[APPELLATE CRIMINAL.]

Before Mr. Justice West and Mr. Justice Pinhey.

IMPERATRIX *v.* LAKSHMAN SAKHA'RA'M, VA'MAN HARI, AND BA'LA'JI KRISHNA'.* 1877. December 20.

The Code of Criminal Procedure (Act X. of 1872), Sections 466 and 468—Sanction of prosecution by Government or its deputy—Mahálkári—Court of Subordinate Judge—Court of District Judge.

Section 466 of the Code of Criminal Procedure extends to all acts ostensibly done by a public servant, *i. e.*, to acts which would have no special signification except as acts done by a public servant; therefore a *máhálkari* charged with fabricating the proceedings of a case decided before himself, could not be tried on that charge except with the sanction specified in that section.

Paragraph one of section 466, which mentions a sanction by Government or its deputy, is intended to apply, at least, chiefly to the cases of persons specially responsible to Government, such as accountants who have failed in their duty, and paragraph two, which speaks of sanction by Government alone, to persons professing to exercise certain authority, and with that pretext doing an act which is impeached by a subject on the ground of its being wholly unwarranted or of an excess or impropriety of some kind.

A *máhálkari* falls within the class of public servants contemplated in paragraph one of section 466; a sanction for his prosecution by the District Magistrate is, therefore, sufficient.

For the purpose of sanctioning a criminal prosecution under section 468 of the Code of Criminal Procedure, the Court of the Subordinate Judge is subordinate to that of the District Judge, notwithstanding that the subject-matter of the litigation in the former Court involves more than Rs. 5,000, and an appeal lies direct to the High Court from the decision of that Court in that matter.

A prosecution commences when a complaint is made, the reception of the complaint being a stage of the judicial proceedings towards conviction.

THE Assistant Session Judge of Poona convicted the first accused, Lakshman, *Máhálkari* of Ambegaon, under sections 193 and 466 of the Indian Penal Code, of having committed forgery and fabricated false evidence; the second accused, Váman Hari, of having abetted Lakshman in the commission of these offences; and the third accused, Báláji Krishná, of having committed forgery and also of having abetted Lakshman in the offence with which he was charged. The first was sentenced to undergo five years' rigorous imprisonment and to pay a fine of Rs. 1,000, or, in default, to suffer one year's further rigorous imprisonment; the second to imprisonment

* Criminal Appeals Nos. 234, 277, and 278 of 1877.

1877.

IMPERATRIX v. LAKSHMAN SAKHA'RA'M, VA'MAN HARI AND BA'LAJI KRISHNA'.

for three years and a fine of Rs. 500, or, in default, one year's rigorous imprisonment; and the third to two years and a fine of Rs. 200, or, in default, six months' rigorous imprisonment in addition.

The documents which formed the subject of these convictions were:—

1*st*.—A plaint presented to Lakshman Sakhárám as *máhálkari* by Váman Hari, under the Bombay Act V. of 1864, signed and verified by the latter, and dated the 9th of June 1876. The verification bore no endorsement as required by section 5 of the Act; and the plaint had no number.

2*nd*.—A summons addressed to Rádhábái, the defendant named in the above-mentioned plaint, bearing the date the 10th of June 1876, but no number. This document had, on the face of it, an acknowledgment of the service and of the receipt of a copy of the summons purporting to be signed by Rádhábái, and dated the 12th June, in the hand-writing admittedly of Báláji Krishná.

3*rd*.—Proceedings admittedly in the hand-writing of Lakshman Sakhárám, dated the 13th June, consisting of notes of the evidence of Rádhábái and her two witnesses, and a decision by him disposing of the case as *máhálkari*.

4*th*.—A receipt initialled by Lakshman Sakhárám, executed by Váman Hari to Rádhábái's husband.

For the purpose of a defence to a partition suit brought in the Court of the Subordinate Judge of Poona by Rádhábái against Váman Hari, the latter produced a copy of the decision of Lakshman Sakhárám as *máhálkari* and of this receipt or release.

A petition presented by Rádhábái's brother-in-law, Rámchander, led to an inquiry into the conduct of the three accused persons. Accused No. 1, Lakshman, being a *máhálkari*, the District Magistrate of Poona sanctioned his prosecution, and directed that he be "placed on his trial under section 466, Indian Penal Code, or any other section which may seem applicable after further investigation."

The sanction for the prosecution of Váman Hari and Báláji Krishná (accused Nos. 2 and 3) was refused by the Subordinate Judge, but was granted by the District Judge.

All the three accused were, accordingly, placed on their trial, and convicted.

The appeals were heard by West and Pinhey, JJ.

