APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., *Chief Justice and Mr. Justice Viswanatha Sastri.*

P. SANJIVI REDDY AND ANOTHER (PLAINTIFFS), APPELLANTS * 1925, October 6.

v.

K. KONERI REDDI (DEFENDANT) RESPONDENT.

Defamation, suit for—Absolute privilege—Statement in complaint under sec. 107, *Criminal Procedure Code* (*V of* 1898) *—Repetition of same statement in subsequent Police enquiry under sec.* 161, *Criminal Procedure Code.*

Statements made in a complaint to a Magistrate under section 107, Criminal Procedure Code, praying that security should be taken from a person for keeping the peace and a repetition of the same statements before a police officer to whom the Magistrate referred the complaint for enquiry and report, are absolutely privileged and no action for defamation in respect of such statement is maintainable. *Dr. Groenvelt* v. *Dr. Burwell*, (1700) 1 Ld. Raym., 454; 91 E.R.; 1202 and *Watson* v. *M'Ewan* [1905] A.C. 480, followed.

APPEAL against the decree of R. A. JENKINS, the District Judge of Bellary, in Original Suit No. 53 of 1923.

The facts and arguments are given in the judgment.

The plaintiff whose suit for damages for malicious prosecution and defamation was dismissed preferred this appeal.

Sir K. V. Reddi and *P. V. Rangaram* for appellants.

S. Ranganatha Ayyar for respondent.

COUTTS TROTTER, C.J. COUTTS TROTTER, C.J.—The plaintiffs in this case brought a suit claiming damages for malicious prosecution and for defamation. The defendant presented a petition to the Deputy Magistrate of Adōni praying that the plaintiffs and some others should be bound over under section 107 of the Criminal Procedure Code. The Magistrate on receipt of the petition sent it to the police

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for enquiry and report. The police reported, after enquiry and after hearing what the petitioner had to say that there was no foundation for the allegations in the petition. Thereupon the Magistrate dismissed it and refused to take any action under section 107, Criminal Procedure Code. This civil suit is the outcome of those proceedings.

No difficulty arises with regard to the claim for malicious prosecution. The short and sufficient answer to such a claim is that the plaintiffs were not in fact prosecuted. But the claim for defamation raises a question of some little importance.

A code like the Criminal Procedure Code which purports to provide for every conceivable situation labours under at least one disadvantage and that is that it is difficult, if not impossible, to argue by analogy and to extend the principle to be found in one class of cases with which it deals to another. I make no question but that it is against the general principles of the Code that action should lie for statements made in circumstances such as the present. But unfortunately while the Code contains definite provisions as to certain statements the effect of which is to make them absolutely privileged it can hardly be said to have provided for statements such as these. Indeed the contention for the plaintiffs is that the present occasion cannot be brought within the words of the Code at all. The difficulty in the present case is created by the wording of section 202, Criminal Procedure Code, the section which authorizes a Magistrate to refer a matter for investigation to a police officer taken in conjunction with the definition of 'complaint' contained in section 4 (1-h). In the latter section 'Complaint' is defined as

"the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code that some person, whether known or unknown, has committed an offence"

and section 202 which gives the Magistrate the power to refer a matter for investigation by a police officer is in terms restricted by defining the occasion on which he may so act by the words

"on receipt of a complaint of an offence of which he is authorized to take cognizance."

It is argued that as a petition under section 107 does not allege the commission of an offence but merely the apprehension that an offence may be committed, the Magistrate has no jurisdiction to order a police investigation. From this it would follow that the investigation is one not authorized by the Code and it is said to follow that the statement made on such an occasion cannot be supposed to be absolutely privileged. It is further pointed out that, on the principle of *expressum facit cessare tacitum*, where the Code indicates that absolute privilege should attach to statements, it has done so by implication under section 161. That section makes a person interrogated by a police officer making an investigation bound to answer all questions relating to the case put to him by the police officer. Unfortunately the investigation dealt with by section 161 is limited to an investigation made under Chapter XIV of the Code which relates to information as to the commission of a cognizable offence. I have already stated that this was not a case of an offence at all but merely a threatened or contemplated offence. The argument is thus two-fold, first that the Magistrate has no jurisdiction to refer the case for investigation at all, and secondly, that even if he had, as the information did not relate to the commission of an offence, the witness was under no necessity to answer questions put to him and therefore absolute privilege cannot attach to such answers. It was not disputed at the bar that, if the witness were compellable to answer questions, absolute privilege would

