anomaly if an action for damages against him could not be sustained on the same facts.

I would set aside the decree of the District Judge and direct him to restore the appeal to file and dispose of it in the light of the above remarks. Costs in this Court to be costs in the cause.

K.R.

PERIYA GOUNDAN v. KUPPA GOUNDAN.

AYLING, J.

APPELLATE CRIMINAL—SPECIAL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling and Mr. Justice Sadasiva Ayyar.

P. VARADARAJULU NAIDU (ACCUSED), APPELLANT,

v.

KING-EMPEROR.*

1919, April, 2, 3 and 4.

Criminal Procedure Code (Act V of 1898), ss. 196 and 428—Prosecution for offence under section 124-A, Indian Penal Code—Sanction by whom to be given—Local Government—Sanction by one Member of Government alone, whether sufficient—Sanction after complaint, whether valid—Sanction by telegram—Proof of sanction—Telegram purporting to be sent by Government—Presumption as to sender—Evidence Act (Indian), sec. 88—Objection, overruled by Magistrate—Conviction—Appeal—Additional evidence on appeal as to proof of sanction, if can be permitted—Policy in granting sanction under section 196, Criminal Procedure Code.

Sanction, given *after the filing* of the complaint, does not fulfil the requirements of section 196, Criminal Procedure Code.

Barindra Kumar Ghose v. *King-Emperor*, (1910) I.L.R., 37 Calc., 467, followed.

Sanction granted under section 196 of the Code must, in order to satisfy the section, have been the act of the Local Government and not of a single Member of such Government.

Section 88 of the Evidence Act forbids the raising of any presumption as to the person by whom a telegram is sent, and the Act does not contain any special provision as to telegrams purporting to emanate from Government.

Where therefore a telegram containing a sanction to prosecute a person under section 124-A, Indian Penal Code, purported to be despatched from Ootacamund and to be signed 'Madras' which is the telegraphic name of the Chief Secretary to the Government of Madras, there was no presumption as to the

* Criminal Appeal No. 17 of 1919 and Criminal Miscellaneous Petition No. 148 of 1919.

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person by whom it was sent, and, in the absence of proof, it could not be held that the telegram was sent by the authority of the Madras Government.

The powers given by section 428, Criminal Procedure Code, to an Appellate Court to take additional evidence are perfectly general and are subject only to the condition that the Court should record its reasons.

Where a conviction on a serious charge, such as sedition, if otherwise sustainable, would have to be upset for want of formal proof of sanction, owing to a misconception as to the proper mode of proving it on the part of the prosecution, a misconception which was shared by the trial magistrate,

Held (by WALLIS, C.J., and AYLING, J., SADASIVA AYYAR, J., dissenting) that it was a fit case for the Appellate Court to admit additional evidence to supply the defect in formal proof of the sanction; but on its being elicited in Court that the sanction sought to be proved was not the act of all the members of the Local Government, the Court declined to order fresh evidence to be taken, and set aside the conviction and sentence.

Per SADASIVA AYYAR, J.—Under section 428, Criminal Procedure Code, an Appellate Court should permit additional evidence to be taken only where it feels a reasonable doubt whether on the evidence as it stands the conviction is justified, and not where being convinced that the prosecution fails on the evidence on record, it considers that the negligence of the prosecutor might be excused; the discretion to be exercised under the section is not an arbitrary one and should not be exercised, especially against the accused in a criminal case if the prosecution had ample opportunity to adduce all its evidence, and is similar to the power exercised by an Appellate Court in a civil appeal under Order XLI, rule 27, Civil Procedure Code.

Considerations of public policy involved in granting sanction under section 196, Criminal Procedure Code, in the first instance, or after failure of a prosecution on technical grounds, pointed out by SADASIVA AYYAR, J.

APPEAL against the order of S. V. NARGUNAM, the Subdivisional First-class Magistrate of Madura division, in Calendar Case No. 53 of 1918, and petition praying the High Court will be pleased to pass an order directing the taking of additional evidence in the said Calendar Case No. 53 of 1918 on the file of the Court of the Subdivisional First-class Magistrate of Madura.

