CRIMINAL REVISION.

Before Edgley J.

1940

April 5.

ABU HUSSAIN SHAIKH

v.

EMPEROR.*

Breach of the Peace—*Establishment of rival* hât—*Order forbidding the public at large to frequent new* hât, *if legal—Publication of order—Code of Criminal Procedure (Act V of 1898), ss. 134, 144.*

A Magistrate may, in the circumstances set forth in sub-s. (*1*) of s. 144 of the Code of Criminal Procedure, not only direct an individual to abstain from a certain act or acts, but may also issue a similar direction to members of the public generally, provided, in the latter case, the prohibition is limited to occasions on which the members of the public may frequent or visit a particular place.

The law does not contemplate the prohibition of the frequenting or visiting of the particular place to which reference is made in sub-s. (*3*), but the prohibition of some act on an occasion on which such place is visited or frequented.

Ashutose Roy v. *Harish Chandra Chattopadhya* (1) and *Abdul Majid Basunia* v. *Nripendranath Mazumdar* (2) dissented from.

The place covered by the order and also the act prohibited should be described with reasonable precision whether such place be an entire district or a particular street in a town and whatever the nature of the prohibited act may be.

Nagendra Nath Biswas v. *Rakhal Das Sinha* (3) and *Niharendu Datta Majumdar* v. *Emperor* (4) relied on.

The promulgation of an inadequate précis of a prohibitory order in the manner indicated by s. 134 of the Code is insufficient to sustain a conviction under s. 188, Indian Penal Code for disobedience of that order, unless it is shown that the accused had full knowledge of the original prohibitory order.

Parbutty Charan Aich v. *Queen Empress* (5) relied on.

RULE obtained by the accused for revision of their conviction under s. 188, Indian Penal Code, for disobedience of a prohibitory order.

*Criminal Revision, No. 33 of 1940, against the order of S. Sen, Sessions Judge of Khulna, dated Dec. 1, 1939, affirming the order of Suresh Chandra Das Gupta, Subdivisional Magistrate of Khulna, dated Sep. 14, 1939.

(1) (1924) 29 C.W.N. 411.
(2) (1934) 38 C.W.N. 556.
(3) (1918) 23 C.W.N. 141.
(4) I. L. R. [1939] 2 Cal. 507.
(5) (1888) I. L. R. 16 Cal. 9.

The material facts of the case and the arguments in the Rule are sufficiently stated in the judgment.

Sudhangsu Sekhar Mukherjee and *Amaresh Chandra Roy* for the petitioners.

Anil Chandra Ray Chaudhuri and *Nirmal Kumar Sen* for the Crown.

EDGLEY J. This Rule is directed against an order, dated December 1, 1939, made by the learned Sessions Judge of Khulna, by which he affirmed the conviction of the petitioners under s. 188 of the Indian Penal Code.

The case for the prosecution was to the effect that the petitioners had disobeyed an order promulgated by the Subdivisional Magistrate of Khulna prohibiting the holding of a *hât* at Domraon, which had been established as a rival *hât* to another *hât* which is known as the Gazirhat. It was alleged that the prohibitory order was issued by the Subdivisional Magistrate on May 8, 1939, and that thereby certain specially named persons and the public generally had been forbidden to hold the rival *hât* at Domraon on Fridays and Mondays and had also been ordered to abstain from certain other acts set forth in the order. It was alleged that this order had been duly promulgated in the locality on May 12, 1939, but that, in spite of its promulgation, the petitioners (who are members of the general public) had disobeyed it and had, therefore, rendered themselves liable to prosecution under s. 188 of the Indian Penal Code.

The case for the defence was mainly to the effect that the order had not been disobeyed and that, in any case, it was an invalid order and had not been properly promulgated in accordance with the provisions of the law.

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The case for the defence was rejected by both the Courts below and the petitioners were convicted under s. 188 of the Indian Penal Code and were sentenced to pay fines or, in default, to undergo various periods of imprisonment.