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attach to his answers, nor was it disputed that qualified privilege might be held to attach to the statements made in this case. That however would not help the respondent here, as there were allegations of malice which were not gone into by the learned Judge which would have invalidated any claim to qualified privilege. With regard to the statements alleged to have been made to the police officer, I do not feel any great difficulty. It is, I think, possible to argue that the words of section 154 at the opening of Chapter XIV, "Every information relating to the commission of a cognizable offence" may be held to cover "information relating to the threatened commission of a cognizable offence" which, of course, would cover the present case where the suggestion was that the petitioner's life was in danger. But I prefer to put it on another and a wider ground. In *Watson* v. *M'Ewan*(1) the House of Lords decided that the absolute privilege which attaches to a witness in the box also attaches to statements made by him for the purpose of his being examined in the box. In that case one of the statements on which it was sought to found the action was made to the solicitor for the purpose of taking the witness's proof and might have been held to be covered by the professional privilege of the solicitor. But another of the statements was made not to a professional lawyer but to a layman, the husband of the plaintiff, in reference to proceedings for a separation which were pending between them. But the House of Lords did not proceed on the ground of professional privilege at all but on the ground of the privilege of a witness. Lord HALSBURY says at page 487,

"It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must as a necessary consequence involve that which is a

(1) [1905] A.C., 480.

step towards and is part of the administration of justice, namely, the preliminary examination of witnesses to find out what they can prove."

I take that as clearly implying that all statements made by a potential witness as a preliminary to going into the witness-box are equally privileged with the statements made when actually in the box in Court. And the compiler of the head-note took the same view because he states—

"The privilege which protects a witness from an action of slander in respect of his evidence in the box also protects him against the consequence of statements made to the client and solicitor in preparing the proof for trial."

I am therefore of opinion that the statements made to the police officer which could only be made with a view to their being repeated on oath before the Magistrate were absolutely privileged. It would in my opinion have been much better if the Code had contained a general power to Magistrates to refer any matter brought to their notice for investigation to a police officer without confining it to Chapter XIV. Petitions under section 107 are habitually referred for investigation by Magistrates. This is a great safeguard to the subject, and no class of cases requires more security from the very nature of the allegations made. An allegation not that a man has committed an offence but that he contemplates committing one can obviously be made much more recklessly than an allegation that he has in fact committed an offence which is a much more tangible subject of investigation. I think it will be well that the Code should be revised and that express provision should be made conferring power in terms upon magistrates to refer petitions under section 107 for investigation. It is quite true that there is a ruling recorded in Weir's Criminal Rulings, Vol. II, page 51 (Criminal R.C. No. 132 of 1891) that there is no irregularity in a

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Magistrate calling for a report from a magistrate (and a police officer must be in the same position) before taking action under section 107. But I think it would be well if the matter were finally settled by an express statutory direction.

With regard to the statements in the petition presented to the magistrate, it is clear that such a document is contemplated by section 107(1) as part of the regular machinery of the section. Its wording is—

> "Whenever a magistrate of the class described in the section is informed that any person is likely to commit any breach of the peace"

and it is clear that the petition would fall within the information contemplated by the section. If so, it would clearly be invested by the common law of England with absolute privilege which attaches not merely to the actual proceedings of any tribunal exercising judicial functions, but to all preliminary steps which are in accordance with the recognized and reasonable procedure of such a tribunal. This was laid down by Lord HOLT, C.J., in 1700 in the case of *Dr. Groenvelt* v. *Dr. Burwell*(1). I am of opinion that that principle which is absolutely necessary for the administration of justice must be held to obtain in India also. The learned Judge was therefore right in non-suiting the plaintiffs, and this appeal must be dismissed with costs.