Gill (with *M. C. Apte*) for Lakshman Sakhárám :—A *máhálkari* in certain matters is invested with the powers of a Judge, and is not removeable from his office without the sanction of Government. Therefore, under section 466 of Criminal Procedure Code, the sanction of Government is necessary. A distinction should be drawn between the first and the second paragraph of this section. The former provides for the sanction of Government, or of certain other authorities therein mentioned, being obtained before the entertainment of a complaint against public servants; the latter enacts that the sanction of Government itself should be obtained before proceeding with their prosecution. This refers to a stage beyond the entertainment of the complaint, and includes the issuing of process. As held in *Regina* v. *Parshrám Keshav*,(1) the Courts have no jurisdiction to commence a prosecution against any class of public servants not removeable from their office without Government sanction, except with the sanction of the Government itself. The sanction given by the District Magistrate is not sufficient. The conviction must, therefore, be quashed.

Kashináth Trimbak Telang (with *Shántárám Náráyan*) for Váman Hari (No. 2), and *Ghanashám Nilkant* for Báláji Krishná (No. 3) :—The trial of Váman Hari and Báláji Krishná is also without jurisdiction, because a larger sum than Rs. 5,000 was in question in the suit before the Subordinate Judge. An appeal would lie from his decision to the High Court, and not the District Court. Under section 468 of the Code of Criminal Procedure, when an offence against public justice is committed before or against a Court, a complaint of it cannot be entertained except with the sanction of that Court, or of some other Court to which it is subordinate. Here, the Subordinate Court, on being applied to, specifically refused to

(1) 7 Bom. H. C. Rep. 61 Cr. Ca.

1877.

IMPERATRIX v. LAKSHMAN SAKHA'RA'M, VA'MAN HARI AND BA'LA'JI KRISHNA'.

grant the sanction; and that Court not being subordinate in this matter to the District Court, the sanction given by it is of no avail. The sanction of the High Court should have been first obtained. It is too late for it now to give its sanction.

Hart (with him *Nánábhái Haridás*, Government Pleader) for the prosecution:—As to Lakshmán Sakhárám, no sanction is necessary for his prosecution. He is charged under sections 193 and 466 of the Indian Penal Code as a private individual: *Regina* v. *Parashrám Keshav.*(1) If any sanction is necessary, that of the District Magistrate is sufficient: section 466 of Criminal Procedure Code; *Regina* v. *Malhar,*(2) Act III. of 1852. The sanction of Government is, at all events, not necessary before the case goes before a Magistrate. A preliminary inquiry must be held before it is found that any sanction is necessary. Even if a sanction were requisite for the proceedings before the Magistrate, still the conviction is saved by sections 33 and 283 of the Criminal Procedure Code.

As to Váman Hari and Báláji Krishná, no sanction is necessary for a charge under section 193 of the Penal Code, unless the evidence was actually used before a Court: section 468, Criminal Procedure Code. The offence *against* the Court, referred to in that section, means such an offence as is dealt with in section 228 of the Penal Code.

If a sanction is necessary, the District Court can give it instead of the Subordinate Judge: section 468, Criminal Procedure Code; Act XIV. of 1869, sections 21 and 22; *Regina* v. *Malhar Rámchandra.*(3) If not, the High Court can give its sanction now. The Subordinate Judge having refused sanction, the District Judge may give it.—See the case of *Dinobundhoo Chuckerbutey.*(4) Sanction may be given at any time: section 470, Criminal Procedure Code. Cites also section 33, Criminal Procedure Code; *Regina* v. *Ranchordás Nathubhai*;(5) the case of *Náráin Náik.*(6)

The judgment of the Court was delivered by

WEST, J.:—In the appeal before us, Mr. Gill, the counsel for

(1) 7 Bom. H. C. Rep., Cr. Ca. 61.
(2) 7 Bom. H. C. Rep., Cr. Ca. 64. See p. 66.
(3) 7 Bom. H. C. Rep. 64, at p. 66.
(4) 5 Calc. W. R., Misc. Ap. 6.
(5) 4 Bom. H. C. Rep., Cr. Ca. 35.
(6) 14 Calc. W. R., Cr. Rul. 34.

1877.

IMPERATRIX v. LAKSHMAN SAKHA'RA'M, VA'MAN HARI AND BA'LA'JI KRISHNA'.

