

REVISIONAL CRIMINAL

*Before Mr. Justice Allsop*EMPEROR *v.* BAFATI*

1938

November,
23

Municipalities Act (Local Act II of 1916), section 261—"Gutter of a public street"—"Street"—Drain leading from a street through some fields to a river—Interfering with the drain in the fields—No offence under the section.

Where a person made a hole in the side of a drain, leading from a street in a city through some fields to a river, the hole being made in a part of the drain which was not in the street but out in the fields, it was *held* that no offence punishable under section 261 of the Municipalities Act had been committed.

The field, though it had been channelled or sewerred, could not come within the meaning of the word "street" as defined in the Act.

The word "gutter" in section 261 cannot be read apart from the words, "of a public street", in the section and the section can not apply unless the gutter is a "gutter of a public street". The part of the drain which is out in the fields can not be deemed to be a "gutter of a public street" merely because it is used to drain away the water from a public street.

The provisions of section 261 are clearly intended to protect materials of a public street from damage or interference. The pavements, gutters and flags, mentioned in the section, are part of the materials of the street. A drain which is not part of the street can not be held to be material of the street.

Dr. M. H. Faruqi and Mr. Lakshmi Saran, for the applicant.

Mr. K. D. Malaviya, for the opposite party.

The Deputy Government Advocate (Mr. Sankar Saran, for the Crown.

ALLSOP, J.:—This is a reference by the learned Sessions Judge of Allahabad which I think must be accepted. A Magistrate convicted two persons, Bafati and Bachan, of an offence under section 261 of the Municipalities Act because they made a hole in the side of a drain leading from the city through some fields to the river.

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This was a municipal drain and it is obvious that Bafati and Bachan had no right to interfere with it; but the learned Sessions Judge thinks, and I believe rightly, that any offence they may have committed was not punishable under section 261 of the Municipalities Act. This section is in the following terms: "Whoever displaces, takes up, or makes an alteration in, or otherwise interferes with the pavement, gutter, flags or other materials of a public street, or the fences, walls or posts thereof . . . shall be punished."

The place where the hole was made in the drain is certainly not in a street in any ordinary sense of that term. It is out in the fields. It was apparently argued before the Magistrate that the field came within the definition of the term "public street" in the Municipalities Act because it had been channelled or sewerred, but as the learned Judge points out, the field could not come within the meaning of the word "street" because it is not a road, bridge, footway, lane, square, court, alley or passage which the public or any portion of the public has a right to pass along. The learned Judge repelled the argument of the Magistrate. It was argued before the learned Judge that the drain came within the meaning of the word "gutter" in section 261, in other words that the word "gutter" should be read apart from the words "of a public street". The learned Judge has rightly found that it cannot be read apart from the words "of a public street".

In this Court it is argued further that the drain is a gutter and it is the gutter of a public street because it is used to drain away the water from a public street. Learned counsel argues that a gutter, to be the gutter of a public street, need not be in that street. His point is that any drain which leads through a street and then from the street through the fields or elsewhere to take the water away from the street really appertains to the street and is strictly within the meaning of the words

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“gutter of a street”. In my judgment this contention, which is not supported by any authority, is too far fetched to be accepted. It is clear that the provisions of section 261 of the Municipalities Act are intended to protect the materials of a public street from damage or interference. The pavements, gutter and flags are part of the materials of the street. It would be impossible in my view to hold that a drain which is not part of the street was material of the street.

I accept the reference and set aside the conviction and sentences in each case. If the fine or any part of it has been paid the money shall be refunded.

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EMPEROR v. LACHHMI NARAIN AND OTHERS*

*Criminal Procedure Code, sections 76, 90—“Bailable warrant”
—Issue of warrant in a case in which ordinarily a summons is issued in the first instance—Court not bound to direct security to be taken.*

There is no provision in the Criminal Procedure Code which says that a warrant issued under section 90, to a person who is charged with an offence which is bailable and is such that ordinarily a summons is issued in the first instance, must contain an endorsement under section 76 directing the officer to whom the warrant is issued to take security from the person to be arrested and to release him from custody if such security is supplied. Whether such a direction is given or not is entirely in the discretion of the court.

Mr. *Shiv Charan Lal*, for the applicants.

The Deputy Government Advocate (Mr. *Sankar Saran*), for the Crown.

ALLSOP, J.:—This is a reference made by the learned Sessions Judge of Aligarh recommending to this Court to set aside the convictions and sentences of the petitioners under sections 147, 353 and 225 of the Indian Penal Code but instead to convict them under section

*Criminal Reference No. 694 of 1938.

352 of the Indian Penal Code and to impose on each of them a fine of Rs.25 or in default rigorous imprisonment for a period of three weeks.

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From the order of reference it appears that Lachhmi Narain, Pearey Lal, Budh Sen son of Chandar Bhan, Budh Sen son of Chhatar Mal, Surji, Kanhaiya, Ganga Ram and Pita were convicted by a Magistrate under sections 147, 353 and 225 of the Indian Penal Code upon the ground that they forcibly rescued one Kaley from the custody of four police constables who had arrested him in execution of a warrant issued by a Bench of Honorary Magistrates in a case in which he was charged with offences under sections 323 and 426 of the Indian Penal Code. There was a scuffle between these men and the constables and the coat of one of the constables was torn.

The learned Judge has made his reference because he considers that the custody was illegal and that for this reason those who were convicted could not have committed offences punishable under sections 225 and 353 of the Indian Penal Code. His argument is that Kaley was charged with bailable offences and that for this reason the Magistrate should have issued what he describes as a bailable warrant and not a non-bailable warrant. I cannot find that the terms bailable warrant and non-bailable warrant are anywhere employed in the Code of Criminal Procedure. There are bailable offences and non-bailable offences. There are also offences in respect of which a summons should issue in the first instance or a warrant should ordinarily issue in the first instance. It is true that a summons should ordinarily issue in the first instance to a person who is alleged to have committed an offence under section 323 or an offence under section 426 of the Indian Penal Code, but under section 90 of that Code if the court finds it necessary in some circumstances to issue a warrant it may do so.

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There is a provision in section 76 of the Criminal Procedure Code that a court which issues a warrant may direct the person to whom that warrant is issued to take security from the person to be arrested and to release him if such security is supplied. It is presumably a warrant to which this section has been applied which the learned Judge describes as aailable warrant. There is nothing in section 90 of the Criminal Procedure Code which says that a warrant issued under that section must be accompanied by a direction under section 76. Whether such a direction is given or not is entirely in the discretion of the court. There is nothing in the Code anywhere which says that a warrant issued under section 90 to a person who is charged with aailable offence must contain an endorsement under section 76. There is no force in the reasoning of the learned Judge.

It has been urged before me that the sentences should be reduced. They are sentences of imprisonment only for periods of two months and I see no reason to interfere. The reference is rejected. The persons concerned should surrender to their bail and serve out their sentences.