

CRIMINAL REVISION.

Before Mr. Justice Batchelor and Mr. Justice Shah.

EMPEROR v. MANUEL PHILIP.*

Criminal Procedure Code (Act V of 1898), section 188—Offence committed on high seas—Native Indian subject of His Majesty—Jurisdiction of British Magistrate to try accused without sanction of Government.

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April 4.

The accused pulled up certain fishing stakes which the complainant had planted in the sea at a distance of five or six miles beyond the low water mark. They were convicted by a Magistrate for offences punishable under sections 426 and 143 of the Indian Penal Code (Act XLV of 1860). On appeal, it was contended that the Magistrate had no jurisdiction to try the case without sanction of the Local Government under section 188 of the Criminal Procedure Code (Act V of 1898), for the offences, if any, were committed on the high seas :—

Held, overruling the contention, that the Magistrate had jurisdiction to try the case, inasmuch as the first proviso to section 188 of the Criminal Procedure Code, 1898, was limited to territorial jurisdiction and had no bearing upon the question of jurisdiction to try an offence committed on the high seas.

THIS was an application in revision against convictions and sentences passed by G. R. Dabholkar, First Class Magistrate at Bandra, confirmed on appeal by J. D. Dikshit, Sessions Judge of Thana.

The facts were that the accused pulled up the fishing stakes which the complainant had planted in the high seas at a distance of about six miles from the shore. They were tried by the First Class Magistrate at Bandra for the offences of being members of an unlawful assembly and mischief. The defence set up was that there was a custom among the fishermen of Utan (the village where the parties lived) to assemble and perform a worship and then put their boats into the sea and race for the fishing places and one who planted his stakes first got a place for seven others near it and so the

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second and third up to the eighth, the place being only big enough for 64 stakes. It was alleged that the complainant had planted his stakes in violation of the above custom and hence they were removed.

The trying Magistrate convicted the accused of the offences charged and sentenced them each to undergo simple imprisonment for one day and to pay fines of varying amounts.

On appeal, a question was raised that the place of the offence being on the high seas, the Magistrate had no jurisdiction to try the accused in absence of sanction under section 188 of the Criminal Procedure Code. The learned Sessions Judge held that the Magistrate had jurisdiction to try the cases on the following grounds:—

I am of opinion that section 188, Criminal Procedure Code is not applicable as the offence is committed on high seas. The section seems only to apply where the offence is committed at a place in any territory without or beyond the limits of British India. A territory does not include waters either territorial or high seas. There may be a territory for which a Political Agent may or may not exist. If there is a Political Agent and the offence is committed in a territory for which a Political Agent is appointed then the sanction of that officer is required. If no Political Agent has been appointed then sanction of the Local Government is necessary. The sanction contemplates only a territorial division of the globe. It does not contemplate any waters that are not included in a territorial division of the Earth. So far as I am aware no Government appoints any Political Agents for the high seas. I am supported in this construction by the observations contained in the celebrated case of *Reg. v. Kastya Rama* (1871) 8 Bom. H. C. R. (Cr. Ca.) 63, 68, viz., "If, then, a State may claim exclusive jurisdiction on the sea to the extent of a marine league from low-water mark of the nearest land; as seems to me to be sufficiently established.....it is, I apprehend, impossible to avoid the necessary conclusion that *the territories*, strictly speaking, of a State include not only the compass of *land*, in the ordinary acceptation of the term, belonging to such State, but also that portion of the sea lying along and washing its coast, which is commonly called its maritime territory." This view was adopted on the theory that the general territorial jurisdiction of a state extends into the sea as far as a cannon shot will reach which is often calculated to be a marine league or three miles. After discussing the law as aforesaid the learned Judge

proceeded to say "although the alleged offence of mischief was committed *without the District of Thana*, the Magistrate, F. P. was empowered..... to take cognisance of it." This was so because the place of offence was within three miles from the low water mark of the land in the District of Thana. Their Lordships clearly distinguish the territorial division of land from the division of water. Having regard to this and the Statutes of Parliament from time to time enacted on the subject, I hold that section 188, Criminal Procedure Code, has no application to the present case.

The law point was not argued before me. I had only sent down the case for evidence to determine, if the place of the offence was within three miles from the low water mark, so that if it was so, the question of jurisdiction need not be decided. Mr. D'Souza, who argued the case before me, finally stated that the following cases were cited in the course of the argument before Mr. Mehta, viz., *Reg. v. Kastya Rama* (1871) 8 Bom. H. C. R. (Cr. C.) 63; *Queen-Empress v. Kathaperumal* (1889) I. L. R. 13 Mad. 423; *Queen-Empress v. Ram Sundar* (1896) I. L. R. 19 All. 109; *Queen-Empress v. Baku* (1899) I. L. R. 24 Bom. 287; *Sirdar v. Jethabhai* (1906) 8 Bom. I. R. 513; *Queen-Empress v. Daya Bhima* (1888) I. L. R. 13 Bom. 147 and *Queen-Empress v. Sheikh Abdool Rahiman* (1889) I. L. R. 14 Bom. 227.

