CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice Holmwood.

1908
June 30.

RASH BEHARY LAL MANDAL
v.
EMPEROR.*

Search warrant—Information—Absence of pending proceedings at the time of issue—Validation of illegal warrant—Re-issue of search warrant on judicial cognizance taken—Taking cognizance on information duly recorded—Nature of information—Sufficiency of information to justify initiation of proceedings—Bona fides *of proceeding—Transfer—Criminal Procedure Code (Act V of 1898), ss. 96, 98, 190 (1) (c), 526 and 537.*

The issue of a search warrant under s. 96 of the Criminal Procedure Code, when there is no investigation, inquiry, trial or other proceeding under the Code, as is mentioned in s. 94, pending at the time, is illegal, though the Magistrate had received information of the commission of an offence, but had not acted judicially on it, when he issued such warrant.

If, however, he subsequently takes cognizance under s. 190 (1) (*c*) and then re-issues the warrant, it is legal.

In re Harilal Buch(1) followed.

A warrant illegally issued under s. 96 cannot be treated as valid under s. 98 by the operation of s. 537 of the Code. Section 537 does not give legal effect to a defective warrant, but only validates a finding, sentence or order, defective in procedure.

The information, on which a Magistrate takes cognizance under s. 190 (1) (*c*), must be recorded.

Thakur Pershad Singh v. *Emperor* (2) followed.

It is nowhere laid down how much of such information the accused is entitled to have recorded, but, though all the allegations necessary to prove the offence have not been made out, if enough has been laid before the Magistrate to make out a *prima facie* case, he is justified in initiating proceedings, and the High Court will not interfere.

Proceedings instituted on statements which, though alleging no specific dates, are not vague or indefinite as to the facts mentioned therein, are not bad.

If proceedings were instituted by a Magistrate from personal feelings of enmity derived from a long past dispute between one of his subordinates and the accused, and he was consciously straining the law to injure the latter, it would

* Criminal Revision Nos. 70 and 554 of 1908 against the orders of F. F. Lyall, District Magistrate of Bhagalpore, dated the 28th April 1908.

(1) (1897) I. L. R. 22 Bom. 949. (2) (1906) 10 C. W. N. 775.

be the duty of the High Court to set them aside, but the Court would not do so, if the Magistrate was only acting mistakenly.

Case transferred on the facts.

THE petitioner was a zemindar of Madhipura in the district of Bhagalpore. It was alleged in his petition to the High Court that in 1901 some unpleasantness arose between him and Satyendra Nath Das, the then Sub-divisional officer of Madhipura, and that shortly after proceedings under s. 107 of the Criminal Procedure Code were instituted against his servants by the said Magistrate, which ended in their discharge on the case being transferred to another Magistrate, that in December 1905, Saroda Prosad Sirkar, the uncle of Satyendra Nath, became the Sub-divisional Magistrate of Madhipura, and that the petitioner became involved in criminal prosecutions instituted by the said Magistrate in 1906 and 1907, which were transferred to Monghyr and ended ultimately in his favour. On the 17th January last a complaint was laid before the same Magistrate by one Tufani Sahu against the petitioner under ss. 330 and 342 of the Penal Code, which was transferred by the High Court to Monghyr.

On the 16th February Mr. Lyall, the District Magistrate of Bhagalpore, who, it was alleged, was encamped about two miles from Murho, the petitioner's place of residence, issued search warrants in Form viii of Schedule V of the Code, and caused a search of his house, and of his *cutcherries* at other places, and of the houses of some of his servants, to be made by the police, who seized and removed a large quantity of papers connected with his zemindari. These papers were kept in the Sub-divisional office at Madhipura. On the 28th instant the petitioner moved Mr. Lyall for the return of the documents taken by the police, alleging that there were settlement papers and other documents among them, which were necessary for the purposes of certain pending and contemplated civil suits. The District Magistrate by his order dated the next day, directed that such papers as were not required for the purposes of the inquiries about to be made, might be returned, but that, if any such paper was considered by the Inspector of Police as essential for the purposes of such inquiries, the petitioner was to get a certified copy of it. He also noted that the petitioner's pleader

