APPELLATE CRIMINAL.

Before Mr. Justice Curgenven.

M. L. SIVARAMAKRISHNA AYYAR (First Accused), Petitioner,

1928, October 16.

v.

SESHAPPA NAIDU (Complainant), Respondent.*

Indian Penal Code, ss. 466 and 474—Judge—Pending suit—Fabricates record or dishonestly exceeds powers—If in discharge of official duty—Writing record of imaginary suit—Essence of offence—Prosecution—Previous sanction of Government, if necessary.

Where a Judge in a pending case fabricates any record or dishonestly exceeds his powers, the offence is committed by him while acting or purporting to act in the discharge of his official duty, and he is no less doing so in writing up the record of an imaginary suit, the essence of the offence in both cases being, that an officer having as part of his official duty the correct maintenance of judicial records fraudulently falsifies them.

Where a complaint alleged the commission of offences under sections 466 and 474 of the Indian Penal Code against a village munsif, in that the accused fabricated an entire record of the whole of a proceeding purporting to have been tried and decided by him under the Village Courts Act (I of 1889), *held*, the previous sanction of the Local Government, under section 197 of the Code of Criminal Procedure, was necessary before a Court could take cognizance of the offences alleged.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Stationary Sub-Magistrate, Kulittalai, dated the 10th February 1928, in P.R. No. III of 1927.

V. L. Ethiraj and *A. S. Sivakaminathan* for petitioner.

K. S. Jayarama Ayyar for respondent.

K. S. Vasudevan for *Public Prosecutor* for the Crown.

* Criminal Revision Case No. 310 of 1928.

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JUDGMENT.

The petitioner is a village munsif, and he applies for the revision of an order passed by the Stationary Sub-Magistrate of Kulittalai in P.R. No. 3 of 1927 on his file. That case was instituted by the complainant against the petitioner and two others under sections 466 and 474, Indian Penal Code, and the question which arose was whether cognizance of the offences complained of could be taken without the sanction of the Local Government under section 197, Criminal Procedure Code. The subject-matter of the complaint was a record of a civil suit in which the complainant figured as a defendant, and which purported to have been tried and decreed by the petitioner under the Village Courts Act (I of 1889). The complaint alleged that the whole proceeding from start to finish was fictitious, and that the entire record was a forgery. The point for decision is whether sanction under section 197, Criminal Procedure Code, is necessary before a Court can take cognizance of an alleged offence of this character.

Section 197 provides (to extract so much of it as is relevant here) that " when any person who is a Judge within the meaning of section 19 of the Indian Penal Code is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Local Government." It is not disputed that a village munsif, when he tries suits under the Village Courts Act, is a Judge. But it is contended that the alleged offence was not "committed by him while acting or purporting to act in the discharge of his official duty."

The passage just quoted represents the latest of several legislative endeavours to define the kind of

offences in respect of which sanction is required. In the 1872 Code (section 466) the phrase was "an offence committed by a public servant in his capacity as such public servant", and in the Codes of 1882 and 1898 "is accused as such Judge or public servant of any offence." But though the present wording is perhaps more explicit, there is no reason to suppose that it marks any change in the intention or the principle underlying the provision. The cases which have been decided under the successive Codes show that much difficulty has been experienced in discovering any general tests by the application of which it may be found whether sanction is or is not necessary. Before examining those cases, one fairly obvious fallacy, commonly urged and indeed to some extent countenanced by the words of the section, may be disposed of. It is said, to take an example, that a Judge who fabricates a record is not "acting or purporting to act in the discharge of his official duty" because it is no part of his official duty to commit such an act. But it is evident that no act can be at once part of his official duty and an offence, so that, were this construction accepted, the provision would involve a contradiction in terms. Clearly what is meant is that the offence must be committed in dereliction of the duty cast upon him as a Judge.

