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compelled to dismiss the suit as against all the defendants other than the first.

No extra costs have been incurred by reason of the present misjoinder of defendants and, accordingly, I shall dismiss the suit as against these defendants with no order as to costs.

[*Feb. 14, 1938.* Upon appeal (Civil First Appeal No. 93 of 1937) it was intimated that the Court would feel bound to dismiss the appeal. But, the plaintiff's advocate alleging at the last moment that the plaintiff could by amendment of the plaint plead a common cause of action, she was allowed by the Court to apply to file an amended plaint on the Original Side upon paying the whole of the defendants' costs of the appeal and the case was remitted to the Original Side accordingly.]

FULL BENCH (CRIMINAL).

Before Mr. Justice Baguley, Mr. Justice Mosely, and Mr. Justice Ba U.

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Apl. 8.

U AUNG PE *v.* THE KING.*

Defamation—False information to a public servant—Defamatory statement in information—No complaint by public servant—Prosecution by person defamed—Two distinct offences—Intent to defame—Penal Code, ss. **182**, *499, 500—Criminal Procedure Code, s. 195.*

A complaint for defamation by the person aggrieved by it can be entertained by a Court notwithstanding that the accused could have been prosecuted on the same facts under s. 182 of the Penal Code on the complaint of a public servant. The two offences are fundamentally distinct in nature, although they may arise out of one and the same statement of the accused.

The defamatory statement does not fall within any of the exceptions to s. 499 by reason merely of the fact that it is punishable as an offence under s. 182, or any other section of the Penal Code; nor is s. 500 of the Penal Code included in the list of sections contained in s. 195 (1)(*b*) of the Criminal Procedure Code.

Krishna Row v. *Appasawmi*, 1 Weir, 585; *Ramsebak Lal* v. *Muneswar Singh*, I.L.R. 37 Cal. 604; *Satish Chandra* v. *De*, I.L.R. 48 Cal. 388, followed.

Queen-Empress v. *Mi Gywet*, (1897-1901) U.B R. 279; *Swee Ing* v. *Koon Han*, A.I.R. (1935) Ran. 163, overruled.

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* Criminal Revision No. 21B of 1938 from the order of the Headquarters Magistrate (1) of Insein in Cr. Regular Trial No. 244 of 1937.

To constitute an offence under s. 499 of the Penal Code no intent to defame is necessary: it is sufficient if the imputation is published intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of the complainant.

The following reference for decision by a Full Bench was made by

BA U, J.—U Po Lu, headman of Yegyaw village, Insein District, resigned, and his brother-in-law, Maung Po San, was appointed temporary headman pending an election. U Aung Pe who was a rival candidate of Maung Po San for the headmanship presented a petition to the Deputy Commissioner, Insein, praying that he might be appointed temporarily as headman. In the course of the petition he stated that Taung Nga was illicity selling opium in the village and that he was related to Maung Po San who would assist him in the illicit trade if he was appointed headman.

Taung Nga took exception to this statement and prosecuted Aung Pe under section 500 of the Penal Code. The case was tried by the Headquarters Magistrate, Insein, and Aung Pe was found guilty and sentenced to pay a fine of Rs. 50 or in default to undergo one month's simple imprisonment and also to pay costs Rs. 5-8 or in default to undergo seven days' simple imprisonment.

The case was taken up to the Sessions Judge, Insein, on revision, and the learned Sessions Judge has now referred it to this Court, recommending that the conviction and sentence may be set aside on the following two grounds:

(1) That the Magistrate should not have accepted the complaint under section 500 of the Penal Code and tried it as the accused could have been prosecuted under section 182 of the Penal Code, *vide Queen-Empress* v. *Mi Gywet* (1), *Swee Ing* v. *Koon Han and another* (2).

(2) That the accused is on the facts alleged and proved entitled to the benefit of the Tenth exception to section 499 of the Penal Code.

The point raised in the second ground will arise if it is held that a person who has committed an offence under section 500 as well as an offence under section 182 of the Penal Code on the same facts can be prosecuted for the former though he is not prosecuted for the latter.

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(1) (1897-1901) U.B.R. 279. (2) A.I.R. (1935) Ran. 163.

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The cases relied on by the learned Sessions Judge dealt with section 211 of the Penal Code; but if the law expounded therein is correct, the principle would equally be applicable to the present case.