The material facts appear from the Judgment.

K. Srinivasa Ayyangar, *A. Krishnaswami Ayyar* and *K. Balasubrahmanya Ayyar* for the accused.

The Public Prosecutor with him *D. M. Durai Raja* for the Crown.

WALLIS, C.J. WALLIS, C. J.—In this case the accused appeals from a conviction under section 124-A of the Indian Penal Code, and Mr. K. Srinivasa Ayyangar who appears for him has raised the contention that the conviction is bad for want of legal proof of the sanction required by section 196 of the Criminal Procedure Code in the case of prosecutions under this section.

The telegram which contains the sanction on which reliance is placed was filed with the complaint, and the defence, having obtained a copy, took several objections to it, which were overruled by the trial Magistrate on the 26th September 1918. On the same day the trial began, and the Public Prosecutor of Madura went into the box as the first prosecution witness, and deposed to receiving a letter marked exhibit A-1 from the District Magistrate, Madura, enclosing a telegram marked exhibit A. The defence objected that the telegram was not proved and it was marked exhibit A for purposes of identification. In October, while the trial was going on, the defence filed a revision petition in the High Court against the Magistrate's order and in ground 6(*a*) alleged the Magistrate ought to have held that there was no proof of the sending of the telegram by the Governor in Council or the Local Government. At that time the Magistrate had only held that the telegram might be marked for purposes of identification. Mr. K. Srinivasa Ayyangar explains that this ground of objection was not pressed before the learned Judges as it was still open to the prosecution to supply the necessary proof. They did not do so. We are told that accused's vakil in his address to the Court at the close of the case again raised this point and that it was argued on both sides, but the Magistrate's judgment does not refer to this. In these circumstances we proceed to deal with it.

The telegram, exhibit A, was as follows :—

Ootacamund, 22-17-15, State 3 to 5.

Clear line, District Madura.

Your letter 20th instant. Under section 196, Criminal Procedure Code, Government authorize Public Prosecutor prefer complaint under section 124-A, Indian Penal Code, against Varadarajulu Nayudu in respect of speech made at Madura on 18th August. Public Prosecutor may act on this authority immediately if after consultation with him you are satisfied that this is desirable. Complaint prepared should be submitted at once to Government for issue of supplemental sanction—Madras.

The word 'Madras' as appears from the Official Telegraphic Guide, and as is matter of general knowledge, is the telegraphic name of the Chief Secretary to the Government of Madras, and it may be taken that the telegram purports to come from the Chief Secretary.

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WALLIS, C.J.

The witness also filed exhibit A-2 which he subsquently received from the District Magistrate. Exhibit A-2 is in the following terms:—

Extract from G.O. No. 787, Confidential, Public, *dated 30th August 1918.*

Under section 196, Criminal Procedure Code, His Excellency the Governor in Council sanctions the prosecution of P. Varadarajulu Nayudu for an offence under section 124-A, Indian Penal Code, in respect of a speech entitled "The Present Political Situation" delivered at Madura on the 18th August 1918.

(True Extract.)

(Sd.) L. DAVIDSON,

Ag. Chief Secretary.

Exhibit A-2 is legal proof under sections 76 to 78 of the Indian Evidence Act that sanction to prosecute the accused was duly given by the Government of Madras on the 30th August 1918, but unfortunately that was after the filing of the complaint, and it has been held in *Barindra Kumar Ghose* v. *Emperor*(1), the authority of which has not been questioned before us, that a sanction given after the filing of the complaint does not fulfil the requirements of section 196 of the Criminal Procedure Code.

We have, therefore, to see whether the alleged sanction of the 22nd of August contained in the telegram, exhibit A, is duly proved. The Evidence Act does not contain any special provisions as to telegrams purporting to emanate from Government, and they are governed like other telegrams by the provisions of section 88 of the Indian Evidence Act, which is as follows:—

"The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission."

