REVISIONAL CRIMINAL.

1898.
November 19.

Before Mr. Justice Aikman.

QUEEN-EMPRESS *v.* MATHURA PRASAD.*

Act No. XLV of 1860 *(Indian Penal Code) ss.* 21, 161—"*Public servant*"—*Manager employed under the Court of Wards.*

Held that the manager of an estate employed under the Court of Wards is a "public servant" within the meaning of section 21 of the Indian Penal Code. *Queen-Empress* v. *Arayi* (1) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Messrs. *C. Ross Alston*, *A. H. C. Hamilton*, and Babu *Satish Chandar*, for the applicant.

The Government Pleader (Munshi *Ram Prasad*), with whom Babu *Satya Chandar Mukerji*, for the Crown.

AIKMAN, J.—This is an application asking this Court to exercise the powers of revision conferred on it by section 439 of the Code of Criminal Procedure.

The applicant, Mathura Prasad, was an employé of the Court of Wards on an estate under the Court in the Sháhjahánpur district. He was charged with and tried before a Magistrate of the 1st class for nine different offences, six of which were under section 409 of the Indian Penal Code, namely, criminal breach of trust by a public servant, and three under section 161 read with section 114 of the Indian Penal Code, abetting the receipt of illegal gratification by a public servant. Objection was taken before the Magistrate to all these offences being tried together. The Magistrate was under the erroneous impression that the provisions of section 234 of the Code of Criminal Procedure empowered him to try at one time any number of offences, provided no more than three offences of one kind were charged. Although he found the accused guilty of all the nine offences, he considered therefore that he complied with the law by convicting him of three only of the six offences under section 409 of the Indian

* Criminal Revision No. 548 of 1898.

(1) (1883) I. L. R., 7 Mad., 17.

1898.

QUEEN-EMPRESS v. MATHURA PRASAD.

Penal Code. He also convicted him of the three charges under section 161 read with section 114 of the Indian Penal Code. In the result he sentenced him to an aggregate punishment of four years' rigorous imprisonment and a fine of Rs. 120. On appeal the learned Sessions Judge sustained one of the convictions under section 409 and one of the convictions under sections 161 read with section 114 of the Indian Penal Code. The convictions and sentences under the other charges were set aside.

Before this Court the first plea urged by the learned counsel, who appears in support of the application, is that an employé under the Court of Wards is not a public servant. So far as the charges of criminal breach of trust are concerned, this question is of little importance, for on the facts found the applicant was guilty, if not under section 409, at least under section 408 of the Indian Penal Code, and the sentences imposed on him are within the limit of punishment prescribed for offences under the latter section. But the question is of importance with regard to the charge of abetment of the taking of an illegal gratification, for if the manager of the Court of Wards, whom the appellant is said to have abetted in taking illegal gratifications, cannot be held to be a public servant, the offence charged was not committed. The learned Counsel relies, in the first place, on the decision in the case *The Queen-Empress* v. *Arayi* (1). In that case it was held by Turner, C.J., that a peon employed by a manager of an estate under the Court of Wards is not a public servant within the meaning of that term in the Penal Code. Counsel were not instructed in that case, and no reasons are given for the view taken. Whether the learned Chief Justice would have held that the manager of an estate under the Court of Wards was not a public servant, does not appear.

Reference was next made to the provisions of section 12, sub-section (ii) of Act No. XVII of 1885, which is entitled "An Act to make better provision for the Superintendence of Government Wards in the Central Provinces." That sub-section

(1) (1883) I. L. R., 7 Mad., 17.

1898.

QUEEN-EMPRESS v. MATHURA PRASAD.

is as follows:—"Every manager, or other servant of the Court of Wards, shall be deemed a 'public servant' within the meaning of sections 161, 162, 164 and 165 of the Indian Penal Code; and in the definition of 'illegal remuneration' contained in the said section 161 the word 'Government' shall, for the purposes of this sub-section, be deemed to include the Court of Wards." It was argued that if the Legislature found it necessary to make this provision in the Act for the Central Provinces, it was clear that the provisions of section 21 of the Indian Penal Code, which section defines what persons fall under the description of "public servant," were not sufficient to cover the case of a Court of Wards' employé.