In *Queen-Empress* v. *Mi Gywet* (1) the learned Judicial Commissioner said:

> "The complainant made a complaint to the Magistrate that the accused, with the intent of causing injury to him, had instituted a criminal proceeding against him knowing that there was no just or lawful ground for such proceeding, and that she, the accused, had thereby defamed him. The Magistrate took action against her under section 500, Indian Penal Code, convicted her of that offence, and sentenced her to pay a fine of Rs. 40 or, in default, to suffer rigorous imprisonment for 40 days, and awarded half of the fine to complainant as compensation.
>
> The proceedings were wholly illegal. The offence alleged was one under section 211, Indian Penal Code, and under section 195, Criminal Procedure Code, cognizance should not have been taken of it without sanction. A Magistrate cannot give himself jurisdiction to try an offence under section 211 by treating it as one under section 500, Indian Penal Code."

This was approved by Mackney J. in *Swee Ing* v. *Koon Han and another* (2). The facts in that case are these:

One Swee Ing made a report at a Police Station charging one Ah Shyan and other persons unknown with having confined and raped her. The police refused to take action as they found, after due inquiry, that the complaint was false; thereupon Swee Ing made a direct complaint to the Court charging Ah Shyan and Koon Han with having confined and raped her. The complaint was thrown out under section 203 of the Criminal Procedure Code. Thereupon Ah Shyan and Koon Han filed two separate complaints against Swee Ing under section 500 of the Penal Code. The two cases were amalgamated and tried together. Swee Ing was found guilty and convicted.

On appeal to this Court Mackney J. said:

> "She defamed them again when she filed her complaint with the District Magistrate, but obviously, what she was

(1) (1897-1901) U.B.R. 279. (2) A.I.R. (1935) Ran. 163.

doing was not defaming these persons but bringing a (possibly false) charge against them. If her complaint is a false one, her object in making it was not to defame these persons so much as to harass them and cause them the inconvenience of being subject to criminal proceedings. For such an offence section 211 Penal Code, is the appropriate section, but the Court may not take cognizance of an offence under section 211, Penal Code, committed in relation to any proceeding in Court except on a complaint in writing of such Court, or by some other Court to which such Court is subordinate. By assuming that the offence falls under section 500, Penal Code, the Magistrate cannot avoid the effect of this provision of law."

The Calcutta High Court has, however, taken a contrary view. In *Ramsebak Lal* v. *Muneswar Singh* (1) Harington J. said :

" The facts are that the accused gave a certain information to the manager of the Bettiah Raj which was untrue. He was prosecuted under section 182, but acquitted on the ground that the person to whom he gave the information was not a public servant within the purview of that section. That information was, as a matter of fact, defamatory of the person who was aggrieved in the present case, and it is in respect of the defamatory statements which were made to the manager of the Bettiah Raj that the present charge under section 500 was instituted.

In my opinion, section 403 is no bar to the present proceedings. * * * * * The one is an offence committed against a public servant, which can only be prosecuted upon the complaint, or under sanction of the public servant injured, or of some one to whom he is subordinate. The offence under section 500 can only be prosecuted on the complaint of the person aggrieved by the defamation. In one case the offence is committed against a person to whom false information is given ; in the other case it is committed against a person about whom a defamatory statement is made. The two offences, to my mind, are quite distinct, and the charges under them would have to be prosecuted

(1) (1910) I.L.R. 37 Cal. 604.

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under the authority of the different persons who are injured by them."

Holmwood J. in a separate judgment agreed with this view and said:

"Although, therefore, the finding of the Magistrate in the section 182 case cannot be in any way allowed to prejudice the accused in the section 500, Indian Penal Code case, it is clear that the question of malice has not at all been tried, and the accused has not been acquitted of any charge involving malice. That is a question which has to be tried on evidence which would be irrelevant in a trial under section 182 of the Indian Penal Code."

