CRIMINAL REVISION

Before Mr. Justice Patkar and Mr. Justice Baker.

In re SHRIPAD G. CHANDAVARKAR.*

1927

October 10

Indian Penal Code (Act XLV of 1860), section 216—Harbouring offender whose apprehension has been ordered—Warrant for apprehension should have been legally issued—Intention of preventing offender from being apprehended—High Court—Revisional jurisdiction—Interlocutory stage of trial—Interference by High Court—Criminal Procedure Code (Act V of 1898), section 435.

To constitute an offence punishable under section 216 of the Indian Penal Code, it is necessary to prove that the warrant to apprehend the offender was issued in the exercise of lawful powers, and that the accused had the intention of preventing the offender from being apprehended.

Under section 435 of the Criminal Procedure Code the High Court will interfere with the proceedings in the lower Court at an interlocutory stage only when the accused is not guilty on the face of the proceedings and in order to prevent his further harassment.

Chandi Pershad v. *Abdur Rahman*[1]; *Choa Lal Dass* v. *Anant Pershad Misser*[2]; *Hari Charan Gorait* v. *Girish Chandra Sadhukhan*[3]; *Queen-Empress* v. *Nageshappa*[4]; *Re Kuppuswami Aiyar*[5] and *Ramanathan Chettiyar* v. *Subrahmanya Ayyar*,[6] followed.

THIS was an application under the criminal revisional jurisdiction of the High Court.

The facts of the case are sufficiently set forth in the judgments.

H. C. Coyajee, with *G. P. Murdeshwar*, for the applicant.

P. B. Shingne, Government Pleader, for the Crown.

PATKAR, J. :—In this case the petitioner is a pleader practising in the district of Belgaum and has been charged with having harboured an offender under section 216 of the Indian Penal Code under the following circumstances :—

On August 2, 1926, one Danawa filed a complaint in the Court of the First Class Magistrate, Chikodi, alleging that the Police Jamadar of Chikodi and four other persons tortured and killed her mother-in-law and thereby committed an offence under section 302 of the Indian Penal Code. The learned First Class Magistrate held a preliminary inquiry

*Criminal Revision No. 262 of 1927.

(1) (1894) 22 Cal. 131 at p. 138.
(2) (1897) 25 Cal. 233.
(3) (1910) 38 Cal. 68 at p. 74.
(4) (1895) 20 Bom. 543.
(5) (1915) 39 Mad. 561.
(6) (1924) 47 Mad. 722.

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and came to the conclusion that the murder was not committed by the Police Jamadar and the other four persons as alleged in the complaint, but was committed by the complainant herself with the assistance of one Ramaji. The Magistrate, therefore, dismissed the complaint of Danawa, and himself filed a complaint in the Court of the Sub-Divisional Magistrate, N. D., Belgaum, charging the said Danawa and Ramaji with having committed an offence under section 302. The First Class Magistrate issued a non-bailable warrant of arrest against Ramaji, Exhibit 15, on August 24, 1926. On August 27, 1926, the Police Jamadar came to the house of the petitioner at 9 P.M. and asked whether Ramaji was in the petitioner's house. The petitioner said that Ramaji had come to him in the morning to engage his professional services but had gone away to fetch the fees, and the petitioner informed the Jamadar that Ramaji would in all probability come the next day, and that he would be surrendered to the First Class Magistrate of Chikodi who had issued the warrant. According to the prosecution Ramaji was in the house of the accused, and according to the version of the accused, Ramaji came the next day to the accused's house situate in front of the Court-house at the time when the accused was conducting a civil suit in the Subordinate Judge's Court at Chikodi, and had kept his motor in readiness to go to the Magistrate's *kacheri* at a distance of three-fourths of a mile in order to surrender Ramaji and apply for bail. While the accused and Ramaji were getting into the car, the Jamadar arrested Ramaji who was handed over to the custody of the Magistrate, and the accused-petitioner filed a *vakalatnama* on Ramaji's behalf and applied for bail which was refused by the Magistrate. On August 29, 1926, a charge-sheet was sent up against the pleader under section 216 to the Court of the Sub-Divisional Magistrate charging the accused with having harboured Ramaji knowing that a warrant had been issued against him. The trial commenced, and the prosecution case

was closed, and the case was adjourned for arguments on the question whether a charge should be framed or not. The learned District Magistrate, without issuing any notice to the accused, transferred the case to the Court of the Honorary First Class Magistrate, Belgaum Cantonment.

This application is made by the accused, and he prays, first, that the proceedings against him should be quashed, and secondly, in case the proceedings were not quashed, that the order of transfer made by the District Magistrate without notice to him should be set aside, and the case should be sent back to the Sub-Divisional Magistrate, N. D.

