are not exactly on the point. The cases relied upon on the other side, namely, *Ghamandi Lal* v. *Amir Begam* (1), *Haidar Husain* v. *Abdul Ahad* (2) and *Bai Full* v. *Adesang Pahadsang* (3), are not on all fours with the present case.

Even if there was abatement in the present case, the appellant is entitled, upon the facts clearly set forth in his sworn petition and not controverted by any counter-affidavit, to have the abatement set aside and to have the names of the fresh heirs added on the record. No doubt, in his application the appellant has prayed for substitution and addition of the daughters of the deceased respondent no. 1 as heirs in his place and has not clearly asked for setting aside the abatement; but reading the whole application and the prayer, the application can reasonably be construed as an application for setting aside the abatement and for substitution.

The application is, therefore, granted. Let the heirs proposed be brought on the record as respondents in place of the deceased respondent no. 1. In the circumstances of the case there will be no order as to costs.

Application granted.

APPELLATE CRIMINAL.

Before Bucknill and Ross, J.J.

SHAIKH MUHAMMAD YASSIN

v.

KING-EMPEROR.*

1924.

Dec., 19.

Penal Code, 1860 (*Act XLV of* 1860) *section* 211—*information to the police followed by complaint to the magistrate—sanction of the Court, whether necessary—Code of*

* Criminal Appeal no. 207 of 1924, from a decision of Suresh Chandra Sen, Esq., Assistant Sessions Judge of Muzaffarpur, dated the 27th of September, 1924.

(1) (1894) I. L. R. 16 All. 211. (2) (1908) I. L. R. 30 All. 117

(3) (1902) I. L. R. 26 Bom. 203.

1924.

SHAIKH MUHAMMAD YASSIN v. KING-EMPEROR.

Criminal Procedure, 1898 (*Act V of* 1898), *section* 195(1)(b)—*application for judicial investigation, whether is a complaint*.

Where an information is lodged with the police and the police on enquiry report it to be false, but the informant, by an application to the magistrate, insists on a judicial investigation, he is deemed to have preferred a complaint to the magistrate and a sanction or complaint by the Court itself under section 195(1)(*b*) of the Code of Criminal Procedure, 1898, is requisite before cognizance of an offence punishable under section 211 of the Penal Code can be taken in respect of the false charge made to the police, irrespective of whether the magistrate has investigated the complaint or not.

Tayebulla v. *Emperor*(1) *and Brown* v. *Ananda Lal Mullick*(2), followed.

The facts of the case material to this report are stated in the judgment of Ross, J.

Khurshaid Husnain and *Ahmed Reza*, for the petitioner.

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

Ross, J.—This is an appeal against a conviction by the learned Assistant Sessions Judge of Muzaffarpur. The appellant Muhammad Yassin was charged with having, on the 25th of October, 1923, instituted criminal proceedings charging certain persons with the offences of rioting and murder, knowing that there was no just or lawful ground for such proceedings. The case was instituted by way of information to the police. The police enquired into the case and reported that it was false; and the sub-inspector complained against the informant whereupon the magistrate ordered that he should be summoned under section 211 of the Indian Penal Code. The appellant was committed for the trial and has been sentenced to five years' rigorous imprisonment.

(1) (1916) I. L. R. 43 Cal. 1152. (2) (1917) I. L. R. 44 Cal. 650.

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SHAIKH MUHAMMAD YASSIN v. KING-EMPEROR.

ROSS, J.

It appears upon the record that on the 5th of November, 1923, before the police had submitted the final report, Muhammad Yassin filed a petition before the magistrate complaining of the police investigation and praying that the case should be enquired into and the persons whom he accused summoned. Subsequently, when he was called upon by the magistrate to show cause why he should not be prosecuted for instituting a false case, he again asserted that the case was true. These complaints were never investigated and he was not even examined on oath.