The ruling in *Reg. v. Kastya Rama* (1871) 8 Bom. H. C. R. (Cr. C.) 63 only decided that the Courts have jurisdiction only if the offence is committed within three miles of the low water mark. It by implication shows that they have no jurisdiction if the offence is committed on high seas unless under Statutes 12 and 13 Vic., clause 96 read with Statutes 23 & 24 Vic., c. 88, section 1. It does not lay down that the Courts have no jurisdiction if the offence is committed on the high seas. The only controversy that was then raised was whether the punishment to be awarded was under the Penal Code or the law of England and the point not being necessary to the decision of the case was not decided. The discussion, however, seems to have afforded ample food for the consideration of the Legislature and the defect has since been removed, as will be shown hereafter.

The remaining cases cited relate to offence committed on land and not on high sea in foreign territories to which the provisions of section 188, Criminal Procedure Code clearly applied. The only case that has some semblance of authority bearing on the facts of the present case is the ruling in *Queen-Empress v. Sheikh Abdool Rahiman* (1889) I. L. R. 14 Bom. 227. In this case one of the offences charged was committed or alleged to have been committed within the territorial waters of Goa, in the Portuguese territory and the other on high sea. The accused was a Native Indian subject of His Majesty. As regards the former their Lordships observed that the Treaty

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Act IV of 1880 between England and Portugal as regards the Goa territory confers the right to try such cases in India. The Territorial Waters Jurisdiction Act, 1878 (Statutes 41 and 42 Vic., clause 73) not being applicable to the case, the jurisdiction of the British Courts was conferred by the Treaty Act. The offence, however, was not committed on land but on open sea. It was not consequently necessary to consider whether the provisions of section 188, Criminal Procedure Code, applied to the case. Their Lordships, however, have passingly observed: "and as there is no British Political Agent in Goa, no preliminary sanction was required under section 188 of the Code of Criminal Procedure" (p. 230). In fact, the counsel for the accused in the case had argued that section 188 had no application. It seems to me that the Territorial Waters Jurisdiction Act was not brought to their Lordships' notice, and as the offence was committed on sea and not on land it was not necessary to refer to section 188, Criminal Procedure Code. It seems to have been assumed on the authority of the previous rulings that the waters within three miles of the low water mark of any territory formed part of that territory. With the greatest deference I am of opinion that the remark about section 188, Criminal Procedure Code, was merely an *obiter dictum*.

The second offence in the case referred to above was committed on high sea beyond three miles from the low water mark. In disposing of that case their Lordships have refrained from referring to section 188 altogether. They have affirmed the jurisdiction of the Court, relying upon Statutes 30 & 31 Vic., c. 124, section 11 and 37 & 38 Vic., c. 27. In respect of this their Lordships do not repeat the remark that no certificate was required because there was no Political Agent appointed for Goa or for the high sea. Statutes 30 & 31 Vic., c. 124 has been repealed by the Merchant Shipping Act of 1894 (Statutes 57 & 58 Vic., c. 60), section 686 of which with certain additions reproduces section 11 of 30 & 31 Vic., c. 124. Now the ruling in *Queen-Empress v. Sheik Abdool Rahiman* (1889) I. L. R. 14 Bom. 227 is not applicable to the present case, because the offence was not committed on any British or foreign ship by a subject of His Majesty as was the case there. The ruling is only important in showing that section 188 is not applicable. In the present case the offence was committed on high sea.

Having regard to the Statutes of Parliament and the Acts of the Indian Legislature I make the following geographical divisions of this globe for the purpose of jurisdiction of the secular Courts.

- (1) Territorial divisions of land and foreign country governed by the Criminal Procedure Code and other enactments of the Indian Imperial Legislature.
- (2) Territorial waters governed by Statutes 41 & 42 Vic., c. 73.
- (3) High seas governed by Statutes 12 & 13 Vic., c. 96 [Admiralty Offences (Colonial) 23 & 24 Vic., c. 88 & 37 Vic., c. 27].

It would thus be seen that the offences on high seas are governed only by the Statutes of Parliament. Statutes 12 and 13 Vic., c. 96 confer on Colonial Courts jurisdiction to inquire into and try all offences of whatsoever nature which could have been tried by the Admiral. The words "any waters" therein are wide enough. Section 1 of Statutes 23 & 24 Vic., c. 88 makes Statutes 12 & 13 Vic., c. 96 applicable to India and Statutes 37 & 38 Vic., c. 27 makes the offence punishable according to Indian law. The serious difficulty felt when the case of *Kastya Rama* was decided is now solved by Statutes 37 & 38 Vic., c. 27 and the ruling in that case regarding offences committed within three miles from the shore has received statutory sanction by 41 & 42 Vic., c. 73. In the case of Native Indian subject of His Majesty no sanction or certificate of any kind is required from Government for an offence like the present mischief. I, therefore, hold that the Magistrate had jurisdiction and no sanction was required to acquire it. The case of *Queen-Empress v. Sheikh Abdool Rahiman* (1889) I. L. R. 14 Bom. 227 was decided when the Code of 1882 was in force. The only difference in section 188 of that Code and the present Code is that under the former Code when no Political Agent was appointed nobody's sanction was required while under the present Code where there is no Political Agent appointed, the sanction of the Local Government is necessary. But the present case not being governed by section 188 the amendment in the present Code does not in any way affect the case.