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had assented to his order as sufficient for his purposes. On the 11th April the petitioner applied to the Sub-divisional officer of Madhipura for the unconditional return of the papers, disclaiming any authority on his pleader's part to accept the condition imposed by the District Magistrate. On the 15th the petitioner sent a letter through a Calcutta attorney to Mr. Lyall containing a notice under s. 424 of the Civil Procedure Code, and alleging that the search warrants had been issued maliciously and illegally with the intention of oppressing and harassing the petitioner. On the 20th the petitioner received in Calcutta a notice, dated the 15th, from the Sub-divisional officer of Madhipura to take back all his papers, which had been seized. A notice signed by the Sub-divisional officer, dated the 26th, was served on a servant of the petitioner at Madhipura, intimating that delivery of the papers would be made on the 29th at Murho. On the same date it was alleged that the Sub-divisional officer, accompanied by a Deputy Magistrate, the Sub-Registrar, the Inspector of Police and others went to the petitioner's house at Murho, and 77 bundles of papers were counted out in the presence of a servant of the petitioner and a receipt taken, whereupon the Deputy Magistrate read out seven search warrants issued by the District Magistrate the day before, and all the bundles were put back in boxes and loaded on three carts and a police guard left in charge of the same at the petitioner's *durwaza*. It was further stated that on the following three days the Deputy Magistrate came and inspected some of the papers and took them away, leaving the rest behind and removing the guard.

It appeared from the order-sheet that the District Magistrate, acting on the information of one Hansi Mundal, received on the 14th February last, which he had duly recorded, took cognizance, on the 28th April, under s. 190 (1) (*c*) of the Code, of an offence under s. 420 of the Penal Code, alleged to have been committed by the petitioner, and directed the issue of a search warrant for the production of a certain document. There were six other orders of the same date by the same Magistrate purporting to have received informations, which were also recorded, from six other persons, and taking cognizance, under s. 190 (1) (*c*), against the

petitioner under ss. 384, 384, 403, 420, 505 and 506 of the Penal Code, respectively. In each of the six orders he directed the issue of search warrants under s. 96 for the production before him of specified documents, which were stated to be necessary for the purposes of the inquiries. Summonses were issued in all the cases, and the 9th May was fixed for the hearing. The petitioner having failed to appear on that date the District Magistrate directed his prosecution under s. 174 of the Penal Code, but the order was set aside by the High Court by consent in *Cr. Rev. No. 536 of 1908*.

The petitioner alleged that he had applied for copies of the informations against him, but that he was only allowed copies of the order sheets. Two Rules were then issued by the High Court, *viz.*, *Cr. Rev. No. 70 of 1908* for a transfer of the cases and *Cr. Rev. No. 554 of 1908* to quash the proceedings altogether, and they were both heard together.

Mr. A. Chowdhry and *Babu Atulya Charan Bose* and *Babu Hara Prasad Chatterjee* for the petitioner.

The Advocate-General (*Mr. Sinha*) for the Crown.

STEPHEN AND HOLMWOOD JJ. In the first of these cases a Rule has been granted calling on the District Magistrate of Bhagalpore to show cause, why seven criminal cases that have been instituted against one Rash Behary Lal Mandal by that officer, should not be transferred to the District Magistrate of Monghyr or some other suitable Magistrate. In the second, the petitioner moves that the same criminal proceedings should be quashed. This application was made to us on a date after the Rule was granted, and we directed that it should be heard together with the above-mentioned Rule, and this has now been done. The facts, on which both applications are directly based, are as follows. In consequence of the result of investigations, which we need not at this moment consider, Mr. Lyall, the District Magistrate of Bhagalpore, issued warrants on the 16th February 1908 ordering that the petitioner's house should be searched, and that any zemindari papers found there should be