We are therefore forbidden by the express provisions of the section to make any presumption as to the person by whom the telegram, exhibit A, was delivered for transmission. That the

(1) (1910) I.L.R., 37 Calc., 467.

telegram, exhibit A, was despatched from Ootacamund on the 22nd of August 1918 may be considered proved, but we are forbidden to raise any presumption as to the person by whom it was sent; and, therefore, we cannot hold, in the absence of proof, that it was sent by the authority of the Madras Government.

In view of our decision that it was not proved by whom the telegram, exhibit A, was sent the Public Prosecutor applied to the Court to take additional evidence under section 428 of the Criminal Procedure Code which requires an Appellate Court, if it thinks additional evidence to be necessary, to record its reasons and empowers it to take the evidence itself or cause it to be taken. The terms of the present section are perfectly general, and are subject only to the condition that the Court should record its reason, a provision introduced by way of amendment in 1897. As recently observed by Lord READING, L.C.J., in admitting additional evidence for the prosecution under the similar power now possessed by the Court of Criminal Appeal in England, the jurisdiction must always be exercised with great care—*Rex* v. *Robinson*(1)—but I cannot agree with the contention that it is inapplicable in a case of this kind. It would not in my opinion be creditable to the administration of justice or in accordance with modern ideas on the subject that a conviction or a charge such as this, if otherwise sustainable, should be upset owing to a misconception on the part of the prosecution as to the proper mode of proving a statutory requisite not affecting the merits, a misconception which was shared by the trial magistrate. When the Appellate Court has statutory power to prevent such a miscarriage, by directing fresh evidence to be taken on the point, I am unable, with great respect, to agree with the observation of one of the learned Judges in *Jeremiah* v. *Vas*(2) in so far as they question the propriety of taking action under section 428 in such a case to supply a defect in formal proof. The learned Judges before whom the case first came differed in opinion as to the scope of the section and the decision of Mr. Justice BENSON, to whom the case was referred, proceeded entirely on facts peculiar to that case.

But before allowing the prosecution to tender additional evidence in this case we ought, I think, to be satisfied that the

(1) (1917) 2 K.B., 108. (2) (1913) I.L.R., 36 Mad., 457.

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case is one of formal proof only. The sanction communicated in the telegram, exhibit A, must in order to satisfy the section have been the act of the Local Government and not of a single Member of such Government.

WALLIS, C.J.

We have now elicited in Court that this is not the case for the prosecution and in these circumstances we must decline to order fresh evidence to be taken.

We are therefore constrained to allow the appeal, set aside the conviction and sentence and discharge the accused's bail bond on the ground that the requisite sanction has not been proved. I do so with great reluctance as the point in no way affects the merits of the case but the law leaves us no alternative.

AYLING, J.

AYLING, J.—I agree.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—After we had pronounced our order answering in the negative the question whether there was legal proof that the Governor in Council (that is the Local Government) had sanctioned the complaint (the existence of which sanction was the indispensable foundation on which the validity of the whole prosecution rested), Mr. Osborne made an oral application to us requesting us to exercise our powers as an Appellate Court under section 428, Criminal Procedure Code, to take "additional evidence" in proof of the genuineness of the telegram which had been marked exhibit A by the Magistrate only for the purpose of identification.

Section 428 says (omitting words unnecessary for our purpose):

> "The Appellate Court (*a*) if it thinks additional evidence to be necessary, (*b*) shall record its reasons and (*c*) may . . . take such evidence itself."

