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Murphy J.

Salt Act really have no application to the facts of the present case. The conviction is under section 47 of the local Act and as pointed out by the learned Chief Justice, in the judgment he has just delivered, section 117 is not the ordinary offence of abetment, but makes punishable a different kind of offence altogether, that of inciting the public generally, or any number or class of persons exceeding ten, to commit an offence. As far as I can see I think the learned Magistrate's conclusion is correct and there is no reason for interfering.

Rule discharged.

B. G. R.

CRIMINAL REVISION.

Before the Honourable Mr. J. W. F. Beaumont, Chief Justice, and Mr. Justice Murphy.

1930

November 21

EMPEROR *v.* BALKRISHNA ANANT HIRLEKAR AND OTHERS.*

Criminal Law Amendment Act (XIV of 1908), sections 16 and 17 (1)—Government Notification—Gazette Extraordinary—Publication—Association declared unlawful—Reasonable opportunity must be afforded to members to see Gazette—Criminal Procedure Code (V of 1898), section 342—Joint statement of all accused—Conviction illegal.

In order to prove that an association heretofore lawful has been declared unlawful under the Criminal Law Amendment Act XIV of 1908, the Government must not only insert the declaration in the official Gazette but must publish the Gazette in the manner usually adopted for publishing such Gazette, and allow a reasonable opportunity to people concerned to see the Gazette so that they may regulate their conduct accordingly.

A notification was published in the form of a Gazette Extraordinary dated "Poona, 14th October 1930," declaring an association known as Akhil Bharat Prabhat Sangh unlawful. The accused who were the members of a body affiliated to the Sangh, were arrested at 5-50 a.m. on the morning of October 15. Their plea of not guilty was recorded in a joint statement. They were convicted by the Magistrate under section 17 (1) of the Criminal Law Amendment Act, 1908. On an application to the High Court,

Held, that the conviction was illegal on two grounds: (1) the accused had no reasonable opportunity to see the Gazette as there was no evidence as to the time of its publication or the method by which it was published; (2) that the Magistrate did not comply with the provisions of section 342 of the Criminal Procedure Code, in that he took a joint statement from all the accused and did not examine them separately.

*Criminal Revision Application No. 414 of 1930.

CRIMINAL application against the conviction recorded by Oscar H. Brown, Presidency Magistrate, 7th Court, Bombay.

The accused were members of the Grant Road Yuvak Prabhat Pheri Sangh at Bombay. On October 15, 1930, at about 5-30 a m. they were going in a procession carrying the Congress Flag, a harmonium and singing Prabhat Pheri Songs. They were arrested at that hour and were put up before the Presidency Magistrate, 7th Court, on a charge under section 17 (*1*) of the Criminal Law Amendment Act, XIV of 1908, on the ground that they were members of the Akhil Bharat Prabhat Pheri Sangh which was declared an unlawful association by Government Notification No. S.O. 4521 and which notification was published in the form of a Gazette Extraordinary, dated "Poona, October 14, 1930."

All the accused pleaded not guilty and their plea was recorded in a joint statement. The Magistrate held that that the accused in their joint statement had stated that if they had known that their Pheri was banned they would not have come out, but in the opinion of the Magistrate such a plea could not help the accused. He, therefore, convicted all the accused and sentenced each of them to four months' rigorous imprisonment.

The accused applied to the High Court.

Mahale, with *M. N. Talpade*, for the accused:—I submit that when a statutory order is issued by Government sufficient time must be allowed to the public or those for whom the order is intended to be aware of the same and give them *locus poenitentioe*. The power to make a notification was given to the local Government by section 16 of the Criminal Law Amendment Act. The term "notification" implies notice, which it is necessary to give where the act is executive as

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distinguished from Judicial. The people who are to be affected must have knowledge of the change in law. In order that an order may be more effective the public must be given sufficient time to make up their mind whether they should continue their activities which were thitherto lawful. In the case of a Statute or an Act there is sufficient publicity while it is passing through the Parliament or the Legislative Assembly. In *Johnson* v. *Sargant & Sons*[1] Bailhache J. was of opinion that a statutory order in order that it should be more effective must be brought to the knowledge of the persons affected by it, and in the absence of evidence of its coming into operation, it should be deemed to have come into operation when those concerned come to have knowledge of its publication.

