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specifically cited, the propriety of the conviction is at least open to serious doubt. In that view of the matter, we make the Rule absolute, set aside the conviction and sentence, and direct that the fine, if paid, be refunded.

A Rule in the same terms must be issued in Mr. Macpherson's case.

E. H. M.

Rule absolute.

CRIMINAL REVISION.

Before Sharfuddin and Gore JJ.

1912
 Dec. 12.

BHIM LAL SAH

v.

EMPEROR.*

Complaint, dismissal of—Jurisdiction to direct a prosecution in the absence of any judicial proceeding—Order not made independently, but on the suggestion of the District Magistrate—Complaint—Preliminary inquiry without the existence of reasons for doubting its truth—Omission to record reasons—Permission given to accused to cross-examine and adduce defence evidence—Penal Code (Act XLV of 1860), s. 211—Criminal Procedure Code (Act V of 1898), ss. 202 and 476—Practice.

Where the petitioner's case was disposed of by the acquittal of the accused, on the 1st August, by a Magistrate who did not then take action under s. 476 of the Criminal Procedure Code, but proceedings thereunder were taken, on the 9th August, and an order made, on the 23rd, by another Magistrate, who had then no seisin of the case, and the District Magistrate having expressed a doubt as to the jurisdiction of the latter, and having considered that such order should be passed by the Magistrate who tried the original case, such Magistrate thereupon, purporting to act under s. 476, directed the prosecution of the petitioner, under s. 211 of the Penal Code, on the 16th September :

Held, (i) that the order of the 23rd August was without jurisdiction, as there was no judicial proceeding of any kind before the Magistrate who passed it ;

(ii) That the order of the 16th September was bad in law, as the trying Magistrate had not considered it necessary to take action under s. 476,

* Criminal Revision, No. 1415 of 1912, against the order of A. McGavin, Deputy Magistrate of Purnea, dated Sept. 16, 1912.

when he acquitted the accused in the original case, and did not exercise an independent judicial opinion in passing it a month-and-a-half later, at the instance of the District Magistrate.

There may be cases in which a Court does not think it necessary in the public interest to take action under s. 476 of the Code, and allows the injured person to seek redress by granting sanction, and in such a case it is not necessary that the order should be passed at or near the time of the disposal of the original case.

When a complainant prefers a complaint and supports it by his oath, he is entitled to be believed, unless there is some apparent reason for disbelieving him, and he is entitled to have the persons complained against brought to trial. When there is no reason whatever for disbelieving the truth of the complaint, the Magistrate has no jurisdiction to act under s. 202.

The accused should not be made a party to a proceeding under s. 202, nor allowed to cross-examine the prosecution witnesses, or to adduce evidence for the defence.

Baidya Nath Singh v. Muspratt (1) approved.

Emperor v. Tanuk Lal Chowdhuri (2) disapproved.

ON the 2nd January, 1912, the petitioner, Bhim Lal Sah, and one Sudan Sah, filed two separate complaints against certain persons, under ss. 342 and 384 of the Penal Code, before Babu Mukutdhari Singh, a Deputy Magistrate temporarily in charge, who passed the following order: "Complainant to prove his case on 18th January, 1912. Accused may cross-examine." No reasons were recorded for distrusting the truth of the complaint, and no local investigation ordered, but notices were issued upon the accused. On the 18th, Mr. Warde Jones resumed office and proceeded with the inquiry. He recorded the evidence of the prosecution witnesses, allowing the accused to cross-examine them, took defence evidence and the written statements of the accused, and, after considering the whole of the case, dismissed the complaint under s. 203 of the Criminal Procedure Code, and drew up proceedings against the petitioner and Sudan Sah

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under s. 476 on the 20th February. Against such orders an application was made to the High Court, which ultimately set them aside and directed the accused in both cases to be placed on trial, holding that s. 202 did not authorize the presence of the accused at the inquiry thereunder, nor the cross-examination of the prosecution witnesses, nor the adducing of defence evidence.

The accused were accordingly tried by Mr. McGavin, a Deputy Magistrate, to whom the cases had been transferred, and acquitted on the 1st August. He had previously directed, under s. 476 of the Code, the prosecution of a witness for giving false evidence, and at the conclusion of his judgment he called upon the petitioner and Sudan Sah to show cause why they should not be ordered to pay compensation to each of the accused, but he did not take any action against them under s. 476.