When the learned Public Prosecutor asked us to exercise our indubitable power under the above section in favour of the prosecution I expected that he would make his application in writing setting forth his reasons, because the law required the Appellate Court to record its own reasons before taking what the legislature evidently considered as the exceptional course of allowing additional evidence to be adduced in appeal. If I remember right it was even suggested to him that even though we heard his oral application he was expected to file a written application in the course of the day. No such written application

was, however, filed yesterday. The failure on the part of the prosecution to establish by evidence the very foundation of their case, notwithstanding that the existence of that foundation was denied even during the course of the examination of the very first witness for the prosecution (namely, Mr. C. Krishna Nayar) who produced exhibit A on the 26th September 1918; notwithstanding that that alleged foundation was again disputed in October 1918 [see ground 6 (*a*) of the Revision Petition] in the revision case in this Court; and notwithstanding that the defence insisted on that fundamental defect in the prosecution case during the final arguments before the trial Magistrate, this glaring failure is, to say the least, extraordinary. The only explanation given by the learned Public Prosecutor was that the prosecution erroneously thought that there was nothing in the objection (as the want of legal proof of the sanction required by section 196) as it was not argued during the hearing of the revision petition in this Court. I regret to state that this explanation to my mind is unsatisfactory.

Then it was argued that there could be no reasonable doubt from the common sense point of view that exhibit A represented a real sanction given by the Governor in Council, that evidence of a conclusive character to prove its character as a real sanction was and is easily available, that to refuse to allow that evidence to be produced in appeal would lead to the failure of the prosecution on a mere technicality and that because even if the present prosecution fails on this technicality, a new prosecution could and would be launched at once on the undoubtedly genuine sanction, exhibit A-2, or on a new sanction, that it would tend to the convenience of both sides to the saving of expense to both sides and to economy of time of Courts if the additional evidence is allowed to be let in.

As regards the first point, there would have been greater force in it if exhibit A-2 had referred to the existence of a previous sanction like that stated in exhibit A and if the trial Magistrate had not altogether ignored the objection to the want of legal proof of the requisite sanction in his judgment.

As regards the second argument, the tendency of my mind (if I may be permitted to say so) is against allowing mere technicalities to stand in the way of a decision on the merits, if it could be reasonably helped. But in a matter of discretion,

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it has been almost an invariable rule with Courts not to exercise it against the accused, and in favour of the prosecution, unless in exceptional cases or where the merits are clearly against the accused. (For example unsuccessful complainants are very rarely allowed to apply in revision against orders of discharge or acquittal, though our power to interfere cannot be doubted.) As we have not heard the appeal yet on the merits, we cannot at this stage say that on the ground of not allowing a clearly or confessedly guilty man to escape, we should exercise our discretion in favour of the prosecution. In fact, in a case involving the consideration of a very difficult question as to the scope of the obscure explanation to section 124-A it is almost impossible to hold any definite view as to the prima facie guiltiness of the appellant at this stage or whether his guilt is grave enough to justify the view that it is desirable to allow additional evidence in order not to allow an offence of a grave and clear character to go unpunished.

As regards the convenience of all parties and the saving of expense and time to both sides, the appellant's vakil, Mr. A. Krishnaswami Ayyar, refused to see the benefit of the course proposed so far as his client is concerned. Further, it is only if we could be reasonably sure that, on the failure of the present prosecution, the Governor in Council would at once launch a fresh prosecution that the alleged conveniences and savings of time and money would accrue through the cure of the defect in the present prosecution by the reception of additional evidence. There is nothing on the record to show that the Governor in Council may not drop the matter altogether on failure of this prosecution on the technical ground (of want of proof of the alleged sanction of the 22nd August 1918). It has to be remembered that the offence under section 124-A occurring in chapter VI is an offence against the State. Further, the body of the section is supplemented by three explanations, of which the second and third are more in the nature of exceptions than explanations. The question whether a particular passage alleged to offend against the provisions of the body of section 124-A is or is not saved by one or other or both of these explanations 2 and 3 is almost always a contested matter and frequently one of great dubiety. That the gravity of the offence varies according to the time, the place and the circumstances in which the words were

spoken or written is clear from the convicting Court having the discretion to impose sentences ranging from a mere fine to transportation for life. [See *Queen-Empress* v. *Ramachandra Narayan*(1) as to severe sentences being reserved for violently seditious writings in times of public disturbance.] Liberty of free expression, of the discontents and the misapprobations at the acts and policies of Government with a view to obtain desirable alterations and ameliorations, is a fundamental constitutional right recognized by the British Government. Whether such expression passes the prescribed bounds and becomes a danger to the stability of the State, and whether even when it had passed reasonable limits, it is desirable on grounds of State policy to launch a prosecution are questions which the Governor in Council has deeply and anxiously to consider before sanctioning a prosecution and the like considerations apply in the case of a prosecution once launched.