Two points have been pressed by the learned advocate for the petitioners in connection with this Rule. In the first place, he contends that the order was not properly promulgated in accordance with the provisions of the Code of Criminal Procedure and he further contends that the order itself is invalid, as it is not in proper form and gives insufficient information to the members of the public regarding the acts from which they had been ordered to abstain. In this connection, it may be mentioned that these arguments are mainly based on the assumption that the notice which was actually promulgated was not the order recorded by the learned Magistrate on May 8, 1939, but an inadequate précis thereof contained in a *parwânâ*, dated May 9, 1939. It may be noted that the learned advocate does not contend that disobedience of the order did not tend to cause the requisite consequences for which provision is made in s. 188 of the Indian Penal Code.

As regards the promulgation of the order it appears that, on May 8, 1939, the learned Subdivisional Magistrate came to the conclusion that it was necessary to issue a prohibitory order restraining certain persons and the public generally from holding or attending the rival *hât* at Domraon and he drew up a formal order with regard to this matter which is in the following terms :—

Whereas I am satisfied from a report of the Sub-Inspector of Police of Terokhada police station, dated May 6, 1939, endorsed by the Circle Inspector of Police, Sadar, dated May 6, 1939, that a rival *hât* is being held at Domra, police-station Terokhada, within the local limits of my jurisdiction, at a distance of less than a mile from the old and long established *hât* at Gazirhat, on Mondays and Fridays (*i.e.*, the dates on which Gazirhat is held) whereby the public tranquillity is being disturbed, for which breach of the peace, danger to human life, public safety, riot and affray are imminent and whereas immediate prevention and speedy remedy of such disturbance is desirable, I do hereby direct under s. 144, Criminal Procedure

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Code, the persons named in the margin and the public in general, when frequenting and visiting the said *hât* at Domra from the date of promulgation of this order, to abstain from holding or attending the rival *hât* at the abovenamed place at Domra on Mondays and Fridays and not to do any unlawful acts by seizing or restraining traders and boatmen coming to Gazirhat and threatening or committing violence to the people attending Gazirhat or to commit any breach of the peace or disturb public tranquillity.

Given under my hand and the seal of this Court this May 8, 1939.

K. N. Majumdar,
Subdivisional Magistrate, Khulna.
8-5-39.

Thereafter, on May 9, 1939, certain *parwânâs* were issued to the Sub-Inspector of Police in charge of the Terokhada police-station, which purported to be orders under s. 144 of the Code of Criminal Procedure. In this case, we are only concerned with one of these *parwânâs*, Ex. 1, which was addressed to the public generally. This *parwânâ* is in the vernacular and is to the following effect :—

To the public at large.

It is hereby made known to you that there is every likelihood of a serious breach of the peace as there is an existing dispute regarding the establishment of a rival *hât* to the Gazirhat in *mouzâ* Domraon between the proprietor of the said Gazirhat and the persons who desire to establish the said new *hât*.

I do hereby forbid you to frequent the said new *hât* which is being held on Mondays and Fridays in *mouzâ* Domraon within the jurisdiction of the Terokhada police-station.

Fixed date May 23, 1939.

Given under my hand and the seal of the Court, this May 9, 1939.

To—Officer-in-Charge, Terokhada police-station, for service and return.

K. N. Majumdar,
Subdivisional Magistrate, Khulna.
9-5-1939.

On the back of the abovementioned document is endorsed a service return in the handwriting of the Sub-Inspector to the effect that the notice had been duly promulgated and its contents had been explained verbally. It was further stated that the general public and the *hâturiâs* (who admittedly are the persons concerned in organising the rival *hât*) had been warned not to violate the order. The notice was said to have been promulgated on May 12, 1939, between the hours of 9 a.m. and 12-30 p.m.

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The judgments of both the Courts below contain findings to the effect that the prohibitory order made by the learned Subdivisional Magistrate on May 8, 1939, was duly served, but it does not appear that, in arriving at those findings, either the learned Magistrate or the learned Sessions Judge considered the effect of the service return which appears on the back of the *parwânâ*, Ext. 1.