On the 9th August, Mr. Warde Jones, without having seisin of the case at the time, called on the petitioner to show cause against his prosecution under s. 211 of the Penal Code, and made the following order on the 23rd :—

“The matter has already been fully threshed out in the course of a trial in a competent Court, and found false. Previously also, after due inquiry, this complaint was found to be false by me. No further preliminary inquiry is, therefore, now called for under s. 476, Cr. P. C. I accordingly sanction the prosecution of Bhim Lal under s. 211, I. P. C.”

Proceedings were drawn up and submitted to the District Magistrate, who recorded an order on the 5th September 1912, in these terms :—

“I am in doubt whether the order directing a prosecution under s. 476 should be passed by Mr. Warde Jones or by Mr. McGavin. The complaint was heard by Babu Mukutdhari Singh, who was temporarily acting for Mr. Warde Jones. After the hearing of the complaint the case was made over to Mr. McGavin for trial. I think the order should be passed by Mr. McGavin.”

In the meantime, an application for sanction under s. 195 of the Code was filed by the accused in the original case against the petitioner and Sudan Singh, in respect of an offence under s. 211 of the Penal Code. After the date of the order of the District Magistrate Mr. McGavin took up the matter, and passed the following order on the 16th September :—

“*Proceeding under s. 476.*—Whereas Bhim Lal lodged a complaint before Babu Mukutdhari Singh under ss. 342 and 384, I. P. C., which, after trial in Magistrate’s Court, has been found false, I direct that Bhim Lal shall be prosecuted under s. 211....”

The petitioner then moved the High Court and obtained a Rule on the following grounds, as numbered in the petition :—(i) that Mr. Warde Jones had no jurisdiction to pass an order under s. 476; (ii) that the District Magistrate’s order of 5th September was *ultra vires*; (iii) that Mr. McGavin had no jurisdiction to act under s. 476 at the time he passed the order complained of, and (vi) that there is no reasonable chance of a conviction under s. 211 of the Penal Code.

In his explanation, the Magistrate, Mr. Warde Jones, dealt with the above grounds, and asked for guidance as to the proper procedure to be followed under s. 202 of the Code, in connection with which he quoted the following passage from the judgment of Holmwood and Carnduff JJ. in *Emperor v. Tanuk Lal Chowdhuri* (1) :—

“That being so, the complainant must be dealt with in the same manner as laid down in the Code; and if the Magistrate in charge, who cannot always be expected to investigate those cases himself, is otherwise engaged, he must transfer it to another Magistrate under Chapter XVI. He must then take the statement on oath of the original complainant before the police, he must hear his evidence under section 202, and, if necessary, he can allow the persons accused, if they choose to appear, to cross-examine, and adduce witnesses to show the falsity of the case.”

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Mr. K. N. Chaudhuri (with him *Babu Manmatha Nath Mukerjee* and *Babu Jyotish Chandra Bhattacharjee*), for the petitioner. The last order under s. 476, made, not at or about the time of the termination of the original case, but a month-and-a-half later, on the suggestion of the District Magistrate, is bad: *Begu Singh v. Emperor* (1). The proceedings of the 23rd August are also without jurisdiction, as the Magistrate had no seisin of the case at the time. The procedure followed in this case, of permitting the accused to cross-examine and produce evidence, is not warranted by s. 202: see *Baidya Nath Singh v. Muspratt* (2).

No one appeared for the Crown or the opposite party.

SHARFUDDIN AND COXE JJ. The petitioner, Bhim Lal Sah, on the 2nd January, 1912, complained against Atraj Singh and others of having committed certain offences. On this the following order was passed: "Complainant to prove his case on 18th January, 1912. Accused may cross-examine." No local investigation was ordered. No reasons were recorded for distrusting the complaint. Indeed, it is difficult to see what reasons there could be. The order was absolutely illegal, and, considering how opposed it is to the plain words of the Code, and how frequently orders of this kind have been condemned, it is very difficult to understand how the Magistrate who passed it could have believed that he was doing what he was entitled to do. The case dragged on till near the end of February, when the complaint was dismissed. The prosecution of Bhim Lal was then ordered under s. 211. The case then seems to have come before this Court, and this Court held that the accused persons

