APPELLATE CRIMINAL.

Before Mullick, A.C.J., and Wort, J.

1927.

May, 16, 17, 18, 19.

KING-EMPEROR

v.

GHULAM NABI.*

Arms Act, 1878 (*Act XI of* 1878), *sections* 19(*a*) *and* (*f*)—"*Proceedings*", *meaning of—Abetment, conviction for, on charge of substantive offence.*

The mere submission of a charge sheet by the police does not amount to the institution of proceedings within the meaning of section 29 of the Arms Act, 1878.

"Proceedings" in section 29 means legal proceedings in court and not searches or arrests or investigations made by the police in the exercise of the power conferred upon them by the Code of Criminal Procedure, 1898, or other laws.

Emperor v. *Kutru* (1), referred to.

Semble, that a person charged with a substantive offence may, in a proper case, be convicted of abetment.

The facts of the case material to this report were as follows:—

The three respondents were charged under section 19(*a*) and (*f*) of the Arms Act and were convicted by the City Magistrate of Patna. On appeal they were acquitted by the Sessions Judge. The Local Government appealed under section 417 of the Code of Criminal Procedure.

The case for the prosecution was that the Criminal Investigation Department having received information that there was a traffic in arms in Patna City, deputed Sub-inspector Lal and two other officers to make confidential enquiries as to the truth of the information. The officers were instructed to assume the characters of opium and cocaine smugglers and to endeavour to obtain the confidence of the suspects.

*Government Appeal no. 3 of 1927, against a decision of A. C. Davis, Esq., Sessions Judge of Patna, dated the 6th October, 1926, overruling a decision of Babu Ranjit Prasad, City Magistrate of Patna, dated the 20th August, 1926.

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The department supplied them with opium to enable them to sustain the parts they were to play.

In the course of the inquiry it was ascertained that an unlicensed revolver was in the possession of Rasuli, a shawl merchant and father of Nabi, one of the respondents. Sub-inspector Lal was instructed to negotiate for the purchase of the weapon, and to endeavour to obtain temporary possession of it for the inspection of his superior officers. On the 24th June, 1925, Sub-inspector Lal requested Rasuli to allow him to take the revolver to show to his companion for approval. Rasuli was persuaded by Ghulam Husain to hand the weapon to the sub-inspector who took it to his official superior. The weapon was photographed and returned to Rasuli. Subsequently the sub-inspector offered to purchase the revolver from Nabi, the son of Rasuli, the latter being away. Nabi said that he could not sell it until its price had been settled by Ghulam Husain. About the 20th June the latter came to Patna again from Gidhour, where he ordinarily resided, and he fixed the price at Rs. 130 and told Sub-inspector Lal that he could take delivery of the weapon any day he liked.

On the 27th June the C.I.D. advanced to Sub-inspector Lal Rs. 130 with which to purchase the revolver. Sub-inspector Lal made a declaration on oath before the City Magistrate that he had received the notes for the purpose of purchasing the revolver, and the numbers of the notes were recorded by the Magistrate.

On the night of the 28th June the sub-inspectors went to the shop of Nabi to complete the purchase. The notes were handed over to him and he handed them over to his brother-in-law, Md. Hussain, one of the respondents, a boy 14 years of age. The revolver was then brought from a room by Md. Hussain and given to Nabi who tendered it to Sub-inspector Lal. The latter, without accepting delivery of the weapon, engaged Nabi in conversation and both of them, together with one of Sub-inspector Lal's companions,

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sat on a charpai just outside the shop. In the meanwhile Sub-inspector Lal's other companion had signalled to a constable who had been stationed a short distance from the shop and the constable had passed on the signal to a raiding party concealed in the neighbouring police station.

The raiding party arrived and found on the charpai Nabi, the two sub-inspectors, the revolver, two small packets of cocaine and an umbrella. On the person of Md. Hussain were found the notes for Rs. 130. Nabi at once said to the officer commanding the raiding party that the Rs. 130 was the price of a shawl which he had sold. This was also the defence subsequently set out in the written statement filed by Nabi in the trial court and in the memorandum of appeal to the Sessions Judge. A witness for the defence deposed that on the 25th June he had seen two persons purchasing a pair of shawls at the shop of Nabi for Rs. 135; that Rs. 5 had been paid as earnest money; that the purchasers had said they would come with the balance of the price in a day or two and take the shawls. No account books were proved in support of this alleged sale.