It is urged on behalf of the accused that no offence is committed by the pleader under section 216, firstly, on the ground that the warrant was not issued in the exercise of the lawful powers of the First Class Magistrate, and, secondly, that the accused did not harbour or conceal Ramaji with the intention of preventing him from being apprehended. It is urged that the warrant of arrest against Ramaji, Exhibit 15, issued on August 24, 1926, was illegal as the Magistrate had no jurisdiction to take cognizance of the offence of murder under section 190, clause (*c*), of the Criminal Procedure Code. The First Class Magistrate was trying the complaint of Danawa against the Police Jamadar and four other persons for a charge of murder of her mother-in-law Akkawa. The learned Magistrate held a preliminary inquiry and came to the conclusion that the offence was committed not by the Jamadar but by the complainant Danawa herself with the assistance of Ramaji. He, therefore, must be considered to have taken cognizance of the offence of murder under section 302 against Danawa and Ramaji under section 190, clause (*c*), of the Criminal Procedure Code, and as the learned First Class Magistrate of Chikodi had not been specially empowered to take cognizance of a case under section 190, clause (*c*), and had, therefore, no jurisdiction to take cognizance of the offence of murder against Danawa and Ramaji, he could not issue a warrant against Ramaji

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under section 204 of the Criminal Procedure Code which refers to a Magistrate taking cognizance of an offence.

It is urged on behalf of the Crown that there were two warrants against Ramaji, one for offences under sections 411 and 414, dated August 22, 1926, and another, Exhibit 15, dated August 24, 1926, with reference to the charge of murder and, therefore, even if there was any illegality in the issue of the warrant with regard to the charge of murder, there was an outstanding warrant against Ramaji for offences under sections 411 and 414 issued by the Magistrate in the exercise of his lawful powers within the meaning of section 216. We find, however, that Hanmant, Exhibit 1, the Police Head Constable, has admitted in his deposition that he called the accused and asked him to produce Ramaji as there was a warrant against him for the charge of murder. No reference was made to the warrant for the offences under sections 411 and 414 which is now relied upon on behalf of the Crown. The application for bail, Exhibit 17, made by the accused on behalf of Ramaji refers only to the offence under section 302. It is clear, therefore, that the accused had no knowledge of the issue of a warrant under sections 411 and 414. If the accused had known that there was also another warrant against Ramaji under sections 411 and 414, the offences would have been mentioned in the application for bail. It is clear, therefore, that the accused did not know of the order of apprehension with regard to the charges under sections 411 and 414, and though the accused knew of the order of apprehension with regard to the charge of murder, that order, in our opinion, was not in the exercise of the lawful powers of the Magistrate as he had no jurisdiction to issue such warrant under section 190, clause (*c*), and section 204 of the Criminal Procedure Code. This ground alone would be sufficient to show that no offence under section 216 is committed.

The next question is whether the accused harboured or concealed Ramaji with the intention of preventing him from

being apprehended. The Police Head Constable admits in his statement that when he asked the accused-pleader to produce Ramaji as there was a warrant against him for the offence of murder, the accused said that Ramaji had come to him but that he had not brought the pleader's fees, that he was sent to fetch the fees, and that he would produce him after he brought the fees. This would clearly show that the accused had no intention of harbouring or concealing Ramaji with the intention of preventing him from being apprehended; on the contrary he intended to surrender Ramaji to the Magistrate on his arrival after bringing his fees. We think, therefore, that the requisite intention necessary for a conviction under section 216 is excluded by the admission of the Head Constable Hanmant, Exhibit 1.

It is suggested that Ramaji was in the house of the accused and that the accused falsely said that he had gone to bring the fees, but, if there was any truth in that suggestion, it was quite open to the Police to call upon the accused to allow the Police free ingress to his house, and to afford all reasonable facilities for a search in his house under section 47 of the Criminal Procedure Code. On the evidence in this case, the Police Jamadar did not suggest to the accused that Ramaji was in his house, nor did he call upon him to allow free ingress in his house or to allow him reasonable facilities for a search therein. We think, therefore, that the requisite ingredients to constitute an offence under section 216 are not proved, and are excluded by the admissions of the Head Constable, Exhibit 1.