VISWANATHA SASTRI, J.

VISWANATHA SASTRI, J.—The suit was for the recovery of Rs. 5,000 being the damages sustained by plaintiffs by reason of certain "false and malicious accusations and imputations" made by defendant in a "criminal complaint filed" by him in the Court of the Deputy Magistrate, Adōni, on 28th June 1923. These "accusations and imputations" were repeated in a statement made by the defendant to the Sub-Inspector of

(1) (1700) 1 Ld. Raym., 454; 91 E.R.; 1202.

Police, Aspari, on 21st July 1923, to whom the Deputy Magistrate had referred the complaint for investigation. Defendant admitted the filing of the "petition" and contended that "it cannot be deemed to be a complaint"; that the filing of it did not amount to a prosecution; that consequently plaintiffs had "no cause of action to sue for damages for malicious prosecution"; that no such suit lay in respect of statements made to the police officer in the course of the inquiry and that the statements were not made "maliciously and without reasonable and probable cause;" but "in good faith, *bona fide*, for good reasons and for the protection of this defendant's own interest." On these pleadings the trial Judge joined the following issues:—

I. Were the allegations absolutely privileged?

II. Was there any prosecution such as would entitle the plaintiff to damages, if it were proved to be malicious and based on false allegations?

No evidence was received, and the learned trial Judge after considering the law came to the conclusion that

> "no action can be taken by the plaintiffs for damages for defamation in respect of allegations made by the defendant in his complaint to the magistrate or in his statement to the police."

He also held that as "there was no prosecution, but only an attempt at prosecution, no suit for damages for malicious prosecution can lie."

These findings are impeached in appeal.

The petition of 28th June 1923 presented to the Deputy Magistrate, Adōni, is not printed, but the allegations said to have been made in it are detailed in paragraph 5 of the plaint. The petition was one praying for action under section 107 of the Criminal Procedure Code, and as it was dismissed without issuing any

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notice to plaintiff, there was no prosecution of plaintiffs and consequently no action for damages for malicious prosecution would lie.

On the question whether an action for damages for defamation would lie on the basis of the petition, the contention of the defendant was one of absolute privilege. In *re Muthusami Naidu*(1) a bench of this Court following *Golap Jan* v. *Bholanath Khettry*(2) held that a defamatory statement in a complaint to a magistrate was absolutely privileged. But it was contended on behalf of the appellants that a petition to a magistrate to take action under section 107 of the Criminal Procedure Code was not a "complaint" within the meaning of the term as defined in section 4(1), clause (*h*) of the said Code; and that subsequently no claim to absolute privilege can be made, with respect to accusations and imputations made therein. A "complaint" is defined in the Code as an

> "allegation made orally or in writing to a magistrate with a view to his taking action under the Code that some person . . . has . . . committed an offence."

It is argued that no offence was committed by the defendant, and that consequently the petition should not be deemed to be a "complaint." It is open to a person whose personal safety is threatened, to apply to a magistrate for protection and one of the ways of affording protection is by taking security under section 107 of the Criminal Procedure Code. The petition put in by defendant initiated a proceeding; and *in re Muthusami Naidu*(1), the case above cited, the learned Judges observe:

> "We do not think that a statement in a complaint which initiates a proceeding should be held to be entitled to less privilege than other statements made by parties in the subsequent stages of the proceedings."

(1) (1914) I.L.R., 37 Mad., 110. (2) (1911) I.L.R., 38 Calc., 880.

I may here state that the words used in the plaint are "The defendant filed a criminal complaint in the court of etc." In my opinion, therefore, the plea of absolute privilege will prevail with respect to the petition presented to the Deputy Magistrate.