Sanction for the prosecution of Nabi and Md. Hussain was obtained from the District Magistrate and a complaint was filed against Nabi and Md. Hussain on the 30th June in the court of the City Magistrate. The latter recorded the statement of the complainant Sub-inspector Lal and directed the police to investigate and report. During the investigation the house of Ghulam Husain at Gidhour was searched and he was arrested. The police, however, liberated him on bail to appear before the magistrate on the 17th. On the 13th August a charge sheet was submitted against Nabi and Md. Hussain and Ghulam Husain. In the order sheet the magistrate recorded the following order:

"Charge sheet received for 17-8-1925. Put up on the date fixed."

On the 14th an application for sanction to prosecute Ghulam Husain was made to the District

Magistrate and the sanction was filed in court on the 17th. The examination of the witnesses then commenced. During the trial the prosecution led evidence to prove that the sub-inspectors had posed as cocaine and opium smugglers; and that sub-inspector Lal had received assistance from Rasuli and Ghulam Husain in the Punjab which had enabled him to track down unlicensed revolvers in the Punjab and Calcutta. The Sub-inspector declined to answer questions in cross-examination relating to his cocaine dealings with the accused persons or to the transactions in the Punjab and Calcutta. The court upheld his refusal.

All three accused persons were charged under clause (*f*) of section 19 of the Arms Act with being in possession of the revolver on the 28th June, 1925, and, under clause (*a*), with having sold the revolver to Sub-inspector Lal on that date. The trial culminated in the conviction of all three accused persons on both charges. In appeal the Sessions Judge was of opinion that from the finding of the two packets of cocaine on the charpai, it was a fair inference that the Rs. 130 found on Md. Hussain represented the price of cocaine bought by the sub-inspectors from the accused persons and that the defence had been prejudiced by the action of the magistrate in disallowing the questions put to sub-inspector Lal in cross-examination as to the transactions in cocaine and the transactions in the Punjab and Calcutta. He held that the revolver had been planted on the charpai by the sub-inspectors and acquitted the accused persons.

C. M. Agarwala (Assistant Government Advocate) for the Crown :

Although there was no justification for shutting out cross-examination relating to the cocaine transactions the accused have not been prejudiced. The questions merely related to the statements of the sub-inspectors that they posed as smugglers. The Sessions Judge was apparently under the impression

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that the object of the questions was to elicit information on which to base a defence that the Rs. 130 represented the price of cocaine. This was never the defence of the accused persons themselves. The entire reasoning on which the appellate judgment is based is vitiated by this mistake as to the nature of the defence.

The evidence shows that the accused persons were in joint control of the weapon. It was in Nabi's possession but he could not sell it without the consent of Ghulam Husain. It was finally actually produced by Md. Hussain at the direction of Nabi. They are all, therefore, guilty under clause (*f*). Similarly they all took part at one stage or another in the incidents which terminated in the sale and are all guilty under clause (*a*).

Fazl Ali, for Nabi and Ghulam Husain: The accused have not had a fair trial as on material points cross-examination has been shut out. The Sessions Judge was right in acquitting them if he found that the transaction of the 28th was a transaction in cocaine and not in arms.

So far as Ghulam Husain is concerned there was no warrant for his arrest and the sanction for his prosecution was obtained too late to validate the trial. Section 29 of the Arms Act bars the institution of proceedings under section 19 (*f*) until sanction has been obtained. His arrest before sanction was therefore illegal.

[Mullick, A.C.J.: Does not the expression "no proceedings shall be instituted" refer to the institution of proceedings in court?]

No. The section intends to bar any kind of proceedings until sanction is obtained. In any case proceedings were instituted in court when the charge-sheet was submitted which was before sanction was obtained.

The evidence shows that Ghulam Husain was neither in possession or control of the revolver, and

admittedly he was not even present on the 28th when the weapon is alleged to have been sold.