In this connection, it is pointed out by the learned advocate for the petitioners that the record indicates that the order, dated May 8, 1939, must have been made before the public had actually begun to assemble at the Domraon *hât* and he contends that in the form, in which it was actually promulgated, it was illegally directed to the public generally without regard to the limitation imposed by sub-s. (*3*) of s. 144. He argues that an order under s. 144 of the Code of Criminal Procedure, which is addressed to the public generally, is only valid: (*i*) if it is issued at a time when the members of the public, whom it is sought to restrain from doing certain acts, are actually frequenting or visiting a particular place and (*ii*) if it is addressed to the limited section of the public who may have occasion to visit or frequent the prohibited area.

In support of the above contention reliance is placed upon certain observations made by Mukerji J. in the case of *Ashutose Roy* v. *Harish Chandra Chattopadhya* (1), which are in the following terms :—

> Although cl. (*3*) of s. 144 provides that an order under this section may be directed to particular individuals or to the public generally when frequenting or visiting a particular place, it does not provide for the issue of an order to the public generally except as qualified by the last line of the clause. The order can only be issued to the public generally when frequenting or visiting a particular place. This order in so far as it directs the public in general to abstain from attending the *hât* is bad, since it is not until the public attend the *hât* that the order can be binding on them. They cannot be forbidden by the order to do an act, when the order cannot be addressed to them until after they have done that act.

Mukerji J. adhered to these views in a later case: *Abdul Majid Basunia* v. *Nripendranath Mazumdar* (2). It appears, however, that the main

(1) (1924) 29 C.W.N. 411, 413. (2) (1934) 38 C.W.N. 556.

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grounds on which both these decisions were based had no connection with the subject matter of the above-mentioned observations, and this being the case, these observations must admittedly be regarded as *obiter dicta*.

In this connection, Mr. Mukherjee, who appears on behalf of the petitioners, admits that, if the view expressed in the abovementioned observations were correct, it would render it impossible in many cases to prevent any apprehended danger unless the names of the persons threatening trouble were actually known to the Magistrate at the time when he issued his order, as no order could be issued against unknown persons whom it was considered desirable to restrain unless such persons had actually assembled at a particular place and a Magistrate with the requisite powers happened to be present there at the critical time. In my view, the language of the Code does not warrant such a narrow interpretation. The second portion of s. 144(*1*) provides that a Magistrate duly empowered—

> may, by a written order stating the material facts of the case and served in the manner provided by s. 134, direct any person to abstain from a certain act or to take certain order with certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquillity, or a riot, or an affray.

It is further provided by sub-s. (*3*) :—

> An order under this section may be directed to a particular individual, or to the public generally when frequenting or visiting a particular place.

In my view, the plain meaning of sub-s. (*3*), read in the light of sub-s. (*1*), is that, in the circumstances set forth in sub-s. (*1*), a Magistrate may not only direct an individual to abstain from a certain act or acts but may also issue a similar direction to members of the public generally, provided in the latter case the prohibition is limited to occasions on which the members of the public may frequent or visit a particular place. In other words, it would not be

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legal to issue a general prohibition to the public to abstain from a certain act, but an order to the public generally to abstain from a certain act on the occasions when they happened to visit a particular place would be valid. The language is also sufficiently wide to cover residents in a particular locality, but, in either case, it is, of course, essential that the place covered by the order and also the act prohibited should be described with reasonable precision, whether such place be an entire district or a particular street in a town and whatever the nature of the prohibited act may be. For instance, if it is intended to prohibit access to a certain place within a particular locality, such as a certain street within the municipality of Howrah, it would be necessary to tell the general public that, when frequenting or visiting the municipality of Howrah, they should abstain from visiting the prohibited street which should be named.

It is argued by the learned advocate, who appears on behalf of the Crown, that the construction of sub-s. (*3*), which I propose to adopt, would impose an undue restriction upon the powers of the authorities mentioned in sub-s. (*1*) as regards the issue of orders prohibiting the members of the public at large from visiting a particular district. I think, however, that the acceptance of this contention would necessitate the placing of too wide an interpretation upon the language of the sub-section. It seems to me to be clear that, as regards notices issued to the general public, some limitation, as already indicated by me, must have been intended. The expression "a "particular place" appears to be sufficiently wide to include the whole district over which a Magistrate may have jurisdiction [*Abdul Karim* v. *Crown* (1)], but, apart altogether from the question whether even a District Magistrate has jurisdiction to direct a prohibitory order under s. 144 of the Code of Criminal Procedure to members of the public outside his district, I think, it is clear that the public who