As neither Act No XIX of 1873 (The North-Western Provinces Land Revenue Act), nor any other Act applicable to these Provinces, contains any provision similar to that quoted from section 12 of Act No. XVII of 1885, it is clear that a Court of Wards' employé cannot be held to be a "public servant," if he cannot be brought within one or other of the ten clauses of section 21 of the Indian Penal Code. Reference was also made to section 35 of the North-Western Provinces Land Revenue Act, which contains the following provision:—"Every kanungo and patwari and every person appointed temporarily to discharge the duties of any such officer shall be deemed to be a public servant within the meaning of the Indian Penal Code." It was contended with much force that if the Legislature had intended that Court of Wards' employés should be held to be public servants, some provision similar to that quoted above would have appeared in Chapter VII of Act No. XIX of 1873, which contains the law as regards the Court of Wards. I must say that I was much impressed with the force of this reasoning: but after full consideration I have arrived at the conclusion that the provisions of the 9th clause of section 21 of the Indian Penal Code are wide enough to include the case of Court of Wards' employés. The material words of that clause are—"Every officer whose duty it is as such officer to take, receive, keep or spend any property on behalf of

1899

QUEEN-EMPRESS v. MATHURA PRASÁD.

Government." Now the Board of Revenue, which is a department of Government, is the Court of Wards for these Provinces, and as such is in charge of the estates of proprietors who are held disqualified to manage their own lands. It is true that section 202 of Act No. XIX of 1873, which lays down the duties of a manager, says that the manager "shall in every respect act to the best of his judgment for the proprietor's interest as if the property were his own." But while the disqualification of a proprietor lasts he has no power to collect any rents from his own estates. If he does receive rents he cannot give a good discharge to tenants. The collection of rents is taken from him by the Court of Wards, that is, by the Government, and although the Government may ultimately be accountable to the proprietor for the money which it has realized, it is none the less Government which receives the money. Therefore it seems to me that an officer of the Court of Wards does, when he realizes money from a Court of Wards' estate, realize that money "on behalf of Government." The provisions referred to above from the Central Provinces Act may have been enacted with the object of removing any doubts; but as the words of the Penal Code seem to me to be wide enough to cover the case of Court of Wards' servants I overrule the objection which the learned counsel urged with so much ingenuity and force.

The next point taken on behalf of the applicant is, that the defect in the trial which has been referred to at the outset of this judgment, is a defect which, *ipso facto*, renders the whole proceedings void. In support of this reliance is placed on a dictum of Petheram, C. J., in the case *In the matter of Lachmin Narain* (1). At page 131 of the judgment the learned Chief Justice says:—"It is clear from the terms of that section (section 234 of the Code of Criminal Procedure), that a man can only be tried for three separate offences of the same kind at the same trial, and, speaking for myself, I think that if a man were tried for four specific offences at one trial it would not only be an

(1) (1886) I. L. R., 14 Calc., 128.

irregularity which could be cured by section 537 of the Code, but a defect in the trial which would render the whole trial inoperative, unless it were cured by some subsequent proceeding by striking out some portions of the charge, and as to the propriety or legality of such a proceeding, we do not at present express any opinion." There is no doubt that this dictum is clearly in favour of the applicant, but it must be taken to be *obiter*, for it was not necessary for the decision of the case then before the Court. Section 233 of the Code of Criminal Procedure provides that, with certain exceptions therein specified, for every distinct offence of which any person is accused there shall be a separate charge, and every charge shall be tried separately. I think there is much force in the view taken by Petheram, C.J., that a breach of the provisions of this section is some thing more than a mere irregularity, but, in my opinion, it is not open to me to adopt that view, inasmuch as I find that not only in this Court but in the Calcutta and Bombay High Courts a breach of the provisions of section 233 or of the corresponding section 453 of the former Code, has been treated as an irregularity, and not as an illegality rendering the whole proceedings void.