Lakshman, has taken objection, on his behalf, to the sufficiency of the sanction given by the District Magistrate. He contends that, under section 466 of the Code of Criminal Procedure, no complaint can be entertained for any offence whatever against any public servant not removeable from his office without the sanction of the Government, except with the sanction of the Government itself; and that the sanction by the District Magistrate, besides being vague and indefinite, is insufficient. He referred to the case of *Regina* v. *Parashrám Keshav*,(1) in which it was held that section 167 of the superseded Code of Criminal Procedure, which corresponds with section 466 of the one now in force, required such sanction to give jurisdiction to the trying Court, and that a conviction, founded on evidence taken without such sanction, was bad. He argued that section 466 does not restrict itself to chapter IX or any other chapter of the Indian Penal Code.

We felt some doubt as to the scope of the language used by Mr. Justice Melvill (who delivered the judgment of the Court in that case) in relation to this point. He says at page 63: "But we agree with the view * * * that section 167 relates only to those acts and omissions which are declared in the Penal Code to be offences when they are committed by a public servant." We have, therefore, consulted him, and we find that he did not intend to say that, if there were acts and omissions on the part of a public servant outside the Penal Code, or even within the Code, if the official character of the accused was essential to them, section 167 did not apply. The case he was considering was one which fell within the operation of that Code, and his observations were directed to a denial of the limitation imposed by a circular of the High Court of Calcutta not to laying down a new limitation of the operation of the enactment he was considering.

We are of opinion that the scope of section 466 extends to all acts ostensibly done by a public servant, *i. e.*, to acts which would have no special signification except as acts done by a public servant. In the present case a *máhálkari*, an officer invested with the powers of a Judge in a certain class of cases, is charged with fabricating the

(1) 7 Bom. H. C. Rep. 61 Cr. Ca.

1877.

IMPERATRIX v. LAKSHMAN SAKHA'RA'M, VA'MAN HARI AND BA'LA'JI KRISHNA'.

proceedings of a case from the plaint to the decision, purporting to have been held before himself and complete in every respect, including the signature with his proper official designation. The very object of the fabrication would be to invest those proceedings with a special character, and it is, we think, proper that the alleged fabricator should be dealt with in his official capacity under the provisions specially enacted; although private individuals charged with the same acts or omissions, or acts in one sense the same, would be proceeded against in the ordinary way.

We are thus led to the construction of section 466. The first paragraph of it runs thus :—"A complaint of an offence committed by a public servant in his capacity as such public servant, of which any Judge or any public servant not removeable from his office without the sanction of the Government is accused as such Judge or public servant, shall not be entertained against such Judge or public servant, except with the sanction or under the direction of the Local Government, or of some official empowered by the Local Government, or of some Court or other authority to which such Judge or public servant is subordinate, and whose power so to sanction or direct such prosecution, the Local Government shall not think fit to limit or to reserve." This paragraph prohibits "the entertainment of a complaint" without sanction, and allows the sanction of the Government to be given by deputy. The second paragraph prohibits the "prosecution" of such Judge or public servant, unless with "the sanction of Government." This provision, it must be remembered, was not contained in the old Code,—a circumstance which militates, *primâ facie*, against the construction that the second paragraph merely expresses in a condensed form what the Legislature has set out in the first in greater detail.

One possible mode of harmonizing the two paragraphs, is to apply the first to complaints by persons injured or by those who, in the interest of justice, take upon themselves to impeach the conduct of public servants; and to apply the second to prosecutions initiated by Magistrates without any complaint. But a little consideration is, we think, sufficient to show the untenability of this construction. Magistrates may be expected to be careful to have strong grounds before they begin prosecutions against public servants, and it is

most unlikely that the Legislature would insist upon the sanction of the Government itself with regard to these prosecutions, and yet allow a vicarious sanction to be given when private individuals take the initiative.

Mr. Gill has argued that the use of the word "complaint" in the first, and that of the word "prosecuted" in the second paragraph point to different stages in the proceeding. This distinction, though ingenious, we are unable to adopt. We think that a prosecution commences when a complaint is made. The observations of Willes, J., in *Austin* v. *Dowling*(1) are pertinent to this point. He says: "The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a Magistrate, one makes a charge against another, whereupon the Magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment." And in the case, to us a very familiar one, of appeals under section 211 of the Indian Penal Code, we have always held that, when a complaint is made, the proceedings have been instituted and the prosecution has commenced, the reception of the complaint being a stage of the judicial proceedings towards conviction.

It appears to us, on a careful consideration of the whole subject, that paragraph one of section 466 is intended to apply, at least, chiefly to the cases of persons specially responsible to Government, such as accountants, for instance, who have failed in their duty; and that paragraph two is directed to persons professing to exercise certain authority, and with that pretext doing an act which is impeached by a subject on the ground of its being wholly unwarranted, or of an excess or impropriety of some kind. In respect of this paragraph the question for decision would generally be authority or no authority; under the first did the alleged acts or omissions occur?

