(5) (1900) 5 C. W. N. 106.
(6) (1924) I. L. R. 4 Pat. 24.
(7) (1918) I. L. R. 43 Bom. 300.
(8) (1926) I. L. R. 50 Mad. 660.
(9) (1918) 49 Ind. Cas. 917.
(10) (1927) 105 Ind. Cas. 810.

A complaint under section 476 of the Code of Criminal Procedure with regard to an offence under section 211 of the Indian Penal Code can be made both against the person who institutes a criminal proceeding as well as a person who causes such proceeding to be instituted.

Shabbir Hasan v. *Emperor* (1) and *King-Emperor* v. *Syed Khan* (2) referred to.

CRIMINAL APPEALS by the accused and CRIMINAL RULE obtained by Aziz Mian, the complainant.

The facts of the case are sufficiently set out in the judgment.

Mahendrakumar Ghosh for the appellants and the petitioners.

Debendranarayan Bhattacharya for the Crown.

Cur. adv. vult.

SUHRAWARDY J. These two appeals and the revision case are connected and arise out of the same matter. Aziz Mian, the appellant in appeal No. 935 and the petitioner in revision case No. 29 of 1930, filed a complaint before the Chief Presidency Magistrate against one Afaq Ali, on the allegation that he had given him Rs. 50 to be made over to Fazlar Rahaman, the appellant in appeal No. 934 of 1929, and the money was misappropriated by Afaq Ali. The learned Magistrate ordered the issue of a warrant on a charge under section 406 of Indian Penal Code. The case was adjourned from time to time, as the warrant was not returned. On the 1st October, 1929, the warrant came back executed, but as the accused did not appear a proclamation was ordered to be issued. The order was thus recorded: "Proclamation dates; date of publication, 21st "October. Put up on 28th October, 1929. Date of "appearance, 21st November, 1929." On the 21st October, the accused appeared in court, surrendered and was released on bail. The order passed was "Recall proclamation. Inform complainant, fixing "date, 28th October, 1929." It was the date originally fixed for the matter to be put up before the Magistrate, after the publication of the

(1) (1927) 105 Ind. Cas. 810. (2) (1925) I. L. R. 3 Ran. 303.

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proclamation. On the 28th October, the following order was passed: "Complainant absent, said to "have gone to his native country. Accused says that "the complainant was seen in court. Pleader for "complainant now asks for a month's time. This is "absurd. The accused is discharged under section "254, Criminal Procedure Code." The certified copy of the order which has been placed before us shows that the accused was discharged under section 203, but it appears from the Magistrate's explanation that the order was passed under section 253; and, as the original record is not before us, we must take it that the order passed by the Magistrate on the 28th October, 1929, was under section 253; and, it is conceded that, if it was passed under that section, it must have been passed under clause (*2*) of that section. Thereafter, Afaq Ali applied to the Magistrate to prosecute the complainant Aziz Mian, for having brought a false case against him. The Magistrate examined Afaq Ali and sent the matter to the Criminal Investigation Department for enquiry and report. On receipt of the report, the learned Magistrate lodged a complaint under section 476 of the Code of Criminal Procedure in the court of the Third Presidency Magistrate for prosecuting Aziz Mian and Fazlar Rahaman under section 211 of the Indian Penal Code. The two appeals are by Aziz Mian and Fazlar Rahaman against this order passed by the Magistrate under section 476. The revision case is directed against the order of the Magistrate, dated the 28th October, 1929. It will be convenient to deal with the revision case first.

It is argued on behalf of the petitioner that the Magistrate was not justified in passing the order, discharging the accused under section 253 (*2*) in this case. The charge against the accused was cognizable and non-compoundable and hence the Magistrate could not pass an order under section 259. It is contended that, in a cognizable and non-compoundable case, the Magistrate is bound to adjourn the case even if the complainant is absent and to carry on the

prosecution on behalf of the State; and in support of this case reliance is placed on the case of *Maung Thu Daw* v. *U Po Nyun* (1). There it was held, and rightly held, that where there is reasonable ground for believing that an offence has been committed, the Magistrate should not, because the complainant is absent, dismiss the case and discharge the accused, but the final responsibility for the conduct of such case rests with the State; and once the machinery of law has been set in motion, the right of arresting its progress rests with the State alone. This brings us to the consideration of the question as to whether there was reasonable ground for believing that an offence had been committed. The case brought by the complainant against the accused is of a class of cases which are fairly common in Calcutta and such cases by their recurrence have won the name of "Noakhali "cases." It is to be noted that both parties hail from Noakhali. In such cases, the usual complaint is that the complainant had entrusted some money to the accused, who was going home, to make it over to some one in the native village of the complainant, but the accused, instead of so doing, appropriated the money to himself. Some of these cases may be true, but the learned Magistrate, who has wide experience of these matters, observes that many of them are brought for the purpose of satisfying private grudge. In the present case, the defence of the accused was that he had never come to Calcutta and had never been entrusted with money by the complainant; that he was the maternal uncle-in-law of Fazlar Rahaman and had some disputes with him regarding some land and that this case was brought against him by Fazlar Rahaman, through the complainant, for the purpose of harassing him and putting him in trouble. The learned Chief Presidency Magistrate is of opinion that the case against the accused is not true, considering the conduct of the complainant and the other circumstances in the case. It has further been broadly argued that the Magistrate had no power

