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March 10.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Burkitt and Mr. Justice Aikman.

IN THE MATTER OF THE PETITION OF GANESHI.*

Criminal Procedure Code, s. 555—Act No. 1 of 1878 s. 9—Jurisdiction of officer in charge of the excise and opium administration of a district to try cases under the Opium Act—Meaning of the term "personally interested."

A Magistrate in charge of the excise and opium administration of a district is not "personally interested" in the observance of the provisions of Act No. 1 of 1878. He is therefore not precluded from exercising jurisdiction in respect of offences against the above mentioned Act.

The facts of this case sufficiently appear from the judgment of Edge, C. J.

The Public Prosecutor (Mr. *A. Strachey*) for the Crown.

EDGE, C. J.—This is a case which was referred under s. 438 of the Code of Criminal Procedure, 1882, by the Sessions Judge of Benares for the order of this Court.

Musammat Ganeshi had applied to the Court of the Sessions Judge to revise an order of conviction by which she had been convicted under s. 9 of Act No. 1 of 1878 of the offence of selling opium without a license. Against that conviction she had previously appealed and her appeal had been dismissed by the Sessions Judge. The application for revision, which was made subsequently to the order dismissing the appeal, was an application which the Sessions Judge could not entertain so far as his Court was concerned. All questions with regard to the legality of the conviction had been finally determined by his order dismissing the appeal. Properly speaking, Musammat Ganeshi, if she desired to raise a question as to the legality of the proceedings against her, should, as her appeal to the Sessions Judge had been dismissed, have applied to this Court to exercise its powers of revision. However, the matter is now before us and we have jurisdiction to deal with the case. Musammat Ganeshi had been convicted of the offence under s. 9 of Act No. 1 of 1878 by the Joint Magistrate of Benares, who was the officer

* Criminal Revision No. 735 of 1892.

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who had been placed in charge of the excise and opium administration of the district within which the offence is alleged to have been committed. The Joint Magistrate was not a party to the prosecution. It had been instituted in his Court by a Sub-Inspector of Police. The only question which we have to decide is whether s. 555 of the Code of Criminal Procedure, 1882, precluded the Joint Magistrate from taking cognizance of the offence and adjudicating upon the charge. The section is as follows:—"No Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try or commit for trial any case, to or in which he is a party or personally interested, and no Judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself." The explanation contained in the section is immaterial for the purposes of this case. The Joint Magistrate was not a party to the case. The only question we have to consider is this:—was he personally interested in the case before him? It is proved that he was the person apparently responsible to Government for the maintenance and enforcement of the law relating to the cultivation and keeping and sale of opium. Now the Magistrate of a district would be the person responsible for the public peace and the enforcement of the law within his district. It could not be suggested that, because it would be the duty of the District Magistrate to see that the law was maintained and carried into effect in his district, he would be thereby "personally interested" within the meaning of s. 555 in the prosecution of an offender for an offence within the district against the statute law relating to the preservation of the public peace. In my opinion a Magistrate cannot be said to be "personally interested," within the meaning of s. 555 of the Code of Criminal Procedure merely by reason of its being his duty as an officer under Government to see the law relating to the sale of opium is enforced and maintained in the part of the district of which he has charge. It is difficult to define what is the meaning of "personally interested." Probably it is safer to attempt no definition of these general words. In my opinion they cannot mean that a public officer whose duty it is to see that the law is obeyed is, merely by reason of that duty, a person personally interested

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in the prosecution and trial of an offender against the statute law. The words "personally interested" cannot refer to any very remote interest in the matter, and must refer to some particular and immediate personal interest in the case and its results. If it were otherwise no paid judicial officer under the Government of India could take cognizance of an offence the commission or repetition of which might affect the public revenue, which is the source from which those officers are paid, and in that event not only all Magistrates, but Session Judges and Judges of the High Court, would be precluded from taking cognizance of any offence against the laws relating to the public revenue, and there would be no Court which could entertain an appeal or an application in revision from a conviction by a bench of Honorary Magistrates for an offence against the laws relating to or affecting the public revenue. Section 191 of the Code of Criminal Procedure shows that the mere fact that a District Magistrate or a Sub-Divisional Magistrate or any other magistrate specially empowered in that behalf who is authorised under clause (*c*) to take cognizance of offences has directed the institution of a prosecution upon his own knowledge, or upon his own suspicion that the offences has been committed, does not preclude such magistrate from jurisdiction to hear and determine the case, which may in fact have been instituted upon his own peculiar knowledge of the facts. In such cases the accused has a power given him by the statute to obtain the transfer of the case to some other magistrate, but unless the accused exercises that privilege the jurisdiction of the magistrate to institute, hear and determine the particular case is unquestionable. I refer to s. 191 for the purpose of showing that a merely preconceived opinion as to the guilt of an accused does not necessarily deprive a Magistrate of jurisdiction to adjudicate on the charge. We have been referred by Mr. *Strachey* to a number of cases, some decided in this country, some in England. In my opinion none of those cases touch the case which is before us, in which the magistrate was neither a party nor personally interested. The cases to which Mr. *Strachey* referred are the following :—*Queen-Empress* v. *Saha Dev valad Tukaram* (1);

(1) I. L. R., 14 Bom., 572.