Hence, such cases are concerned not merely with the guilt or innocence of the accused person and are not therefore governed to the same extent as other cases by the consideration that a presumably guilty party should not be allowed to escape from justice on mere technicalities. As JENKINS, C.J., said in *Barindra Kumar Ghose* v. *Emperor*(2) "the policy of this safeguard" (that is the safeguard of a sanction under section 196 by the highest executive authority, the Governor in Council) is manifest; the maintenance of this control is of the highest importance; and it is beyond the competence of the Local Government to delegate to any other body or person this controlling power and the discretion it implies. The question whether action should be taken under chapter VI is more than a matter of law; considerations of policy arise and these can only be determined by the authorities specially designated in the section.

"It would, I think, be opposed to the true intendment of section 196 for the Local Government to abandon to"

(its legal or other advisers) and I might add, even to the Court":

"The discretion and responsibility that properly belongs to itself; and I should hesitate to take a view of this section that

(1) (1898) I.L.R., 22 Bom., 152, at p. 159 (F.B.).
(2) (1910) I.L.R., 37 Calc., 467, at p. 489.

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might permit the Government to entrust to the zeal of an advocate or of those by whom he may be instructed the determination of the serious questions involved."

I think that the important considerations of policy referred to in the above weighty observations apply not only to the desirability or otherwise of initiating a prosecution under chapter VI but also to the question whether it is desirable to launch a fresh prosecution if the first prosecution fails or is likely to fail on account of technical defects. Such questions are intended by the legislature to be left to the sole determination and discretion of the Governor in Council. We cannot safely assume that the reasons of State policy which led to the issue of exhibit A-2 still continue in the opinion of the Governor in Council; that, therefore, they are sure to launch a fresh prosecution if this fails, and that, therefore, there would be less waste of time if the fundamental defect in this prosecution is allowed to be remedied by additional evidence. The above considerations, in my opinion, distinguish this class of cases to which section 196, Criminal Procedure Code, applies from other similar cases where failure of justice for want of sanction under section 195, Criminal Procedure Code, is prevented by the application of section 537, Criminal Procedure Code. I think that the intention of the legislature to give unfettered discretion to the Governor in Council in the matter of the desirability of creating public excitement by launching prosecutions for offences under chapter VI is likely to be rather furthered by throwing out this case on the record as it stands, leaving it to the Government to fully consider the present conditions and if they consider it still desirable to do so to initiate a fresh case against the appellants, than to act on the learned Public Prosecutor's application to take additional evidence in this case itself.

Even assuming that the above distinction is not sound, is it desirable to set up the precedent of permitting an Appellate Court to take additional evidence not because the Appellate Court feels a reasonable doubt whether on the evidence, as it stands, the conviction is justified but because, after being convinced that the prosecution fails on the evidence on record, it considers that the negligence of the prosecution might be excused? I do not deny the power of the Appellate Court to do so under section 428, Criminal Procedure Code, but I am clearly

of opinion that it should be exercised against the accused only in very exceptional cases. Sitting with NAPIER, J., to try a criminal appeal recently, I felt a doubt whether the medical evidence of a Subordinate Medical officer was sufficient to arrive at the conclusion that the injuries to rib bones found on a buried and disinterred corpse had been caused by ante-mortem violence. We had therefore the additional evidence of a higher Medical officer taken who supported the evidence of his subordinate, and we then arrived at a decision satisfactory to both our minds and confirmed the conviction for murder. But the present is not a case where there is evidence which, if reliable, proves a relevant fact but the Appellate Court feels a doubt on the point and thinks that additional evidence might throw fresh light which would enable it to arrive at a definite and satisfactory conclusion. In *Empress of India* v. *Fatch*(1) Mr. Justice MAHMOOD says

"When . . . that Court" (Sessions Court) "takes all the evidence produced by the prosecution and that evidence fails to sustain the charge, this Court (that is the High Court) will not except in very exceptional circumstances direct that additional evidence should be taken. The powers conferred by section 282, Criminal Procedure Code (of 1872), are not in my opinion intended to be exercised in cases like the present in which the prosecution having had ample opportunities to produce evidence have done so and that entire evidence falls short of sustaining the charge."

