APPELLATE CIVIL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Braund.

1939

Apl. 4.

TAN BA CHENG AND ANOTHER

v.

REGISTRAR, ORIGINAL SIDE, HIGH COURT.*

Complaint by a Civil Court—Criminal Procedure Code, ss. 195 (1) (b), 476—Complaint as to abetment of offence—Abetment not specifically mentioned in s. 195 (1) (b)—Clause 4—Magistrate's power to convict for abetment on evidence—Interpretation of penal statute—Administration of Criminal law—Intention of legislature—Exercise of discretion by Judge on Original Side, High Court to lay complaint—Interference by appellate Bench—Misapprehension or error apparent on record—Complaint not an invitation to convict—Magistrate's freedom at trial.

Under s. 476 of the Criminal Procedure Code a Civil Court has jurisdiction to make a complaint not only as regards any offence referred to in s. 195 (*1*) (*b*), but also as regards an abetment of any such offence although the offence of abetment is not specifically mentioned in s. 195 (*1*) (*b*). In view of clause 4 of this section, the Magistrate who hears a complaint laid of an offence under s. 195 (*1*) (*b*) can convict the accused of abetment of the offence if he holds on the evidence before him that the accused was not a principal but an abetter.

The phrase in s. 476 " any offence referred to in s. 195 (*1*) (*b*) " must mean any offence to which s. 195 (*1*) (*b*) has reference. Though a penal statute is to be construed strictly, it cannot be so construed as to reduce the administration of criminal law to an absurdity. " The paramount object, in construing penal as well as other statutes, is to ascertain the legislative intent, and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings when best effectuating the intention."

The power to lay a complaint under s. 476 of the Criminal Procedure Code is a discretionary power, and an appellate Bench of the High Court would not interfere with the exercise of his discretion by a single Judge of the Court unless it could be shown that the discretion had been exercised under some misapprehension or error which was plain on the face of the record.

Powell v. *Streatham Manor Nursing Home*, (1939) A.C. 243 ; *Rash Mohan Shaha* v. *Registrar, O.S. High Court, Rangoon*, Civ. Misc. App. 9 of 1938, H.C., Ran., referred to.

The complaint must be drawn up with care omitting any reference which might be construed by the trial Magistrate as an invitation to record a finding adverse to anyone charged with an offence. The Magistrate must conduct the trial as in any ordinary case, completely unaffected by any consideration of its origin.

---

* Civil Misc. Appeal No. 10 of 1939 from the Order of this Court on the Original Side in Civil Misc. Case No. 12 of 1939.

N. M. Cowasjee for the appellants. An appeal lies to this Court under s. 476B of the Code of Criminal Procedure as complaints have been filed against the appellants under s. 476 thereof. An appeal lies from an order of a Judge on the Original Side of this Court on any ground that can be urged against an order of this kind from any subordinate Court. *Munisamy* v. *Rajaratnam* (1); *Abdul Latiff Usman* v. *Haji Tar Mohamed* (2); *Jagabandhu* v. *Abdul Sarkar* (3); *Ramjan Ali* v. *Mooljee Sicca & Co.* (4).

In all appeals under this section it is incumbent on this Court sitting as a Court of appeal to reconsider the entire matter on the merits, and also the propriety of the order. Unless this Court is satisfied that a *prima facie* case has been made out the order appealed against should be set aside. *Ram Charan Das* v. *Emperor* (5); *Jagabandhu* v. *Abdul Sarkar* (3).

The decisions of this Court to the contrary are erroneous. The Legislature has given a right of appeal both on facts and law and such right cannot be curtailed. It makes no difference whether the appeal is from the Original Side of this Court or from any other Court. Before an order for prosecution can be made there must be a reasonable foundation for the charge. *Jadu Nandan Singh* v. *Emperor* (6); *U Po Thein* v. *Bula Khan* (7).

There was no evidence in the present case justifying a prosecution under s. 205 or under s. 109 read with s. 205 of the Penal Code. The order of the Judge was not based on any evidence, and if it was based upon the exercise of some discretion, the discretion was not judicially exercised. The learned

(1) I.L.R. 45 Mad. 928 (F.B.)
(2) I.L.R. 47 Bom. 270.
(3) I.L.R. 57 Cal. 500.
(4) I.L.R. 56 Cal. 932.
(5) 23 All. L.J. 515.
(6) I.L.R. 37 Cal. 250.
(7) A.I.R. (1936) Ran. 474.