In the present case, the Government Notification bears date October 14, 1930, Poona. There is no evidence of its publication in Bombay. The accused were arrested in Bombay at 5-50 a.m. on October 15, 1930. The accused evidently had no knowledge of the notification, nor was there any time for *locus poenitentioe*. The plea of the accused is that had they known of the ban they would not have come out.

Further, the taking down of one joint statement of the eleven accused persons is contrary to the spirit of section 342 of the Criminal Procedure Code, which makes provision for the individual examination of the accused. The section is imperative in its terms, and its strict non-compliance vitiates the trial. See *Ghasiti* v. *Emperor*.[2]

P. B. Shingne, Government Pleader, for the Crown :— The legislature does not provide for any notice or any time for *locus poenitentioe* to the accused. (See Craies' Statute Law, p. 323). In section 16 of the Criminal

(1) [1918] 1 K. B. 101 at p. 103. (2) (1925) 27 Cr. L. J. 408.

Law Amendment Act, though the word "notification" is used, yet the manner of publication is indicated. The publication in the official Gazette is enough. It is provided by section 114, ill. (*e*), of the Indian Evidence Act that all official acts must be presumed to have been duly performed. It must be presumed that there was publication. One of the police had received a copy of the Gazette on the evening of October 14, 1930.

Section 342 of the Criminal Procedure Code does not in terms make the separate examination of each accused compulsory. Where more accused than one have a common statement to make, there is nothing objectionable in taking a joint statement of them all. No prejudice has been shown to the accused by the procedure adopted.

BEAUMONT, C. J. :—In this case eleven accused were convicted under section 17 (*1*) of the Criminal Law Amendment Act XIV of 1908 with being members of an unlawful association.

Counsel for the accused in this application for revision takes three points.

The first is that the evidence as to the accused being members of an unlawful association was wrongly admitted. The second point is that the accused had no knowledge that the association was an unlawful one, and the third point is that the Magistrate did not comply with the provisions of section 342 of the Criminal Procedure Code, in that he took a joint statement from all the accused and did not examine them separately.

With regard to the first point, I am satisfied that there is nothing in that. I think the police evidence was rightly admitted, and that the accused were members of the alleged unlawful association.

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The second point involves a consideration of the terms of the Criminal Law Amendment Act of 1908. Section 16 of that Act provides :—

" If the Local Government is of opinion that any association interferes or has for its object interference with the administration of the law or with the maintenance of law and order, or that it constitutes a danger to the public peace, the Local Government may, by notification in the official Gazette, declare such association to be unlawful."

and then section 17 provides—

" (*1*) Whoever is a member of an unlawful association, or takes part in meetings of any such association, or contributes or receives or solicits any contribution for the purpose of any such association, etc."

shall be punished as therein provided.

Now, I can find nothing in the Act which makes the proof of knowledge in the accused that the association is unlawful a condition precedent to a prosecution for being a member of such association. But where an association heretofore lawful is made unlawful, it appears to me that the most elementary principles of justice and fairplay require some notice of the illegality to be given to the members of the association so that they may regulate their conduct accordingly. I think that the legislature has provided for such notice by making it necessary to notify the declaration of the illegality in the official Gazette. The official Gazette is the normal means of communicating Government intentions to the public.

The learned Government Pleader has argued, and I think that the paucity of evidence in this case compelled him to argue, that all that is required is that the declaration should appear, that is to say, that it should be inserted in the Gazette. I do not take that view. The word used in section 16 is " notification " and not " insertion." " Notification " is defined in Webster's Dictionary as—