In *Jeremiah* v. *Vas*(2) SUNDARA AYYAR, J., says at page 467

"At any rate, it (section 428) does not appear to be applicable where the prosecution having had ample opportunities to produce evidence has failed to do so."

When that case went before BENSON, J., owing to difference of opinion between SUNDARA AYYAR and PHILLIPS, JJ., that learned Judge did not dissent from the above enunciation of the law but on "the affidavit of the complainant's counsel in the Magistrate's Court" and "the report of the Magistrate" held it to be clearly established—

"That the prosecution was prepared to adduce evidence of the publication of the libel, but that when counsel proceeded to adduce his evidence, the Magistrate intervened and stated that it was unnecessary."

(1) (1883) I.L.R., 5 All., 217. (2) (1913) I.L.R., 36 Mad., 457.

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Thus BENSON, J., differed from SUNDARA AYYAR, J., on the question whether the prosecution had "had ample opportunities of adducing evidence" "and yet had failed to do so" and so he felt himself justified in calling for additional evidence.

SADASIVA AYYAR, J

There is no affidavit filed in the present case to the effect that the prosecution while prepared to adduce evidence were not given opportunities to adduce it and, as I have said already, the learned Public Prosecutor was not even prepared to state in a written application the grounds on which he desired indulgence for the prosecution and (if I understood him aright) was not prepared to say definitely which witness or witnesses he was going to examine and whether the additional evidence related only to the fact that the message delivered at the Ootacamund Telegraph Office transmitted from Ootacamund and corresponding with exhibit A was signed by the Chief Secretary or also to the questions whether the Local Government in this case (that is the persons authorized by law to administer the Executive Government of the Madras Presidency as defined in clause 29, section 3 of the General Clauses Act) sanctioned the prosecution or one Member alone of the Government gave the sanction taking on himself the sole responsibility of the Local Government and then the Chief Secretary sent the telegram taking that decision of the single Member as that of the Local Government. (I do not intend to express any opinion at this stage whether such a decision by a single Member under departmental rules would in the eye of the law be treated as the act of the Local Government, but it has to be noted that the defence took the objection at the earliest stage that an 'individual' Member or Members of the Local Government cannot exercise the power under section 196 in the name of the Government.) After I had written this opinion I found that at the last moment a written application was filed for the prosecution, praying for the taking of additional evidence; but it gives no further definite information and therefore does not materially affect the cogency to my mind of the reasons I have attempted to make clear. The statements made by Mr. Durai Raja in answer to my Lord's questions in no way tended to the further elucidation of the exact scope of the additional evidence. The discretion to be exercised by the Appellate Court in taking additional evidence is not an arbitrary discretion as is shown by the provision that

it "shall record its reasons". Surely it should not be exercised, especially against the accused, in a criminal case where under similar circumstances the Court of Appeal hearing a civil appeal would not admit additional evidence on appeal under Order XLI, rule 27, of the Code of Civil Procedure (which also directs the Appellate Court to record its reasons before admitting additional evidence). In *Arasappa Pillai* v. *Manika Mudaliar*(1) and *Satis* v. *Takurdas*(2) it was held that where no evidence or insufficient evidence had been offered on a relevant point in the Court of First Instance by a party who had ample opportunity to adduce all his evidence, an Appellate Court ought not in appeal to allow his application to adduce further evidence on that point. For the above reasons I concur with my Lord in allowing the appeal.

K.R.

(1) (1914) 16 M.L.T., 301. (2) (1917) 25 C.L.J., 473.