

APPELLATE CRIMINAL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Phillips.

In re MUTHIA MOOPAN AND SIX OTHERS (ACCUSED
Nos. 2, 5, 8, 9, 10 AND 12 IN MISCELLANEOUS CASE No. 34
OF 1910), PETITIONERS IN CRIMINAL REVISION CASE

No. 678 OF 1910,

MARUTHA MOOPAN AND TWO OTHERS (ACCUSED NOS. 3, 6
AND 7 IN MISCELLANEOUS CASE No. 34 OF 1910),

PETITIONERS IN CRIMINAL REVISION CASE

No. 679 OF 1910,

AND

RATNASAMI MOOPAN (FOURTH ACCUSED IN
MISCELLANEOUS CASE No. 34 OF 1910),
PETITIONER IN CRIMINAL REVISION CASE
No. 680 OF 1910.*

1911.
September
1 and 9.

*Criminal Procedure Code (Act V of 1898), sec. 107—Security to keep the peace—
Section 403—Autrefois acquit—Section 495, withdrawal from prosecution,
section inapplicable to security proceedings—No conviction or acquittal under
section 107—Sections 112, 117, 118, 119, 253—Section 145, order under, no
bar to order under section 107 on same facts.*

A preliminary charge-sheet under section 107, Criminal Procedure Code, was withdrawn by the police before the parties mentioned therein were ordered to appear. The Magistrate endorsed the charge-sheet to the effect that the accused were acquitted. A fresh charge under the same section was subsequently brought by the police against certain of the same persons who had been previously charge-sheeted.

Held, that the withdrawal of the first charge-sheet was no bar to proceedings under the second.

“Neither an order of discharge nor of acquittal can properly be made in a case where the accused has not been directed to appear at all.”

Section 495, Criminal Procedure Code, is not applicable to security proceedings.

An order passed by a Magistrate under section 145, Criminal Procedure Code, is no bar to the same Magistrate binding over the same parties on the same facts under section 107, Criminal Procedure Code.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898) praying the High Court to revise the order of T. VIJAYABAGHAVACHARY, the First-class Sub-Divisional Magistrate of Tanjore, in Miscellaneous Case No. 34 of 1910, dated the 7th November 1910.

* Criminal Revision Cases Nos. 678 to 680 of 1910 (Criminal Revision, Petitions Nos. 566 to 568 of 1910).

In re
MUTHIA
MOOPAN.

The facts of this case are set out in the following Order.

The Hon'ble Mr. T. Richmond and T. Anantachariar for the petitioners in Criminal Revision Cases Nos. 678 and 679 of 1910.

C. Narasimhachariar for the petitioner in Criminal Revision Case No. 680 of 1910.

P. E. Grant for the Public Prosecutor on behalf of the Government.

SUNDARA
AYYAR
AND
PHILLIPS, JJ.

ORDER.—These are applications asking this Court to set aside the order of the Sub-Divisional Magistrate of Tanjore, directing the petitioners under section 107, Criminal Procedure Code, to give security to keep the peace for one year. One Seethalakshmi Ammal, against whom also proceedings were taken under section 107 along with petitioners but against whom the Magistrate did not think it necessary to pass an order directing her to keep the peace, is the owner of the Kapistalam Estate in the district of Tanjore. She executed a lease of ten villages belonging to her in the year 1903 in favour of one Swaminatha Moopanar for a period of ten years. She, however, cancelled the lease in February 1910 and attempted to take possession of the villages. Swaminatha Moopanar resisted the attempt. This led to an order being passed against Seethalakshmi Ammal under section 144 of the Criminal Procedure Code restraining her from taking forcible possession of the properties. Proceedings were also initiated under sections 145 and 107, Criminal Procedure Code. The preliminary order under section 145, Criminal Procedure Code, was passed on 10th August 1910 and the final order declaring the lessee Swaminatha Moopanar to be in possession and restraining Seethalakshmi Ammal and two others from interfering with his possession until the establishment of their rights in a civil suit was passed on 1st September 1910. A preliminary charge-sheet was laid by the police under section 107, Criminal Procedure Code, on 25th July 1910 against the present petitioners and Seethalakshmi Ammal and a number of other persons. But the police wished to withdraw it in order that they might present a fresh charge-sheet against some only of those included in it. The Magistrate permitted the withdrawal and endorsed on the charge-sheet that the accused were acquitted. A second charge-sheet giving rise to the present proceedings was laid by the police against the petitioners and Seethalakshmi Ammal and another person on the 23rd August

1910. The Magistrate's final order directing the petitioners to give security is dated 7th November 1910. Objection was taken before the Magistrate to the passing of an order directing the accused to give security under section 107, Criminal Procedure Code, when an order had already been passed under section 145, Criminal Procedure Code. But he did not consider that the objection should prevail. He observes "I consider that in the interest of the public peace it is necessary to take security. Swaminatha Moopnar is in possession and the accused labour under the great temptation to dispossess him by violent means as a civil remedy means time and trouble and meanwhile he will be making his profits. Their acts in the past do not warrant the belief that they will have recourse only to peaceful means to gain their end." But he did not consider it necessary to pass any order for security against the principal party in the case, Seethalakshmi Ammal, who wanted to regain possession of the property leased by her to Swaminatha Moopnar.

