

APPELLATE CRIMINAL.*Before Dhavle and Rowland, JJ.*

JUGESHWAR SINGH.

v.

KING-EMPERIOR.*

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April 5, 8,
9, 10,
May 2.

Code of Criminal Procedure, 1898 (Act V of 1898), sections 195, 476 and 476B—complaint; regularity of, whether can be challenged after commitment—complaint made by Court against some persons—Magistrate taking cognizance, whether can proceed against other persons concerned in the offence—Penal Code, 1860 (Act XLV of 1860), sections 107, 120A and 120B—criminal conspiracy amounting to abetment within section 107—provisions of sections 120A and 120B, whether should be invoked.

Once a commitment has been made on a complaint under section 476 of the Code of Criminal Procedure, 1898, it is not permissible to take an objection to the initiation of the proceedings, the remedy available to the accused being limited to an appeal under section 476B.

Jabbar Ali v. Emperor(1) and *Ali Ahmad v. Emperor*(2), followed.

The intention of the legislature appears to be to prevent innocent persons being put on trial at the instance of persons likely to be moved by motives of revenge and not to protect guilty persons from the penalty of their crimes. When cognizance has been taken of an offence, the inquiry will proceed against all the persons whom the evidence shows to have been concerned in it; provided that the court making the complaint and naming some persons therein has not expressly considered, and decided in the negative, the question whether other persons should also be prosecuted on the same facts.

Mathura Singh v. King-Emperor(3) and *Jamuna Singh v. Laldhari Singh*(4), followed.

*Criminal Appeal no. 26 of 1935, from a decision of D. E. Reuben, Esq., I.C.S., Sessions Judge of Gaya, dated the 12th December 1934.

(1) (1929) A. I. R. (Cal.) 208.

(2) (1932) A. I. R. (Cal.) 545.

(3) (1934) 15 Pat. L. T. 438.

(4) (1934) 15 Pat. L. T. 694.

An Honorary Magistrate called upon five persons to show cause why a complaint should not be lodged against them under section 476, Code of Criminal Procedure, and after an inquiry made an order for the prosecution of only three of them on the 7th February, 1934, and a complaint against these persons was presented on the 16th February. The Magistrate had, however, ceased to be exercising magisterial powers between 26th September 1933 and 18th July 1934. The complainant preferred an appeal to the District Magistrate who made a complaint under section 476B against the other two persons also and directed these accused persons to be proceeded against in the same case. During the course of the trial before the Sessions Judge the accused persons attacked the regularity of the complaint made by the Honorary Magistrate, but the objection was overruled, and four of them were eventually convicted and sentenced.

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Held, (i) that the objection should have been taken at an earlier stage by way of an appeal against the order making complaint;

(ii) that the District Magistrate having properly complained against two persons under section 476B and the Sub-divisional Magistrate (before whom the case against all the five accused persons had been inquired into) having taken cognizance of the whole case under section 195, he was competent to proceed against not only the two persons named in the complaint of the District Magistrate but also the other three accused persons concerned in the offence.

A conspiracy will not amount to an abetment within the meaning of section 107, Penal Code, 1860, unless an act or illegal omission takes place in pursuance of the conspiracy.

Section 120A of the Penal Code provides an extended definition of criminal conspiracy covering acts which do not amount to abetment by conspiracy within the meaning of section 107, and section 120B provides a punishment for criminal conspiracy where no express provision is made in the Code for the punishment of such a conspiracy.

Where, therefore, a criminal conspiracy amounts to an abetment under section 107 it is unnecessary to invoke the provisions of sections 120A and 120B because the Code has made specific provision for the punishment of such a conspiracy.

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The facts of the case material to this report are set out in the judgment of Rowland, J.

Harihar Prasad Sinha, for the appellants.

Assistant Government Advocate, for the Crown.