1939

TAN BA CHENG v. REGISTRAR, ORIGINAL SIDE, HIGH COURT.

Judge had no power to make any assumption when no one had suggested that the appellants had committed the offence of forgery or of abetment thereof. As regards the charge of perjury, the essential ingredient of the offence, namely, the intention of the person, had not, in any way, been proved; nor was there any reason why the appellant should have forged the document in question.

The Court has also no jurisdiction to order an inquiry in regard to an offence of abetment. A penal statute must be construed strictly. The form in which the order is couched is an invitation to the trial magistrate to convict, and, in any event, the order should be altered so that the appellants may have a fair trial, and that the trying Magistrate may not be influenced by anything that the Judge may have said in the order.

Myint Thein (Government Advocate) for the respondent was not called upon.

ROBERTS, C.J.—This is an appeal brought against the Registrar on the Original Side of this Court, who has drawn up two complaints against both and one of the appellants respectively, in accordance with an order of the learned Judge on the Original Side, passed on the 21st of January of this year, under section 476 of the Criminal Procedure Code.

The material words of that section, for the purpose of this appeal, read as follows :

" When any Civil Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in section 195, sub-section (*1*), clause (*b*), which appears to have been committed in relation to a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing signed (in the case of the

High Court) by such officer as the Court may appoint, and shall forward the same to a Magistrate of the first class having jurisdiction, and may take sufficient security for the appearance of the accused before such Magistrate or if the alleged offence is non-bailable may, if it thinks necessary so to do, send the accused in custody to such Magistrate."

The suit in question was one in which the two present appellants were the plaintiffs. It was of a complicated nature and in the course of a protracted hearing the learned Judge came to the conclusion that a forgery had been committed and that, although the appellants had not committed it themselves, they had aided and abetted its commission. If that be so, they had committed an offence punishable under section 205, read with section 109, of the Penal Code. He also came to the conclusion that the second appellant had committed perjury, punishable under section 193. Accordingly, he formed the opinion that it was expedient that, in the interests of justice, an inquiry should be made into the commission of those two offences.

The first point which is taken before us is that the words of the section say that the Court has jurisdiction, where it thinks that an inquiry should be made "into any offence referred to in section 195, sub-section (*1*), clause (*b*)", to make a complaint: and it is said, and said rightly, that the offence of abetment is not specifically mentioned in section 195, sub-section (*1*), clause (*b*), of the Code of Criminal Procedure, although by sub-section (*4*) of section 195 it has been enacted that the provisions of sub-section (*1*), with reference to the offences named therein, apply also to criminal conspiracies to commit such offences and to the abetment of such offences and attempts to commit them. It is clear that under this section a Magistrate can take cognizance, not only of the offence under section 195,

1939

TAN BA CHENG v. REGISTRAR, ORIGINAL SIDE, HIGH COURT.

ROBERTS, C.J.

sub-section (*1*), clause (*b*), upon the complaint in writing of the Court in relation to which the offence is alleged to have been committed, but of all cases in which the abetment of such offence has been proved. If, therefore, a Court decides that it is expedient that an inquiry should be held and that a complaint should be made against a person for the commission of forgery, contrary to section 205 of the Penal Code and such a complaint is heard by the Magistrate, he plainly has jurisdiction to convict that person of abetment of forgery merely if he has arrived at the conclusion, after hearing the evidence, that the accused was not a principal but an abetter. It is said that, although this is so, where the Court has arrived at that conclusion it cannot make a complaint against an abetter merely, because the offence of abetment is not specifically mentioned in section 195, sub-section (*1*), clause (*b*). I cannot help feeling that this leads to an absurd conclusion and, although the statute is a penal one and must be construed strictly, I find it impossible to assent to an argument which is based upon these premises. If two persons in two different Courts in the same building on the same day were found to have been *prima facie* guilty of exactly the same offence in relation to a proceeding before the Court, namely, the abetment of forgery, the Judge in one Court, having ground at first to suppose that the suspected person might be the principal offender, might act under the jurisdiction conferred by section 476, and the Magistrate, finding him an abetter only, might send him to prison, whereas in the second Court the Judge, realizing that there was no possible ground for saying that the person suspected was a principal but that he was an abetter merely, according to Mr. Cowasjee's argument, would be powerless to proceed against him for exactly the same offence as in the other Court. This, I think,

1939

TAN BA CHENG v. REGISTRAR, ORIGINAL SIDE, HIGH COURT.

