APPELLATE CRIMINAL—FULL BENCH.

Before Sir Arnold White Chief Justice, Mr. Justice Wallis and Mr. Justice Miller.

1907.
August 29.
October 14.
November 4.
1908.
January 6.

RAHIMADULLA SAHIB
v.
EMPEROR.*

Criminal Procedure Code, Act V of 1898, s. 476—Order under section must be made during or immediately after the conclusion of the proceedings.

On a reference to the Full Bench whether a Magistrate has jurisdiction to take action *suo motu* under section 476 of the Code of Criminal Procedure more than two months after the termination of the proceedings before such Magistrate:

Held (Miller, J., dissenting), that it was the intention of the Legislature in enacting section 476 that an order under the section should be made either at the close of the proceedings or so shortly thereafter that it may reasonably be said that the order is part of the proceeding.

Begu Singh v. *Emperor* (I.L.R., 34 Calc., 551), referred to and followed.

In re Subbaraya Vathya (15 M.L.J., 489), referred to and followed.

The earlier enactments and corresponding English Acts on the subject considered and discussed.

THE case came in the first instance before (Wallis and Miller, JJ.) who made the following

ORDER OF REFERENCE TO A FULL BENCH.—In this case the Magistrate has ordered the prosecution of the petitioner under section 211 of the Indian Penal Code for causing criminal proceedings to be instituted against one Kandan Chetty knowing that there were no just or lawful grounds for such proceedings. On information given to the police by the petitioner an investigation was made and an inquiry held with a view to a committal under section 307 of the Indian Penal Code, and at the conclusion of the inquiry, the accused was discharged. This was on the 11th July 1906. Subsequently, the Additional District Magistrate refused to set aside the order of discharge. His order is dated the 28th August 1906. On the 25th September 1906 the Magistrate

* Criminal Revision case No, 213 of 1907, presented under sections 434 and 439 of the Code of the Criminal Procedure, praying the High Court to revise the proceedings of M.R.Ry. A.R. Rajagopal, Second-class Magistrate of Periyakulam, dated the 3rd November 1906, in Revision Case No. 9 of 1906

who had held the enquiry issued a notice calling on the petitioner to show cause why he should not be prosecuted under section 211, and on the 3rd November 1906 passed an order ordering his prosecution under that section.

The order states that the Magistrate was acting *suo motu* and he must be taken to have been acting under section 476 of the Criminal Procedure Code.

It is now contended that he had no jurisdiction to take action under section 476 after the close of the proceedings in the course of which the offence was brought to his notice, and the recent Full Bench ruling in *Begu Singh* v. *Emperor*(1) has been relied on in support of this view. This decision appears to conflict with a decision of a Bench of this Court in *Runga Ayyar* v. *Emperor*(2) in which action taken after the close of the proceedings and by a fresh Magistrate was held to be within the jurisdiction conferred by the section. There was however a decision which appears to be the other way in Criminal Revision Case No. 54 of 1901 reported in Weir's 'Criminal Rulings,' Vol. II, p. 597; and in *In re Subbaraya Vathyar*(3) another Bench expressed the opinion, if they did not actually decide, that under section 476 immediate action is contemplated and that to take action after the lapse of several months would be illegal. As it is desirable to have the point settled in this Court we have resolved to refer to the Full Bench the question whether the Magistrate's order was made without jurisdiction."

The reference came on for hearing in due course before a Full Bench constituted as above,

T. Rangachariar for *V. Krishnaswami Ayyar* and *K. V. Krishnaswami Ayyar* for petitioner.

Mr. *J. C. Adam* for the Public Prosecutor *contra*.

S. Venkatachariar for the complainant.

The Court expressed the following—

OPINION (SIR ARNOLD WHITE, C.J.).—Having regard to the terms of the order of the 3rd November 1906, I am inclined to think that the Magistrate considered he was exercising the powers conferred by section 195 of the Code of Criminal Procedure and

(1) I.L.R., 34 Calc., 551. (2) I.L.R., 29 Mad., 331.
(3) 15 M.L.J. 489.