[Mullick, A.C.J.: I suppose he was not charged with abetting the sale?].

No, and, therefore, he cannot be convicted of abetment.

W. H. Akbari, for Md. Hussain: My client is a mere boy and was living in the house of Nabi as a dependent. Even if he did fetch the weapon from the room as directed by his brother-in-law this does not render him liable under either clause (*a*) or (*f*).

Agarwala in reply: The offences under clauses (*a*) and (*f*) of section 19 are cognizable offences and, therefore, the police could arrest without warrants. In any case section 29 refers to the institution of proceedings in court [See *Emperor* v. *Kutru* (1)].

[Mullick, A.C.J.: That case does not help much as the charge sheet was received by the magistrate on the 13th and sanction was not obtained until the 17th.]

But the magistrate did not take cognizance of the offence on the 13th. The police had allowed Ghulam Husain out on bail and directed him to appear on the 17th. The magistrate by his order of the 13th merely meant that he would consider on the 17th whether he should proceed against the persons named in the charge sheet or not. On the 17th he apparently decided to proceed against them and hence he commenced the examination of the witness. By that time the sanction had been filed.

If the court takes the view that Ghulam Husain was not a party to the sale it can convict of abetment [See *A. V. Joseph* v. *King-Emperor* (2)].

[Mullick, A. C. J.: There are authorities against you.]

Yes, but the principle is clear. If the allegations which the accused has to meet on the substantive

(1) (1925) I. L. R. 47 All. 575 (577). (2) (1925) I. L. R. 3 Rang. 11.

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charge are the very facts which constitute abetment, then he is not prejudiced by a conviction for the lesser offence. It would of course be different if the facts constituting the abetment differed from the facts alleged to constitute the substantive offence.

The distinction has been explained in *Yeditha Subbaya* v. *Emperor* (1).

With regard to Md. Hussain it can hardly be said that he was an innocent agent when he took part in a transaction by which a revolver worth a few rupees changed hands for Rs. 130.

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MULLICK, A.C.J. (after stating the facts proceeded as follows): The question is whether the learned Sessions Judge's findings are so clearly wrong that our interference is necessary in appeal.

In an appeal by Government from an acquittal the accused starts with a double presumption in his favour. Firstly there is the rule that it is for the prosecution to make out their case and that until they do so beyond all reasonable doubt the accused must be presumed to be innocent and, secondly, that the accused having succeeded in securing an acquittal from a court a superior court will not interfere until the Crown shew conclusively that the inference of guilt is irresistible.

We have been taken at great length through the evidence in this case and we think that having regard to the position which the police officers held at that time and their standing in the service and the punishment and disgrace which was bound to follow in the event of detection it is impossible to hold that they deliberately palmed off a revolver on two innocent men. The trial court appears to have been greatly influenced by the statements made by Brij Behari Lal of his successes in the Punjab and in Calcutta and the learned Magistrate appears to have assumed that Brij Behari with the assistance of Ghulam Nabi and Ghulam Husain actually bought other unlicenced

(1) (1912) 23 Mad. L. J. 722.

firearms there but the evidence shews no such thing and is extremely vague and flimsy upon this point. The learned Magistrate thought that the evidence such as it is was admissible under sections 14 and 15 of the Indian Evidence Act. We agree with the learned Sessions Judge that the learned Magistrate was under a total misconception of the law of evidence. There was no question here whether the firearm (Exhibit 1) was found on the charpai of Ghulam Nabi by accident. There might have been a question whether Ghulam Nabi knew that the firearm was smuggled and whether he intentionally sold a smuggled firearm but that issue was not clearly raised. Therefore to admit evidence of similar transactions if indeed there had been such evidence was altogether irregular and illegal. As a matter of fact there was no evidence at all of similar transactions and the question of admissibility does not really arise.