ROBERTS, C.J.

would reduce the administration of criminal law to an absurdity.

When one looks at section 195, sub-section (*1*), clause (*b*), it seems to me that a complaint of abetment of forgery is a complaint of an offence punishable under one of the sections of the Code named therein, namely, section 205. It is quite true that it is only punishable under section 205 when read with section 109 : but if there were no section 205 it would not be punishable at all. If, therefore, it is not punishable without the existence of section 205, I feel that it is an offence punishable under that section of the same Code, even though that section has to be read with other sections in order to find exactly in what the guilt consists and what the measure of punishment may be.

Moreover, I think, that the phrase in section 476 of the Criminal Procedure Code "any offence referred to in section 195, sub-section (*1*), clause (*b*)" must mean any offence to which section 195, sub-section (*1*), clause (*b*) has reference. The provision that I am quoting does not say "any offence *specifically mentioned* in section 195, sub-section (*1*), clause (*b*)". It says, "any offence *referred to* * * *." Now, what are the offences to which section 195, sub-section (*1*), clause (*b*), has reference? They are these named offences and then, by way of explanation, sub-section (*4*) says that the provisions of sub-section (*1*) with reference to the offences named therein apply also to the abetment of such offences and attempts to commit them. In my opinion, therefore, on all these grounds —and, be it noted, if one only of these arguments is sound, it suffices—the case comes within the jurisdiction of the learned Judge: it seems to me impossible to think that the provisions of the criminal law can be construed in such a way as to exclude from the ambit of his powers the making of a complaint in

1939

TAN BA CHENG v. REGISTRAR, ORIGINAL SIDE, HIGH COURT.

ROBERTS, C.J.

relation to an offence less incriminating, generally speaking, than the principal offence, and deprive him of the power to make a complaint of an offence to a Magistrate, who has full jurisdiction to deal with that offence whether it is one committed by a principal offender or by an aider and abetter merely.

Having disposed of this matter, we next have to consider whether the learned Judge exercised his discretion in a matter in which we have now held he had jurisdiction. I am of opinion that his discretion in this case was properly exercised : and in saying this I desire to be most careful in avoiding any expression of opinion as to whether he was right upon the facts or not, or as to whether I should have myself exercised the discretion in the same way : in so saying I desire neither to criticize the learned Judge nor to offer to the Magistrate who will try this case the least assistance as to what my view, if I have had material to form any view in relation to it, may be.

Dunkley, J., in a case in which I was sitting with him, in *Rash Mohan Shaha and another* v. *The Registrar, Original Side of the High Court at Rangoon* (1), said :

> " The power to lay a complaint under section 476 of the Criminal Procedure Code is a discretionary power, and an appellate Bench of this Court would not interfere with the exercise of his discretion by a single Judge of the Court unless it could be shown that the discretion had been exercised under some misapprehension or error which was plain on the face of the record."

There is a right of appeal given against complaints made by a Court under section 476 of the Criminal Procedure Code : so is there a right of appeal given on mere questions of fact to appellate Courts. It has

(1) Civ. Misc. Ap. No. 9 of 1938, H.C., Ran.

