

ALAGU
AMBALAM
v.
EMPEROR.

from which the appeal was transferred, and which is no longer responsible for the due decision of the appeal. We dismiss the petition

APPELLATE CRIMINAL.

Before Mr. Justice Miller.

ALUVALA GURUVIAH

v.

EMPEROR.*

1908.
March
13, 18.

Criminal Procedure Code, Act V of 1898, ss. 133, 136, 140—Where order under s. 133 not complied with, prosecution sustainable under s. 136 without notice under s. 140—Order under s. 133 cannot direct works to be done which are not necessary for the safety of the public.

Where an order issued by a Magistrate under section 133 of the Criminal Procedure Code is not complied with or protested against within the time fixed by the order, a prosecution of the person disobeying under section 136 is sustainable without notice under section 140.

Where a well adjoining a road is dangerous to the public as well as to the existence of the road, an order under section 133 can direct the construction of such works only as are necessary for the safety of the public and not of works necessary for the safety of the road.

Queen-Empress v. Bishamber Lal, (I.L.R., 13 All. 577), approved.

A WELL under the control of the accused petitioner, alongside a public road was in a state of disrepair and threatened the safety of the public as well as the existence of the road. The Deputy Magistrate acting under section 133 of the Criminal Procedure Code issued a notice to the accused calling upon him to protect, according to the instructions of the Local Fund Overseer, the well from danger to the public, within the 14th July, or to appear before the Magistrate on the 6th July to have the order cancelled or modified. The Overseer directed the accused to raise a masonry

* Criminal Revision Case No. 527 of 1907, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of R. Ramachandra Rao, Esq., District Magistrate of Kurnool, in Criminal Appeal No. 21 of 1906, confirming the conviction but modifying the sentence passed by M. R. My. K. Subramaniam, Stationary Second-class Magistrate of Atmakur Division, in Calendar Case No. 183 of 1906.

wall fencing. This was not done within the 14th July, nor did the accused protest against the order on the 6th. On the 20th July the Deputy Magistrate acting under section 136, Criminal Procedure Code, sanctioned the prosecution of the accused under section 185, Indian Penal Code. The accused was accordingly tried and convicted by the Sub-Magistrate and sentenced to pay a fine of Rs. 20. On appeal the District Magistrate upheld the conviction but reduced the sentence to a fine of Rs. 5

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Accused presented revision petition under sections 435 and 439 of the Criminal Procedure Code to the High Court.

Dr. S. Swaminadhan for the petitioner.

The Public Prosecutor *contra*.

JUDGMENT.—Dr. Swaminadhan raises two questions on behalf of the petitioner: (1) whether the conditional order under section 133, Criminal Procedure Code, is illegal, and (2) whether, in the absence of the notice required by section 140, the conviction can be sustained.

The petitioner did not come forward to object to the order under section 133 which directed him to protect his well 'according to the instructions of the Local Fund Overseer.' Assuming that the order is not such as is contemplated by section 133, I do not, in these circumstances, think it necessary to interfere with the conviction in revision.

The question whether the notice prescribed by section 140 must be given before any punishment can be inflicted for disobedience of the order passed under section 133, is not free from difficulty.

If the order is made absolute under section 137 or section 139 then clearly no punishment can follow unless the procedure laid down in section 140 is adopted, but neither section 137 nor section 139 declares, as section 136 does, the liability to punishment. The Public Prosecutor, with the support of *Queen-Empress v. Bishamber Lal* (1) contends that whenever the time fixed in the order under section 133 has been allowed by the person against whom that order is made to pass without compliance with the order or protest against it, the liability to punishment attaches at once to that person and may be enforced irrespective of section 140.

(1) I.L.R., 13 All., 577.

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Both sections 136 and 140 impose a duty on the Magistrate ; he " shall " make the order absolute, and he " shall " thereupon give time for compliance with it and point out the penalty attached to disobedience. Must he then, if he enforces the penalty under section 136, at the same time, give further time for compliance with the order and threaten a further penalty for disobedience? Again, if it is necessary to give warning of the penalty when a notice is issued under section 140, should it not be equally necessary to give the same warning before enforcing a penalty for disobedience to the order under section 133? I have found some difficulty in finding an answer to these questions which shall be quite satisfactory, and at the hearing I was disposed to take the view presented by Dr. Swaminadhan on behalf of the petitioner, but on consideration I think that view does not give effect to the declaration of liability enacted in section 136, or to the difference between that section and sections 137 and 139. The view taken by the Allahabad High Court does give full effect to section 136 and is on that account the better interpretation, and I adopt that view and dismiss the petition.

I do not know if the Magistrate contemplates further proceedings but I think it desirable to point out that the petitioner is only bound to provide for the safety of the public, and not to improve, so far as it is threatened by the existence of his well, the road, and it will be the duty of the Magistrate to see if further proceedings are taken that he is not required to do more than the law requires him to do.
