

that there was no intimidation, force or violence and that the theft (if it was a theft) was carried out by some person or persons whom he never even saw.

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Under the circumstances I think that the appeal should be allowed; the judgment and the decree of the learned District Judge set aside and that of the Munsif restored. The appellant will be entitled to his costs in this Court and in the Courts below

JWALA PRASAD, J.—I agree.

*Appeal allowed.*

## REVISIONAL CRIMINAL.

*Before Dawson Miller, C.J. and Foster, J.*

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*Code of Criminal Procedure, 1898 (Act V of 1898), section 109—“taking precautions to conceal his presence”, whether continuous act of concealment is contemplated.*

Under section 109(a) of the Code of Criminal Procedure, 1898, when a magistrate receives information “that any person is taking precautions to conceal his presence within the local limits of such magistrate’s jurisdiction and that there is reason to believe that such person is taking such precautions with a view to committing any offence”, he may call upon such person to execute a bond with sureties for his good behaviour. *Held, (i) that clause (a) is not limited to cases in which the person proceeded against has not been brought under arrest; (ii) that it is not necessary, in order to bring a person within the operation of that clause, to show that he has followed a continuous course of conduct in taking precautions to conceal his presence.*

\*Criminal Revision No. 886 of 1926, from a decision of A. N. Mitter, Esq., Sessions Judge of Saran, dated the 10th May, 1926, affirming a decision of Pushkar Thakur, Magistrate, 1st Class, of Chapra, dated the 26th April, 1926.

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*Reshu Kaviraj v. King-Emperor*<sup>(1)</sup> and *Sheikh Piru v. King-Emperor*<sup>(2)</sup>, dissented from.

*Held, further*, however, that the fact that a person was found at night in a bagicha talking to a number of other men, some of them being persons of bad character, and that they all ran away on the approach of police officers, is not sufficient to show that such person was taking precaution to conceal his presence.

The facts of the case material to this report are stated in the following order of Macpherson, J., before whom the case was first set down for hearing.

MACPHERSON, J.—This rule has been issued to consider the legality of an order of a Deputy Magistrate of Chapra under section 109 (a) of the Code of Criminal Procedure requiring the two petitioners Rambirich Ahir and Mosafir Ahir to execute a bond of Rs. 200 each with two sureties of Rs. 100 each to be of good behaviour for a period of one year.

The facts established are that about 9.30 P.M. on the 15th March a constable of the Ekma thana with a dafadar and two chaukidars found some twelve men armed with lathis, dantas and bhalas collected in a bagicha near Chainwa railway station and conversing in low tones. On being accosted the twelve men began to run away, but on a cry of "chor, chor" being raised and chase being given they began to ply their lathis against their pursuers. The result was that they escaped except four who were arrested by the constable and his party with the assistance of the villagers. Three of the men arrested had dantas and the petitioner Mosafir had a spear, and also a candle and a box of matches. The petitioner Rambirich Ahir was also arrested there. All four men were proceeded against under section 109 and orders under section 118 were passed against them, but the two others have not applied to this Court in revision. One of them Nawab was a C class bad character and the fourth man Chaturgun is proved to be generally absent from home at night.

The defence of Rambirich was that he has some land and was going to Chapra in connection with a civil suit when he was arrested at Chainwa railway station. The statement about his arrest at the railway station was found to be false. It is, however, true that some land is entered in the record-of-rights in the name of his father and the Magistrate considered that the mere fact that he had a civil suit is sufficient to show that he is in possession of some property. Accordingly his case fell only under clause (a) of section 109 and not also, as that of the other three men did, under section (b) also.

Mr. Jafar Imam admits that he cannot press the case of Mosafir.

As regards Rambirich, Mr. Jafar Imam contends that the facts found are not sufficient to bring him within clause (a) of section 109.

(1) (1917-18) 22 Cal. W. N. 163.

(2) (1925) 41 Cal. L. J. 142.

It may be that he was concealing himself on one occasion in the bagicha along with persons of bad or doubtful character armed with lethal weapons or with lathis and even in circumstances which afford reason for the belief that he was concealing himself with a view to committing an offence; but it is argued that that is not sufficient inasmuch as the concealment must be a continuous act. In support of the contention learned Council refers to *Reshu Kaviraj v. King-Emperor*(1) and *Sheikh Piru v. King-Emperor*(2), which are also mentioned in this connection at page 99 of Woodroffe's 'Criminal Procedure in British India'. In *Reshu Kaviraj v. King-Emperor* (1) the facts were that the petitioner who was a kaviraj and a dealer in cocoons was found at midnight in a lane in association with two other who had in their possession house-breaking implements, that on being discovered he fled and when arrested remained silent, and that the explanation which he subsequently offered to the Magistrate of his presence at the time and place was false. Teunon, J., with hesitation held that the facts did not come within either clause of section 109. Shamsul Huda, J., definitely added that in his opinion clause (a) of section 109 refers to a continuous act and does not apply to a case where there is a momentary effort at concealment to avoid detection or arrest. The opinion of Shamsul Huda, J., was approved by M. N. Mukerji, J., in *Sheikh Piru v. King-Emperor* (2). The learned Judge observed "In my opinion, passing under a false name or taking precautions to conceal one's presence or identity at a place amounting to a continuous course of conduct is what is meant by the clause. Moreover such precautions for the purpose of concealment must be taken with a view to commit an offence." But in fact the point did not arise in that case which was concerned with clause (b) only, so that the observations are obiter.