been laid down by this Court over and over again and following the English practice and the judgment of Viscount Sankey, L.C., in *Powell and wife* v. *Streatham Manor Nursing Home*, (1) that the appellate Court will consider most carefully the tribunal whose decision upon facts it has to review and will only interfere when it is certain upon the facts that there was a real misapprehension of it. We have to apply the same principle, as it seems to me, in dealing with section 476 of the Criminal Procedure Code, as we apply in relation to appeals. It is well known that in an appeal on a pure question of fact from the Original Side of this Court the appellate Court shows great reluctance to interfere with a Judge of experience who has had the opportunity of investigating matters at first hand for himself. None-the-less, appellate Courts often, for the benefit of subordinate Courts, give directions by way of general guidance to Judges as to how they should ascertain the facts and as to the proper manner in which evidence is to be appreciated. Here, we have an appeal from an order under section 476 of the Criminal Procedure Code, made directly by a High Court Judge upon the Original Side in a case which came before him. And, speaking for myself, I am disinclined to think that he is likely to have been wrong, not in the view which he took of the facts, but in the exercise of his discretion by reason of the fact that he may not have observed all the rules which Courts from time to time have said ought to be borne in mind by subordinate judicial officers when considering the desirability of making complaints under this section.

Whenever the machinery of the criminal law is set in motion, regard must be had to the particular facts of

(1) (1935) A.C. 243.

1939

TAN BA CHENG v. REGISTRAR, ORIGINAL SIDE, HIGH COURT.

ROBERTS, C.J.

the case. It is impossible to say when a complaint ought to be made under this section and when it ought not : no hard and fast rule in this case can be laid down. And I am perfectly satisfied, from a reading of the learned Judge who made the order, that he has carefully considered the matters before him and, whether he was right or wrong with regard to the facts (as to which I express no opinion), he has exercised the discretion which is required of him in making the order.

I think, for the purposes of this judgment, I need no more than make two quotations from what the learned Judge has said. He said :

" The minute book was vigorously attacked by the learned advocate for the Defendant trustees. The book, therefore, was one of the utmost importance in the suit, and the question as to who wrote the entries in that book was equally important. It is in that regard that Mr. Chin Hone On said that he actually saw Mr. Tan Ba Cheng writing the entries in it and we now know that that is false."

And he had previously remarked in relation to the other matter :

" It necessarily follows, from the mere fact that the Plaintiffs were co-plaintiffs in a suit under section 92, that they agreed together, the one with the other, to do this thing, namely, to cause to be done an illegal act, that is to say, the commission by a person, whose identity has not as yet been established, of an offence punishable under section 205 of the Penal Code."

He reviewed the evidence with some care and said :

" I am not now deciding whether or not the Plaintiffs have in fact committed all or any of the abovementioned offences. My present function is merely to consider whether a *prima facie* case has been made out. It seems to me that there is a reasonable

foundation for a charge under all the abovementioned sections of the Penal Code : "

And he adds that there is a reasonable probability of a conviction. Whether he is right or wrong as regards the last matter is quite beside the point. He then says, having examined section 476 :

" I am of opinion that there is ground for inquiry into the abovementioned offences in regard to both the Plaintiffs."

And he sent the case for inquiry and trial to the District Magistrate.

We have looked at the form of the order drawn up by the learned Registrar and we are of opinion that it is expedient, that orders under this section should be carefully drawn up and that it is desirable, and we accordingly direct that the learned Registrar should attend in Chambers before my brother Braund in order to supervise the drawing up of this order. It is important to see that the complaint which is lodged follows the directions laid down in section 476 of the Criminal Procedure Code with care and that it omits from its contents any reference which might be construed by the Court before which the proceedings are taken as a pressing invitation to record a finding adverse to anyone charged with an offence. All that the learned Judge does is to exercise his discretion and in the exercise of it to decide that the criminal law should be put in motion and that he has done in this case : and I am by no means disposed to put a spoke in that machinery so as to injure its motion. The case must go on in the usual way and the learned Magistrate who tries it must try it as he would do a complaint of an ordinary kind and must remain completely unaffected by any consideration of its origin. It is for him, and for him alone, to try whether either a *prima facie* or a

1939

TAN BA CHENG v. REGISTRAR, ORIGINAL SIDE, HIGH COURT.

ROBERTS, C.J.

satisfactory case has been made out against any of these accused persons and if there is no ground for the complaint which is lodged, no doubt it will be his duty as well as his pleasure to acquit them both.

There will be no order as to costs.

BRAUND, J.—I agree.