Then the learned Sessions Judge appears to have been strongly influenced by another obvious irregularity. The learned Magistrate allowed the officers of the Criminal Investigation Department to plead privilege in the matter of the alleged transactions in opium and cocaine between them on the one hand and the accused on the other from April 1924 up to March 1925. It is quite clear that as it was the intention of the prosecution to prove that the police officers had gained the confidence of the accused the defence were entitled to know what were the particular circumstances under which that relationship was established and if necessary to obtain details of the various alleged transactions in illicit cocaine and opium. There was a statement in the examination-in-chief of Brij Behari that the accused had purchased opium and cocaine from him but when the defence attempted to explore this allegation the court immediately stopped further cross-examination on the ground of privilege. It is quite clear that there was no privilege at all and the evidence was wrongly excluded. But fortunately in this case the exclusion has not made any

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appreciable difference. The purpose of the cross-examination was to shew that the police officers were not on confidential terms with the accused but to pursue that line became useless as soon as it was proved that the letters Exhibits 1, 2 and 3 were obtained by Brij Behari from Ghulam Husain in the winter of 1924.

It is also to be noticed that at no period was it the defence of the accused that the money which was found on Muhammad Hussain's person was paid by the detectives as the price for a quantity of illicit cocaine. The learned Judge appears to have made a case in this respect which was not the case of the accused. The cross-examination with regard to previous sales would have been material if that had been the defence but in the circumstances the exclusion of the evidence did not prejudice the accused.

Finally the learned Sessions Judge has also been much influenced by the fact that the City Magistrate after having taken the declaration of the 27th June, 1925, regarding the notes proceeded to try the case himself. It does appear from the copy of the order sheet which has been produced before us that the City Magistrate had some knowledge of the case while it was under investigation and perhaps it would have been better if he had declined to try the case. But we do not think that there has been such prejudice to the accused that we must either acquit them or order a retrial. It is obvious that the writing containing the numbers of the notes was not admissible by itself. The document cannot prove itself. But in this case evidence has been given by Brij Behari Lal that the notes which were found in Muhammad Hussain's pocket were the notes which he received from the Criminal Investigation Department and which he shewed to the City Magistrate on the 27th June and the numbers of which were taken down by the City Magistrate in the declaration which has been objected to. This evidence is quite sufficient if believed to

prove that the notes found in Muhammad Hussain's pocket at the arrest of the 28th June were the notes which the Sub-inspector had obtained from the Department on the 27th.

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It is clear that upon this evidence if believed the conviction of Ghulam Nabi for the possession of an unlicensed revolver and its sale is fully justified.

With regard to Muhammad Hussain the question arises whether he was merely a servant. He appears to be only 14 years of age and to have been living in the house of Ghulam Nabi as a dependent member of the family. It is true that he took the notes and put them in his pocket and that he was standing close by when the police arrested Ghulam Nabi but having regard to his age and the fact that he did not take part in any of the previous negotiations I think he should be given the benefit of the doubt and that he should be acquitted.

With regard to Ghulam Nabi there is one more fact which requires notice. Immediately on arrest he said that the two men, pointing to the detectives, had come to him to purchase a shawl. If it had been proved at the trial that there was some substance in this defence and that the two Sub-inspectors either had had previous delaings in shawls with the accused or had arranged to buy a shawl on that night the possession of the 13 ten rupee notes by Muhammad Hussain would have been explained. But unfortunately the accused have given no satisfactory evidence of any contract of this kind. They say that they are shawl merchants on a big scale in Patna. The learned trial court says that they only sell shawls on commission but in any event they have account books and a certian number of account books were actually seized by the police. A sum of Rs. 3,000 was also found in their cash box so that it is clear that they are men of business habits and that the sale of a shawl for Rs. 130 is not likely to escape entry in their account books. No such

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entry has been shewn nor has any attempt been made to tender the account books. Instead of this a witness, (defence witness no. 5) has been called to shew that he was present on the 26th June when two men whom he did not know arranged to buy a shawl from Ghulam Nabi and promised to come the next day. Another witness (no. 6) Muhammad Hussain has been called to shew that about a year earlier which would be sometime in May or June 1925 he saw two men come and buy a shawl for Rs. 130 out of which Rs. 5 had already been paid as earnest money and Rs. 125 was paid in the witness's presence. The learned City Magistrate has examined this evidence very carefully and I agree with the reasons given by him for distrusting it. There is the fact that the best evidence, namely, that of the account books has not been produced and in the absence of that evidence oral evidence of this kind is of very little value.