(1) (1927) I. L. R. 5 Ran. 136.

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under section 253 (*2*) to discharge the accused, without hearing the evidence for the prosecution, merely because the complainant was absent on the date of hearing. If the magistrate is satisfied that *primâ facie* there is a case against the accused or has reason to suspect that an offence has been committed, he has power to proceed under section 252 of the Code of Criminal Procedure: but if, on the date of hearing, he has reason to suspect that the case is a false one and that there is no reasonable ground for suspecting that an offence has been committed, he has the right to proceed under section 253, which is couched in wide terms. That section makes it clear that if a magistrate, after taking evidence under section 252, finds that no case has been made out, he may discharge the accused; and it further says that nothing in that section (that is, taking of the evidence under section 252 and making such examination of the accused and finding that no case has been made out against the accused)—shall be deemed to prevent the magistrate from discharging the accused at any previous stage of the case, if, for reasons to be recorded by such magistrate, he considers the charge to be groundless. Under the first clause, the magistrate may discharge the accused, if, after recording the evidence for the prosecution, he finds that no case has been made out against him. Under the second clause, he may discharge the accused at any stage, even before recording any evidence, if he considers the charge to be groundless. The wording of the section is so plain that it is hardly necessary to cite any authority for the view thus expressed. But it has been so held in *Govinda Dass* v. *Dulall Dass* (1), where the learned Judges say "Having regard to the terms of section "259 we are of opinion that in warrant cases not "coming within that section, except under the last "clause of section 253, which is not applicable, a "magistrate is not competent to pass an order of "dismissal, or discharge in consequence of the absence "of the complainant." It is further remarked that

(1) (1883) I. L. R. 10 Calc. 67, 68.

a magistrate can pass an order of dismissal, or discharge an accused in consequence of the absence of the complainant under the last clause of section 253. Our attention was also drawn to a recent decision of the Madras High Court in *Sheriff Sahib* v. *Abdul Karim Sahib* (1). In that case, the magistrate had discharged the accused and refused to examine all the witnesses cited by the complainant, holding that no case had been made out against him. It was held that the magistrate could not hold that no case has been made out against the accused without examining all the witnesses for the prosecution; and that, if he purported to discharge the accused under the last clause of section 253, he did not in his order say that the charge was groundless, which was a different thing from saying that a case had not been made out. It is further observed there that where a complaint *primâ facie* discloses an offence, a magistrate cannot hold the charge to be groundless, unless he knows what is the sort of evidence that is going to be adduced to prove it. The rule that can be deduced from this case is that, where the magistrate proceeds to take evidence, he must take the whole of the evidence before holding that no case has been made out against the accused. I do not quarrel with this view, but I hold that he can discharge the accused at any stage, before recording any evidence, or if, in the course of recording evidence, he is of opinion that the charge is groundless. See the case of *V. R. Alexander* v. *R. W. Connors* (2). The order of the learned Chief Presidency Magistrate does not contain the word "groundless," but reading it as a whole and considering it with the explanation submitted by the magistrate, which we are bound to do under section 441 of the Criminal Procedure Code, it seems that he believed that the charge was groundless, in view of the absence of the complainant, the statement made by the accused and the further fact that no steps were taken by the complainant to have the sale proclamation issued. The learned magistrate further disbelieved

(1) (1927) I. L. R. 51 Mad. 185. (2) (1916) 20 C. W. N. 698.

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the story that the complainant had gone to his native country and he found at the time when he passed the order that the case was one of the class which he characterises as Noakhali cases and was brought for the purpose of settling private disputes. This ground accordingly must fail.

