

opportunity of cross-examining the witnesses, which circumstances removed the case from the operation of s. 33. But, as I have said, s. 512 of the present Criminal Procedure Code, taken in conjunction with s. 327 of the old law, meets the difficulty, and at least made the deposition of Musammat Chittan evidence at the trial. I also think that, under the special circumstances, the deposition of Musammat Durga, taken in 1874, was admissible, in advertence to the terms of s. 157 of the Evidence Act. I agree with the Chief Justice that there was good evidence before the Judge to show, first, that Ishri Singh was one of the persons who took part in the violence that led to the death of Fakir Chand, and secondly, that the appellant is that Ishri Singh. I concur therefore in dismissing his appeal, as also in the mitigation of the sentence to one of transportation for life. I can only add that if the statement of the girl Durga in the Court below, in cross-examination, as to the action of the committing Magistrate, is correct, the conduct of that officer was not only most improper, but absolutely illegal, and a repetition of it will involve very serious consequences.

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CRIMINAL REVISIONAL.

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September 25.

Before Mr. Justice Straight.

QUEEN-EMPRESS, v. YUSUF KHAN.

Act XV of 1883 (N.-W. P. and Oudh Municipalities Act), ss. 69, 71—Municipal rules—Infringement of rules—Prosecutions—N.-W. P. Government Notification No. 865, dated the 3rd November, 1869—Rule VI, legality of.

Municipal Boards and Magistrates should see that before prosecutions are instituted under the Municipal rules, care is taken that the requirements of s. 69 of Act XV of 1883 (N.-W. P. and Oudh Municipalities Act) are satisfied.

A District Magistrate, who was also Chairman of a Municipal Board, having information that a certain person had evaded the payment of octroi duty, directed his prosecution for breach of Municipal rules. The Magistrate in thus causing proceedings to be taken, acted wholly of his own motion and authority. The accused was tried and convicted under Rule 6, Government N.-W. P. Notification No. 865, dated the 3rd November, 1869, read with s. 45 of Act XV of 1873 (N.-W. P. and Oudh Municipalities Act). This rule provided that any person evading or abetting the evasion of the octroi duties specified in a schedule, should be deemed to have committed an infringement of a bye-law. It purported to have been made under s. 12 of Act VI of 1863 (Municipal Improvements Act, N.-W. P.), which authorized the making of "rules as to the persons by whom, and the manner

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in which any assessment of taxes under this Act shall be confirmed, and for the collection of such taxes."

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Held that assuming the rule to have been legally made under s. 12 of Act VI of 1868, which was not clear, and that it was saved by s. 2 of Act XV of 1873, it would, as declared in s. 71 of Act XV of 1883 (N.-W. P. and Oudh Municipalities Act) continue in force until repealed by new rules made under such last-mentioned Act, and be deemed to have been made under that Act, and its operation was therefore subject to the provisions of that Act, and among them to s. 69, which made it a condition precedent to the institution of a prosecution against the petitioner, that there should be a complaint of the Municipal Board or of some person authorized by the Board in that behalf.

Held that the position of the Magistrate of the District in connection with s. 69 was neither better nor worse than that of any other member of the Board, and unless he had been duly authorized by the Board as a Board, he had no more *locus standi* to cause a prosecution to be instituted personally than any other individual member; and the words of s. 69 being mandatory, and the petitioner having from the outset urged this objection to the legality of the proceedings, he was entitled to the benefit of it now, and the conviction was illegal and must be set aside.

THIS was an application for revision of an order of Mr. J. Clarke, Deputy Magistrate, Bulandshahr, dated the 2nd April, 1886, and of the order of Mr. H. G. Pearse, Sessions Judge of Meerut, dated the 12th May, 1886, affirming the Deputy Magistrate's order.

It appeared that Mr. Addis, Magistrate of the Bulandshahr District, having, as Chairman of the Municipal Board of Bulandshahr, received information from one Chintaman that the applicant, Yusuf Khan, had evaded the payment of octroi duty on certain cloth at Bulandshahr, directed the Tahsildar to report in the matter. On receiving the Tahsildar's report, the Magistrate made the following order:—"I think that the case against Yusuf Khan should be investigated criminally for breach of Municipal law. It is obviously unfitting that I should conduct the inquiry myself, as I am Chairman of the Board. I therefore make over the case to Mr. Clarke, Deputy Magistrate."

The Deputy Magistrate accordingly tried Yusuf Khan for evading the payment of octroi duty, under a rule made by the Lieutenant-Governor of the North-Western Provinces under s. 12 of Act VI of 1868—(Rule 6, Government N.-W. P. Notification No. 865, dated the 3rd November, 1869), read with s. 45, Act XV of 1873, and convicted and punished him with a fine of Rs. 50.