" Act of notifying; act of making known; an intimation or notice; esp., act of giving official notice or information by words, by writing, or by other means,"

so that the essence of notification is the giving of notice, and, in my opinion, the words "by notification in the official Gazette" mean simply "by giving notice in the official Gazette." One can illustrate the point under consideration by a simple illustration. Supposing the Government make a declaration that a particular association is unlawful and instruct the Government printers to print an extraordinary official Gazette containing that declaration. Supposing that some change in the political situation then takes place, and the Government alters its view. It communicates with its printers and finds that the Gazette has been printed and is ready for publication, but that nothing further has been done. The Government then instructs the printers to send all the copies to the Secretariat, and there they are retained. It seems to me that in such a case as that it is quite plain that the declaration making the association unlawful has not been notified in the Gazette, and the association has not become unlawful. But if the Government view is right, then in such a case the association has become unlawful though nobody knows the fact except the Government, and anybody may be prosecuted for being a member of that association without having had any opportunity of learning that the association has become unlawful. In my opinion this is not the law, and in order to prove that an association has been declared unlawful under the Criminal Law Amendment Act of 1908, the Government must not only insert the declaration in the official Gazette, but must publish the Gazette in the manner usually adopted for publishing such Gazette, and allow a reasonable opportunity to people concerned to see the Gazette. If any one suspects that an association of which he is a member is likely to be declared unlawful, he can take steps to ascertain the manner in which the Gazette is

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published, and to inform himself of the contents of any Gazette, and if he does not do that and is prosecuted for being a member of an unlawful association, he has only himself to blame for not having taken the precautions which the statute enables him to take.

Now, in the present case we have got a copy of an *Extraordinary Bombay Government Gazette*. It is dated "Poona October 14, 1930." The accused were arrested at 5-50 a.m. on the morning of Wednesday, October 15, and were charged with being members of one of the associations declared unlawful in the Gazette. There is no evidence as to the place at which, or method by which, the Gazette was published, nor as to the time of publication. The Government Pleader invites us to presume publication under the provisions of section 114 of the Indian Evidence Act. No doubt when one finds an official Gazette in circulation one may be justified in presuming that it was published in the ordinary course, but the question here is not whether the Gazette has been published at all, but as to the particular moment of time at which it was published, that is whether it was published before 5-50 a.m. on the 15th. That is not a matter of presumption at all, it is a matter for evidence. Government is not under any obligation to publish a Gazette dated Tuesday October 14 on that date. They are quite at liberty to delay publication. Whether they did or did not in fact publish it on the 14th is a matter which must be proved by evidence, and there is no evidence whatever upon the subject. The fact that one police sergeant saw a copy of the Gazette at about 6 p.m. on the 14th (as he says in his evidence) is no evidence of general publication. That being so, it seems to me that the prosecution case falls short of the necessary proof.

If that were the only objection to the conviction I should desire to consider and hear arguments on the

question whether we ought to let in further evidence as to the publication of the Gazette, and the time at which it was published, under the powers given us by section 428 of the Criminal Procedure Code. But as I agree with the view which my brother Murphy is about to express that the Magistrate did not comply with the provisions of section 342, it follows that, in any case the conviction must be quashed and the sentence set aside.

MURPHY, J.:—The applicants seek revision of the convictions and sentences passed upon them under section 17 (*1*) of Act XIV of 1908, read with Notification No. 4125 of October 14, 1930. They were arrested at about 5-50 a.m. on October 15, and charged under the section and notification, with being members of an unlawful association, and convicted and sentenced each to suffer four months' rigorous imprisonment.

Three points have been argued before us.

The first was that applicants' admission that they were members of the Akhil Bharat Prabhat Pheri Sangha, as it amounts to a confession made to a police-officer, was inadmissible in evidence. I do not think this statement was a confession. What happened was that as applicants were proceeding along Lamington Road in procession, with a flag and music, they were stopped and asked who they were, and that one of them replied that they were the members of an association, whose name being translated means the "Grant Road Youths Morning Association", a statement which led to their immediate arrest.

When charged under section 17 of Act XIV of 1908 they stated in Court that they did not know that their association had been banned. The name of the banned association is in fact the Akhil Bharat Prabhat Pheri Sangha, or All Indian Morning Association. I do not think that the statement in question amounted to a

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confession and was inadmissible, as being made to a police-officer.

