REVISIONAL CRIMINAL.

Before Mr. Justice Scott-Smith and Mr. Justice Fforde.

1923

March 6.

KHUSHI RAM AND OTHERS, Petitioners,

versus

THE CROWN, Respondent.

Criminal Revision No. 1594 of 1922.

Criminal Procedure Code, Act V of 1898, Chapter X, sections 133, 135, 138—Public nuisance—unlawful obstruction on a way—Magistrate referring case to a jury before deciding whether the way is a public or a private one—Jurisdiction—Revision by High Court.

Held, that it is the duty of the Magistrate in a proceeding in respect of an obstruction to a way under Chapter X of the Code of Criminal Procedure, before referring the matter to the jury, to decide himself whether the way is a public one or not, and it is only after deciding this question that any matter can be referred to the jury.

Dharan Mandal v. *Gossain Das Mandal* (1), and *Dulalram Deb* v. *Baishnab Charan Deb* (2), followed.

Further, if a private claim to the site of an obstruction is asserted, the Magistrate must himself enquire into such claim, and if he finds on enquiry that a *bona fide* question of title has been raised, he must discontinue the proceedings.

Held also, that when the order of the Magistrate under section 133 of the Code is communicated to those concerned, it is immaterial that personal service of such order has not been effected.

Mussammat *Nur Jan* v. *Queen-Empress* (3), referred to.

Held further, that the word "forthwith" appoint a jury in section 138 (1) (*c*) must be construed in a reasonable way and means that the Magistrate shall appoint a jury "as soon as he reasonably can."

Held, per Fforde J., that where questions as to the public nature or private ownership of the *locus* of an obstruction are left to a jury the order of the Magistrate referring the determination of such a question to the jury is bad and should be quashed.

In the matter of Chundernath Sen (4), *Matuk Dhari* v. *Hari Madhab* (5), *Nasaruddi* v. *Akiluddi* (6), *Dulalram Deb* v. *Baishnab Charan Deb* (2) and *Churaman* v. *Emperor* (7), followed.

(1) (1910) 6 Indian Cases 271.
(2) (1906) 10 Cal. W. N. 845.
(3) 2 P. R. (Cr.) 1900.
(4) (1880) I. L. R. 5 Cal. 875.
(5) (1904) I. L. R. 31 Cal. 979.
(6) (1899) 3 Cal. W. N. 345.
(7) (1914) 12 All. L. J. 1024.

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Application for revision of the order of D. Johnstone, Esquire, Sessions Judge, Multan, dated the 14th November 1922, refusing to stay proceedings.

B. R. PURI, for Petitioners.

ASSISTANT LEGAL REMEMBRANCER, for Respondent.

The judgment of the Court was delivered by—

SCOTT-SMITH J.—On the 3rd and 4th September 1922, on the occasion of the *Muharram* festival there were serious riots in the City of Multan between the Muhammadans and Hindus. Shortly afterwards the Hindus living in certain *Mohallas* erected obstructions with the object of making gateways at the entrances to the lanes in which they lived in order, it is said, that they might prevent Muhammadans coming in and attacking them. The Secretary, Municipal Committee, reported the erection of these obstructions to the District Magistrate who, on the 13th October 1922, passed conditional orders, under section 133, Criminal Procedure Code, addressed to the residents of the *Mohallas*, where the obstructions had been made, directing them to remove them before the 1st November 1922 or to appear before him on the 25th October to take legal proceedings for the cancellation or revision of the orders. The order in each case begins as follows :—

"It has been reported to me and I have satisfied myself by personal inspection that in the *Mohalla*..... .....unlawful obstructions have been built on the public way which is open to the use of the public and that by such obstructions inconvenience is caused to the public....."

On the 25th October 1922 certain of the *Mohalladars* along with *Vakils* representing the residents of the 17 *Mohallas* in regard to which orders had been issued, appeared before the District Magistrate and applied, under section 135, Criminal Procedure Code, for the appointment of a jury. Upon this the Magistrate fixed five as the number of the jury and asked the objectors to nominate two jurors and they nominated two accordingly. The Magistrate said that he would himself appoint the other members of the jury on the 27th October. Counsel asked him that if possible the foreman and the two remaining jurors should be Europeans, and in accordance with their request three Euro-

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peans were appointed on the 27th October and the jury was duly constituted. The Magistrate gave certain orders as regards the inspection of the spot by the jury and, under section 138 of the Code, fixed November the 10th as the date on which they should deliver their verdict. He also revised his original provisional order and fixed the 15th November as the date before which the obstructions were to be removed. He then added the following:—

"Counsel admit that the obstructions have been built by their clients without the permission of the Municipal Committee. They wish to produce evidence in this and similar cases,

(1) that the *Mohallas* concerned are occupied by Hindus only;

(2) that the obstructions do not cause inconvenience to any one;

(3) that in particular cases, the obstructions are not in a public way; and

(4) that in particular cases they are necessary for the protection of religious places."