(1) (1935) I. L. R. 17 Lah. 515.

can be affected by a prohibitory order of this nature must consist of persons who ordinarily frequent or visit or have occasion to frequent or visit the district as a whole or some place within the district. The law does not contemplate the prohibition of the frequenting or visiting of the "particular place" to which reference is made in sub-s. (*3*), but the prohibition of some act on an occasion on which such place is frequented or visited. It would not, therefore, be reasonable to suppose that it could have been the intention of the legislature to empower a Magistrate, by means of an order under s. 144 of the Code of Criminal Procedure, to restrain the movements of the members of the public before they had occasion to frequent or visit the district over which he had jurisdiction by forbidding them to frequent or visit the district at all.

Subject to the abovementioned qualification, I am of opinion that s. 144 of the Code of Criminal Procedure gives a Magistrate full power to restrain the activities of the public within his jurisdiction by issuing orders of a general nature such as the one which was issued by the learned Subdivisional Magistrate of Khulna on May 8, 1939. The validity of general orders of this nature has been recognised in at least two decisions of this Court, namely, in the case of *Nagendra Nath Biswas* v. *Rakhal Das Sinha* (1), and in the case of *Niharendu Datta Majumdar* v. *Emperor* (2). In those cases it was not thought necessary to apply the test to which the Court referred in *Ashutose Roy's* case, cited above, and, with great respect to the observations of the learned Judge in that case, I do not consider that the legislature intended that the scope of an order under s. 144 of the Code of Criminal Procedure should be restricted in the manner suggested by him.

The learned advocate for the petitioners then referred to a certain irregularity which had been

(1) (1918) 23 C.W.N. 141. (2) I.L.R [1939] 2 Cal. 507.

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found by both the Courts below in connection with the promulgation of the order, which was to the effect that no copy thereof had been stuck up as required by s. 134 of the Code of Criminal Procedure. Admittedly, however, an irregularity of this nature would be immaterial provided the persons whom it was sought to prosecute in respect of any disobedience of the order had knowledge of its contents and, in this connection, it was pointed out by Wilson J. in the case of *Parbutty Charan Aich* v. *Queen-Empress* (1)—

> That the terms of s. 134 are * * * * directory and ought to be followed and that it is an irregularity when they are not.

The learned Judge then went on to say—

> but it does not follow that the order is a nullity in consequence, and I think that when the order has been duly made and promulgated, although not strictly in accordance with the terms of the law, and has been brought to the actual knowledge of the person sought to be affected by it, that is sufficient to bring the case under s. 188 of the Indian Penal Code.

On this point, the judgments of both the Courts below contain findings to the effect that the petitioners had the requisite knowledge with regard to the contents of the prohibitory order which was issued by the learned Subdivisional Magistrate of Khulna, but, as I have already pointed out, these findings did not take into consideration the service return which was endorsed on the back of the *parwânâ*, Ex. 1, dated May 9, 1939.

It is argued on behalf of the petitioners that the service-return indicates that the order which was promulgated to the general public was not the formal order which was drawn up by the learned Magistrate on May 8, 1939 (Ex. 2), but was merely an inadequate précis of that order (Ex. 1), which gave no sufficient information with regard to the acts from which the members of the public had been directed to abstain. As already pointed out, the case for the prosecution was that the contents of the order, dated May 8, 1939, had been communicated

(1) (1888) I. L. R. 16 Cal. 9.

to the petitioners and, this being the case, if it was found that the only order which had been notified to the general public was the précis, dated May 9, 1939, the conviction clearly could not be sustained. This latter order conveys a very inadequate idea of what had really been prohibited by the Magistrate. The formal order, dated May 8, 1939, set out the facts and the reasons for the prohibition and explained in clear terms what the acts were, from which the public were to abstain. There was no difficulty in understanding this order and it may be assumed that any law-abiding citizen to whom it had been explained would have obeyed it. The meaning of the précis was, however, obscure and it was even inconsistent with the terms of the main order. For instance, in the order, dated May 8, 1939, certain named persons and the public in general, when frequenting or visiting the new *hât* at Domraon, were directed to abstain from certain acts. It was, therefore, assumed in the main order that the persons to whom the order was directed were persons who would have occasion to frequent the Domraon *hât*. In the order, dated May 9, 1939, on the other hand, the persons concerned are actually forbidden to frequent the *hât* at all.