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that the provisions of section 476 were not present to his mind at all. However, the order of reference states that the Magistrate was acting *suo motu* and that he must be taken to have been acting under section 476 of the Code of Criminal Procedure, so I propose to deal with the case on that footing.

It is no doubt true that section 476 may be construed, without doing violence to any of its provisions so as to warrant an order being made under the section after the close of the proceeding in which the offence was alleged to have been committed or brought under the notice of the Court. But it is equally true that there is nothing in the section which militates against the other view, whilst the provision in the section as to sending the accused in custody, without any provision being made for his arrest when he is not in custody, as he would not be when the order under the section is made in an independent proceeding, lends support to the view that the section contemplates the making of the order as a part of the proceeding in which the offence was alleged to have been committed or was brought under the notice of the Court. The conclusion at which I have arrived is that it was the intention of the Legislature that an order under the section should be made either at the close of the proceeding or so shortly thereafter that it may be reasonably said that the order is part of the proceeding.

The history of the section appears to be this:—So far as the object of the section is to secure the conviction of a party who has been guilty of an offence against public justice its origin may be traced to the provisions of section 20 of the Criminal Procedure Act, 1-51, 14 & 15 Vict., cap. 100, which empowers a Court to commit any person who, in the opinion of the Court, has been guilty of perjury in a proceeding before that Court. I do not think it has ever been suggested that an order of commitment could properly be made under the English enactment as an independent proceeding after the close of the case in which the offence was alleged to have been committed and, for the purposes of the question now under consideration, I do not think any distinction can be drawn between the language of the English statute and the language of section 476 of the Code of Criminal Procedure.

Turning to the Criminal Procedure Code of 1861 we there find the enactments which appear as sections 195 and 476 in the Code of 1898 appearing as sections 169 and 170 and 171 respectively,

under a chapter headed "Prosecutions in certain cases." As regards sections 169 and 170 there was an express provision that the sanction required by these sections might be given at any time. There was no express provision in section 171 as to when the Court might take action.

The sections of the Code of 1861 to which reference has been made were reproduced in the Code of 1872 (see sections 468 to 471) under a chapter bearing the same title as in the Code of 1861.

In the Code of 1898 the sanction provisions were reproduced in section 195 under a sub-heading "Conditions requisite for Initiation of Proceedings," whilst the express provision that sanction might be given at any time disappeared. In the Code of 1898 the enactment empowering the Court to act on its own initiative in regard to offences referred to in section 195, was reproduced as section 476 under the heading "Proceedings in the case of certain offences affecting the Administration of Justice" in close juxtaposition to a section empowering the Court to take action in certain cases of contempt (section 480)—a section which expressly provides for a procedure of an immediate and summary nature.

We find in sections 16, 17 and 19 of the Civil Procedure Code of 1861 certain provisions which are reproduced in section 643 of the Code of 1882. The usefulness of these provisions is not apparent since they would seem to cover the same ground as is covered by section 476 of the Criminal Procedure Code of 1898, and it may be observed that in the new Civil Procedure Bill, and in the Bill of 1901 which has been recently withdrawn section 643 of the Code of 1882 has been dropped. Section 643 of the Civil Procedure Code in the clearest terms provides for a procedure of an immedi te and a summary character, and the reasons which render such a course of procedure desirable when action is taken under the Civil Procedure Code seem equally applicable when action, directed towards the same end, is taken under the Criminal Procedure Code.

The point raised in the order of reference has recently been considered by a Full Bench of the Calcutta High Court in *Begu Singh* v. *Emperor* (1). The actual point there referred was whether an order purporting to be under section 476 and made by

(1) I. L. R., 34 Calc., 551.

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a Magistrate, who was not the Magistrate who tried the case, was bad for want of jurisdiction.

It does not of course follow that, if an order under this section made by a Magistrate, other than the Magistrate who tried the case is bad, an order made by the same Magistrate after the close of the case is also bad. As to the actual point referred in the Calcutta case Geidt, J., took a somewhat different view from that of the other Judges, but all the Judges were agreed wtth regard to the question now before us, viz., that the power conferred by section 476 was properly exercisable only at or immediately after the conclusion of the trial.

