

APPELLATE CRIMINAL.

Before Mr. Justice Mirza and Mr. Justice Baker.

EMPEROR (APPLICANT) *v.* HAJI NUR MAHOMED HAJI RAJE MAHOMED
AND SIDUBHAI IBRAHIM (ORIGINAL ACCUSED), OPONENTS.*

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October 12

*Criminal Procedure Code (Act V of 1898), sections 156 (3), 200, and 202—
Cognizance of complaint under section 190—Investigation by Police—Report—
Charge sheet by Police after investigation—Charge sheet void.*

When a Magistrate has referred a complaint for investigation under section 202 of the Criminal Procedure Code, it is not competent to the police to send up the accused for trial on a charge sheet, after the investigation. The only action they can take is to make a report to the Magistrate. Section 156 (3) has no application in such a case.

Isuf Nasya v. Emperor,⁽¹⁾ followed.

APPLICATION made by Government of Bombay to revise the order passed by the Presidency Magistrate, Third Court, discharging the accused.

On October 15, 1927, a complaint was filed by one James Cunningham before the Chief Presidency Magistrate charging one Govind Nurmahomed (accused No. 1) and Sidubhai (accused No. 2) with theft and receiving stolen property. The Magistrate took cognizance of the offence against accused No. 1 and No. 2 under section 200 of the Code of Criminal Procedure and after examining the complainant, directed an inquiry and investigation to be made by the Police under section 202. The Police Officer concerned made no report but sent up a charge sheet charging the two accused under sections 411 and 114, Indian Penal Code. A preliminary objection was taken on behalf of the accused in the Magistrate's Court that the Police had no right to place the accused on a charge sheet and the entire proceedings were null and void. The Magistrate upheld the objection and discharged the accused.

The Government of Bombay applied in revision against the order of discharge.

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

*Criminal Application for Revision No. 129 of 1926.

⁽¹⁾ (1926) 54 Cal. 303.

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B. J. Desai, V. F. Vicaji and S. B. Kapadia, with G. S. Rao for K. N. Koyaji, for the opponent.

Craigie, Blunt & Caroe, for the complainant.

MIRZA, J. :—A complaint was made to the Chief Presidency Magistrate that the three accused had committed offences under sections 411 and 114, Indian Penal Code. The Magistrate took cognizance of the offence against accused Nos. 1 and 2 under section 200 of the Code of Criminal Procedure, and after examining the complainant, directed an inquiry and investigation to be made in the matter by the Bombay Police under section 202. The Police Officer concerned made no report, but sent up a charge sheet charging the two accused under sections 411 and 114, Indian Penal Code. The learned Magistrate in the meanwhile was proceeding with the case against accused No. 3, and the case of accused Nos. 1 and 2 stood adjourned from time to time. As the trial of accused No. 3 resulted in his conviction and sentence, the case against the accused Nos. 1 and 2 was, on their application, transferred by the Chief Presidency Magistrate to the Court of the Presidency Magistrate, Third Court. Endorsements were made by the Magistrate on the charge sheet from time to time indicating the various adjournments and the final order made by him transferring the case to the Third Court. In the Third Court an objection was taken on behalf of the accused that the charge sheet was illegal, and the case could not proceed. The Magistrate upheld the objection and discharged the accused. An application was made to the Magistrate on behalf of the prosecution that he should himself issue process in the matter, but the Magistrate held that as the case transferred to him was a case under the charge sheet, he was not competent to deal with the matter as asked for. The prosecution

thereupon applied to the Chief Presidency Magistrate to re-transfer to himself the case under the charge sheet and to issue process. The Chief Presidency Magistrate rejected the application. The Government of Bombay have now applied for revision of the order passed by the Presidency Magistrate, Third Court, discharging the accused.