The Queen v. *Farrant* (1); *The Queen* v. *Rand* (2); *The Queen* v. *Handsley* (3); *Leeson* v. *General Council of medical Education and Registration* (4); *The Queen* v. *McKenzie* (5); *The Queen on the Prosecution of Shaw* v. *Lee* (6); *The Queen* v. *Gaisford* (7); *Municipality of Benares* v. *Bishen Chand* (8); In the matter of the petition of *Nobin Krishna Mookerjee* (9); In the matter of *Kharak Chand Pal* v. *Tarach Chunder Gupta* (10).

In conclusion, I am of opinion that the Joint Magistrate had jurisdiction to hear and determine the charge against Musammat Ganeshi, and I would return the record to the Court of the Sessions Judge with this expression of opinion.

TYRRELL, J. I entirely concur.

KNOX, J.—The sole question before us is whether the Joint Magistrate of Benares was personally interested in the case of *The Queen-Empress* v. *Musammat Ganeshi*, and therefore debarred from trying the case without the permission of the Court to which an appeal lay from his Court. The circumstances of the case have been fully set out by the learned Chief Justice in his judgment. There is nothing in the circumstances which discloses that there existed in the mind of the Joint Magistrate any feeling prejudicial to the accused before him. It is not a mere interest in a case or in the circumstances of a case which disqualifies a Magistrate or a Judge from trying a case. That which disqualifies him is, to adopt the language used in the case of *The Queen* v. *Handsley* (11), "a substantial interest giving rise to a real bias and not merely to a possibility of a bias." I would therefore return the papers to the Sessions Court of Benares with no orders or directions beyond the opinion of the Court.

BLAIR, J.—I would answer this reference in the terms used by the Chief Justice and return the record without further orders.

(1) 20 Q. B. D. 58.
(2) 1 Q. B. 230.
(3) 8 Q. B. 383.
(4) 43 Ch. D. 366.
(5) 2 Q. B. of 1892, p. 519.
(6) 9 Q. B. D. 394
(7) 1 Q. B. of 1892, p. 381.
(8) Weekly Notes 1886, p. 291.
(9) I. L. R., 10 Calc. 194.
(10) I. L. R., 10 Calc. 1030.
(11) 8 Q. B. D., 383.

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BURKITT, J.—I also would make the same reply.

AIKMAN, J.—I entirely concur with the learned Chief Justice. It is, as remarked by him, difficult to define what is the personal interest referred to in s. 555 of the Code of Criminal Procedure as debarring a Magistrate or Judge from trying a case. I should be inclined to say that it was an interest attaching to him as an individual, *e.g.* in the present case to Mr. Porter, as Mr. Porter, and not an interest which he derives solely from his official position. The decisions which have given a wider meaning to the words of s. 555, have, it seems to me, overlooked the important provisions of s. 191, cl. (*c*.) Code of Criminal Procedure.

I concur in the order proposed.

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March 24.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Aikman.

IN THE MATTER OF THE PETITION OF MURAD-UN-NISSA.*

Civil Procedure Code s. 546—*Execution of decree—Application for stay of sale of immovable property in execution of a money-decree under appeal.*

An application under the third paragraph of s. 546 of the Code of Civil Procedure to stay the sale of immovable property in execution of a decree for money against which an appeal has been filed must be made to the Court which passed the decree and not to the appellate Court. *Gossain Money Puree* v. *Gour Pershad Singh* (1) referred to.

The facts of this case are sufficiently stated in the judgment of the Court.

Mr. *Abdul Raoof* and Mr. *Mahomed Raoof*, for the applicant.

EDGE, C. J., and AIKMAN, J.—This is an application to stay the execution of a decree for money against which decree an appeal is pending in this Court, and in execution of which decree an order has been passed for the sale of immovable property. It is an applica-

* Application under s. 546, Civil Procedure Code, in First Appeal No. 258 of 1892.

(1) I. L. R. 11 Calc. 146.