In this view of the case, we think that there should not be any further protraction of the proceedings which are pending against the accused. The High Court has power at an interlocutory stage to quash the proceedings if a clear case is made out. Ordinarily, the High Court would not interfere at an interlocutory stage and interfere with the proceedings pending before a Magistrate, but when it appears that the accused is not guilty on the face of the proceedings,

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the High Court will interfere even at an interlocutory stage in order to prevent further harassment of the accused. See *Chandi Pershad* v. *Abdur Rahman*[1]; *Choa Lal Dass* v. *Anant Pershad Misser*[2]; *Hari Charan Gorait* v. *Girish Chandra Sadhukhan*[3]; *Queen-Empress* v. *Nageshappa*[4]; *Re Kuppuswami Aiyar*[5] and *Ramanathan Chettiyar* v. *Subrahmanya Ayyar*.[6]

We would, therefore, make the rule absolute and quash the proceedings.

In this view of the case, it is not necessary to consider the other prayer with regard to the transfer of the case.

BAKER, J.:—This is an application by a pleader, Mr. Chandavarkar, practising at Chikodi in the Belgaum District for the quashing of the proceedings in a case pending against him under section 216 of the Indian Penal Code on the ground that the prosecution evidence does not disclose the commission of any offence, or in the alternative for its transfer.

The facts are that one Danawa filed a complaint on August 2, 1926, in the Court of the First Class Magistrate of Chikodi alleging that the Police Jamadar of Chikodi and four others tortured her mother-in-law Akkawa to death, that thereupon the learned Magistrate held a preliminary enquiry and came to the conclusion that the complaint was false and that the murder was committed by the complainant herself. Accordingly, he dismissed her complaint and filed a complaint himself in the Court of the Sub-Divisional Magistrate of Belgaum, charging the said Danawa and one Ramaji with having committed an offence under section 302 of the Indian Penal Code. The Chikodi Magistrate himself issued a non-bailable warrant against Ramaji and sent the warrant for execution to the Chikodi Police on August 24, 1926. On August 27, 1926, the Police Jamadar reported to the

(1) (1894) 22 Cal. 131 at p. 138.
(2) (1897) 25 Cal. 233.
(3) (1910) 38 Cal. 68 at p. 74.
(4) (1895) 20 Bom. 543.
(5) (1915) 39 Mad. 561.
(6) (1924) 47 Mad. 722.

Magistrate that Ramaji, against whom a warrant had been issued and whom he did not succeed in arresting, was in the house of the pleader Chandavarkar. A watch was kept in the house of the pleader and on the 28th Ramaji was arrested as he was coming out of the Pleader's house. On these facts a charge under section 216 for harbouring an offender was lodged against Mr. Chandavarkar in the Court of the Sub-Divisional Magistrate, Northern Division, Belgaum.

The case proceeded before the Magistrate from August 28, and on December 22, 1926, the prosecution evidence was finished and the case was fixed for argument as to whether a charge was to be framed. The case was adjourned from January 4 to January 28 for that purpose. On January 21, the Sub-Divisional Magistrate framed a charge under section 302 against Ramaji and Danawa and committed the case to be tried by the Court of Sessions. It appears that he made a report to the District Magistrate regarding the case against the petitioner and on April 12, 1927, without notice to the petitioner the District Magistrate transferred the case to the Honorary Magistrate, Belgaum. The question of transfer is now comparatively of small importance as the Sub-Divisional Magistrate, Mr. G. A. Hiremath before whom the proceedings had gone on has been transferred and the case being incomplete, it necessarily has to be taken up by another Magistrate, and it really makes very little difference whether an Honorary Magistrate of Belgaum or the new Sub-Divisional Magistrate proceeds with it.

The order of the District Magistrate does not give any reasons for the transfer as required by section 528, nor was any notice given to the petitioner. It has frequently been held by this Court that a case should not be transferred without notice to the parties. See *In re Daud Hussan*[1];

[1] (1889) Ratanlal's Crim. Cas. 460.

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In re Ratanji Premji[1]; *In re Mahadhu*[2]; *In re Krishna Anant Pai*[3]; *Imperatrix* v. *Sadashiv*[4] and *In re Nageshwar*.[5] On the other hand, this rule has been relaxed in cases where the Magistrate himself asked for a transfer. Cf. *In re Hawaji Sakharam*[6] and *Queen-Empress* v. *Kuppumuthu Pillai*[7]; and as regards the omission to record reasons for the transfer, it has been held to be only an irregularity in *In the matter of the petition of Dukhi Kewat*.[8]

However, as I have already said, the question of transfer is of comparatively small importance in view of the fact that the Sub-Divisional Magistrate, who tried the case, has now left the District.