ROWLAND, J.—The appellants have been convicted by the Sessions Judge of Gaya of offences committed in connection with an unregistered usufructuary mortgage deed which was used by the defence in a criminal case in which Jageshwar Singh and Jagdeo Singh were accused under section 447 of the Indian Penal Code. Possession of a plot of land was in issue and the document purported to create a hypothecation of this plot in favour of Jageshwar and Jagdeo. Jugal Lal's signature appeared on it as an attesting witness and it purported to be scribed by Parmeshwar Lal of Misirbigha. The document was found to be a forgery. The Honorary Magistrate, Khan Sahib Syed Muhammad Islam, who disposed of the case called on Jageshwar, Jagdeo and Jugal to show cause against their prosecution. It was alleged that the document was not written by Parmeshwar Lal but by Raghubar Deyal. He was also called on to show cause against prosecution. So was Bhikhari Lal another person whose name appeared on the margin as an attesting witness. The Honorary Magistrate purporting to act under section 476 of the Indian Penal Code complained against Jageshwar, Jagdeo and Jugal Lal, the first two under sections 471 and 467 read with s. 120, and the third under sections 193 and 467 read with s. 120 of the Indian Penal Code. His view was that the forged document came into being as a result of conspiracy and the complaint appears to have been intended to refer to section 120B of the Indian Penal Code. He declined to prefer a complaint against Raghubar Deyal and Bhikhari Lal. Against this order Shamdeo, the complainant of the section 447 case, preferred an appeal to the District Magistrate, who

after reviewing the facts found that there was a *prima facie* case against Raghubar Deyal and Bhikhari also, and under section 476B of the Criminal Procedure Code he complained against these two persons under section 467 and s. 467 read with s. 120B of the Indian Penal Code. He directed these two accused to be proceeded against in the same case as the other three persons already being prosecuted. Sessions Judge found that the document was forged, basing his judgment on possession of the land by the opposite party Shamdeo Singh; on the production of rent receipts by Shamdeo; on the fact that the original raiyati khatian was in possession of Shamdeo; on the fact that proceedings have been taken by Shamdeo under section 40 of the Bengal Tenancy Act; on the absence of mention of this document in the written statement of Jageshwar and Jagdeo in the section 447 case; on the fact that the stamp paper was of insufficient value being on four annas stamp instead of eight annas; on the fact that the purchase of the stamp paper as endorsed thereon was later than the date of the alleged document; and on the evidence of the handwriting expert and other persons as to handwriting. The explanations offered for the appellants entirely failed to displace the reasoning of the Sessions Judge which is fully supported by the evidence and the argument in the appeal has been directed mainly to an attack on the regularity of the initiation of the proceedings. The order of Khan Sahib Syed Muhammad Islam for the prosecution of the first three accused was dated 7th February 1934, and his complaint was presented on 16th February. At the time he was not exercising the powers of a Magistrate. He had been vested with such powers by notification no. 2581, dated 27th September, 1930, for a period of three years expiring on 26th September, 1933. He was again vested with magisterial powers on 18th July, 1934, and it is argued that in the interval he was not a court capable of initiating proceedings under section 476. The

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Sessions Judge thought that once a commitment had been made it was too late for the accused to take an objection against the initiation of the proceedings which they ought to have taken at an earlier stage. They had not appealed to the District Magistrate against the order purporting to be made under section 476 directing their prosecution nor to the Sessions Judge against the order of the District Magistrate under section 476B. The Sessions Judge's view is supported by the decision of the Calcutta High Court in *Jabbar Ali v. Emperor*(¹). The decision is followed by the same Court in *Ali Ahmad v. Emperor*(²). The intention of the legislature appears to be, to prevent innocent persons being put on trial at the instance of persons likely to be moved by motives of revenge and not to protect guilty persons from the penalty of their crimes. There is another answer available to the prosecution and that is that the Subdivisional Magistrate before whom the case against all these appellants was inquired into had before him the complaint of the District Magistrate under section 476B against two of the persons who were put on trial. What section 195 prohibits is taking cognizance of an offence of a certain class except on a complaint of a Court but where a Court has complained of an offence specified in this section then cognizance can be and is to be taken of the whole case, that is to say, prosecution will go forward as against all the persons found to be concerned in the offence and also under any sections found applicable to the facts which are the subject matter of the complaint. It was so held in this Court in the case of *Mathura Singh v. King-Emperor*(³) and in *Jamuna Singh v. Laldhari Singh*(⁴). The complaints considered in those cases were complaints by private parties and not of offences requiring a complaint by

(1) (1929) A. I. R. (Cal.) 203.

(2) (1932) A. I. R. (Cal.) 545.

(3) (1934) 15 Pat. L. T. 438.