So far as the question whether this Court ought, in appeal, to interfere with the discretion exercised by the learned Judge under section 476 of the Criminal Procedure Code is concerned, there is very little I have to add. As in all cases of appeals which involves the discretion of a subordinate Court, the limits within which the appellate Court ought to act must be very closely circumscribed and it seems to me to be in the first place essential to appreciate what it is that the appeal lies from. There is a world of difference between an appeal from a decision of fact by a subordinate Court and a decision from the exercise of a discretion. In this particular case all that was required of the learned Judge was that, upon the evidence which he had available to him and upon his own individual appreciation of it, he had to come to a formal opinion—it has to be observed that it is his opinion that was material about two things : first, whether there appeared to him to have been committed an offence in relation to the proceedings that had gone on in his Court, and, secondly, whether it was in the public interest, or rather, in the interest of justice, that he should put in motion what my Lord the Chief Justice has described as the machinery of the criminal law. And all we can do in appeal is to look at such available record as we have of what the material was in the Court below and to try to see whether the learned Judge carried out that duty. We are not in the least concerned to decide here

whether, if the same material had been before us, or either of us, we, or either of us, should have come to the same conclusion : all we have to do, shortly, is to see whether the learned Judge in fact exercised the jurisdiction that the act vested in him.

Now, what do we find ? After all, the best test of what the learned Judge has done is to see how he has himself described his own mental process. He said in his judgment that he appreciates that he is not deciding whether or not the plaintiffs had in fact committed the offences in question.

He says :

" My present function is merely to consider whether a *prima facie* case has been made out. It seems to me that there is a reasonable foundation for a charge under all the abovementioned sections of the Penal Code and that there is a reasonable probability of a conviction."

Now, the learned Judge made that statement after a long process of taking evidence and after a very careful consideration of the evidence himself : and it seems to me, at best, that it would be impossible to say that on the face of the record there has been any failure at all by the learned Judge to exercise a discretion upon those principles which section 476 requires him to use.

So far as the major charge, that is to say, the charge of forgery is concerned, it relates to both the appellants and there was material upon which the learned Judge could come to some such conclusion as the one he reached. I must not be misunderstood as weighing up the evidence on either side, because I certainly would not allow myself to express any opinion as to whether a case is likely to be made out against the appellants or not : all I am concerned with is to point out what the material was. The learned Judge had a case which the plaintiffs had started and in which they pressed, among

1939

TAN BA CHENG v. REGISTRAR, ORIGINAL SIDE, HIGH COURT.

BRAUND, J.

other things, for the appointment of a number of new trustees. And the learned Judge in effect says this :

"I find in the course of these proceedings that there are a number of trustees put forward as new trustees. I find that they took very little interest in the proceedings. They did not even attend Court. They have not approached the advocate who has been instructed : and, in short, they were content to let matters take their own course."

On the other hand, Mr. Cowasjee points out that there is no evidence that any of these proposed trustees were nominees of the plaintiffs. The learned Judge himself has, in his judgment, considered these facts. He says :

"None of the others was sufficiently interested ever to enquire from the advocate whom they had instructed, at any time during the fifteen months or more which elapsed between their signing the written statement and my giving judgment in the suit, how the case was going, and at no time throughout the somewhat lengthy hearing did they attend the Court. The Defendant No. 37 did come to Court during the hearing and was called as a witness by the Plaintiffs themselves. But he said in cross-examination that he himself did not want to be a trustee. It is quite clear that he is really a puppet of the Plaintiffs."

All I am pointing out is that it is wrong to say that there was no material before the learned Judge from which he could conclude as he did : but, by that I must be very careful not to give the impression that I endorse any finding against the plaintiffs in that respect.

It seems to me, therefore, for those reasons and the other reasons which my Lord the Chief Justice has given, that it is impossible to say here that the learned Judge has exercised no discretion.

As regards the other point as to whether the Court has jurisdiction or not, it is a point which at one time gave me, I confess, a good deal of difficulty. The point is a very short one : it can be simply stated, I

think, in these terms : whether in section 476 of the Criminal Procedure Code the words " referred to in section 195, sub-section (*1*), clause (*b*) or clause (*c*) " require that the offence in respect of which the complaint is ultimately laid must be one of those which are mentioned specifically in section 195, sub-section (*1*), clause (*b*) or clause (*c*), or whether it is sufficient that the offence is one to which those clauses apply or have reference.

