

1869  
 May. 3.

*Before Mr. Justice Norman and Mr. Justice E. Jackson,*

THE QUEEN *v* BHYRO DAYAL SING AND OTHERS \*

*Act XXV. of 1861, s. 62—Procedure.*

There is nothing in section 62, Criminal Procedure Code, to justify a Magistrate in making an order under that section on the mere report of a Police officer.

The judgment of the Court was delivered by

NORMAN, J.—On the 24th of October 1868, the Sub-Inspector of Bhabooah submitted a report to the Deputy Magistrate of that place, Baboo Jadu Nath Bose, stating that Chowdhry Bhyro Dayal Sing and others, proprietors of Mouza Siktee, had constructed a dam at the river Kookoornabee, in order to irrigate their lands to the inconvenience of the public, making it necessary for those wishing to cross the river to use a boat. The Sub-Inspector gave it as his opinion that, if the dam was removed, the river would become fordable, if not perfectly dry.

The Deputy Magistrate called for an explanation from the proprietors of Siktee.

They stated that the dam had existed for upwards of a century; that it had caused no inconvenience to the public nor dispute; that the necessity of crossing the river in a boat, existed in consequence of the breaking down of the Government bridge.

The Deputy Magistrate remarked that “if, by the act of an individual, the public is put to inconvenience, and that act is against law, the plea of long usage cannot be held legal. No one can be allowed to erect a dam on a river for his own use and benefit.” He ordered a notice to issue to the proprietors, directing them to restore the bund as heretofore; and stated that, if they did not do so, they would be amenable to punishment under section 283 of the Indian Penal Code. He adds—“if there be no bund, persons will be able to ford the river when the water is shallow.”

The Judge of Shahabad, on the ground that the order was illegal, and based on mere assumption, transmitted the record of

\* Reference under section 434, Code of Criminal Procedure.

the case to this Court under section 434 of the Code of Criminal Procedure. This Court called on the Deputy Magistrate to explain under what provision of the law he acted. The Deputy Magistrate after some delay, and a correspondence which the Judge fairly characterizes as shuffling, has sent in his explanation.

1869  
THE QUEEN  
v.  
BHYRO DATAL  
SING.

He says, in passing the order for the demolition of the bund which stands in the bed of a hill stream, and which, by the consequent accumulation of water on account of the obstruction to natural drainage, had rendered the Bhabhooah and Mahoneah road impassable, he acted under the provision of section 62, Act XXV. of 1861. He says that the road is partially damaged; that a ferry-man is in the habit of plying on the spot, and that inconvenience is caused to the people by the existence of the bund.

Now the first observation we have to make is, that there is nothing in section 62 to justify a Magistrate in making an order on the mere report of a Police constable, or on surmises and assumptions based on no evidence. When the defendants appeared on notice, they stated facts showing that they had a legal prescriptive right to maintain the bund as it stands. If there was reason to suppose that what they stated was false, and that the bund was a nuisance, the Deputy Magistrate should have called on the Sub-Inspector to produce his witnesses, examined them in the presence of the defendants, and heard what the defendants had to say, and any evidence they might wish to adduce in reply before he made any order under section 62.

There being no evidence to contradict it, the Deputy Magistrate was bound to act on the defendant's statement. There was nothing before the Magistrate to shew that the right of way along the Bhabooah and Mahoneah road, was other than a qualified right to proceed along the road as far as the river, to cross the river where the bridge was broken down by fording when the waters are low, or by ferry-boat at other times. There was nothing from which the Deputy Magistrate could legally infer that the public, or in fact any one was obstructed or impeded in the exercise of any legal rights they ever possessed.

We quash the Deputy Magistrate's order as irregular and illegal.