(1) (1907) I. L. R. 34 Calc. 551. (2) (1886) I. L. R. 14 Calc. 141.

should be properly tried, and that until they had been tried the proceedings under s. 211 should be dropped. They were tried and acquitted by Mr. McGavin, Deputy Magistrate, on the 1st August. A week later Mr. Warde Jones, another Deputy Magistrate, called on Bhim Lal to show cause why he should not be prosecuted under s. 211, and, finally, on the 23rd August, directed his prosecution under s. 476 of the Criminal Procedure Code. The District Magistrate, however, hesitated to act on this proceeding, and observed that the order ought to be passed by Mr. McGavin. Thereupon, Mr. McGavin passed the following order on the 16th September: "Petition purporting to show cause against prosecution under s. 211 filed. The cause shown is not good. Draw up proceedings under s. 211 of the Indian Penal Code." The petitioner then obtained this Rule on the District Magistrate to show cause why his prosecution should not be set aside on the first, second, third and sixth grounds mentioned in his petition. The Rule must clearly be made absolute on the third ground. The order of Mr. McGavin purports to have been passed under s. 476 of the Criminal Procedure Code. Now, if he had thought that action ought to be taken under that section, he ought to have passed the order one-and-a-half months before. The fact that he did not do so indicates very strongly that he did not at the time think it necessary, and that the belated order of the 16th September does not represent his independent judicial opinion. As to the order of the 23rd August, it is unnecessary to waste words on it. There was no judicial proceeding of any sort or kind before Mr. Warde Jones, and his order for the prosecution of the petitioner was altogether beyond his jurisdiction.

We are, however, informed that the persons accused by Bhim Lal petitioned for his prosecution,

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and we have considered whether Mr. McGavin's order can be treated as one under s. 195 of the Criminal Procedure Code. Clearly there may be cases in which a Court may not think it necessary in the public interest to take action under s. 476, but may be willing to allow the person injured to seek redress. In such a case it is not necessary that the order should be passed at or near the time of the disposal of the original case. But, considering how illegally and unnecessarily Bhim Lal has been harassed in these proceedings, we do not think that his further prosecution should be sanctioned.

The Deputy Magistrate in charge, Mr. Warde Jones, has submitted an explanation, and with reference to this Court's condemnation of the practice of securing the attendance of the accused person, says that it is a "matter of common practice that when cases are inquired into locally under s. 202 of the Criminal Procedure Code by judicial and non-judicial officers, the statements of accused persons and their witnesses are almost always taken; and inasmuch as s. 202 of the Criminal Procedure Code does not specifically forbid such procedure, and in the present case the accused persons availed themselves of the option given them to cross-examine, put in statements and adduced evidence, I followed the practice." He refers to another decision of this Court in which, in his view, this practice was sanctioned, and asks for guidance.

It may be observed that the Deputy Magistrate appears to be in error in supposing that there was any local investigation under s. 202 in this case, but leaving that aside, we may express our hearty concurrence in the condemnation pronounced by the former Bench on the practice of conducting these preliminary inquiries in the presence of the accused.

The practice of making the accused a party to such proceedings was condemned in *Baidya Nath Singh v. Muspratt* (1), and its futility is obvious. We do not suppose that Magistrates have so little to do that they prefer trying cases twice over, and it is difficult to avoid a feeling of uneasiness lest the object of the practice may not be to harass complainants and deter them from seeking relief in the Criminal Courts.

As regards the case cited by the Deputy Magistrate, we are, with the greatest respect, unable to agree with the view expressed that, in inquiries under s. 202, the accused should be allowed, if necessary, to cross-examine the complainant's witnesses. Or rather, we should say that, in our opinion, it cannot ever be necessary. The expression of this view was not necessary to the decision of that case, and we do not think that it need be referred to a Full Bench.

When a man files a complaint and supports it by his oath, rendering himself liable to prosecution and imprisonment if it is false, he is entitled to be believed, unless there is some apparent reason for disbelieving him; and he is entitled to have the persons, against whom he complains, brought before the Court and tried. In the present case there was at first, at any rate, no reason whatever for distrusting the truth of the complaint, and the case should have been tried without further delay.

E. H. M.

Rule absolute.

(1) (1886) I. L. R. 14 Calc. 141.

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