In *Satish Chandra Chakravarti* v. *Ram Doyal De* (1) though the point now under discussion was not directly involved yet the observations of Mookerjee Acting C.J. bearing thereon are worthy of great respect. The learned Acting Chief Justice said:

"Now, the maker of a single statement may be guilty of two distinct offences, one under section 211 (which is an offence against public justice) and the other an offence under section 499, wherein the personal element largely predominates. The Legislature has provided, in the Criminal Procedure Code that the sanction of the Court, where the offence is committed, is essential in the former case for the institution of criminal proceedings. In the latter case the Legislature has omitted to make a similar provision. This diversity, for aught we know, may have been deliberate, and plainly affords no reason why the Court should struggle to hold that the statement does not fall within the mischief of the rule embodied in section 499. The two offences are fundamentally distinct in nature, as is patent from the fact that the former is made non-compoundable while the latter remains compoundable ; in the former case, for the initiation of the proceedings, the Legislature requires the sanction of the Court under section 195 of the Criminal Procedure Code ; in the latter case, cognizance can be taken of the offence only upon a complaint made by the person aggrieved under section 198 of the Criminal Procedure Code. Whether every

(1) (1920) I.L.R. 48 Cal. 388.

statement made by an advocate, by a party to a judicial proceeding, or by a witness therein should be excluded from the category of defamation, or, if included therein, should be made punishable in a proceeding instituted only with the sanction of the Court where the statement was made, are manifestly questions of policy which can be settled appropriately only by the Legislature. If, for reasons of public policy, the Legislature thinks fit to adopt the first alternative, as it is unquestionably competent to do, and to confer on advocates, parties and witnesses, not merely a qualified privilege as at present, but an absolute privilege as in the case of Judges, a new exception framed in suitable terms should be inserted in section 499 of the Indian Penal Code. If, on the other hand, the second alternative commends itself to the Legislature as more expedient, section 500 of the Indian Penal Code may well be included in the list of sections contained in section 195 (1) (*b*) of the Criminal Procedure Code. It is, after all, the province of the statesman, and not of a Judicial Tribunal, to discuss, and of the Legislature to determine, what is the best for the public good and to provide for it by proper enactments. But till the law has been amended, in one or other of the modes just indicated, or possibly in some other manner, it is incumbent upon us, if we are to avoid the greatest uncertainty and confusion to interpret the clear and unambiguous provisions of the statute in their plain natural sense, and not allow ourselves to be led into speculations as to their reasonableness or unreasonableness by reference to the ever captivating but often misleading ideals of public policy."

The Madras High Court took a similar view in *Krishna Row* v. *Appasawmi Aiyar* (1). The case is an old one but it does not appear that the view taken therein has since been dissented from. The headnote of the case is in the following terms :

"A complaint of defamation cannot be dismissed on the technical ground that the offence of defamation charged merged in an offence punishable under section 182 of the Penal Code and that no sanction was

(1) 1 Weir's Law of Offences & Cr. Pr., p. 585.

obtained for prosecution under the latter section as required by section 195, Cr. P. Code.

Where a public servant in the course of a departmental inquiry made a statement to the Head of his department that the complainant, another public servant, borrowed monies for his immediate superior ; Held, that such statement would be defamatory, if it was untrue and if it was made under such circumstances as would lead the officer to believe that the complainant had borrowed money for his superior from persons connected with the department."

The view taken by the Calcutta and the Madras High Courts appears, to my mind, to be the correct view.

Section 235 (2) of the Criminal Procedure Code says :

"If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences."

The present case, in my opinion, clearly illustrates what this section means.

When U Aung Pe gave information to the Deputy Commissioner that the respondent Taung Nga sold opium illicitly, assuming that he knew that the said information was false or that he believed it to be false, he did so with the intention of influencing the Deputy Commissioner not to appoint his rival Po San as headman. He has thereby committed an offence under section 182 of the Penal Code.

As the said information has also apparently harmed the reputation of Taung Nga he has also committed an offence under section 500.

Therefore, these two offences can be tried together in the same trial as permitted by the section or else separately as directed by section 233, Code of Criminal Procedure.

As, however, the ingredients that constitute the offence under section 182 are quite different from the ingredients that constitute the offence under section 500, different kinds of evidence will be required to prove the two respective offences.

If the accused is found guilty, the question of sentence, whether the offences are tried separately or in the same trial, will have to be considered with reference to section 35 of the Code of Criminal Procedure and section 71 of the Penal Code.

As there is a conflict of decisions, and as the point involved is of general public importance, I refer this case for decision by a Bench, Full or otherwise, as the learned Chief Justice may direct.