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There are points of fact in which the case of Rambirich is distinguishable from that of Reshu Kaviraj and apart from the view enunciated in Reshu Kaviraj's case I would reject this application in revision. But it can hardly be predicated of the concealment of his presence which Rambirich took precautions to effect that it was a continuous act. Personally I doubt whether the view of Shamsul Huda, J., in *Reshu Kaviraj* (1) is sound, especially as extended by M. N. Mukerji, J. There is, however, no authority of this Court on the point and this rule was in fact issued in order that the correctness of the views expressed in those cases might be considered. The question of the correct interpretation of clause (a) of section 109 constantly arises in the subordinate Courts and they exhibit doubt as to the extent to which the view of Shamsul Huda, J., is binding on them and much hesitation in following it. The next case in my list to-day (In the matter of Rakhil Bauri, Criminal Reference No. 46 of 1926) is a reference by the Sessions Judge of Manbhumi-Sambalpur, recommending that an order under clause (a) of section 109 be set aside. The Additional District Magistrate of Manbhumi in appeal had made the following observations regarding the judgment of Shamsul Huda, J., in *Reshu Kaviraj v. King-Emperor* (1).

I am not sure if this "opinion" was intended to be binding and I certainly do not consider that it can be held to be binding on courts under the control of the Honourable High Court at Patna. It appears to me to be in conflict with the plain wording and intention of section 109 and, strictly followed, would render it impossible

(1) (1917-18) 22 Cal. W. N. 163.

(2) (1925) 41 Cal. L. J. 142.

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to take action against any person, however bad his character or however clear the presumption that he intended to commit an offence, if his attempt at concealment were confined to a solitary instance.

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The learned Sessions Judge observes :

The observation (*i.e.*, the judgment of Shamsul Huda, J.) cannot be said to be an obiter as the point was expressly raised in argument and arose from the facts of the case, as would appear from the judgment. There being no other case of our High Court to the contrary I think that observation is binding on us.

It is manifest that a ruling of this Court is required for the guidance of the courts in this Province, and it is expedient that it should be that of a Division Bench.

Under proviso (a), rule 1, Chapter II of the Rules of the Patna High Court, I refer Criminal Revision No. 386 of 1926 to a Division Bench for a decision. I have not passed order as to Mosafir Ahir as it is desirable to refer the whole case.

As it will be convenient to hear along with this case, Criminal Reference No. 46 of 1926 in which the point for determination is the same, I refer it also.

On this reference,

*Jafar Imam*, for the petitioner.

*H. L. Nandkeolyar*, Assistant Government Advocate, for the Crown.

DAWSON MILLER, C.J.—This is an application in revision seeking to set aside an order of the Sessions Judge of Saran dismissing an appeal from the Deputy Magistrate.

The petitioners Rambirich Ahir and Mosafir Ahir were brought before the Deputy Magistrate under section 109 of the Code of Criminal Procedure on the 24th April, 1926, and were each ordered to execute a bond of Rs. 200 with two sureties of Rs. 100 each to be of good behaviour for one year. An appeal to the Sessions Judge was dismissed on the 10th May.

Mr. Jafar Imam now appears on behalf of the petitioners and asks us to set aside the order on the ground that the facts proved do not bring the case within the provisions of section 109. The section enables the magistrates there enumerated to call upon persons to shew cause why they should not be ordered to execute a bond with sureties for their good behaviour. The circumstances under which the

Magistrate may take action are set out in clauses (a) and (b) of the section. He may act on receiving information

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" (a) that any person is taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction, and that there is reason to believe that such person is taking such precautions with a view to committing any offence, or

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(b) that there is within such limits a person who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself."

The facts proved in so far as they are material appear from the judgment of the Sessions Judge and are as follows:—On the 15th March, 1926, a constable of the Ekma police-station was deputed to go round on night duty at villages Chainwa, Charwa and Rasulpur. He took two chaukidars and a daffadar with him and at about 9-30 P.M. went to a bagicha a short distance away from Chainwa railway station on hearing soft voices. There they found about a dozen men armed with lathis, dantas and bhalas talking to one another. On being accosted by the constable they began to run away. An alarm was raised and the men began to use their lathis. The constable and his men, however, warded off the blows and it does not appear that any body received any injury. With the help of villagers who came upon the scene they managed to arrest four persons including the two petitioners. The petitioner Mosafir was carrying a spear and Rambirich carried a danta which, I understand, is a stick of any kind less formidable than a lathi. They gave their names but apparently not correct addresses. These, however, were supplied later. Rambirich lives at Rasulpur within the local limits of the Magistrate's jurisdiction. Mosafir lives at Maharajganj. Mosafir was unable to give a satisfactory account of himself and was dealt with as coming within clause (b) of the section. So far as he is concerned the learned Counsel who appeared on his behalf was unable to suggest any valid reason why the order should be set aside and accordingly the application in his case must be dismissed.