(1) L. R. 5 C. P. 534. See p. 540.

1877.

IMPERATRIX v. LAKSHMAN SAKHA'RA'M, VA'MANHARI AND BA'LA JI KRISHNA'.

This being our opinion on the question of construing section 466, we turn to the question of the sufficiency or otherwise of the sanction recorded in this case. We are of opinion that the case of the *máhálkari* falls within para. 1 of this section, and that the sanction given by the District Magistrate is sufficient, this officer being indisputably the *máhálkari's* superior, and his power not being in any way limited by the Government. We must also over-rule the objection on the ground of vagueness. The direction to prosecute the *máhálkari* under section 466 or any other section which may seem applicable after further investigation, fully legalizes his trial.

Mr. Kashináth Telang, on behalf of his client Váman Hari, has raised another preliminary point. He contends that the subject-matter of the litigation before the Subordinate Judge, in which the alleged fabricated evidence was produced, involved more than Rs. 5,000; that an appeal would, consequently, lie direct to the High Court, which, therefore, is the Court to which the Court of the Subordinate Judge is subordinate for the purpose of giving sanction to Váman's trial. And he laid stress on the fact that the Subordinate Judge had specially declined to grant the sanction when applied for. This objection, also, we must decide in favour of the Crown. The subordination of the civil Courts is regulated by Act XIV. of 1869, and it, in distinct words, makes the Court of the Subordinate Judge subordinate to the Court of the District Judge: whether an appeal lies or does not lie in a certain class of cases to that Court, is not a final criterion to determine the subordination. The Code of Criminal Procedure gives no appeal from the decision of a First Class Magistrate to the Magistrate of the District, and yet this Court, in the case of *Imp.* v. *Padmanábh Pai*,[1] held that for the purposes of section 468 he was subordinate to him. The subordination spoken of in this section is the general subordination irrespective of special considerations of convenience or otherwise which induced the Legislature to provide a direct appeal to the High Court in certain matters of exceptional importance. The Civil Courts Act gives the District Judge power to suspend a Subordinate Judge, and it would be unreasonable to say that the Court of the latter is not subordinate to that of the former.

(1) *Supra*, p. 384.

1877.

IMPERATRIX v. LAKSHMAN SAKHA'RA'M, VA'MAN HARI AND BA'LA'JI KRISHNA'.

A similar objection raised by Mr. Ghanashám Nilkanth, on behalf of his client Báláji, must be disposed of in the same way.

[His Lordship then proceeded to discuss the case on the merits, and ordered the acquittal of all the three accused persons.]

Convictions reversed.

[APPELLATE CIVIL.]

Before Mr. Justice West and Mr. Justice Pinhey.

December 10.

BASA'WA' AND GURBASA'WA', HEIRS OF PARA'PA' (ORIGINAL DEFENDANTS), APPELLANTS *v.* KALKA'PA', SHARBA'NA' AND SIDOJI (ORIGINAL PLAINTIFFS, NOS. 1 AND 2, AND ORIGINAL DEFENDANT NO. 1), RESPONDENTS.*

Registration—Act VIII. of 1871, *Section* 49—*Receipt—Release.*

Held that the Court is bound in regular appeal to entertain an objection that a document is invalid for want of registration, even though no objection may have been raised to its admissibility in the Court below.

Held, also, that a document called a receipt, but intended to be used to prove the release of a claim secured by mortgage, required registration under section 49 of Act VIII. of 1871, inasmuch as it affected immoveable property.

THIS was an appeal from the decision of A. M. Cantem, Subordinate Judge, First Class, at Belgaum.

The plaintiffs sued to be put into possession of the village of Rámpur for twenty-five years under a mortgage executed to them by the first defendant Sidoji on the 6th of February 1873.

The second defendant Parápá, at the time of the institution of the suit, was in possession of the property under a decree obtained by him in a previous suit against Sidoji upon a mortgage executed by Sidoji to him in the name of one Basalingá. The plaintiffs alleged that this decree had been fraudulently and collusively obtained by Parápá, that Sidoji had, in the first instance, denied the claim made in that suit, and had produced a receipt for the payment of his debt, but had subsequently cancelled the power of attorney of the pleader through whom he had adduced the receipt, appointed another pleader, withdrawn his defence, and submitted to a decree. The plaintiffs in the present suit produced the receipt, and the Subordinate Judge, holding it to be proved, was of opinion that the decree, under which Parápá was in possession of

* Regular Appeal No. 22 of 1877.