The question whether there is any such privilege in the case of the statement made to the Sub-Inspector of Police on 21st July 1923 is not free from difficulty in the face of the ruling of SESHAGIRI AYYAR, J., in *in re Kakumara Anjaneyalu*(1) to the effect that

> "the rule of law that parties before the Court are absolutely privileged cannot be extended to the case of complaints to a police constable."

In that case the question of privilege arose in a prosecution under section 499, Indian Penal Code, and not as here in a civil action for defamation, and in *Ghunni Lal* v. *Narsingh Das*(2) a bench of five Judges held that "the civil and the criminal law and procedure . . . are . . . independent of each other" and that as "there was no statue in India dealing with civil liability for defamation, the rule of equity, justice and good conscience" had to be applied. The same view has been taken by a special bench of five Judges of the Calcutta High Court in *Satish Chandra Chakravarti* v. *Ram Doyal De*(3). At page 426 it is stated that

> "the principles of justice, equity and good conscience applicable in such circumstances should be identical with the corresponding relevant rules of the common law of England."

In the case before us, the petition presented to the Deputy Magistrate was sent by him to the police for investigation and so far as my experience goes, this is usually done. Such a course is authorized under section 202 of the Criminal Procedure Code, when a magistrate receives "a complaint of an offence of which he is

(1) (1916) 35 I.C., 813. (2) (1918) I.L.R., 40 All., 341 (F.B).
(3) (1921) I.L.R., 48 Calc., 388.

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authorized to take cognizance." But a contention is raised to the effect that as there was no complaint of an offence of which the magistrate was authorized to take cognizance, he had no authority to order police investigation and that the statement to the sub-inspector of police was therefore made to an officer who had no authority to hold any investigation. Section 107 of the Criminal Procedure Code appears in part IV which is headed "prevention of offences." The prevention of offences is a part of the administrative machinery for maintaining "law and order," and this task is laid on magistrates. These magistrates have control over the police, whose assistance they can seek in the discharge of their duties. Such being the case, it appears to me that it is perfectly open to a magistrate who is asked to set in motion section 107 of the Criminal Procedure Code, to avail himself of the help which is available to him under section 202, Criminal Procedure Code, when complaint of an offence of which he is authorized to take cognizance is made to him. In this view I am fortified by the ruling reported in Weir's Criminal Rulings, Vol. II, page 51. In that case the report was no doubt called for from a subordinate magistrate, but this can make no difference. In Halsbury's Laws of England (Edition of 1911), Vol. XVIII, section 1254 it is stated that "the privilege attaches not merely to proceedings at the trial, but to proceedings which are essentially steps in judicial proceedings." In the footnote reference is made to *Waston* v. *M'Ewan*(1) where it was held

> "that the public policy which renders the protection of witnesses necessary for the administration of justice necessarily involves that which is a step towards, and is part of the administration of justice, namely, the preliminary examination of witnesses to find out what they can prove,"

(1) [1905] A.C., 480.

and that consequently statements made by a witness to a litigant or his solicitor in preparing proof are absolutely privileged. I am therefore of opinion that apart from section 202 of the Criminal Procedure Code, it was competent to the Deputy Magistrate, Adōni, to have referred the matter to the police for investigation, and that the Sub-Inspector of Police, Aspari, was entitled to hold the investigation and having presented the petition, it was the duty of the defendant to assist in the investigation. It was said that such wide privileges would have disastrous consequences on innocent citizens, who would be left without redress. But it will always be open to such persons to put sections 182 and 211, Indian Penal Code, in motion by an application under section 195, Criminal Procedure Code.

I would therefore dismiss the appeal with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Wallace.

TAMBI REDDY VIRAREDDY (SECOND COUNTER-PETITIONER, SURETY), APPELLANT,

1925, November 24

v.

DEVI REDDY PATTABHIRAMI REDDY & Co. AND OTHERS (PETITIONERS AND FIRST COUNTER-PETITIONER), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 145 and O. XXI, r. II, cl. 3—Surety for a judgment-debtor—Application

* Civil Miscellaneous Appeal No. 106 of 1923.