

APPELLATE CRIMINAL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Macklin.

EMPEROR v. KASSAM ALLIBHAI (ORIGINAL ACCUSED).*

1934
August 3

City of Bombay Municipal Act (Bom. III of 1888), section 313A—Hawking without license—Whether complaint by the Municipal Commissioner necessary—Complaint by the Police—Police can lodge complaint.

The accused was charged by the police under section 313A of the Bombay City Municipal Act, 1888, with hawking without a license. At the trial it was contended for the defence that the Court could not take cognizance of the complaint since the Municipal Commissioner alone could prosecute a person for an offence under that section :

Held, that there was nothing in the City of Bombay Municipal Act, 1888, to prevent the police officer from lodging a complaint in respect of an offence under section 313A of the Act.

The Queen v. Cubitt,⁽¹⁾ referred to.

In re Motilal Amratlal Shah,⁽²⁾ distinguished.

CRIMINAL APPEAL by the Government of Bombay against an order of acquittal passed by A. P. Mehta and B. S. Turkhud, Honorary Presidency Magistrates, Girgaon, Bombay.

Hawking without a license.

On February 16, 1934, Kassam Allibhai (accused) was alleged to have caused an obstruction inasmuch as he was keeping and exposing goods for sale on a public street. He was, therefore, arrested and in the course of investigation of the case, it was found that he had no license from the Municipal Commissioner for the City of Bombay to hawk or expose for sale any article in a public street. At the trial of the accused for an offence under section 313A of the Bombay City Municipal Act, 1888, it was argued for the defence that the Court could not take cognizance of the complaint lodged by the police as the Municipal Commissioner alone could prosecute a person for an offence under that section.

* Criminal Appeal No. 232 of 1934.

⁽¹⁾ (1889) 22 Q. B. D. 622.

⁽²⁾ (1930) 55 Bom. 89.

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The lower Court accepted the contention and acquitted the accused.

The Government of Bombay appealed to the High Court.

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

V. N. Chhatrapati, for the accused.

BEAUMONT C. J. This is an appeal by the Government of Bombay against an order of acquittal of the accused. The case is a very trivial one, but a point of law of some importance is involved in it. The accused was charged under section 313A of the City of Bombay Municipal Act of 1888 with hawking without a license. The learned Honorary Magistrates, who heard the case, were of the opinion that the complaint, being lodged by the Police and not by the Municipal Commissioner, was *ultra vires*, and that they could not deal with the case; and then somewhat illogically they ordered that the accused should be acquitted. In any view of the case, I think, that order must be wrong. If the learned Magistrates had no valid complaint before them, their proper course was to decline to take cognizance of the case. They could not make an order of acquittal except in a case in which they had taken cognizance and heard the evidence.

However, in considering what order we ought to make, we have to determine the substantial question with which the learned Magistrates dealt, viz., whether a prosecution for an offence under section 313A of the City of Bombay Municipal Act can be lodged by the Police. By section 4 of the Act certain Municipal authorities are constituted, including a Municipal Commissioner. Then by section 313A it is provided:—

“Except under and in conformity with the terms and provisions of a license granted by the Commissioner in this behalf, no person shall hawk or expose for sale in any public place or in any public street any article whatsoever . . .”

The present accused was charged with having committed an offence under that section. Then section 471 provides

that whoever contravenes any provision of any of the sections mentioned in the first column of the following table shall be punished as therein provided, and one of the sections referred to in the column is section 313A, which is punishable by a fine. The sections dealing with complaints, which are relevant for the present purpose, are sections 514 and the following sections. Section 514 imposes a limit of time within which any complaint may be lodged, but it does not specify the person by whom the complaint can be lodged. Section 515 enables any person who resides in the city to complain to a Presidency Magistrate of the existence of any nuisance, and the Magistrate has to take certain steps upon that complaint. Then section 516 has some bearing on the matter. That provides that any police officer may arrest any person who commits in his view any offence against the Act, if the name and address of such person be unknown to him, and if such person, on demand, declines to give his name and address. Then sub-section (2) provides :—

“No person so arrested shall be detained in custody after his true name and address are ascertained, or, without the order of a Magistrate, for any longer time, not exceeding at the most forty hours from the arrest, than is necessary for bringing him before a Magistrate competent to take cognizance of his offence.”