He went on to say that as the Municipal Committee of Multan was interested in these four issues notice would issue to it that the proceedings were in progress and the Committee would have the opportunity of deputing a servant or representative to watch the proceedings before the jury should it wish to do so. The jury returned their verdict on the 9th November and in accordance therewith the Magistrate cancelled his order in four cases and in 13 cases made it absolute. In these 13 cases petitions for revision have been filed in this Court and we have heard Mr Bhagat Ram Puri, on behalf of the petitioners and the Assistant Legal Remembrancer for the Crown.

The first point urged by Mr. Puri, on behalf of the petitioners is that, when the District Magistrate came to know that his clients put forward a claim that the property on which the obstructions were built was their private property or that it was not a public way, it was his duty to enquire into the matter himself and that he could not leave it to a jury. In support of this contention he refers to the case of *Dharam Mandal*

and another v. *Ghossain Das Mandal and another* (1), where it was held that—

"it is the duty of the Magistrate in a proceeding in respect of an obstruction to a footpath under Chapter X of the Criminal Procedure Code, before referring the matter to the jury, to decide himself whether or not the claim is made in good faith, and whether the pathway is a public one or not, and it is only on deciding that there was no such claim that any matter can be referred to the jury."

The same view was taken in *Dulalram Deb* v. *Baishnab Charan Deb* (2) where it was pointed out that:—

"It is not competent to the Magistrate to leave to the jury the decision of the question whether a pathway is public or not, and whether the claim of a private pathway set up is *bona fide* or not."

I entirely agree with these authorities.

The objection of counsel is based on the fact that the District Magistrate in his final order noted that counsel said that they wished to produce evidence, that in particular cases the obstructions were not on any public way and that this showed that the objectors set up a claim to the effect that the places on which the obstructions were raised were not in every case public ways.

Now, it was the duty of the persons, who appeared in answer to the original order, either to show cause against the order or to apply for the appointment of a jury under section 135, Criminal Procedure Code. When they appeared they did not attempt to show cause against the orders but immediately applied that a jury should be appointed. Even after the jury had been appointed their counsel did not specify the particular cases in which the objectors wished to show cause that the obstructions were not on a public way. It appears, moreover, from the subsequent proceedings that in only one case, that of *Mohalla* Nawan Shahr, was any claim put forward to the effect that the obstructions were on private property. In that case as well as in three others the District Magistrate cancelled his conditional order. In none of the cases which are before us was any claim put forward that the

(1) (1910) 6 Indian Cases 271. (2) (1906) 10 Cal. W. N. 845.

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obstruction was on private property, but evidence was led on behalf of the objectors to the effect that the places were not thoroughfares, that they were only used by the inhabitants of the *Mohallas* or by persons visiting them on business, that the inhabitants were entirely Hindus and that their places of worship were included in the *Mohallas*. The minority of the jury found in accordance with this evidence and were of opinion that in these circumstances no inconvenience was caused to the general public and that, therefore, no order for the removal of the obstructions should be passed. On behalf of the Crown evidence was led to prove that the places were public ways and that inconvenience was caused to the public. It seems to me that the real point before the jury was whether the places were public ways or not, and this was a point which the Magistrate should himself have decided. It is quite clear from the order of the District Magistrate of the 27th October 1922, that it was brought to his notice that in certain cases evidence was intended to be produced that the obstructions were not on a public way. He, therefore, should not have left it open to the jury to enquire into any cases in which this claim was put forward. He should, in my opinion, have called upon the parties to specify the particular cases in which they intended to lead such evidence, and should then have himself disposed of the question. I notice that in his final order of the 10th November the District Magistrate says : —

> "*Practically all* of them (*i.e.*, the obstructions) including those in which I have taken no action under section 133, Criminal Procedure Code, were built on the public way ; and in all cases now under consideration the Municipal Committee claim that they were built on the public way."

This shows that even at the time of his final order the District Magistrate had not reached a finding as to which obstructions were and which were not on the public way. The words, "*practically all*" make this clear.

The next question raised by Mr. Puri, was that the order passed by the District Magistrate was not served on the persons against whom it was made within the meaning of section 134 of the Code. He urges that the names of the persons affected should have been

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given in the order, and that they should have been served personally in the manner provided for the service of summonses in sections 69 to 72 of the Code. The word 'person' includes any company or association or body of persons whether incorporated or not—see the definition in section 11 of the Indian Penal Code and also in the General Clauses Act. It can, therefore, I consider, include all the male adult residents in a certain *Mohalla*. In the present case the order was served on 8 or 10 of the principal residents of each *Mohalla*, and by sticking it up in conspicuous places in the *Mohallas*, and the fact that a number of persons appeared in each case and instructed counsel to urge their objections shows that they were duly informed. It has been held that when the order is communicated to those concerned it is immaterial that the method in which it was served on them is not strictly in accordance with the provisions of section 134 of the Criminal Procedure Code—Mussammat *Nur Jan* v. *Queen-Empress* (1).

