preferred, and the court-fee leviable will be upon the altered relief in appeal [vide *Kishun Dut Misir* v. *Kasi Pandey* (1), where the suit for possession, pure and simple, was decreed, but a condition was imposed in the decree that the plaintiff should pay off all incumbrances on the property]. The plaintiff obtained possession of the property, but appealed against the condition as to the payment by him of all encumbrances on the property. It was held that he was to pay court-fee upon the value of the encumbrances as that was the relief sought for in the appeal. The appellants in the present case only want in appeal a declaration without any consequential relief, and, I think, in the circumstances the suit should be treated as falling under Article 17, Schedule II of the Act. The arguments against the view are not convincing enough to entitle us to alter the prevailing practice or to go against the weight of authorities in the other High Court. The learned Vakil on behalf of the appellants presses for his costs on the ground that the learned Government Advocate has opposed in this case.

REVISIONAL CRIMINAL.

Before Adami and Bucknill, J.J.

RAMESHWAR SINGH

v.

KING-EMPEROR.*

1924.

March, 25.

Penal Code, 1860 (*Act XLV of* 1860), *sections* 116 *and* 161—*Attempt to bribe, whether were offer amounts to.*

A mere offer to pay an illegal gratification to a public servant, although no money or other consideration is actually produced, amounts to an attempt to bribe.

* Criminal Revision No. 126 of 1924, from a decision of W. H. Boyce, Esq., I.C.S., Sessions Judge of Bhagalpur, dated the 4th February, 1924.

(1) (1920) 5 Pat. L. J. 455.

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Rex v. *Samuel Vaughan*(1), followed.

Query.—Whether a person who offers an illegal gratification to a sub-inspector of police, for the purpose of obtaining a copy of the police diary of a case, is liable to the amount of punishment provided by the second part of section 116 of the Penal Code, or whether the punishment in such a case is limited to the amount provided in the first part of that section.

This was an application in criminal revisional jurisdiction made by one Rameshwar Singh who was convicted on the 21st of January, 1924, of an offence against the combined provisions of sections 161 and 116, Penal Code (abetting the taking by a public servant of an illegal gratification), by a Magistrate of the first class of Bhagalpur; he was sentenced to rigorous imprisonment for a period of 18 months and in addition to pay a fine of Rs. 250 and in default of payment thereof to a further period of three months' rigorous imprisonment. An appeal to the Sessions Judge of Bhagalpur was dismissed on the 4th of February, 1924.

The facts as put forward by the prosecution in this case were as follows: A certain writer sub-inspector to the superintendent of Police at Bhagalpur, named Babu Benai Kumar Mozumdar, was the real complainant. According to his account, at about 6 A.M. on the 28th of October, 1923, he was engaged in fishing in the river close to his residence and, whilst so engaged, his cook came to him and informed him that the *mahant* of a certain temple known as Boorhanath wished to see him. The complainant went to his garden and found three persons standing there, one of whom was subsequently ascertained to be the petitioner. The petitioner asked the complainant whether he had in his possession the police diaries which referred to what was known as the Shahkund murder case which was then before long to be tried; and, on the complainant stating that these

(1) (1769) 2 East 14: 98 E. R. 308.

diaries were in his possession, the petitioner then stated that if it was possible for the complainant to supply him (the petitioner) with copies of these diaries he (the petitioner) was willing to pay a bribe of Rs. 3,000 for copies of these papers. The sub-inspector appeared to have made light of this suggestion and to have replied laughingly that he could not possibly do what was asked. The three persons (including the petitioner) with whom he (the sub-inspector) had been talking then went away. The sub-inspector made no secret at all of what had taken place and, indeed, shortly afterwards, told a person named Shantosh Kumar Ray, who was fishing with him, all about the matter. He also gave an account of this suggestion which had been made to him to various other people; and, on the following Monday, he told the head clerk of the police office and, indeed, the deputy superintendent of police and eventually the superintendent. It appeared that his superior officers took a more serious view of the matter than he had done and that, unless he had been so instructed by them, the complainant himself would not have thought of making any formal complaint in connection with the occurrence.