I think there is considerable force in the observation of the Chief Justice that if months after the trial the Court may act under section 476 it is difficult to appreciate the necessity of section 195. As regards the general policy of the law, I agree with the view expressed by Geidt, J., "I do not think"—the learned Judge observes—"that it was ever intended that when the proceedings had terminated and passed beyond the ken of the Court, the attention of the Court should be subsequently redrawn by some private person to the fact that in those proceedings there had been committed some offence in contempt of the Court's authority or against public justice which deserved punishment. The commission of the offence and the desirability of a prosecution should be so patent as to move the Court at the time to take action without the stimulus of an application by some interested person."

As regards *Runga Ayyar* v. *Emperor*(1), the learned Judges no doubt say that, a Magistrate who is not the Magistrate who tried the case has jurisdiction to make the order, and this of course involves the view that the order may be made after the close of the case. But, as a matter of fact, in the case then before the Court the Magistrate who tried the case had himself granted a sanction to prosecute, which fell through because the party who obtained the sanction presented an unstamped complaint. It was clear from the fact that the Magistrate who tried the case had granted sanction that he was of opinion that the case was one in which there was ground for enquiry.

In a case (Criminal Revision Case No. 54 of 1901) reported in Weir, Vol. II, p. 597, there is a ruling by Davies and Boddam, JJ.

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(1) I. L. R., 29 Mad., 331.

that a Magistrate has no power to act *suo motu* under section 476 after the case before his predecessor has been closed without any action being taken under that section, and a similar view is indicated in *In re Subbaraya Vathyar* (1).

I think the answer to the question which has been referred to us should be in the affirmative.

WALLIS, J.—In this case, as pointed out in the order of reference, the Magistrate himself states that he acted *suo motu* and he must I think, be deemed to have acted under section 476, Criminal Procedure Code. There can, I think, be no doubt that the provisions of section 476, Criminal Procedure Code, when first enacted as section 171 of the Code of 1871 were suggested by the provisions of section 19 of the Criminal Procedure Act, 1851 (14 & 15 Vict., cap. 100), and it is therefore material to examine the history and language of the English enactment. As recited in the section itself it re-enacts in an amended form two acts of Geo. II and Geo. III for rendering prosecutions for perjury and subornation of perjury more easy and effectual. Now before the passing of the Vexatious Indictments Act, 1859, there were no restrictions at all on prosecutions for perjury and any one could institute one by presenting a Bill to the Grand Jury behind the back of the accused, and such Bill, if found by the Grand Jury, became an indictment upon which the accused had to stand his trial. (Stephen's 'History of the Criminal Law of England,' Vol. I, p. 293.) There was nothing in law to prevent a Judge from preferring an indictment before the Grand Jury against a witness for perjury committed before him, but of course this was not a task that a Judge could be expected to undertake himself, and it was for this reason that the enactment now in question was passed to enable him in a proper case to impose the task of prosecution on another. He is therefore empowered (1) to direct a prosecution, (2) to commit the person to be prosecuted to prison until the next Sessions in default of his giving security, (3) to bind over some one to prosecute, that is, to prefer a Bill before the Grand Jury and prosecute at the trial, (4) to give the person so bound over a certificate entitling him to be paid the costs of the prosecution, and (5) to bind over the witnesses to attend. The section does not expressly say that the direction to prosecute must be

(1) 15 M. L. J., 489.

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made within any particular time but merely provides that it shall and may be lawful for the Judge or Judges therein mentioned "in case it shall appear to him or them that any person has been guilty of wilful or corrupt perjury in any evidence given or in any affidavit, deposition, examination, answer or other proceeding made or taken before him or them to direct such person to be prosecuted for such perjury" and to proceed as already stated. As incidental to the powers of committing and binding over, the Court would have authority to bring the parties before it, and I cannot see anything in the language of the section to show that the exercise of these powers is made conditional on the proceedings in which the perjury is alleged to have been committed being still pending. Ordinarily no doubt the direction to prosecute would be given during or in continuation of such proceedings, but in case the evidence adduced before a county Court Judge in a case before him should be such as to convince him that a witness in a case disposed of by him some days previously must have committed perjury, I am not aware that it has ever been held that the Judge could not direct a prosecution for perjury because the case in which it was committed was over; and, in the absence of authority, I should not be prepared to put any such construction upon the section, especially having regard to its declared object and the state of the law when it was passed. I am therefore of opinion that there is nothing in the provisions of section 19 of the Criminal Procedure Act, 1851, to suggest that a restrictive construction should be put on the Indian enactment.