The third point raised was that the appointment of the jury was bad because two of the jurors were appointed on the 25th October and the remainder on the 27th. All that section 138 lays down as regards the appointment of a jury is that the Magistrate shall forthwith appoint a jury consisting of an uneven number of persons and so on. The word 'forthwith' must be interpreted, in my opinion, in a reasonable way. I think it merely means that the Magistrate shall appoint a jury as soon as he reasonably can. In the present case he appointed at once the two nominees of the objectors and had to consider whom he should appoint as the remaining three members. On behalf of the objectors he was especially asked if possible to appoint three Europeans and he had to ascertain who would be willing to act. The remaining three were appointed within two days, and, in my opinion, there was no unreasonable delay and the terms of the section were substantially complied with.

Mr. Puri also adds that the question whether there was an obstruction or not, was not one for the jury to decide. This question was not, however, left for the jury at all. The District Magistrate has noted on the record

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that the existence of the obstructions was admitted There is, therefore, no force in this objection.

The first objection has, however, in my opinion force. The District Magistrate acted without jurisdiction in not deciding, but leaving to the jury, the question whether the obstructions or any of them were on a public way, and I would therefore set aside his orders in all the cases before us, leaving him if so advised to take fresh proceedings.

FFORDE J.—I concur. There are two questions arising for determination in this case. The first is, whether certain orders made by the Magistrate under the special powers conferred upon him by Chapter X, sections 133 to 143 of the Code of Criminal Procedure are valid ; and the second is whether, if the orders are not valid, this Court should interfere in the exercise of its discretionary jurisdiction to set these orders aside.

The orders which are impugned are dated respectively the 27th of October and the 10th of November 1922. The first of these purports to be made under the provisions of section 138 and the second under section 139 of the Code.

The order of the 27th October, after appointing the three members of the jury whom the Magistrate has power to appoint, and fixing dates for the jury to inspect the various sites and consider the matters they had to determine, proceeds as follows :—

"Counsel admit that the obstructions have been built by their clients without the permission of the Municipal Committee. They wish to produce evidence in this and similar cases that—

(1) the *Mohallas* concerned are occupied by Hindus only ;

(2) that the obstructions do not cause inconvenience to any one ;

(3) that in particular cases, the obstructions are not on a public way ; and

(4) that in particular cases they are necessary for the protection of religious places."

The order then concludes by stating that :—

"Since the Municipal Committee, Multan, is interested in

the above issues notice will issue to it that these proceedings are in progress and it will be given the opportunity of deputing a servant or representative to watch the proceedings before the jury should it wish to do so."

Now this order is objected to on two grounds: firstly, that it leaves it to the jury to determine whether or not some of the obstructions are in a public way; and, secondly, that it is vague and indefinite as it does not specify in what particular cases that issue is left to the jury.

In my opinion both these objections are sound. The duty of determining whether the site of the obstructions is a public place or a public way is cast by statute on the Magistrate in the first instance, and under no circumstances can it be left to the jury If the Magistrate finds, on the parties appearing before him to show cause against the conditional order, that a question of title to the *locus in quo* is involved, he must refuse to act in that particular case unless he comes to the conclusion that the claim of title is not *bona fide*. Further, unless he finds that the place, or the way, as the case may be, is public, he has no power to proceed with the investigation. In the present case it is apparent on the face of the order itself that this question, which goes to the root of the Magistrate's jurisdiction, has been wrongly left to the jury.

On this ground alone the order is bad.

The same objections applied to the order of the 10th November. In referring to the obstructions complained of the order reads as follows :—

"*Practically all* of them including those in which I have taken no action under section 133, Criminal Procedure Code, are built on the public way; and in all cases, now under consideration, the Municipal Committee claim that they are built on the public way."

Here again it appears that even after the jury have investigated the question as to whether or not the obstructions are built on a public way, the order infers that some are not, and, as in the case of the former order, it has the added defect of ambiguity, insomuch as it does not specify which of them are and which are not so built. It has been urged by counsel for the

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Crown that even if the orders are bad, this Court should not interfere as the issue of title left to the jury was so left at the instance of the objectors themselves. I cannot accept that view.

The Courts in India have by a series of decisions made it clear that where questions as to the public nature or private ownership of the *locus* of an obstruction are left to a jury, the order of the Magistrate referring the determination of such a question to the jury is bad and should be quashed—*In the matter of Chunder nath Sen* (1), *Matuk Dha i* v. *Hari Madhab* (2), *Nasaruddi* v. *Akiluddi* (3), *Dulalram Deb* v. *Baishnab Charan Deb* (4), *Churaman* v. *Emperor* (5). This has been held even in cases where the defect in the proceedings does not appear on the face of the order. Where it does so appear, that is, where a want or an excess of jurisdiction is apparent on the face of the proceedings themselves, or where the order of the Magistrate is itself indefinite or ambiguous, the objection to allowing an order in such a case to stand is far stronger.

For these reasons I am of opinion that this Court has no alternative but to quash the two orders objected to.

C. H. O.

Revision accepted.

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(1) (1880) I. L. R. 5 Cal. 875.
(2) (1904) I. L. R. 31 Cal. 979.
(3) (1899) 3 Cal. W. N. 345.
(4) (1906) 10 Cal. W. N. 845
(5) (1914) 12 All. L. J. 1024.