However, on the 5th of November at about 2 P.M. the sub-inspector saw the petitioner standing on the verandah outside the Court of the Magistrate who was then engaged with the Shahkund murder case and who was, it may be added, the Magistrate who tried the present case. The complainant, on seeing the petitioner, then asked sub-inspector Abdul Quddus of Shahkund police-station, who was standing with him, who the petitioner was and where he lived, and was told then that he was a resident of a certain village in the Bhagalpur district and that he was a relation of one of the accused in the murder case which was then being dealt with.

After getting this information the complainant, on the 6th of November, eventually filed a complaint before the Court of the subdivisional officer; and the petitioner was in due course tried and was convicted.

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Gour Chandra Pal, for the petitioner.

H. L. Nandkeolyar (Assistant Government Advocate), for the Crown.

The learned Vakil who has appeared for the petitioner here has raised several ingenious points. Of these, two are legal points and the third is one of a three-fold character which relates to the facts.

The first point which the learned Vakil has raised is that the circumstances which are detailed by the prosecution do not disclose any offence. He suggested that, as there is no allegation that any actual money or other consideration was produced at the time when the proposition was made to the complainant by the petitioner, there was no *attempt to bribe*. He contends that, in order that any offence contemplated by the provisions of section 116, Penal Code, should have been effected, something more than a mere statement, that if a public servant would do something which he should not do in the discharge of his official duties he would be given an illegal gratification, must be shown. I do not, however, think that this is so. In the case of *Rex* v. *Samuel Vaughan* (1) it was there held quite clearly that a mere offer to pay an illegal gratification to a public servant was an attempt to bribe; and I do not think that this proposition of law which was laid down so long ago as the year 1769 has ever seriously since been disputed.

The second point with which the learned Vakil has dealt must be divided into three heads. Of these the first is the suggestion that between the evidence of the complainant and of his servant, who informed him that certain persons were waiting to see him there is a material discrepancy; for the complainant is alleged to have said that his servant had informed him that the *mahant* was waiting to see him; whilst the servant himself states that he informed his master that it was the cook of the *mahant* who wanted to speak to him (his master). An examination of the evidence which

(1) (1769) 2 East 14; 98 E. R. 308.

was given by the complainant's servant disposes of this point altogether; for what he says is :

"I conveyed the message to my master that the *mahant* of Boorhanath wanted to see him and so had sent a man to call him."

The second point on the facts which has been urged before us by the learned Vakil is perhaps somewhat stronger. He contends that the whole case as to identification rests solely upon the evidence of the complainant; and he complains that, although it was suggested at the trial that there should be a test identification in order to ascertain if the complainant could identify the person who had been arrested, this petition was rejected without any reason. It must at once be stated that the complainant's cook [who was the servant who called him to see the three men who had come to see his (the cook's) master] was unable to identify *any* of the three men, who had called, as being the petitioner; but although it is, therefore, in a sense, correct to say that the evidence of identification of the petitioner as being the person who had made this offer of a bribe was confined to that of the complainant himself, yet, what took place afterwards indicates to my mind, very strongly, firstly, that there *had* been such an offer thus substantiating the main truth of the story and, secondly, that the complainant *was* able to pick out and identify the petitioner in such a manner (and did in fact do so) that any idea of the necessity for a further test identification would have been absurd. It is clearly proved that the complainant pointed out to sub-inspector Abdul Quddus an individual on the verandah of the Court house as being the person who had offered him the bribe; that he did not know at the time who he was and that he asked for information as to his identity. It was on the information received, relative to his queries, that the complaint was eventually filed against the present petitioner.

The third point to which the learned Vakil alludes is relative to the defence which was put forward. It was suggested that the whole story told by the sub-inspector was false and an endeavour was successfully

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made at the trial by the petitioner to prove an *alibi* by the testimony of two witnesses. This *alibi* was believed by neither Court and the circumstances under which the complainant, immediately or shortly after what is alleged to have taken place, told numerous persons about the occurrence and the fact that he evidently had not the slightest intention of taking any proceedings against the petitioner (whose conduct he seems to have regarded as somewhat ridiculous) seem to me to show that there was no motive of *animus* moving in the mind of the complainant against the petitioner. No reason was suggested as to why the witnesses who purported to provide for the petitioner an *alibi* should be believed or why this Court should come to a decision on that question different to that at which the two previous Courts had arrived. It was said that there were two witnesses as to *alibi* whereas there was but one witness as to the petitioner's presence at the time when the offer of the bribe was made. There is nothing remarkable in a bribery case in such a state of affairs and the credence which may have to be attached to the one or the other of the stories does not depend simply upon the numbers of the witnesses. As I have said, the circumstances which took place after the alleged occurrence are of such a character as to my mind to show without any reasonable probability of doubt that the story which the complainant has told throughout has been a truthful one.