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produced before him forthwith. This was done, and many papers were taken from the house, where the search was ordered to take place; while other papers were received from his servants at other places. On the 28th February the petitioner put in a petition in the District Magistrate's Court asking for a return of the papers and, on the 29th, an order was passed that such papers might be given to the petitioner as were "not required for the purposes of the inquiry about to be made." Provisions were added as to the rules to be observed in selecting papers to be restored, and it was recorded that the petitioner's pleader said that he had no further request to make, and that the order in question would serve his purpose. No papers were in fact returned and the petitioner denies his pleader's authority to consent to the order as far as he did so. Early in April the petitioner was called on to take back his papers. To this he replied by a petition of the 11th April stating that he was willing to take them back unconditionally, but not on the terms mentioned in the order of the 29th February. On the 15th April the petitioner's attorney gave notice to Mr. Lyall under section 424 of the Civil Procedure Code, that after two months he would sue him for a return of the papers seized and for damages for their seizure and retention. On the 20th April the petitioner, while in Calcutta, received a notice from the Sub-divisional Officer of Madhipura, dated the 15th April, calling on him to take back all the papers seized. On the 29th April seventy-seven bundles of papers were delivered to the petitioner's mukhtear at the petitioner's house, but before he could take possession of them, seven search warrants were produced, under which all the seventy-seven bundles were again taken possession of by the Police. An inspection of these was made by a Deputy Magistrate on the 1st and 2nd of May, and after some papers had been extracted, most of them were returned to the petitioner. The petitioner was served early in May with summonses in relation to the cases, to which the search warrants applied, dated the 28th April, and the petitioner was subsequently given copies of the order sheets in those cases showing that the District Magistrate took cognizance of the offences to which the summonses and warrants related, on the 28th April, under section 190 (1) (*c*).

On these and a few other subsidiary facts the petitioner prays to have the criminal proceedings against him quashed, and all the papers seized returned to him; and also for a transfer of the cases. As there is no dispute about the transfer, we will consider first the prayer for having the proceedings quashed and the papers returned.

Taking the grounds on which the petition is based, and postponing the consideration of the ground that the prosecution is not a *bona fide* one, the earliest in respect of the facts on which it depends, is that the District Magistrate's action in causing the search and taking away the papers was illegal and without jurisdiction. At the hearing before us it was doubtful, if the District Magistrate issued any warrant for the search. But it now appears that he did. The warrants are in the form No. viii of Schedule V of the Criminal Procedure Code reciting that information had been laid before him of the commission of the offence of fraudulently obtaining decrees for sums not due. The question of its legality under section 96 depends on whether there was any investigation, inquiry, trial or other proceeding under the Code as mentioned in section 94. It seems that there was not. The Magistrate had, no doubt, received the information that he mentions in the order, but he had not acted judicially on it at the time he issued the warrants. The judgment in *In re Harilal Buch*(1) supports what seems to us the plain meaning of the two sections in question, and, as there is here no question of search under the second and third paragraphs of section 96 (1), we must hold that the issue of the search warrants was not justified by that section.

It has been contended that the issue of the warrants might have been under section 98, in which case the existence of a proceeding, etc., under the Code is not necessary, and that, though the warrants are informal under section 96, they may be taken to be under section 98 by the operation of section 537. The objections to this argument seem to be that no suggestion is made in the warrants of the existence of any forged document and that, though on the facts it may be that it was supposed

(1) (1897) I. L. R. 22 Bom. 949.

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that some of the documents that it was sought to seize were forged, the warrants subsequently issued seem to have been issued under section 96. Further it does not seem possible to read section 537 as giving a legal effect to a defective warrant, as its highest effect is to validate a finding, sentence or order, which is defective for an antecedent defect in procedure. In the view that we take of the effect of the subsequent proceedings, and bearing in mind that the legality of the warrants may be the subject of inquiry in civil proceedings, it is perhaps not necessary that we should come to a judicial finding on the point, but we cannot find that the warrants justified the seizure and retention of the papers that were seized.

The next grounds, that we have to consider, are that there were not sufficient materials before the Magistrate to justify the issuing of the summonses, and what depends on the same facts, that the informations on which the Magistrate based his proceedings were vague and indefinite, and that he was not justified in taking action on them. As to this all that we have to say is that the information, on which the Magistrate took cognizance under section 190 (1) (*c*), has been recorded in each case, in accordance with the law as laid down in *Thakur Pershad Singh* v. *Emperor* (1); and that in most of the cases, though all the allegations, the proof of which would be necessary to prove the offence mentioned have not been made, enough has been alleged to justify the Magistrate in dealing judicially with the matter. It is nowhere laid down, and it is probably impossible to state in general terms, how much the accused is entitled to have recorded in such cases; but here in most of the recorded statements enough is said to make it impossible for us to say that the Magistrate had not enough before him to justify him in considering that a *primâ facie* case was made out; and, unless we can say as much as this, we cannot interfere. As regards the statements of Goribi Koeri, and possibly that of Hansa Lal, if they stood alone, we might be inclined to interfere; but, in view of the other cases and of the orders we propose to pass as to transfer, we consider our interference unnecessary. Some of the statements are vague in form, no date being specified, but looking to the

(1) (1906) 10 C. W. N. 775.

acts mentioned, this vagueness is formal rather than substantial. Apart from the absence of date, however, they are neither vague nor indefinite.