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That rule runs as follows :--“Any person evading or abetting the evasion of the octroi duties imposed in the schedule, shall be deemed to have committed an infringement of a bye-law.”

Yusuf Khan having applied to the Sessions Judge of Meerut for revision of the order of the Deputy Magistrate, the Sessions Judge rejected the application, but modified the conviction so as to make it one under the rule quoted, read with s. 71 of Act XV of 1883.

It was contended before the Sessions Judge that the Deputy Magistrate acted contrary to law in taking cognizance of the offence, as there had been no complaint by the Municipal Board or any person authorized by the Board in that behalf as required by s. 69 of Act XV of 1883. As to this contention the Sessions Judge observed as follows :--

“In the absence of any definite rule as to who is to be considered a ‘person authorized by the Board’ under s. 69 of Act XV of 1883, this Court considers that on every assumption of common sense the President must be considered such a person. The alternative would be the deadlock of every minor prosecution for breaches of Municipal rules, standing over it might be for a month till the meeting of the Board for a solemn consideration and sanction by the whole collective wisdom.”

Mr. *G. T. Spankie*, for the applicant, contended that the rule, with reference to which the applicant had been convicted, was not legally made under s. 12 of Act VI of 1868, that section only authorizing the Lieutenant-Governor to make rules as to the persons by whom, and the manner in which, any assessment of taxes should be confirmed, and for the collection of such taxes, and the rule in question was not such a rule ; and being illegal that it was not saved by Act XV of 1873, s. 2. It was also contended that the Deputy Magistrate had no jurisdiction, as no complaint had been preferred by the Municipal Board or any person authorised by it in that behalf, within the meaning of s. 69 of Act XV of 1883.

The *Offg. Public Prosecutor* (Mr. *A. Strachey*), for the Crown, contended that the rule under which the applicant had been convicted might reasonably be considered a rule relating to the collection of taxes, within the meaning of s. 12 of Act VI of 1868. Even if it could not be so construed, and was consequently invalid in

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its inception, s. 2 of Act XV of 1873, confirmed and legalized all rules whatever theretofore made and approved by the Local Government, irrespective of their validity or otherwise, under Act VI of 1868. The rule must therefore be regarded as thenceforth a rule "made under the North-Western Provinces and Oudh Municipalities Act of 1873," within the meaning of s. 71 of Act XV of 1883, and consequently must be deemed to have been made under the latter Act, and to continue in force until repealed by new rules made thereunder. The conviction was therefore good under s. 64 of Act XV of 1883. Upon the question of jurisdiction, he submitted that the objection should be treated upon the same principle as objections on the ground of a defective sanction to prosecute, and that the conviction should not be set aside, unless it could be shown that there had been a failure of justice.

STRAIGHT, J.—Assuming the rule, in advertence to which the conviction of the petitioner was had, to have been legally made under s. 12 of Act VI of 1868, which is far from clear, and that it was saved by Act XV of 1873, it would, as declared in s. 71 of Act XV of 1883, continue in force until repealed by new rules made under such last-mentioned Act, and be deemed to have been made under that Act. Its operation was therefore, in my opinion, subject to the provisions of Act XV of 1883; and among them, to that contained in s. 69, which made it a condition precedent to the institution of a prosecution against the petitioner, that there should be a complaint of the Municipal Board or of some person authorized by the Board in that behalf. It is not pretended or suggested that the Magistrate of the District acted other than entirely of his own motion and authority in causing proceedings to be taken against the petitioner, which he had no right to do; and, for aught that appears to the contrary, every other member of the Board never so much as heard that a prosecution was to be instituted. The words of s. 69 are mandatory, and as the petitioner from the outset urged this objection to the legality of the proceedings, I think he is entitled to the benefit of it now. The position of the Magistrate of the District in connection with the terms of s. 69 was neither better nor worse than that of any other member of the Board, and unless he had been duly authorized by the Board as a Board, he had no more "*locus standi*" to cause a prosecution to be instituted personally than

any other individual member. The Judge's remarks on this point are quite erroneous and very misleading. It is as well that Municipal Boards and the Magistrates should see that before prosecutions are instituted under the Municipal rules, care is taken that the requirements of s. 69 are satisfied. Those rules encroach on the ordinary rights of the public, and where their enforcement is directed by the statute to be attended by a certain safeguard, that safe-guard must be respected and observed.

The conviction of the petitioner is quashed, and the fine will be refunded.

Conviction set aside.

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