Not all such derelictions, however, it has been held, fall within the scope of the section. In *In re Gulam Muhammad Sharif-ud-Daulah*(1), PARKER, J., held, under section 197 of the Code of 1882, that sanction was required to prosecute a Judge who used defamatory language during the trial of a suit, because he was accused of uttering it "as a Judge". But in dealing with similar circumstances, a Calcutta Bench in *Nando Lal Basak* v. *Mitter*(2), differed from this view, adopting

(1) (1886) I.L.R., 9 Mad., 439. (2) (1899) I.L.R., 26 Calc., 852.

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the opinion of FIELD, J., expressed in an earlier unreported case, that the corresponding provision in the Code of 1872 "was intended to apply to those cases in which the offence charged is an offence which can be committed by a public servant only, cases, that is, in which he being a public servant is a necessary element in the offence". This view was approved and acted upon by DAVIES and MOORE, JJ., in *The Municipal Commissioners for the City of Madras* v. *Major Bell*(1), by COUTTS TROTTER, J. (as he then was) in *Sheik Abdul Kadir Saheb* v. *Emperor*(2), and by JACKSON, J., in *Raja Rao* v. *Ramaswamy*(3). Difficulty, however, often arises in applying this principle—in deciding, that is, whether the alleged offence contains an element necessarily dependent upon the offender being a public servant. It is not enough that the offence should be imputed to a public servant acting in the discharge of his official duties, if the nature of the offence—e.g., the use of defamatory language—is such that, so far as its ingredients go, anyone else might have committed it. This was the view taken by COUTTS TROTTER, J., in the case cited above with regard to the offence of criminal breach of trust by a public servant. Although the money came into the public servant's hands in his capacity as a public servant, yet he committed in respect of it an offence such as another, not a public servant, might have committed; but the learned Judge, in holding that section 197 would not apply, confessed that it was a question of considerable difficulty and very near the line.

Coming now to the cases which relate to the fabrication of records, an early Bombay decision (*Imperatrix* v. *Lakshman Sakharam Vaman Hari and Balaji Krishna*(4), under the Code of 1872, was upon facts closely similar

(1) (1901) I.L.R., 25 Mad., 15.
(2) (1916) 1 M.W.N., 384.
(3) (1927) I.L.R., 50 Mad., 754.
(4) (1877) I.L.R., 2 Bom., 481.

to the present instance. A Mahalkari, who was an officer invested with the powers of a Judge in a certain class of cases, had fabricated the entire record of a civil suit. The language of section 466 of the 1872 Code, as I have noted above, differed from that of our present section 197, but its intended scope was probably the same The learned Judges held that that scope extended "to all acts ostensibly done by a public servant, i.e., to acts which would have no special signification except as acts done by a public servant . . . The very object of the fabrication would be to invest those proceedings with a special character, and it is, we think, proper that the alleged fabricator should be dealt with in his official capacity under the provisions specially enacted; although private individuals charged with the same acts or omissions, or acts in one sense the same, would be proceeded against in the ordinary way". This passage brings out, I think, very clearly the nature of the issue which those fabrication cases raise. "Anyone", it is urged, "might equally well have committed the forgeries". The answer is "No, no one but the public servant himself could have produced them in the very hand in which, if genuine, they would have been written".

MILLER, J., in *Palaniandy Pillai* v. *Arunachellum Pillai*(1), had to deal with a case where a Village Magistrate was accused of making a false record in his register convicting the complainant of theft of pumpkins. He found that inasmuch as the karnam, and not the Village Magistrate, has to maintain the register, the latter was not acting "as a Judge" in doing what he did. I think it is clear that this finding was enough to exclude the application of section 197, Criminal Procedure Code. The learned Judge took occasion however to consider

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(1) (1908) I.L.R., 32 Mad., 255.

2 Bom., 481, and observed, in criticism of the passage from it which I have quoted,

"Anyone could have done it who had access to the register kept by the karnam or the Village Magistrate, and though the effect of it would be to give the impression that the Village Magistrate in a certain case had acted as Judge, he would not, if the charge is true, have in fact done so".