M. Ahmed for the applicant. In the complaint filed in this case all the ingredients necessary to constitute an offence under s. 182 of the Penal Code are present; therefore a complaint under s. 500 in respect of the same facts cannot be entertained. A private party should not be allowed to set the criminal law in motion where a provision of law requires a public servant to do so. The recommendation of the Sessions Judge should be accepted, and this is in accordance with the two Burma rulings on the subject. *Queen-Empress* v. *Mi Gywet* (1); *Swee Ing* v. *Koon Han and another* (2).

The Indian authorities are against this view, and these have been discussed in the referring judgment.

The object of the applicant was to point out to the Deputy Commissioner that the person appointed as headman was unsuitable for the appointment. Therefore, even if s. 500 applied, the applicant is protected.

Thein Maung (Advocate-General) for the Crown and *Ba Pe* for the respondent were not called upon.

BAGULEY, J.—It is unnecessary to set out the facts in detail as they have been set out in the order of reference upon which the case came before this Full Bench.

The learned Sessions Judge is of opinion that the Magistrate could not try the complaint under section 500 because on the same facts the accused might have been prosecuted under section 182 of the Penal Code.

He points out that a prosecution under section 182 of the Penal Code by reason of section 195 of the Code of Criminal Procedure would not lie because there is

(1) (1897-1901) U.B.R. 279. (2) A.I.R. (1935) Ran. 163.

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no complaint in writing made by the public servant concerned, and he quoted two cases in which it had been laid down that when there was no complaint by the public servant concerned a Magistrate could not give himself cognizance of the case by making the case one under section 500 of the Penal Code.

The first of these cases was *Queen-Empress* v. *Mi Gywet* (1). In this case the learned Judicial Commissioner merely stated that the proceedings were wholly illegal. He said the offence alleged was one under section 211, Penal Code, and under section 195, Criminal Procedure Code, cognizance should not have been taken of it without sanction.

No reason is given for this and the wording at the beginning of the judgment suggests that no real defamation was set out in the complaint. It is difficult to adduce anything very definite from this judgment without knowing the actual wording of the complaint.

The second case was *Swee Ing* v. *Koon Han and another* (2). A quotation from this judgment is given in the order of reference, and it seems to me there is a fallacy apparent on the face of the judgment. It says :

> "If her complaint is a false one, her object in making it was not to defame these persons so much as to harass them and cause them the inconvenience of being subject to criminal proceedings."

A reference to section 499, Penal Code, shows an obvious omission. No intent to defame is necessary, it is sufficient if the imputation is published intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of the complainant.

On the other hand I find it difficult to add anything useful to the two rulings referred to,—*Ramsebak Lal* v. *Muneswar Singh* (3), and the exhaustive judgment of

(1) (1897-1901) U.B.R. 279. (2) A.I.R. (1935) Ran. 163.
(3) (1910) I.L.R. 37 Cal. 604.

Mookerjee Acting Chief Justice in *Satish Chandra Chakravarti* v. *Ram Doyal De* (1).

In this last judgment every case bearing on the matter is referred to.

Clause 29 of our Letters Patent says clearly that we have to deal with this case under the Penal Code, and any person who is charged with any offence for which provision is made by the Penal Code shall be liable to punishment under the said Act *and not otherwise*. It is, therefore, impossible to refer to the English law or to any questions of privilege whether absolute or qualified.

The relevant sections of the Penal Code are sections 499 and 500 and in these sections the word "privilege" is not to be found.

Section 499 deals with, if I may say so, defamation *per se*, and says nothing about where, why, or when the imputation is made, so the law would appear to apply in exactly the same way whether the imputation is made in a Court of justice or before some other public servant, or anywhere else.

Section 195 of the Criminal Procedure Code lays down that a Court shall not take cognizance of certain offences under certain sections except on the complaint in writing of the public servant concerned, or on the complaint in writing of a Court, or some other Court to which the first Court is subordinate, and so on, but section 500 is not mentioned in section 195.

To section 499 there are ten exceptions ; it would have been quite easy for the legislature to have inserted an eleventh exception saying that when the defamation is made in a statement to a public servant or in Court proceedings, by virtue of which the offence was punishable under section 182 or 211 of the Penal Code or

(1) (1920) I.L.R. 48 Cal. 388.