It is first argued in revision that as an order was first passed by the Magistrate on the 25th July acquitting the present petitioners in proceedings taken under the same section and on the same facts as the present proceedings it was not open to the Magistrate to reopen the matter on the same allegations and that the order is therefore illegal, and reliance is placed on the provisions of sections 403 and 495, Criminal Procedure Code. We do not think these sections can be held to bar the present proceedings. Nothing had been done with reference to the previous charge-sheet beyond the lodging of the information before the Magistrate. No process was issued against those who were mentioned as the accused in the case. No proceedings could therefore be said to have been pending against the present petitioners or any other persons. The Magistrate's action in making the endorsement that they were acquitted was absolutely unwarranted by any section of the Criminal Procedure Code and was quite irregular. In fact the expression "acquitted" was quite unmeaning when there were no accused persons present in Court or had been served with any process for appearance. Section 495 has no application to the case. It applies only where the proceedings could end in an acquittal or discharge of the accused. A proceeding under section 107, Criminal Procedure Code, does not terminate in either of these ways. No

In re
MUTHIA
MOOPAN.
—
SUNDARA
AYYAR
AND
PHILLIPS, JJ.

In re
MUTHIA
MOOPAN.
 —
SUNDARA
AYYAR
 AND
PHILLIPS, JJ.

doubt section 117 enacts that the enquiry in such cases shall be made as nearly as may be practicable in the manner prescribed for conducting trials and recording evidence in summons cases. But the final order to be passed is expressly provided for in section 119, Criminal Procedure Code, which lays down that "If, on an enquiry under section 117, it is not proved that it is necessary for keeping the peace . . . that the person in respect of whom the enquiry is made, should execute a bond, the Magistrate shall make an entry on the record to that effect, and, if such person is in custody only for the purposes of the enquiry, shall release him or if such person is not in custody, shall discharge him." Section 118, Criminal Procedure Code, shows that if the finding is against the accused no order is to be passed convicting him. The order should be one directing him to execute a bond. If on the other hand the finding is in his favour, section 119 shows an entry is to be made on the record that it is not necessary that he should execute a bond and if he is in custody he should be released; if he is not in custody he should be discharged. In *Velu Tayi Ammal v. Chidambaravelu Pillai* (1), MILLER, J., points out that the expression discharged in section 119, Criminal Procedure Code, means merely discharged from custody and is not used in the technical sense of discharged (as opposed to acquitted) from an offence as used in section 253, Criminal Procedure Code. No charge has to be framed against the accused in security proceedings which commence with the making of an order under section 112, Criminal Procedure Code, by the Magistrate "setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required." We have not here therefore a case where the framing of a charge is contemplated at all or as the result of the proceedings an order either of discharge or acquittal is to be passed against any one. It may be noted that even the word "accused" is not used by the legislature with reference to security proceedings though the word is a convenient one and may not inappropriately be made use of for some purposes, but as pointed out by MILLER, J., the use of the word requires caution. That learned Judge held in *Velu*

(1) (1910) I.L.R., 33 Mad., 85.

Tayi Ammal v. Chidambaravelu Pillai (1) that section 437, Criminal Procedure Code, which empowers the High Court or a Sessions Judge to direct a further enquiry to be made where an accused person has been discharged does not apply to orders passed under the security sections. The same view was taken by the Calcutta High Court in *Queen Empress v. Iman Mondal* (2). A different view has no doubt been entertained by the Allahabad High Court—see *Queen Empress v. Mutasaddi Lal* (3) and *Emperor v. Fyaz-ud-din* (4). But with all deference it appears to us that the learned Judges of the Allahabad High Court have not given due weight to the express provisions of the sections of the Criminal Procedure Code, prescribing what orders should be passed in security proceedings. While we are of opinion that section 495, Criminal Procedure Code, is not applicable to security proceedings (section 403, Criminal Procedure Code, stands on the same footing), we are not to be understood as countenancing the idea that it would be right to vex a party repeatedly with proceedings under those sections on the same facts as formed the foundation for previous proceedings when those facts were found insufficient to justify an order for security. The general principles of justice would be against sanctioning such a course. In *Emperor v. Fyaz-ud-din* (4), KNOX, J., held that such a procedure would not be illegal though the learned Judge added “I wish to guard myself against being understood to hold that I consider that such proceedings should be instituted lightly, or that a Magistrate should not enter upon them without very great care and caution.” However that may be it appears to us to be clear that neither an order of discharge nor of acquittal could properly be made in a case where the accused has not been directed to appear at all. The provisions regulating trials and enquiries all contemplate the appearance of the accused as essential for the commencement of the proceedings. See sections 242 and 252 “when the accused appears or is brought before the Magistrate”; section 208 (1) the Magistrate shall “when the accused appears or is brought before him, etc.”, section 271 “when the Court is ready to commence the trial the accused shall appear or be brought before it, etc.” Attention was drawn to the terms of section 248 “If a complainant, at any time

In re
MUTHIA
MOOPAN.
—
SUNDARA
AYYAR
AND
PHILLIPS, JJ.