The next ground taken in the revision case by Mr. Ghosh is that full opportunity should have been given to the complainant before ordering his prosecution for an offence under section 211. It appears that, on the 6th December, the complainant applied to the learned Magistrate to revive his complaint which the Magistrate declined to do. It is not necessary for us to consider that order. The present Rule is directed against the order discharging the accused. Mr. Ghosh has relied on certain cases, of which it is enough to cite one, namely, the case of *Lalji Gope* v. *Giridhari Chaudhury* (1), where it was held that the magistrate does not exercise a proper discretion, who, on receipt of a police report that the complaint is false, forthwith orders the complainant to be prosecuted under section 211 of the Indian Penal Code and rejects the prayer of the complainant for hearing his complaint. But if the magistrate examines the complainant and his witnesses and comes to the conclusion that the charge is false, he can then proceed under section 476 of the Code of Criminal Procedure. This case and other cases similar to it proceed on the assumption that the complaint of the complainant has not been finally and judicially disposed of. But where the magistrate has held that the case against the accused is groundless and has before him the report of the police in support of his view, it is not necessary that he should again ask the complainant to prove his case, which the magistrate has disbelieved, even before he examines the complainant and his witnesses. The procedure recommended in cases ordering prosecution under section 211 is that the complainant if his complaint is pending should be given an opportunity of proving his case before he is directed to be

(1) (1900) 5 C. W. N. 106.

prosecuted. In the present case, the complaint had been finally disposed of by the Magistrate under section 253 and, therefore, there was nothing before him into which he should make any further enquiry. This ground also fails, and in this view the Rule is discharged.

With regard to the appeal by the complainant, Aziz Mian, the real ground is that no complaint should have been made under section 476 before the complainant had been given an opportunity of proving his complaint. This point has already been disposed of. The other point raised is that, before making a complaint under section 476, the learned Magistrate had asked the Criminal Investigation Department to report on the complaint. This inquiry was a preliminary enquiry as contemplated by section 476. It is argued, on behalf of the appellant, that the preliminary enquiry under section 476 should be conducted by the court and not by any other agency as is provided for by section 202 of the Code of Criminal Procedure. The wording of section 476 is so plain that it can hardly be argued that the words "such preliminary enquiry" in the section should be qualified by reading into it "by the court itself"—words which the legislature has not thought fit to use. The section simply says that if the court is of opinion that an offence has been committed in respect of a judicial proceeding before it, such court may, after such preliminary enquiry, if any, as it thinks necessary, record a finding, *etc.* This section gives the discretion to the court to hold or not to hold a preliminary enquiry. If the court is of opinion that no preliminary enquiry is necessary, it may at once make the complaint. If, on the other hand, it thinks that it is desirable to have a preliminary enquiry, he may adopt any course for the purpose of such an enquiry. The words "preliminary enquiry" under section 476 may be co-extensive with, if not wider, than the words "enquire into the case" in section 202 of the Criminal Procedure Code. There is no direct authority on this point, but the question did come up

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for observation in some cases. In *Chamari Singh* v. *Public Prosecutor of Gaya* (1), the Sessions Judge made a complaint under section 476 and sent the case to the magistrate to enquire if any offence was committed by the accused and, if so, to prosecute him under certain sections of the Criminal Procedure Code. This procedure the learned Judges condemned and observed: "It is for the court, acting under "section 476, to make any enquiry that is necessary "and then to make a complaint against the person "or persons who, he is satisfied, have committed an "offence." They do not mean to lay down that it is the court acting under section 476 which must hold the enquiry. What they mean is that the court, acting under that section, should make an enquiry and make a complaint as the result of such enquiry and not delegate the function to another court, for they observe that this section does not contemplate that the court should send the case to a magistrate for enquiry as to whether an offence has been really committed and for prosecution, if the magistrate is so satisfied. This decision does not help the appellant, as it only lays down that an enquiry preliminary to a complaint should be made by the court, which does not necessarily mean by the court itself examining witnesses. The case of *Emperor* v. *Waman Dinkar Kelkar* (2) is not also in point. It does not support the appellant, but it may be turned against him on some of the observations made in that case. There the Assistant Collector, who had sanctioned the prosecution, made a complaint by holding a preliminary enquiry in the shape of a part by himself and the rest of it by the Criminal Investigation Department. It was held that the Assistant Collector was bound to hold the whole enquiry himself as he had started it. In *Raja Rao* v. *King-Emperor* (3), the point on behalf of the accused was that they were not allowed at the preliminary enquiry to cross-examine the witnesses produced against them. Waller J. observed "What a court has

(1) (1924) I. L. R. 4 Pat. 24, 33. (2) (1918) I. L. R. 43 Bom. 300.
(3) (1926) I. L. R. 50 Mad. 660, 661-662.