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a Court for the institution of proceedings. But I have no doubt that the principle applies; cognizance having been taken of an offence, the inquiry will proceed against all the persons whom the evidence shows to have been concerned in it; provided that the Court making the complaint and naming some persons therein has not expressly considered, and decided in the negative, the question whether other persons should also be prosecuted on the same facts. I am satisfied, therefore, that section 195 of the Criminal Procedure Code was no bar to the conviction of the appellant Raghubar Deyal under sections 467 and 193, of Jugal Lal under section 471/109, of Jageshwar Singh under sections 467 and 467 read with section 471 and of Jagdeo Singh under section 467 read with section 471. I need not discuss the proceedings against Bhikhari who has been acquitted.

There was a further charge against all the appellants under section 120B of the Indian Penal Code which was not framed by the Committing Magistrate but by the Sessions Judge. The appellants have been convicted under this section also. No separate sentence was imposed so the discussion of the propriety of the Sessions Judge framing a new charge under this section is somewhat academic. The law restricting the institution of a prosecution under section 120B of the Indian Penal Code is contained in section 196A of the Criminal Procedure Code and it is noticeable that the restrictions apply not to every class of criminal conspiracy. Referring to section 120B of the Indian Penal Code we find that sub-section (1) imposes a penalty, equal to the punishment for abetment, on participation in a criminal conspiracy to commit an offence punishable with death, transportation or rigorous imprisonment for a term of 2 years or upwards, in case no express provision is made in the Code for the punishment of such a conspiracy. The section appears to have been introduced to fill a gap in section 107 of the Indi

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Penal Code defining abetment. Under section 107, secondly, a person abets the doing of a thing who engages with others in a conspiracy for the doing of that thing *if an act or illegal omission takes place* in pursuance of that conspiracy. Abetment of an offence is punishable under section 109 or 114, as the case may be, if the offence is committed or under sections 115 and 116, as the case may be, if the offence be not committed; but it is clear that conspiracy will not amount to an abetment unless an act or illegal omission takes place in pursuance of the conspiracy. Therefore the first class of cases which section 120B is designed to cover is that in which the conspiracy is formed for the commission of a serious offence but no act or illegal omission has taken place in pursuance of it. Section 120A which defines criminal conspiracy enacts that an agreement to commit an offence may itself amount to a criminal conspiracy even if no overt act follows on the agreement. The second class of cases is that in which the conspiracy is formed in order to do an illegal act or an act not illegal by illegal means; this sort of conspiracy in no case amounts to abetment and does not amount to a criminal conspiracy unless some act besides the agreement is done in pursuance thereof. Thus whereas section 120A provides an extended definition of criminal conspiracy covering acts which do not amount to abetment by conspiracy within the meaning of section 107, section 120B provides a punishment for criminal conspiracy "where no express provision is made in this Code for the punishment of such a conspiracy". Where a criminal conspiracy amounts to an abetment under section 107 it is unnecessary to invoke the provisions of sections 120A and 120B because the Code has made specific provision for the punishment of such a conspiracy. In the case before us, the offences which are alleged to have been the object of the conspiracy were fact committed so the conspiracy amounted to

abetment. The Court should not, therefore have framed additional charges under section 120B. Appellants having been convicted on the substantive charges framed were not liable to be convicted also of conspiracy. Argument was entered into on the question whether there was a proper sanction to the framing of charges under section 120B. It is not necessary to go into this matter when on other grounds those charges have failed. I would set aside the convictions under section 120B of the Indian Penal Code while confirming the convictions under the other sections.

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The Sessions Judge has imposed sentences of 5 years on Raghubar Deyal, of three years on Jugal and Jageshwar and of 2 years on Jagdeo. As the sentences do not appear to be excessive, I would dismiss the appeal.

DHAVLE, J.—I agree.

As regards the merits there cannot be any doubt on the evidence that the forgery and connected offences have been brought home to the appellants as charged.

As regards the initiation of these proceedings the facts are very peculiar. Stress has been laid by the appellants on the facts that though the first complaint under section 195 of the Code of Criminal Procedure was made by Khan Sahib Saiyed Muhammad Islam signing as Honorary Magistrate, he was at that time without any powers as a magistrate. Section 195(c) requires a complaint of the Court in which the forged document was produced or of some other court to which such court is subordinate. The forged mortgage bond had been produced before Mr. Islam during his trial of the case, brought under section 447 of the Indian Penal Code by Shamdeo against Jageshwar Singh and Jagdeo Singh, in exercise of the powers of a magistrate conferred upon him for three years by the