The circumstances of the two countries, and the status of the officers on whom the powers are conferred by the English and Indian enactments are however very different, and the absence of any such restriction in England is not a strong argument in favour of the absence of such restriction here. There is nothing in the language of section 171 of the Criminal Procedure Code, Act XXV of 1861, to show that any such restriction was intended, but Mr. Rangachariar relies on the fact that in sections 169 and 170, which correspond to section 195 of the present Code, it is expressly provided that sanction may be given at any time, while there is no such express provision in section 171 as regards proceedings initiated by the Court itself. He also relies on the language of the contemporaneous sections 16, 17 and 19 of the Code of Civil Procedure (Act XXIII of 1861) which are

repro duced not very intelligibly in section 643 of the present Code (Act XIV of 1882) and argues that the language "when in a case pending before any Court there appears sufficient ground" shows that action must be taken while the case is pending. And as showing the meaning of section 476 he relies even more strongly on the language of section 478 which enables the Court before which the offence is committed itself to commit the case for trial at Sessions or before the High Court. The language of this section is "When any such offence *is* committed before any Civil or Revenue Court . . . and the case is triable, etc." The operation of the two sections must apparently be co-extensive and it is argued that the use of the present tense "when any such offence is committed" shows that both under this section and under section 476, where the language is not quite so clear, it was the intention of the Legislature that the sending for enquiry or trial in the one case and the commitment for trial in the other must be made while the proceedings in which the offence was committed or brought to notice are pending or in immediate continuation of them. These arguments are, in my opinion, entitled to weight though I cannot say that they appear to me to be conclusive. They are however supported by the authority of the cases in Weir, Vol. II, p. 597, and in *In re Subbaraya Vathyar*(1) as well as by the *obiter dicta* of the Calcutta Judges in *Begu Singh* v. *Emperor*(2) and by the judgment of the learned Chief Justice in the present case. Moreover having regard to the fact that power to take action under section 476 is conferred upon all ranks of the judiciary I think the suggested restriction may be supported on grounds of policy. Under these circumstances I am not prepared to differ from the conclusion arrived at by the learned Chief Justice and would answer the question referred to us in the affirmative.

MILLER, J.—As I have the misfortune to differ from the other members of the Court in the conclusion at which I have arrived, it is my duty to explain somewhat fully the reasons which have led me to my conclusion. I am however to some extent relieved of the task of expressing my views at great length, by the judgment just delivered by my learned brother, which I have had the advantage of reading before it was delivered

(1) 15 M.L.J., 489. (2) I.L.R., 34 Calc., 551.

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and with which I may say I agree in almost everything except, unhappily, in its final conclusion.

I agree with my learned brother's opinion that the English Act of 1851 does not impliedly enact the restriction which we are now asked to import into section 476 of the Code of Criminal Procedure, and that there is nothing in it to suggest that a restrictive construction should be placed on the Indian enactment. I agree also that the arguments derived from the provisions of former Codes and from section 643 of the present Civil Procedure Code though entitled to some weight (as to the amount of weight to be attached to them I am not perhaps quite in accord with my brother) are very far from conclusive. In 1882 when section 476 was re-enacted, the Legislature had before it the provisions of section 643 of the Code of Civil Procedure of 1877 and it is not improper to set against the arguments of Mr. Rangachariar the inference that had it been intended that the two sections should be identical in scope care would have been taken to make them identical or indistinguishable in language.