(1) (1910) I.L.R., 33 Mad., 85.

(2) (1900) I.L.R., 27 Calc., 662.

(3) (1899) I.L.R., 21 All., 107.

(4) (1902) I.L.R., 24 All., 148.

In re
MUTHIA
MOOPAN,
—
SUNDARA
AYYAR
AND
PHILLIPS, JJ.

before the final order is passed in any case under this Chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint, the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused." But it is clear to our minds that the language "at any time before any final order is passed" does not apply to a time before the accused has been ordered to appear inasmuch as section 242, Criminal Procedure Code, applicable to the trial of summons cases says, as already pointed out, that "when the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted." We must hold that the order of the Sub-Divisional Magistrate, dated 9th August 1910, on the first charge-sheet that the present petitioners were acquitted must be treated as unmeaning and cannot be availed of by persons against whom no process had been issued. In fact the accused do not seem to have been aware of this order at first and did not plead it in bar to the present proceedings. The next contention urged in support of the petitions is that as an order had been already passed on 1st September 1910 under section 145, Criminal Procedure Code, a further order under section 107, Criminal Procedure Code, is illegal. We have no doubt that although the reason for apprehending a breach of the peace may be a dispute relating to the possession of immoveable property which would be appropriate for the initiation of proceedings under section 145, Criminal Procedure Code, there can be no legal objection to proceeding being taken under section 107. See *Sindama Naik v. Zamindar of Kadavur*(1) and *Sheoraj Roy v. Chatter Roy*(2). In such cases the Magistrate is bound if moved for the purpose to take steps under section 145 while it is optional with him to proceed under section 107. Where it is considered desirable to move under section 107 it may sometimes work injustice if only one of the opposing parties is directed to give security to keep the peace. See *In the matter of the petition of Ekram Singh*(3), the object of both sections 145 and 107 is to prevent breach of the peace. An order under section 145 would often be more effective than one under section 107 only, as the former

(1) (1884) 2 Weir's Criminal Rulings, 50. (2) (1905) I.L.R., 32 Calc., 966.

(3) (1899) 3 C.W.N., 297.

order would be of more value by quieting the dispute about possession till a Civil Court pronounces upon the merits of the titles of the combatants. At the same time it would not be right to lay down that it might not be sometimes necessary to take security from one of the opposing factions even after the passing of an order under section 145 where the Magistrate is satisfied that notwithstanding such an order, they are likely to take the law into their own hands. We are not therefore prepared to say that the order of the Sub-Divisional Magistrate in this case was passed without jurisdiction on the ground that he had already decided the dispute about possession under section 145 and restrained Seerhalakshmi Ammal and her adherents from disturbing the possession of Swaminatha Moopanar. He was satisfied that in this case the preservation of the public peace required that an order under section 107 should also be passed. There is evidence against all the petitioners that they took part in the attempt to create a disturbance on the 27th June. We do not feel called upon to interfere with the order in revision. We dismiss the petitions.

IN RE
MUTHIA
MOOPAN.
—
SUNDARA
AYYAR
AND
PHILLIPS, JJ.

APPELLATE CRIMINAL.

*Before Sir Ralph Sillery Benson, the Officiating Chief Justice,
and Mr. Justice Sankaran Nair.*

THE SESSIONS JUDGE OF COIMBATORE, PETITIONER,

v.

IMMUDI KUMARA KANGAYA MANTRADIYAR

AND SIX OTHERS (ACCUSED), RESPONDENTS.*

1912.
September
16 and 18.

*Criminal Procedure Code (Act XIV of 1898), secs. 208, sub-sec. (1) and (3)—
Witnesses, refusal of Magistrate to summon, before commitment—Magistrate's
discretion.*

A Magistrate has a discretion for reasons to be recorded by him to refuse to summon witnesses under section 208, Criminal Procedure Code (Act XIV of 1898) prior to his making a commitment.

Sub-section (1), section 208, Criminal Procedure Code, contemplates the production of evidence by the prosecution or by the accused without the aid of the Magistrate. Sub-section (3) contemplates the intervention of the

* Criminal Miscellaneous Petition No. 305 of 1912.