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notification of the 27th September, 1930. When these powers expired by lapse of time, he was not succeeded by any other magistrate. But the proceedings he took under section 476 of the Code of Criminal Procedure were based on an application made by Shamdeo during the trial of the case under section 447 of the Indian Penal Code. It was on this application that immediately on the disposal of that case the Honorary Magistrate ordered notices to issue against the five persons tried by the court of session to show cause why a complaint should not be made against them in respect of offences arising out of the forgery and its user. Before the expiry of his powers as a magistrate, Mr. Islam adjourned these preliminary proceedings on the request of the five persons, as they represented that the same matter was directly and substantially in issue in the appeal that Jageshwar and Jagdeo had preferred against their conviction. The appeal was disposed of and the record returned after the expiry of the magisterial powers of Mr. Islam, who however, proceeded to complete the preliminary proceedings under section 476 of the Code of Criminal Procedure, without any objection raised by the five accused as regards his authority. He complained against three persons only out of the five, and on an appeal by Shamdeo under section 476B of the Code of Criminal Procedure, the District Magistrate complained against the other two. The terms of this latter complaint distinctly indicate that the District Magistrate endorsed the complaint of Mr. Islam against the other three accused: the District Magistrate concluded

“The witnesses against them (Raghubar and Bhikhari) will be the same as in the case against the other three persons already prosecuted over the same transaction. The present accused should also be proceeded with in the same case.”

It was upon these two complaints that committing magistrate proceeded against the five persons. The power, if it may be so called, to make a complaint under section 476 is not among the powers specified

in Schedules III and IV of the Code of Criminal Procedure, and is not a magisterial power, for it can be exercised as well by civil or revenue courts as by criminal courts. The object of section 195 clearly is to avoid harassment at the instance of private parties who may be acting for reasons of their own rather than in the interests of the administration of justice, and the complaint required by the section merely bars the taking cognizance of offences in the ordinary way under section 190(1). It cannot be said that this object was in any way defeated by the fact that at the time he made his complaint, Mr. Islam was not empowered to act as a magistrate. He was not an officious intruder but was merely completing the preliminary proceedings that he had begun before the expiry of his powers as a magistrate and that he had adjourned at the request of the accused; and he was doing this at a time when it is not suggested on behalf of the appellants that there was in existence any Court which could be pointed out as the proper Court for completing the proceedings. Had any objection been raised at that time on behalf of the accused, the matter would doubtless have been disposed of by the District Magistrate under section 559(2). But in any event Mr. Islam's complaint against Jageshwar, Jagdeo and Jugal was definitely endorsed by the District Magistrate while exercising his powers under section 476B in respect of the other two accused. It seems to me that it is now too late under section 537 of the Code for the appellants to ask for a reversal of their conviction on the ground "of any error, omission or irregularity in the complaint" required under section 195 for initiation of the proceedings against them, since objection could and should have been raised at a stage earlier than one earlier stage in the proceedings.

As regards the charge under section 120B Indian Penal Code, I observe that this section is mentioned in Shamdeo's initial application

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Honorary Magistrate against all the five accused merely on the footing that they had conspired to forge the mortgage deed to support the false claim of Jageshwar and Jagdeo in the case under section 447. There never was any case of criminal conspiracy against these persons apart from the forgery and its user, and it is not suggested by the learned Advocate for the appellants that any evidence was given on the charge of criminal conspiracy apart from what was given in respect of the other offences. The conspiracy was only inferable from the forgery and user, if proved, but would in that case come within the provisions of the Indian Penal Code as regards abetment and would, therefore, not be punishable under section 120B at all. The charge under this section against the accused was, thus, also entirely unnecessary. The formal addition of such a charge has plainly not affected the decision of the case on the merits, and it will, therefore, be sufficient to set aside the convictions of the appellants under this charge.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Dhavle and Rowland, JJ.

DWARKA MAHTON

v.

PATNA CITY MUNICIPALITY.*

Bihar and Orissa Municipal Act, 1922 (Act VII of 2), sections 194 and 360—proper authority to judge the right of requisition—Court or municipal authorities—right available to owner or occupier by way of objection—section 360—owner whether precluded from questioning the propriety of original notice before magistrate—

Criminal Revision no. 592 of 1934, from an order of P. Ghosh, Special Magistrate, Patna, dated the 26th September, 1934, on an application against the order of C. S. Jha, Esq., Assistant Magistrate, Patna, dated 9th August, 1934.

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