The next objection involves the propriety of the convictions on the point of the coming into force of the Notification No. 4125 of 1930 on October 14. The notification is published in the form of a Gazette Extraordinary, and the order is dated "Poona October 14," while the Gazette is dated the same day and purports to have been issued in Bombay on the same day from the Government Central Press. The law under which it was issued is section 16 of the Act, which provides that in certain circumstances the Local Government, being of that opinion, for certain reasons, may declare an association unlawful by a notification in the official Gazette; and the practical point which has been stressed before us is that, on the date in question, the applicants could not have known that their association had been declared unlawful, and so should not be held liable under section 17. It is true that ordinarily some sort of notice of the becoming unlawful of bodies, which so far have not had that character, may be expected; but what we have to see is not whether the applicants had, or had not, notice of the changed nature of their acts, but whether at the time in question the association they belonged to had in fact been declared an unlawful association, and this I think ultimately depends on the date of publication of the notification. The point was not raised in the Court below. The only evidence before us consists of a statement by a police-officer that he had received a copy of the notification before he arrested the applicants, and the dates on the notification itself. Ordinarily, it may be presumed under section 114, ill. (*e*), of the Indian Evidence Act, that a Government notification purporting to have been published in a Gazette of a certain date, was in fact so published; but

where the interval between the issue of a notification and action taken on it is as short as it was in this case, a Court might require stricter proof that all the formalities requisite to the act of notifying, or, in other words, publishing the notification, had actually been carried out on October 14. These are, I presume, the issue of the Gazette with the notification, to the various officials and the public subscribers to whom it is sent in the usual course. But further evidence on this point is not necessary in this case, for the trial appears to have been illegal on another ground.

At the close of the prosecution case, it was incumbent on the Magistrate to record the statements of the accused under section 342 of the Criminal Procedure Code. Instead of doing this for each of them, the Magistrate recorded what he has called a joint statement of all the accused in a single paragraph. It has repeatedly been held by this Court that failure to record the statement of an accused person is an illegality which vitiates the trial, and it is evident that a joint statement in the form in which we find it in this case, is not a compliance with the section, for it is quite conceivable that some of the accused may have had a different defence—such as that they were not members of that Sangha, and mere spectators—and if this was so, their explanation of the charge against them must have been shut out by the manner in which the joint statement was recorded. I think the learned Magistrate's proceedings must be set aside on this ground. In view of the fact that accused in their common statement are shown as having jointly expressed ignorance of the real character of what they were doing, and said that they would not have done it had they known such processions were forbidden, I agree that

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it is not necessary to direct the Magistrate to proceed from the point of taking the accused's statement and that the convictions and sentences should be set aside.

Convictions and sentences set aside.

J. G. R.

CRIMINAL APPELLATE.

Before the Honourable Mr. J. W. F. Beaumont, Chief Justice, and Mr. Justice Murphy.

1930
December 2

EMPEROR *v.* JAMSHEDJI NASSERWANJI MODI.*

Indian Factories Act (XII of 1911), sections 27, 28 and 41(a)—Owner of press—Management left with the Manager—Owner liable as occupier.

The word " occupier " in section 41 of the Indian Factories Act, 1911, means a person who occupies the factory either by himself or his agent. He may be an owner, or a lessee or even a mere licensee but he must have the right to occupy the property and dictate how it is to be managed.

CRIMINAL Appeal by the Government of Bombay against the order of acquittal made by D. N. D. Khandalawalla, Presidency Magistrate, third Court, Bombay.

One Jamshedji Nasserwanji Modi was the proprietor of the Soona Printing Press, Bombay. He was charged under section 41A of the Indian Factories Act as the occupier of the press on the ground that he employed a person for more than 11 hours on January 11, 1930, and for more than 60 hours in the week ending January 11, 1930, contrary to sections 28 and 27 of the Act. The accused contended that he knew nothing about the internal management of the press which was left in the sole charge of his manager, Mr. Mistry, and was therefore not guilty of the offence charged.

The Presidency Magistrate, third Court, Bombay, acquitted the accused on the ground that the full management as to the employment and selection of the operatives was a matter entirely within the control of the manager, who admitted his responsibility to see that the provisions

* Criminal Appeal No. 475 of 1930.