That a grave irregularity was committed there cannot be any doubt, and I have to consider whether the irregularity has in fact occasioned a failure of justice. In the explanation appended to section 537 of Act No. V of 1898, it is said that in determining whether any error or omission or irregularity in any proceeding under the Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings. It is clear from the Magistrate's own record that the accused did take objection before him, and I am informed that immediately after the accused had been furnished with a copy of the charges and when his objection before the Magistrate was overruled, he had recourse to the Court of Session by a petition presented on the 7th of June, the charges having been framed on the 2nd of June, in which the same objection to the trial of so many offences

1898

QUEEN-EMPRESS v. MATHURA PRASAD.

together was urged. The Court of Session, however, declined to interfere at that stage of the case. The object of the law which enacts that, with the exceptions specified, there must be a separate trial for each offence, is framed no doubt, as well to prevent the cumulative effect upon the mind of the Court of a number of charges being brought forward together, as in the interest of the accused, who cannot but be harassed and bewildered by having to meet in one trial a number of separate charges. Now in this case the accused had not only to meet nine separate charges, but in reality a much larger number. For instance, charge No. 8 includes not only a charge of abetting the manager in the receipt of a bribe of Rs. 10, but a charge against the accused of accepting one for himself. Again, it appears that in charge number 9, in which the applicant is accused of having accepted on behalf of the manager a sum of Rs. 175, this sum was made up of a number of small sums realized from a number of tenants as an illegal gratification for allowing them to continue in their holdings. Although the amount is said to have been handed over to the manager in a lump sum, the evidence of a number of tenants was called to prove the payments of separate sums by them to the applicants. The result was that the record swelled to an enormous length, to upwards of 300 closely written pages. To meet all these different accusations at one trial must, it appears to me, have seriously prejudiced the applicant in his defence, and that the bringing forward of so many different charges must have influenced the mind of the Magistrate is equally clear. It is further argued with reference to the 9th charge, the conviction under which has been sustained by the learned Sessions Judge, that the accused was prejudiced by the manner in which it was drawn up. In it the offence is said to have taken place in the "month of *Magh*" last year. Evidence was called on behalf of the defence which the Sessions Judge seems to hold has the effect of proving that the offence could not have taken place in that month, inasmuch as the manager is said to have been during the whole of that month absent from Sháhjahánpur, where the offence is alleged

to have been committed. It is to be noted that the charge is not worded "in or about the month of *Magh*," and it is contended that the accused was prejudiced by being called on to meet only a charge for that month. The Sessions Judge is of opinion that the offence may have been committed in the following month of *Phagun*. If so, the accused ought to have had an opportunity of calling evidence to prove that the offence was not committed by him in *Phagun*. The result of the above examination of the record is, that I am constrained to come to the conclusion that the irregularities committed in the Court of the Magistrate are such as are not covered by the provisions of section 537 of the Code of Criminal Procedure. It is to be regretted that the Magistrate, who seems to have gone into the case before him very patiently, should have, by neglect of the provisions of the Code of Criminal Procedure, rendered the interference of this Court necessary. But, in my opinion, I have no alternative but to set aside the convictions and sentences, and direct that the accused be re-tried according to law. The fines, if paid will be refunded; the sentence of rigorous imprisonment will cease. Accused will be detained in custody until the District Magistrate makes arrangements for the re-trial of the accused, which he will proceed to do forthwith. In the event of a fresh trial resulting in conviction, the term of imprisonment which the applicant has already undergone ought to be taken into account.

FULL BENCH.

1898
November 10.

Before Mr. Justice Knox, Acting Chief Justice, Mr. Justice Banerji and Mr. Justice Burkitt.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (OPPOSITE PARTY) *v.* JILLO (APPLICANT).*

Civil Procedure Code, section 409—*Application for leave to sue* in formâ pauperis—*Decree*—*Appeal.*

Held that no appeal will lie from an order rejecting an application for leave to appeal *in formâ pauperis*. *Baldeo* v. *Gula Kuar* (1), and *Lekha* v. *Bhauna* (2) referred to.

* First Appeal No. 101 of 1896, from an order of Pandit Raj Nath, Subordinate Judge of Moradabad, dated the 4th January 1896.

(1) (1886) I. L. R., 9 All., 129. (2) (1895) I. L. R., 18 All., 101.