The learned advocate, who appears on behalf of the Crown, argues that it is quite clear from the evidence and the findings that the order which was actually served was the main order of the learned Magistrate, dated May 8, 1939, and on this point he has referred me to the depositions of some of the witnesses examined in the trial Court, more particularly to the testimony of Ashrafuddin Ahmad, who recorded the service-return on the back of the *parwânâ*, Ex. 1. It cannot be said, however, that his testimony is at all clear with regard to this matter. He states that he served the *parwânâ* and he also refers to the service of the order. His attention does not appear to have been called directly to the service return, dated May 12, 1939, and his evidence contains no clear indication on the point whether the main

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notice, Ex. 2, was served by him with the *parwânâ* Ex. 1, or whether it was served at all. The testimony of the Inspector, Girija Bhushan Ray, P. W. 7, is similarly somewhat inconclusive. It is true that he refers to the order, Ex. 2, and explains that he was present at Domraon when the order was served by the officer-in-charge of the Terokhada police-station. He also states that the promulgation of the service was by reading out the order and explaining it to the persons who were present. The service-return, dated May 12, 1939, is, however, to the effect that the *parwânâ*, Ex. 1, was served in this way and, as the questions which were put to Girija Bhushan Ray as regards the service of the notice were not in sufficient detail, it is difficult to arrive at any definite conclusion on his testimony as it stands whether he was not confusing the *parwânâ*, Ex. 1, with the order, Ex. 2.

It is strenuously argued by the learned advocate, who appears for the Crown, that, even if it be conceded that there may have been some confusion of thought with regard to the service which was effected between the hours of 9 a.m. and 12-30 p.m., it is abundantly clear that the notice, which was promulgated during the latter portion of the afternoon of May 12, 1939, must have been the order, Ex. 2. Even with regard to this point, however, I do not think it would be safe to come to any such conclusion without a further examination of the witnesses concerned with the promulgation of the notice after their attention had been expressly drawn to the service-return on the back of the *parwânâ*, Ex. 1.

With regard to the second main contention put forward by the learned advocate for the petitioners to the effect that the order itself is invalid, the decision must mainly depend upon the question whether the order which was actually promulgated was the main order recorded by the Magistrate on May 8, 1939, or the inadequate précis

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of this order, dated May 9, 1939. I have already referred to the nature of these two orders and I have pointed out that, in my view, the service of the *parwânâ*, Ex. 1, would be insufficient for the purpose of enabling this Court to sustain the conviction of the petitioners. If, on the other hand, the order which was actually promulgated and of which the petitioners had knowledge was the order recorded by the learned Magistrate on May 8, 1939, I would have been prepared to hold that this order complied with the provisions of s. 144 of the Code of Criminal Procedure and to uphold the conviction on the basis of the findings contained in the judgment of the learned Sessions Judge.

It is, therefore, necessary for the ends of justice that this case should be remanded to the trial Court in order that further evidence may be taken for the purpose of ascertaining whether the order, dated May 8, 1939, was actually promulgated as required by law and whether the petitioners had knowledge of its contents. After recording such further evidence on this point as the learned Magistrate may consider necessary he should reconsider the matter in the light of such further evidence and the observations which have been recorded in this judgment.

Subject to these observations, the decisions of the Courts below are set aside and the case is remanded to the trial Court for further consideration on the evidence which is already on the record with such additional evidence as the learned Magistrate may consider necessary.

The petitioners will, of course, be allowed to cross-examine any witnesses who may be examined by the learned Magistrate and they may also adduce such further evidence in rebuttal as they may consider necessary.

The Rule is made absolute in these terms.

Rule absolute; case remanded.

A. A.