The contention of the learned vakil who appears for the appellant is that inasmuch as the petition of the 5th November, filed before the magistrate, was a complaint within the definition in the Criminal Procedure Code, the offence, if any, became an offence which was committed in or in relation to a proceeding in Court; and, consequently, a complaint in writing by the Court or by some other Court to which it was subordinate was a condition precedent to cognizance being taken of this offence under section 211. Two authorities have been cited in support of this proposition. The first is the decision in *Tayebulla* v. *Emperor* (1) where Mukharji and Sheepshanks, J.J., distinguished the cases where there is an information to the police only from those where there is also a complaint in Court. Their Lordships pointed out that: " A sanction is requisite in respect of an offence under section 211 of the Indian Penal Code only when such offence has been committed in or in relation to any proceeding in any Court; no sanction is necessary when a false charge has been made to the police and has not been followed by a judicial investigation thereof by a Court............The position is different where, upon the police report as to the falsity of the complaint, the complainant insists upon a judicial investigation; if he does so, he is deemed to have preferred a complaint to the magistrate. If the magistrate finds his case

(1) (1916) I. L. R. 43 Cal. 1152.

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to be false, a sanction would be requisite under section 195(1)(b) as the offence may be said to have been committed in a proceeding in a Court." The same view was taken in *Brown* v. *Ananda Lal Mullick*(1) where it was laid down that where an information to the police is followed by a complaint to the Court, based on the same allegations and the same charge, and such complaint has been investigated by the Court, the sanction or complaint of the Court itself under section 195(1)(b) of the Code is necessary before the Court could take cognizance of an offence punishable under section 211 of the Indian Penal Code, in respect of the false charge made to the police on the ground that it was an offence committed in relation to a proceeding in Court. The decision in that case was arrived at independently of the decision in *Tayebulla's* case to which, at the end of the judgment, reference is also made.

The learned Assistant Government Advocate seeks to distinguish these cases on the ground that the complaint in the present instance was not investigated by the Court. To my mind that cannot make any difference in favour of the prosecution. The complainant was entitled to have his complaint enquired into and the fact that no enquiry was made cannot be made a merit in the prosecution. The absence of an investigation cannot be made a ground of distinction. The point is that by making his complaint to the Court the informant has withdrawn the information from the category of mere police proceedings and has raised it to the category of a proceeding in Court. This necessitates a complaint by the Court if the informant is to be proceeded against. The matter is no longer in the hands of the police but is within the cognizance of the Court itself. A further answer was suggested to this effect that the order of the magistrate summoning the appellant was itself a complaint either within section 195(1)(b) or within section 476 of the Code.

(1) (1917) I. L. R. 44 Cal. 850.

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ROSS, J.

In my opinion this is not a tenable argument. A reference to the definition of "complaint" in the Code is a sufficient answer. And these proceedings were initiated by the sub-inspector of police who made the complaint and on that complaint the magistrate passed an order to summon the appellant. It is, in my opinion, impossible to construe that order passed on a complaint as being itself a complaint within the meaning of the Code. It follows, therefore, on the decisions above referred to that the proceedings in which the appellant has been convicted were wholly without jurisdiction because the bar imposed by section 195 has never been removed.

The conviction, therefore, cannot stand and must be set aside.

BUCKNILL, J.—I agree.

Conviction set aside.

S. A. K.

APPELLATE CRIMINAL.

Before Bucknill and Ross, J.J.

GOLAM MOHAMMAD KHAN

v.

KING-EMPEROR.*

1924.

Nov., 25.
Dec., 22.

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 164—*Exculpatory statement by accused, whether admissible against him.*

Where an accused person makes a statement before a magistrate under section 164, Criminal Procedure Code, 1898, and the statement is not a confession but is of an exculpatory character, it is still admissible in evidence against the accused at his trial as evidential of a fact relative to the prosecution case.

* Criminal Appeal no. 170 of 1924 from the decision of G. Rowland, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 6th July, 1924.