It is clear from the record that what was transferred by the Chief Presidency Magistrate to the Third Court was not the case including the complaint, but the case as made out by the charge sheet. The complaint remained on the file of the Chief Presidency Magistrate, and was put in as an Exhibit in the proceedings before the Third Court. Under the ruling in *Isaf Nasya v. Emperor*⁽¹⁾ it was not competent to the police, when they were directed to investigate the offence, to have charged the accused with the offence on a charge sheet. The proceeding was clearly illegal, and the Third Presidency Magistrate, in my opinion, was right in discharging the accused. The complaint was not before him, and he could, therefore, not make any order on the complaint. The application made by the prosecution to the Chief Presidency Magistrate was misconceived. The prosecution did not apply to him to proceed with the complaint, but asked him to re-transfer to himself the case as made out by the charge sheet. The result is that the complaint is still on the Chief Presidency Magistrate's file, and has not yet been disposed of. It would be open to the prosecution to apply to the Chief Presidency Magistrate to dispose of the complaint according to law. The present application in revision is dismissed, and the rule discharged.

BAKER, J. :—I agree. The point of law in the present case is this, whether, when a Magistrate has

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referred a complaint for investigation under section 202, the Police are entitled after investigation to arrest the accused and send him up for trial under a charge sheet as if they had taken cognizance of the case under their ordinary powers of investigation. The difficulty which has arisen in the present case is, in my opinion, due to the complainant in his complaint having asked for a police investigation which gave rise to the supposition that this investigation was under section 156 (3) of the Criminal Procedure Code. It has been held by the Madras High Court in *In re Arulu Kotiah*⁽¹⁾ that it is the duty of a Magistrate, on presentation of a complaint of any offence, to immediately proceed in the manner laid down in Chapter XVI (sections 200 *et seq.*), and that if the third clause of section 156 had been intended to provide an alternative procedure to that laid down in sections 200 *et seq.*, it would have found a place in Chapter XVI and not in Chapter XIV which deals with the procedure and powers of the Police in cases in which information of an offence is given to a Police Officer. There is a ruling of this Court in *Emperor v. Vishwanath*,⁽²⁾ which at first sight might seem to lay down a contrary rule. On reference to that decision, however, I find that in that case there was no complaint. In making the reference the Sessions Judge said: "Here, the learned Magistrate had no complaint before him nor did he examine the complainant—both of which are conditions precedent to the delegation of the enquiry." That case, therefore, is on different facts to the present case, and is not of any assistance in the decision of the point which is now before us. It is quite clear, on the ruling of the Calcutta High Court in *Isaf Nasya v. Emperor*,⁽³⁾ that the Magistrate to whom a complaint is made can

⁽¹⁾ (1911) 12 Cr. L. J. 468.

⁽²⁾ (1908) 8 Bom. L. R. 589.

⁽³⁾ (1926) 54 Cal. 303.

only proceed under sections 202, 203 and 204, and in the present case, from the Magistrate's own order, it would be seen that he sent the case for investigation to the police after examining the complainant on oath. That must be taken to be an order under section 202. In that case the police had no power to arrest the accused or send him up for trial on a charge sheet. The only action they could take was to make a report to the Magistrate, after consideration of which it was open to him to proceed either under section 203 by dismissing the complaint, or section 204 by issuing process. The view taken by the learned Presidency Magistrate is, therefore, in my opinion, correct, and must be upheld. The sole remaining point is as to the result of the proceedings. It is quite clear that the result is that the original complaint made by Cunningham is still undisposed of, because no order has been passed by the Magistrate on the result of the investigation made by the police. The question whether such an order should be made by the Chief Presidency Magistrate to whom the complaint was originally made or by the Presidency Magistrate to whom the proceedings under the charge sheet were transferred, is of minor importance. I agree that what appear to be transferred to the Third Presidency Magistrate were the proceedings initiated upon the police charge sheet. In any case, as the complaint is still undisposed of, it will be necessary for the proceedings to be taken up at the point where the irregularity commenced, that is to say, it will be necessary that the police report should be made in reply to the reference under section 202, and the Chief Presidency Magistrate should then proceed to dispose of it in accordance with law, that is to say, under section 203 or section 204 as the case may be. The rule will be discharged.

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Rule discharged.

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