The next ground that we have to consider is that the so-called orders of attachment, by which we understand to be meant the second set of search warrants, and the keeping of the papers in custody, presumably after the 29th April, are unwarranted by law. We can see no force in this contention. From the order sheet it appears that the Magistrate took cognizance of the seven offences with which we are concerned on the 28th April, issued summonses in respect of them, and ordered search warrants to be made out under section 96. These last orders, had, therefore, exactly the jurisdiction, which was lacking in the case of the first warrants, namely a proceeding under the Code. The papers may have been illegally in the possession of the Magistrate or the police up to the time they were returned on the 29th, but as we have held that the Magistrate was justified in initiating proceedings, it is impossible to see on what ground the seizure and retention of the papers, by virtue of the warrants executed on the 29th April, can be impeached.

The last ground for setting aside the conviction that we are asked to consider is that "the prosecution is not a *bonâ fide* one." The petitioner's Counsel asked us to attach to *bonâ fides* the meaning attached to "*good faith*" in section 52 of the Indian Penal Code, namely that nothing is said to be done in good faith, which is done without due care and attention. If we accept this meaning we cannot regard a want of good faith as a ground for setting aside criminal proceedings, as whenever a Magistrate makes a mistake he does something without due care and attention; and no one suggests that any mistake is a ground for setting proceedings aside. But looking at the contents of the petition in this application, and to the recital in the petition for transfer of former proceedings, which date back a very long way and have no immediate bearing on the present case, we cannot attach so limited a meaning to the phrase in question. The District Magistrate considers that it is imputed to him that he is acting otherwise than in what he takes to be in the interests of justice. We agree with him, and further consider that he is accused

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of acting from personal feelings of enmity derived from a long past dispute between one of his subordinates and the petitioner, and that he is consciously straining the law to injure the petitioner. Were such a state of things or anything like it shown to exist, it would, no doubt, as is admitted by the Advocate-General, be our duty to set aside these proceedings. We have carefully considered the record and other papers that influenced the Magistrate's conduct. We were invited on behalf of the petitioner to exclude the latter from our consideration, because they were not on the record: but where the petitioner travels as far outside the record as he does it would be manifestly unfair to confine the Magistrate to narrower limits. We cannot now go into any detail as to our opinions as to facts alleged to have been brought to light, as they may form the subject of future proceedings. But the result of our investigation is that we find that the Magistrate's action in his first seizure of the papers cannot be supported, and that he acted hastily and ill-advisedly on the 9th of May, when, on the non-appearance of the petitioner in obedience to a summons, he ordered proceedings to be drawn up against him under section 174 of the Indian Penal Code, though these proceedings have been quashed by consent on another Rule, *No. 536 of 1908*. But that throughout he acted solely with the desire to secure the proper administration of justice in a complicated and difficult case we have no doubt at all.

Consequently all the grounds urged in support of this application fail, and it is dismissed.

As to the Rules for transfer, the Advocate-General admits that they should be made absolute, and, considering the feelings that have been excited on both sides, we have no doubt that this is the proper course to be followed. We need hardly point out that these cases could in no case be tried before the District Magistrate, unless the petitioner consented, and he never intended they should be, as he took cognizance under section 190 (1) (*c*). The Advocate-General suggests, and the petitioner's Counsel agrees to this, that an officer should be specially deputed to deal with these cases at Bhagalpore, which will be for the convenience of both sides. We accordingly order that all the

cases be taken up by a Joint Magistrate of at least 8 years' standing. He will proceed to deal with the seven cases already *sub judice* under Chap. XXI or XVIII, if necessary, and will have full authority to deal with the other cases in which informations have been, or may be laid, in respect of the same matter under section 200 of the Criminal Procedure Code.

E. H. M.