The third point which was put forward by the learned Vakil relates to the question of sentence. He points out that under the first portion of the provisions of section 116 a person who is convicted of abetment of an offence punishable with imprisonment can only be punished with a term of imprisonment which shall not be more than *one quarter* of the longest term provided for the offence in respect of the abetment of which the person is convicted. He also points out that in the second portion of section 116 it is provided that if the abettor or the person abetted is a public servant, *whose duty it is to prevent the commission of such*

offence, the abettor can only be punished with *half* the longest term of imprisonment which is provided for the substantive offence. It will be observed that in this case the maximum term of imprisonment provided for an offence against the provisions of section 161 is three years and that in this case this petitioner has been sentenced to eighteen months' rigorous imprisonment, that is to say, that he has been sentenced under the latter half of the proviso of section 116. It is contended that this is an illegal sentence. It is suggested that what is meant by the latter part of section 116 of the Indian Penal Code is that it is only in the case of a public servant whose special duty it is to prevent the commission of certain offences that the punishment provided under the latter half of section 116, as distinguished from the lesser punishment provided under the first half of that section, is applicable. The question is one which is based upon the suggestion, made by the learned author Dr. H. S. Gour in his work *The Penal Law of India*, at page 656, 2nd edition, that the half of the longest term of imprisonment provided for the offence of the abetment of which the individual concerned has been convicted is only applicable where the abetment is of a public servant whose duty *in his capacity as such public servant* is to prevent the commission of the very offence abetted; and he quotes a case in which where a prisoner was tentatively approaching a Civil Surgeon to see if he would accept a bribe and the Civil Surgeon stopped him from making further advances, it was held that the offence of abetment was complete but was one punishable under the first half and not under the latter half of section 116; and this was so because the Civil Surgeon, although undoubtedly a public servant, was not one whose duty it was as a public to prevent the offering of bribes. Unsupported apparently by authority the principle has been suggested by the learned author of the work in question as applicable to the offer of a bribe made to a police officer on the ground that bribery is not a cognizable offence nor was one which it is the specific duty of

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a police officer to prevent. Presumably, however, in the case of cognizable offences even the learned author of this book would agree that the second half of the section might be put into operation. The matter need not be further discussed here because, in view of the position which I think should be adopted with regard to the sentence, the question is not one which need here be decided. The affair here was evidently of a very tentative and not highly important nature. The matter was indeed by this police officer himself regarded as too insignificant to be worth any serious consideration and in the words of the learned Magistrate:

> "The sub-inspector simply laughed over this offer and replied that it was not his habit to give copies of police papers in his custody;"

and, indeed, later, he seems to have told this story round amongst his friends almost as a good joke. That he was perhaps wrong in taking this nugatory view of what had taken place I have no doubt; but I think that, under the circumstances, the sentence is unduly severe.

Whilst, therefore, seeing no ground for altering the conviction in this case I have come to the conclusion that the sentence should be reduced to one of rigorous imprisonment for six months. The fine will stand.

ADAMI, J.—I agree.

Sentence reduced.

REVISIONAL CIVIL.

Before Das and Ross, J.J.

HARIHAR PRASAD NARAIN DEO

v.

MAHESWARI PRASAD NARAIN DEO.*

1924.

March, 28.

Code of Civil Procedure, 1908 (*Act V of* 1908), *sections* 2(2), 151, *Order XX, rule* 3—*Partition suit—decision on issue*

* Civil Revision No. 348 of 1923, from a decision of Rai Bahadur Surendra Nath Mukherjee, Subordinate Judge of Patna, dated the 21st July, 1923.