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With regard to Rambirich it was shewn that he and his father had certain property at Rasulpur and that he was engaged in a law suit in connection therewith. He stated that he was going to Chapra to get copies of certain documents in connection with the law suit and was arrested by the constable and the chaukidars at Chainwa railway station. This was not quite accurate as the place where he was arrested was some distance from the station. He was able, however, to give a satisfactory account of himself and was not a person of no ostensible means of subsistence so that clause (b) of the section was not applicable in his case. He was, however, found by the Magistrate to come within the provisions of clause (a). Before a person can be ordered to execute a bond under clause (a) it must be shewn that he was taking precautions to conceal his presence within the local limits of the Magistrate's jurisdiction and, further, that such precautions were taken with a view to committing some offence. The offence is not definitely stated but it appears from the evidence of the Sub-Inspector that Rambirich was reported to be a bad character. It does not appear however that he was convicted of any crime. He called some witnesses who spoke to his character but apparently their evidence did not impress the Magistrate.

It was contended on behalf of Rambirich that a mere momentary effort at concealment in order to avoid detection or arrest was not sufficient to bring the case within clause (a) of the section but that there must be some continuous course of conduct shewing that the subject was taking precautions to conceal his presence within the local limits of the magistrate's jurisdiction. In support of this contention the case of *Reshu Kaviraj v. King Emperor*<sup>(1)</sup>, was referred to in which Shamsul Huda, J., is reported to have said that in his opinion clause (a) of section 109 refers to a continuous act and does not therefore apply to a case where there is a momentary effort at concealment to avoid detection

(1) (1917-18) 22 Cal. W. N. 163,

or arrest and further that that clause cannot apply to the case of a person brought under arrest for it cannot be said of such a person that he is taking precautions to conceal his presence. That case was referred to with approval in a later case of the same High Court [*Sheikh Piru v. King-Emperor*(1)]. I am not prepared to go so far as to limit the application of the clause to cases where a person has not been brought under arrest. A reference to section 55 of the Act shews that an officer in charge of a police-station may arrest any person found taking precautions to conceal his presence within the local limits of such station under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizable offence, or any person who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself. If it is to be held that after he is once arrested and brought before the Magistrate no action can be taken under section 109 (a) on the ground that the arrested person is no longer taking precautions to conceal his presence, there would appear to be little object in allowing him to be arrested at all, for the only manner in which he can be dealt with is under section 109, and a large proportion of the cases dealt with under that section are cases where the person has already been arrested. Nor am I prepared to say that it must in all such cases be proved that the accused has followed a continuous course of conduct in taking precautions to conceal his presence. I consider, however, that a person, whether he be of good or bad character, who merely shows a disinclination for the society of the police and endeavours to avoid them by running away on their approach cannot be said to come within the mischief aimed at in clause (a). Now apart from the fact that the petitioner and his companions endeavoured to run away from the police there is practically nothing in this case which can be said to shew that the petitioner Rambirich was taking precautions to conceal his presence. The fact that he was found at half past

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nine at night talking to a number of other men some of whom are proved to have been persons of bad character in a bagicha close to a public railway station is, in my opinion, no evidence that he was taking precautions to conceal his presence. It is perhaps impossible, it is certainly undesirable, to lay down any general principles as to the conditions which would bring a case within the purview of the clause, for the circumstances which may arise are so multiple and various; but I think it may be said that there must be some definite attempt at concealment by taking precautions with that object in view, whether it be by disguise or otherwise, indicating a desire to hide the fact that the accused is present within the local limits of the Magistrate's jurisdiction. The clause is one which should be used with proper discretion and was never intended to apply to a person merely found talking at night time with bad characters in a place which is open to the public. I am unable to find that in the circumstances proved the petitioner Rambirich was taking any precautions to conceal his presence. The orders of the Magistrate and of the Sessions Judge must be set aside and the petitioner Rambirich who has been unable to find securities and is at present in prison must be released.

FOSTER, J.—I agree.

*Order set aside.*

## REVISIONAL CRIMINAL.

*Before Ross and Foster, JJ.*

PURENDAR JHA

v.

NUNULAL JHA.\*

*Substitution of Parties—Application for—verification not necessary—false verification—Penal Code, 1860 (Act XLV of 1860), sections 191 and 193.*

\* Criminal Revision no. 824 of 1926, from a decision of R. Ghose, Esq., Sessions Judge of Purnea, dated the 22nd April, 1926, affirming a decision of Babu Khetra Mohan Kutar, Munsif of Araria, dated the 23rd of December, 1925.

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