So under that section it may happen that a Police Officer arrests somebody committing an offence, and, not being able to obtain his name and address, brings him before a Magistrate competent to take cognizance of the offence, and if in fact the Police Officer cannot lodge a complaint, it is difficult to see what the Magistrate is to do with a case brought before him under section 516. That section certainly seems to suggest that there is no objection to a complaint lodged by the Police. Then section 517 (which is the section on which the learned Magistrates mainly relied for their opinion) provides that the Municipal Commissioner may take, or withdraw from, proceedings against any person who is charged with any offence under

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this Act and so forth. The wording is not very artistic. It does not in terms provide that the Commissioner may charge a person, but only that he may take proceedings against a person who is charged. But I take it that the section means that the Commissioner may prefer a charge against any person. The section, however, is in terms plainly permissive, and there is nothing in it to show that the Commissioner alone may take proceedings. No doubt you may have cases in which special offences are created by a particular Act and the power to enforce them is conferred upon particular officers and nobody else. Such a case may be found in *The Queen v. Cubitt*.⁽¹⁾ But there the Act provided that the provisions of the Act should be enforced by certain officers, and the Court held that only those Officers could enforce the provisions. Here, however, section 517 is, as I have pointed out, permissive in form.

The learned Magistrates relied on the decision of this Court in *In re Motilal Anwatlal Shah*.⁽²⁾ But that case is distinguishable. It was a decision on a different Act, viz., the Bombay District Municipal Act of 1901. It was in respect of quite a different offence to the offence charged in this case, and it was a prosecution by a private individual and not by the Police. The case is, therefore, clearly distinguishable. On the whole there seems to me to be nothing in the City of Bombay Municipal Act to prevent a Police Officer from lodging a complaint in respect of an offence under section 313A. That being so, I think, we must allow the appeal, set aside the order of acquittal, and refer the case back to the learned Magistrates to hear on the merits.

MACKLIN J. I agree. Any argument that may be derived from the wording of section 517 to the effect that the Commissioner may take, or withdraw from, proceedings

⁽¹⁾ (1889) 22 Q. B. D. 622.⁽²⁾ (1930) 55 Bom. 89.

against any person who is charged with any offence under this Act is destroyed by what follows. The section includes, among the matters on which a person can be charged and upon which the Commissioner may institute or withdraw from proceedings, the offence of committing any nuisance whatsoever, and in section 515 it is provided that any person residing in the city may complain to a Presidency Magistrate of the existence of any nuisance. It follows that, at any rate as regards nuisance, the Commissioner is not the only person empowered to take or withdraw from proceedings in respect of this Act, and in the absence of clear directions to that effect it seems unreasonable to take it that the Commissioner is the only person who is so empowered generally. I agree, therefore, with the order proposed by the Chief Justice.

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Macklin J.

Appeal allowed.

Y. V. D.

ORIGINAL AND APPELLATE CIVIL.

FULL BENCH.

*Before Sir John Beaumont, Chief Justice, Mr. Justice Rangnekar and
Mr. Justice Divatia.*

THE ADVOCATE GENERAL OF BOMBAY, PETITIONER v. THREE
ADVOCATES (O. S.), OPPONENTS.*

THE DISTRICT GOVERNMENT PLEADER, KOLABA, APPLICANT v.
TWO ADVOCATES (A. S.), OPPONENTS.†

Disciplinary Jurisdiction—Letters Patent of Bombay High Court, clause 10—Indian Bar Councils Act (XXXIII of 1926), section 10—“Professional or other misconduct”—Bombay Pleaders Act (Bom. XVII of 1920), sections 24, 25, 26—“Reasonable cause”—Membership of an unlawful association.

The three Barristers in question were on the Roll of the High Court as Advocates (O. S.). They were charged and convicted by Presidency Magistrates under section 17 (1) and (2) of the Criminal Law Amendment Act XXIII of 1932 in that they had been

* Mis. Nos. 102, 103, 104 (O. O. C. J.). † Civ. App. Nos. 427 and 453 of 1934.

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September 17