Nor is the argument drawn from section 478 of much greater force. If the language of section 478 is such as to necessitate the inference that under its provisions action must be taken by the Court to commence the enquiry during, or immediately after the close of, the proceedings in the course of which the offence to be enquired into was committed, it by no means follows that section 476 was not intended to provide an alternative procedure which might be adopted after the proceedings were closed. But in *Queen-Empress* v. *Shankar*(1), two learned Judges of the Bombay High Court upheld a commitment under section 478, which appears to have been made nearly two years after the close of the proceedings in the course of which the offence was committed. It is true that the present question was not then argued before or indeed presented to the Court, but the case at least shows that the intention and scope of section 478 is in spite of its language, not so clear upon the face of the section as Mr. Rangachariar seemed to suggest.

That case I may perhaps remark before leaving it, incidentally shows that the fears of Rampini and Gupta, JJ., who referred to the Full Bench of the Calcutta High Court the question

(1) I.L.R., 13 Bom., 384.

decided in *Begu Singh* v. *Emperor*(1) are not altogether so unfounded as is suggested in the judgments of some of the learned Judges composing the Full Bench

In the Bombay case sanction had actually been given some time after the case closed to a private party to prosecute for a very serious forgery, the substitution of a false agreement of compromise in a suit for the true one, but the sanction was not acted upon by the party to whom it was given. As Jardine, J., points out the person to whom sanction is accorded may compound the offence and allow the sanction to lapse: he is not bound over to prosecute: he can do as he pleases; and if the view of section 476 now pressed upon us by Mr. Rangachariar is to prevail if he does not choose to prosecute, the offender must go unpunished. Mr. Rangachariar relied also to some extent on sections 480 and 481 as indicating the scope of section 476 but those sections deal with a restricted class of offences in regard to which it is always possible to take action as soon as the offence has been committed. It is pressing the argument from juxta-position very far to suggest that the procedure applicable to such cases is necessarily to be applied to all cases within the provisions of section 476.

Now, agreeing with my learned brother that there is nothing in the history of the enactment to necessitate the placing on section 476 of the Code, of a restrictive construction, and that no conclusive argument can be drawn from other provisions of the same Code or other Codes, I turn to the language of section 476 itself. I, of course, agree with the learned Judges of this Court who held in *In re Subbaraya Vathyar*( ) that the section contemplates immediate action, that is to say, that the language of the section warrants and provides for immediate action, but I am unable to go further, and to hold that, it either expressly or impliedly excludes what I may call action subsequent—action taken after the close of the proceedings in the course of which the offence was committed or brought to notice. The words 'when the Court is of opinion' are wide enough to embrace any point of time at which the opinion is formed, whether during, or after the, close of, the proceedings, and there is nothing in the rest of the section to indicate that the opinion must, in all cases, be formed as soon as the offence is committed. There is nothing that I can see

(1) I.L.R., 34 Calc., 551. (2) 15 M.L.J., 480.

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inconsistent with the view that in a proper case 'subsequent' action may be taken; there is nothing in the procedure provided by the section which is incompatible with such action. The preliminary enquiry can be made at any time: if the accused person is present at its close he can be sent to the Magistrate with the case; if he is absent the Magistrate to whom the case is sent can be left to secure his attendance at the trial.

It seems to me that some light is thrown upon the intention of the Legislature in this matter by a consideration of the provisions of sections 195 and 200 along with section 476 of the Code.

In 1885 three Judges of a Full Bench of the Allahabad High Court expressed the opinion that section 476 enacts the procedure to be adopted by a Court desirous of making a 'complaint' under section 195 (*Ishri Prasad* v. *Sham Lal*(1)). Straight, J., there observes "it is easy to imagine the inconvenience which might be caused if a Munsif or a Subordinate Judge or a Judge were obliged to appear before a Magistrate and make a complaint on oath in order to lay the foundation for a prosecution, and for this reason the Legislature thought it desirable that the procedure to be followed in case of complaint by a Court, should be different from that which has to be observed by an ordinary complainant." That this is a correct view of the section, that one of the functions of section 476 is to provide the machinery by which a Court is enabled without inconvenience to make a complaint, is made very clear by the amendments introduced into the present Code, in sub-section 2 of section 476, and in the opening words of section 200. Both those amendments might perhaps have been expressed in happier language, but I have no doubt—and I am confirmed by the decision in *Eranholi Athan* v. *King-Emperor*(2) that they were intended to have the effect of affirming the view taken by Allahabad High Court in *Ishri Prasad* v. *Sham Lal*(1).