I have already ventured to suggest the answer to this line of reasoning, and would add the objection, with all respect, that the same contention would apply even to a forged interpolation in a genuine record, thereby carrying the application of the argument to greater lengths than it has been taken before me, and excluding from the scope of section 197, Criminal Procedure Code, such an offence, for example, by a public servant as that rendered punishable by section 167, Indian Penal Code (framing an incorrect document with intent to cause injury). MILLER, J., adds "I do not see how a Magistrate who fabricates a record in which he figures as Judge can properly be said to be acting as Judge when he does so".

The correctness of this latter observation was doubted by SPENCER and KRISHNAN, JJ., in *Subbiah Pillai* v. *Emperor*(1), a case distinguishable however on the ground that the fabrication (of a judgment and a calendar) was in a real case actually pending before the Village Magistrate. While feeling no doubt that, in these circumstances, the Village Magistrate was acting not in a private capacity but as a Judge, so that section 197 would not apply, they had not to decide whether, if the proceedings were wholly fictitious, the same conclusions should be drawn. Lastly I may notice two unreported cases. In Criminal Revision Case No. 310 of 1925,

(1) (1920) M.W.N., 7.

WALLACE, J., held that a Sub-Registrar who tampers with a document presented to him for registration is not protected by the section. Anyone who got access to the document was equally well situated to do the same. In the other case, Criminal Revision Case No. 291 of 1916, a Village Munsif before whom some suits were pending had attached a jutka and pony before judgment, and a complaint was filed against him under sections 379 and 114, Indian Penal Code, SESHAGIRI AYYAR, J., who disposed of the Revision Petition, rejected the contention that as the Village Munsif was acting *ultra vires* he was not acting as a Judge within the meaning of the section. "If this argument is pushed to its logical conclusion", he observes, "no public servant or Judge can have the safeguard of a sanction, as it is not within the powers conferred upon such an officer to commit an offence". He adds that in all cases where a public servant purports to exercise his function as such, he must be deemed to be acting as such public servant, and that accordingly sanction was necessary.

Thus it will be seen that there is good authority for the position that where a Judge, in a pending case, fabricates any record or dishonestly exceeds his powers, the offence is "committed by him while acting or purporting to act in the discharge of his official duty". Mr. Jayarama Ayyar, conceding this, contends that the fabrication of an entire record does not involve such an offence,—that in the absence of any pending case it cannot be said that the alleged offender was discharging or purporting to discharge his official functions. The best answer which I can make is that if in forging a judgment and a calendar in the one case, and in unauthorizedly issuing an attachment warrant in the other, a Judge is purporting to discharge his duties, he is no less doing so in writing up the record of an imaginary suit. The difference is a difference of degree and not of kind. The

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essence of the offence in each case is that an officer having as part of his official duty the correct maintenance of Judicial records fraudulently falsifies them. The purport of that forgery was that, acting in the discharge of his duty, he had entertained and decided a civil suit, and it can make no difference, for the purpose whether the record was wholly false or partly true and partly false, and so whether the suit was wholly fictitious or fictitious only in part. In either case, so far as the fictitious part was concerned, he was as much or as little "purporting to act in the discharge of his official duties" in inventing the record of it. Nor do I feel hesitation in deciding that an essential ingredient of the act complained of was that the author was a public servant. I had already found occasion to remark upon this aspect of the matter. It does not seem even to have been argued in (1920) M.W.N. 7, and it has received an affirmative answer in 2 Bom., 481. JACKSON, J., in 50 M., 754, finds some difficulty in following this latter decision, observing, "if the ingenious man had forged the record as coming before some other court, there presumably would be no question of sanction, and why must there be a sanction because he selected his own court?" This is really MILLER, J.'s argument in another shape and my own view is that it makes all the difference that the court and the records are those for which the Judge as a Judge is responsible.

I accordingly allow the Revision Petition, set aside the order of the Stationary Sub-Magistrate and direct that the complaint as against the petitioner be dismissed for want of sanction under section 197, Criminal Procedure Code.

B.C.S.