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In my opinion the story of the prosecution with regard to the presence of Ghulam Rasul in the shop in Patna on the 25th March has not been shaken by the re-butting evidence given by the defence.

There remains the case of Ghulam Husain. The first objection taken with regard to it is that the sanction given by the District Magistrate on the 17th August, 1925, was bad. The facts are these:—The complaint of the 30th June, 1925, made by Brij Behari did not ask for any proceedings against Ghulam Husain. Ghulam Husain, however, was under arrest in connection with another case and the police appear to have continued their investigations against him in the matter of the sale of the revolver (Exhibit 1) along with the case against Ghulam Nabi and Muhammad Husain and on the 13th August they submitted a charge sheet in which they reported to the City Magistrate that the case was complete not only against Ghulam Nabi, and Muhammad Hussain but also against Ghulam Husain. They had no authority to prosecute Ghulam Husain without sanction but, in my

opinion, no proceeding within the meaning of section 29 of the Arms Act had been instituted against Ghulam Husain before the District Magistrate gave his sanction on the 17th August. On that date an application based upon the charge sheet of the 13th August was made by the police to the District Magistrate and he accorded formal sanction for the prosecution of Ghulam Husain. Although Ghulam Husain had been in custody in connection with another case and although the police had been investigating the case against him the first application by the police for proceedings against him in court was made on the 13th August and that application was not considered by the Magistrate until the 17th August on which date he assumed jurisdiction over Ghulam Husain and examined some evidence for the prosecution. In the meantime sanction had already been received from the District Magistrate, and I think that the provisions of section 29 of the Indian Arms Act were complied with. No judicial or legal proceedings had been taken against Ghulam Husain before the 17th. It is true that the police had been investigating the case against him but I think they were empowered to do this without the sanction of the District Magistrate. As in the case of a suit, a proceeding is instituted when for the first time the adjudication of a court of competent jurisdiction is sought. "Proceedings" in section 29 mean legal proceedings in court and not searches or arrests or investigations made by the police in exercise of the powers conferred upon them by the Criminal Procedure Code or any other law. In *Emperor* v. *Kutru* (1) the opinion was expressed that "proceeding instituted" in sections 29 and 30 of the Arms Act means legal proceedings taken in court.

Then as regards the merits of the case against Ghulam Husain it is to be observed that he is charged with possession and sale on the 28th June. Having regard to the fact that it was he who was on the most intimate terms with Rambarat, that it was he who

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arranged for the delivery of the revolver on approval on the 25th March, and that it was he who settled the price between the 19th and the 23rd June the inference is irresistible that he had control over the revolver and was in joint possession of it on the 28th June. It is also quite clear that upon the evidence on the record a conviction for abetment under section 109 of the Indian Penal Code read with section 19 of the Indian Arms Act would be justifiable if by any chance the substantive charges failed.

In my opinion the evidence is quite sufficient to shew that both Ghulam Nabi and Ghulam Husain were in possession of the revolver in March and in June 1925 and that they sold the same to Brij Behari Lal.

Therefore the conviction of Ghulam Husain by the City Magistrate under section 19 of the Arms Act was, in my opinion, correct.

The result is that agreeing with the learned Sessions Judge we affirm the acquittal of Muhammad Hussain but disagreeing with him we set aside the acquittal of Ghulam Husain and Ghulam Nabi and restore the convictions entered by the City Magistrate and affirm the sentences passed by him.

WORT, J.—I agree.

APPELLATE CIVIL.

Before Kulwant Sahay and Ross, JJ.

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SOMAR SINGH
v.
DEONANDAN PRASAD SINGH.*

Limitation Act, 1908 (*Act IX of* 1908), *Schedule* 1, *Articles* 181 *and* 182—*final decree in a mortgage suit, application to enforce, whether is an application for execution—proper article applicable—preliminary decree, appeal from—final decree, execution of—terminus a quo—Article* 182(2) *meaning of.*

*Appeal from Original Order no. 168 of 1926, from an order of Babu Kamla Prasad, Subordinate Judge of Patna, dated the 17th May, 1926.