It has to be conceded that, if the words " referred to in " are construed in their strictest possible sense, it would mean that the offence has to be one of those which are to be found within the four corners of section 195, sub-section (*1*), clause (*b*) or clause (*c*). And it is that circumstance that at one time gave rise to considerable difficulty in my mind, coupled with the circumstance that, on ordinary principles, one has to construe a penal provision in a statute strictly—strictly that is in favour of the person who is liable to be penalised by the section. But that does not mean, I think, that where a section of a penal statute admits of one reasonable interpretation only we are not to be entitled to give it the only reasonable construction we can give it because it does some slight violence to the natural meaning of the words. Here, it seems to me that there is only one way in which the words " referred to in " can be construed so as to give a reasonable construction at all to the scheme which is envisaged by section 476. And I find a passage—in " Maxwell on the Interpretation of Statutes " (at page 240) which seems to support that view. He says :

" The rule of strict construction, however, whenever invoked, comes attended with qualifications and other rules no less important, and it is by the light which each contributes that the meaning must be determined. Among them is the rule that

1939

TAN BA CHENG v. REGISTRAR, ORIGINAL SIDE, HIGH COURT.

BRAUND, J.

that sense of the words is to be adopted which best harmonises with the context and promotes in the fullest manner the policy and object of the Legislature. The paramount object, in construing penal as well as other statutes, is to ascertain the legislative intent, and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention. They are indeed, frequently taken in the widest sense, sometimes even in a sense more wide than etymologically belongs or is popularly attached to them, in order to carry out effectually the legislative intent, or, to use Lord Coke's words, to suppress the mischief and advance the remedy."

Now, returning to section 476, read with section 195, we have to observe that the offence of abetment is dealt with only in sub-section (*4*) of section 195. By that sub-section it was added as an amendment that the provisions of section 195, sub-section (*1*), clause (*b*), were to apply to an abetment. And, in that sense quite clearly section 195, sub-section (*1*), clause (*b*) is made to have reference to an abetment. It is clear that unless we construe the words "referred to in" as meaning "to which section 195, sub-section (*1*), clause (*b*), is applicable" there would be no way in which the offence of the abetment, when it arises in relation to an offence connected with proceedings in Court, could ever be made the subject of a complaint. Section 195 (*1*) (*b*) read in conjunction with sub-section (*4*) in effect says that no complaint relating to an abetment of an offence under section 205 shall be laid except on the complaint in writing of a Court. That is quite plain. If, it seems to me, you are going to paralyse the only means by which a Court can lay a complaint by excluding from it abetment, it amounts, in my view, to paralysing the whole machinery; or, to put it in popular language, it seems to me to make complete nonsense out of the clear intention of the legislature that the machinery shall apply to abetment.

1939

TAN BA CHENG v. REGISTRAR, ORIGINAL SIDE, HIGH COURT.

BRAUND, J.

I have given as careful consideration as I can to this point because, admittedly, at one stage it did worry me. But I can see no escape from the alternative either of reducing the section to complete meaninglessness or else to giving to the words "referred to in" the construction which I have indicated earlier in this judgment.

It seems to me, therefore, for these reasons, that there was jurisdiction in the learned Judge to lay the complaint as he has done in respect of the offence of abetment read in connection with section 205.

For all those reasons, I agree with my Lord the Chief Justice that this appeal must be dismissed. I only desire to add that whoever hears the criminal case which is now liable to follow, must be careful to approach the matter afresh and not to allow himself, in any way, to be influenced by the views which the learned Judge has expressed. No question of fact nor of law has yet been found against either of the appellants so far as the charges against them are concerned. It will be best, in this as in all other cases of the kind, if the Magistrate who ultimately tries the case does not even read the judgment out of which the complaint has arisen.

[*23rd October 1939.* At the trial both the appellants were acquitted of the offences of forgery, abetment and conspiracy by the Magistrate, but he convicted the second appellant for the offence of perjury. On appeal the High Court set aside the conviction.]