The more important question in this case, however, is, whether the prosecution case discloses that any offence has been committed. The first point to notice is that under section 216 of the Indian Penal Code, before the offence of harbouring can be committed, it is necessary that a public servant, in the exercise of the lawful powers of such public servant, has ordered a certain person to be apprehended for an offence. In the present case, the warrant issued by the First Class Magistrate, Chikodi, was without jurisdiction, because, admittedly, he was not empowered to take cognizance of cases under section 190 (*c*) of the Code of Criminal Procedure, upon his own knowledge or suspicion that an offence has been committed. In order to meet this objection, it is argued by the Government Pleader that there was already a warrant regularly issued upon a Police report against Ramaji for an offence under sections 411 and 414. But throughout the deposition of the Police officer in this case there is no reference to this other warrant and it appears that the pleader was expressly told that Ramaji was to be arrested on a warrant on a charge of murder. It was again contended that the warrant against Ramaji was

(1) (1889) Ratanlal's Crim. Cas. 474.
(2) (1892) Ratanlal's Crim. Cas. 590.
(3) (1896) Ratanlal's Crim. Cas. 877.
(4) (1896) 22 Bom. 549.
(5) (1899) 1 Bom. L. R. 347.
(6) (1918) 21 Bom. L. R. 276.
(7) (1900) 24 Mad. 317.
(8) (1906) 28 All. 421.

issued under section 190 (*b*) upon a Police report. But, this position is untenable as the Police report was Akkawa had committed suicide. It must, therefore, be held that the warrant issued by the First Class Magistrate against Ramaji on a charge under section 302 was without jurisdiction. Apart from this, in order that an offence under section 216 should be committed, it is necessary that the person harbouring the offender must be harbouring him with the intention of preventing him from being apprehended, and this is an ingredient, which, on the prosecution evidence, is lacking in the present case. It would appear from the deposition of the Police Jamadar himself that he went to the pleader's house and asked if Ramaji was there, and the pleader replied that he had been there to consult him and had gone away to get the fees, and that on his return he would hand him over to the Police. It may be mentioned that the case of the petitioner is that when Ramaji returned with the money he told him to get into his motor with the object of taking him to the Magistrate and handing him over, but meanwhile he was arrested. It does not, therefore, appear that the pleader concealed the presence of Ramaji in his house with the object of preventing him from being apprehended, but, on the contrary, he promised to hand him over to the police. In these circumstances, the evidence led by the prosecution does not show that any offence has been committed by the applicant.

The power of the High Court to interfere in pending proceedings in cases of this kind, where it appears that no offence has been committed, has been laid down in a number of cases, cf. *Chandi Pershad* v. *Abdur Rahman*[1] followed in *Queen-Empress* v. *Nageshappa*[2]; *Re Kuppuswami Aiyar*[3]; *Ramanathan Chettiyar* v. *Subrahmanya Ayyar*[4]; and *Hari Charan Gorait* v. *Girish Chandra Sadhukhan*.[5]

[1] (1894) 22 Cal. 131.
[2] (1895) 20 Bom. 543 at p. 545.
[3] (1915) 39 Mad. 561.
[4] (1924) 47 Mad. 722.
[5] (1910) 38 Cal. 68.

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In my judgment, therefore, on the prosecution evidence, no offence has been committed by the applicant pleader and no useful purpose would be served by allowing these proceedings, which have already lasted thirteen months, to be recommenced, and I am, therefore, of opinion that the proceedings should be quashed and the petitioner discharged.

Rule made absolute.

R. R.

CRIMINAL REVISION

Before Mr. Justice Fawcett and Mr. Justice Mirza.

In re FULCHAND MAGANLAL.*

1927

November 14.

Criminal Procedure Code (Act V of 1898), section 488—Maintenance—Wife "living in adultery"—Single lapse from virtue is not living in adultery.

The expression "living in adultery" in section 488 of the Criminal Procedure Code, 1898, refers to a course of conduct and means something more than a single lapse from virtue.

In re Shivram,[1] distinguished.

Kallu v. *Kaunsilia*[2]; *Patala Atchamma* v. *Patala Mahalakshmi*[3]; and *Jatindra Mohan Banerjee* v. *Gouri Bala Debi,*[4] followed.

This was an application in revision against an order passed by M. P. Desai, Additional City Magistrate at Ahmedabad.

The applicant married the opponent in 1920. They lived together for some time, but separated afterwards. The opponent while living separate gave birth to a son, who, the applicant alleged, was illegitimate. It was held in a civil suit between the parties that they had no access to each other at the time the son was begotten.

The opponent applied under section 488 of the Criminal Procedure Code to recover maintenance. The applicant resisted the application on the ground of opponent's adultery.

*Criminal Revision No. 228 of 1927.

(1) (1890) Ratanlal's Crim. Cas., p. 506.
(2) (1904) 26 All. 326.
(3) (1907) 30 Mad. 332.
(4) (1924) 29 C. W. N. 647.