That being so the question arises whether a Court which deems it necessary to make a complaint, and so to proceed under section 476 of the Code, ought to be subjected to restrictions which do not apply to the persons styled by Straight, J., in the Allahabad case 'ordinary complainants.'

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(1) I.L.R., 7 All., 871. (2) I.L.R., 26 Mad., 98.

In *Begu Singh* v. *Emperor*(1), Harrington, J., suggests one reason why this should be so. The party aggrieved by the unjustifiable institution of criminal proceedings against him by a Court has not the same facility for obtaining redress as he would have if the prosecution were left to a private person.

Now the danger that a Court when moved to take action by a private person, may, from malicious or corrupt motives, prefer instead of granting a sanction to that person, to take the prosecution into its own hands is, I venture respectfully to think, not very imminent, but I fully recognise the possibility that both in this and in other ways the powers which section 476 can be construed to confer, are like other powers open to abuse by the Courts to which they are entrusted I fully recognise also that every Court like every other complainant ought to take action at the earliest possible moment, but I find some difficulty in holding that, while the ordinary complainant is permitted if he can to explain any delay which appears to be attributable to him, any delay in taking the first steps whether reasonably explicable or not is to be fatal to a prosecution instituted by a Court.

In considering the probable intention of the Legislature it is necessary to remember that against the danger of abuse of powers there can be set the danger of unpunished offences. As I have already pointed out the power of sanction given by section 195 is not enough to ensure the prosecution of offenders against justice in all proper cases, and if the power of complainant is to be restricted to cases in which, to use the words of Geidt, J., in *Begu Singh* v. *Emperor* (1), "the commission of the offence" is so "patent as to move the Court at the time to take action," there is at once apparent the danger that offenders may for want of the means of instituting proceedings against them, be able to escape the penalty of their offences.

To take the illustration given by my learned brother, it may well happen that a Court some days, or weeks, after trying and deciding a suit before it, may discover, perhaps in the course of the trial of another suit, that the plaintiff or a witness in the former suit, has in the former suit been guilty of gross perjury or of using as genuine a forged document. Is the Court to be helpless in such a case? Must the offender go unpunished unless the

(1) I.L.R., 34 Calc., 551.

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opposite party (who it may be has obtained a decree in his favour on a point of law and is satisfied therewith) chooses to apply for a sanction to institute proceedings, or unless the Judge himself goes down to the Magistrate's Court and makes and swears to a complaint? To my mind section 476 may be construed to provide the necessary power in such a case and the machinery necessary to give effect to that power and I do not think that the fact that the power is, like other powers expressly conferred by the Code, capable of being abused, would justify me in attributing to the framers of the Code an intention to withhold it from the Courts in India where there may be cases in which its exercise is very important and very necessary.

As regards authority there seem to be two cases in this Court in one of which it was held that the successor of the Magistrate before whom an offence was committed can, and in the other that he cannot, take action in respect of that offence under section 476. That question presents somewhat different considerations from the one before us and I do not discuss it. I have already referred to the case in *In re Subbarayd Vathyar*(1), in which the learned Judges do not give reasons for the view taken by them, and to *Bagu Singh* v. *Emperor*(2), in which the question before us was not the one referred for decision but was discussed by the Court.

There are cases in which, without discussion, action taken under section 476 after the close of proceedings has been upheld or directed (and as to section 478, compare the case in *Queen-Empress* v. *Shankar*(3) to which I have referred). But they are only of value as showing that the impropriety of conferring the jurisdiction on the Courts is not obvious, and that the language of section 476 does not obviously preclude the view I have taken. I am of opinion that Magistrate had jurisdiction, and I answer the question referred to us in the negative.

The case came on for final hearing before (Wallis and Miller, JJ.) when the Court delivered the following

ORDER.—In accordance with the opinion of the Full Bench we set aside the order made by the Magistrate.

(1) 15 M.L.J., 489. (2) I.L.R., 34 Calc., 551.
(3) I.L.R., 13 Bom., 384.