"to decide under section 476 is, (*a*) whether an offence "of the kind contemplated appears to have been "committed; and (*b*) whether it is expedient in the "interests of justice that it should be further enquired "into. In order to arrive at a decision, the court may, "if it thinks fit, hold such preliminary enquiry as it "considers necessary. The nature, method and "extent of the preliminary enquiry are, it seems to me, "entirely at its discretion." This observation of the learned Judge is against the appellant in so far as it holds that "the nature, method and extent" of the enquiry are in the discretion of the judge. The method adopted in the present case by the learned Magistrate was to have an enquiry made by the Criminal Investigation Department. The only case which lends some support to the appellant's contention is the case of *Sakhi Rai* v. *Emperor* (1), a decision of a single Judge. The facts shortly stated were that a person lodged a complaint before the Subdivisional Officer, who, without examining him on oath, ordered the complaint to be put up with the police report. He subsequently passed an order, calling upon the complainant to show cause why he should not be prosecuted under section 211. In showing cause, the complainant produced several witnesses, who were examined under the order of the Subdivisional Officer, by different subordinate magistrates. On a perusal of the police report and the evidence recorded by the magistrates, the Subdivisional Officer made a complaint against a witness for the complainant under section 476 on a charge under section 193 of the Indian Penal Code. The learned Judge held that the complainant could be called upon to show cause why he should not be prosecuted only under section 476 and that the preliminary enquiry to be held under section 476 could not be directly held by any other magistrate, except the Subdivisional Officer himself, who, on the police report, thought that the complaint was a false one. In that point of view, the learned judge was of opinion that the evidence recorded by the Subordinate Magistrate was recorded without

(1) (1918) 49 Ind. Cas. 917.

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jurisdiction and could not form the basis of prosecution. On the facts of that case, the decision is right, as the Subdivisional Officer could not, without entrusting the holding of the preliminary enquiry to a subordinate magistrate, merely delegate the work of recording evidence to such magistrate, while himself assuming to hold the preliminary enquiry. But if the learned judge meant to lay down the law generally that the preliminary enquiry could not be made except by the court acting under section 476, I beg to express my respectful dissent. The question now before us was not directly raised in that case and the observation made by the learned Judge must be taken in connection with the particular facts of that case. On the other hand, a decision of the Allahabad High Court in *Shabbir Hasan* v. *Emperor* (1) supports the view I have expressed. Dalal J. is reported to have there said, "If the civil court so "desires, an enquiry may be ordered by the police, "but, in that case, when the police papers arrive, the "civil court has to determine whether it is necessary "to take action against particular persons under "section 476." The result of an examination of these cases and of the consideration of the words of section 476 itself is that the preliminary enquiry mentioned in that section may be conducted by the court either by itself or by any other method available. This appeal accordingly fails and is dismissed.

The next Appeal (No. 934 of 1929) is by Fazlar Rahaman, who was not the complainant, nor does it appear from the record that he was in any way connected with the complaint. Afaq Ali's case is that this man was the wire-puller behind the screen. His case is that he had a long-standing dispute with the appellant Fazlar Rahaman for possession of a plot of land in their native country and that the complainant Aziz Mian was set up by this appellant to lodge a false complaint against him. The Criminal Investigation Department held an enquiry into this matter and reported against both. On receipt of the report, the learned Chief Presidency Magistrate said

(1) (1927) 105 Ind. Cas. 810.

that it was expedient, for the ends of justice, that an enquiry should be made into an offence under section 211 of the Indian Penal Code against both. Under that section, a person who institutes a criminal proceeding, as also a person who causes such proceeding to be instituted may both be guilty of an offence under that section. The question before us is whether this Fazlar Rahaman can be said to have committed an offence in or in relation to a proceeding in the court of the Chief Presidency Magistrate within the meaning of section 476 of the Code of Criminal Procedure. That section is not restricted to the party making the complaint or actually before the court, but is wide enough to include any person who appears to have committed an offence mentioned in section 195 (*1*) (*b*) which is not restricted to parties to the proceeding like clause (*c*) of that section. The court has, therefore, jurisdiction to prosecute a person who causes a false complaint to be lodged. All that section 476 requires is that the court should be satisfied that it is expedient in the interest of justice that an enquiry should be made into an offence which appears to it to have been committed in or in relation to a judicial proceeding. It does not speak of a party to the proceeding. An offence enumerated in section 195 (*1*) (*b*) may be committed by a person who is not a party to the proceeding, but if the court is satisfied that such an offence has been committed, in relation to a judicial proceeding, it can lodge a complaint under section 476 against any person committing the offence. See *Shabbir Hasan* v. *Emperor* (1). We agree with the view taken by the Full Bench of the Rangoon High Court in *King-Emperor* v. *Syed Khan* (2). We think, therefore, that the order passed by the Chief Presidency Magistrate sanctioning the prosecution of Fazlar Rahaman is not illegal. This appeal also is accordingly dismissed.

COSTELLO J. I agree.

Rule discharged. Appeals dismissed.

A. C. R. C.

(1) (1927) 105 Ind. Cas. 810. (2) (1925) I. L. R. 3 Ran. 303.