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some other section, then no prosecution under section 500 would lie. But there is no such extra exception.

In my opinion, as I have said, there seems an obvious flaw in the reasoning in *Swee Ing* v. *Koon Han and another* (1) and it must not be regarded as good law.

This disposes of the point of law, but in addition to this the learned Sessions Judge recommends that the conviction be set aside because the accused was entitled to the benefit of the tenth exception to section 499 of the Penal Code, and, as the whole case has been referred to this Bench, it is necessary to deal with the evidence from this point of view.

The gist of the tenth exception is that the imputation must be made in good faith and the evidence has to be examined to see whether the accused has shown that he acted in good faith.

What Aung Pe alleged was that Taung Nga was illicitly selling opium in the village and that Po San was related to Taung Nga "who is helping him to get appointed with a view that Taung Nga can trade in opium illicitly and as such the whole village tract is liable to be spoilt."

Now it is clear that within the last two years or so Taung Nga had been prosecuted under the Opium Law (Amendment Act), section 3, and had been acquitted.

When a man is charged with something of this sort and acquitted after trial, the man who repeats the charge has to be on very sure ground if he wishes to plead that he repeats this charge in good faith, and it is for Aung Pe to show that he acted in good faith as it is an exceptional defence which he is putting up.

Examining the evidence for the defence, the first witness is Kyaw Zaw, who says he has no personal

(1) A.I.R. (1935) Ran. 163.

knowledge of Taung Nga. He gives evidence of reputation and hearsay but, as the ordinary rules of evidence apply to this trial, hearsay evidence is inadmissible.

The next witness is Shwe Nyein. This man admits to being an opium eater, naturally, as he says he bought opium from Taung Nga. He also admits that he has been dismissed from his employment by Taung Nga and tales told by a dismissed servant are usually unreliable.

The next witness is Chit Ti. He says Taung Nga is the owner of many fields and is a respectable man, and after giving his evidence he says that he is an opium eater and in that capacity bought opium from Taung Nga, but winds up by saying he is not an opium eater but an opium smoker. This is a very different matter and he must know which of them he is.

The next witness, Sa Yan, makes the astounding statement : " I know Ko Aung Pe to be *Kyaungtaga* and a *Phayalaga*. He is the head of the bachelors in the village " (Lubyo-gaung). If this be the case, Aung Pe must be the only man in Burma who is a *lubyo-gaung* and a *kyaungtaga*—, this is a combination unheard of.

The next witness is Maung Ohn Maung, Resident Excise Officer, who says that he has nothing noted in the register about warnings given to Taung Nga.

On this evidence I can see no ground for holding that Aung Pe was acting in good faith when he repeated this charge which had been disproved against Taung Nga within the last two years.

The learned Sessions Judge, however, says that some of the evidence comes from the complainant's own witnesses, tending to show that Taung Nga has the reputation of illicitly selling opium in the village.

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Now, as I have said, evidence of reputation is inadmissible in the ordinary way in a case to which the ordinary rules of the Evidence Act apply.

Turning to the witnesses called by Taung Nga, Maung Po Thaung admits that in a case against Tun Shwe he made the statement, Exhibit 1, that "almost all the thieves are opium smokers and they got opium from Taung Nga and Bon Taik." This evidence was given on the 2nd September 1935, and Exhibit 3 shows, it would seem, that the proceedings against Taung Nga under the Opium Law Amendment Act were still being heard on the 8th October 1935, so this statement of Maung Po Thaung's was made before Taung Nga's acquittal and, therefore, is covered by his acquittal.

Ko San Hnyin, the other witness called by Taung Nga, was questioned about Exhibit 2. Where this came from is not clear—it bears no date, but speaking on the 16th October 1937, he says that it was over two years ago and, therefore, is a matter which came into existence before Taung Nga's acquittal.

As I have said before, it is for Aung Pe to show that the charge was made in good faith and that he has some definite evidence either not put before the Court when Taung Nga was under trial, or which has come into existence since his acquittal.

I do not consider that Aung Pe has brought himself within the tenth exception to section 500—I would, therefore, dismiss this application for revision.

MOSELY, J.—I agree.

BA U, J.—I have already given my view on the question of law in the order of reference and I have nothing to add thereto. I agree that this application should be dismissed.