On the merits, the convictions and sentences were confirmed.

The accused applied to the High Court.

Gupte, with *Daphtary*, *Farreira* and *Divan*, for the accused:—Two questions arise on this application: First, whether the First Class Magistrate has jurisdiction to try the said offences without the sanction of the Local Government and secondly, whether the facts found are sufficient to prove that the accused committed any offence. The Magistrate has no jurisdiction to try the offences, as the place where the offences are alleged to have been committed is in the sea about six miles from the low water mark—and thus is without and beyond the limits of British India. And, therefore, the sanction of Local Government is requisite under section 188 of the Criminal Procedure Code to

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enable the Magistrate to try the said offences. The accused being Native Indian subjects of His Majesty, the provisions of the Indian Penal Code apply to them: see section 4, Indian Penal Code. By virtue of 32 & 33 Vic., c. 98, section 1 the Government of India have authority to make laws and regulations for Native Indian subjects without and beyond British India. But the requirements of section 188 must be complied with in order to confer jurisdiction on the Magistrate. The proviso to section 188 is equally applicable to offences committed at sea as well as on land. The words in the proviso are general and there is nothing in the section to limit the operation of the section to cases of offences committed in any territory or on land only. The section is meant to meet the cases of conflict of jurisdiction of different Powers over accused persons. Such a conflict may arise even when the offence is committed at sea for instance, if it is committed on board a foreign ship by a Native Indian subject of His Majesty. The last words, "and where there is no Political Agent, the sanction of the Local Government shall be required," were inserted in the Criminal Procedure Code of 1898 after the decision in *Queen-Empress v. Daya Bhima*⁽¹⁾ and *Queen-Empress v. Sheik Abdool Rahiman*⁽²⁾.

Secondly, no offences were committed because the accused did the acts complained of in the *bona fide* assertion of their rights. Custom should be recognised. In the sea beyond territorial waters the mode of fishing may be regulated by custom: see Halsbury's *Laws of England*, Vol. 14, pp. 573-74. The right to fish in the sea or certain portions of the sea may be regulated by local custom: see *Baban Mayacha v. Nagu Shrivucha*⁽³⁾. The Sessions Judge finds that the custom is

⁽¹⁾ (1888) 13 Bom. 147.

⁽²⁾ (1889) 14 Bom. 227.

⁽³⁾ (1876) 2 Bom. 19 at pp. 59-60.

reasonable, and the custom is admitted. It is found that the accused used no force. The accused committed the acts in the *bona fide* exercise of a right, which, in any event, it should be held that they reasonably supposed existed. Therefore it cannot be held that they had the knowledge or intention to cause wrongful loss or damage. Such knowledge or intention must be proved to satisfy the requirements of section 425 of the Indian Penal Code.

S. S. Patkar, Government Pleader, for the Crown, was not called upon.

BATCHELOR, J.:—This is an application in revision against a conviction recorded by the First Class Magistrate of Bandra and confirmed on appeal before the Sessions Judge of Thana. The applicants have been convicted of being members of an unlawful assembly under section 143 of the Indian Penal Code and of mischief under section 426 of the Penal Code in that they with common intent to cause wrongful loss to the complainant pulled up certain fishing stakes which he had put down in the sea at a distance of five or six miles beyond low water mark.

On the merits it is contended by Mr. Gupte that no offence is proved to have been committed inasmuch as the applicants were protected by the existence of a certain custom among these fishermen, which had been infringed by the complainant. It appears to me, however, that on this point the finding of the learned Sessions Judge puts the defence out of Court. For the finding is that this violent uprooting of the complainant's stakes had nothing to do with any supposed violation of custom by the complainant, but was intended to injure the complainant because the complainant's wife was reputed to be a witch. Moreover it is held, in regard to this custom, that the applicants had

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excommunicated the complainant and had excluded him from having any such chance as the custom would have afforded him of putting down his stakes in the locality in question. On these grounds there is in my judgment no substance in the defence based upon the alleged custom.

Then it was said that inasmuch as the offence was committed on the high seas, it was outside the jurisdiction of the Bandra Court. The learned counsel admitted that the only ground upon which this objection could be put was that under section 188 of the Criminal Procedure Code the prosecution was not entertainable by the Magistrate without the sanction of the Local Government. No such sanction was in fact obtained. It was expressly admitted that if this objection was overruled, no other objection to the jurisdiction could be made. Now it seems to me that section 188 has no concern with such facts as are here before us. Section 188 occurs in a Chapter of the Code which deals with the jurisdiction of the Courts. It provides for the liability of Native Indian subjects of His Majesty, who commit offences "at any place without or beyond the limits of British India" to be dealt with in respect of such an offence as if it had been committed at any place within British India at which the subject may be found. Now it is quite true that the words "any place without or beyond the limits of British India" may, as a mere matter of the meaning of the English words, be read to include a place situate on the high seas between Bombay and Aden. But whether that be the true meaning or not, seems to me to be immaterial, inasmuch as the objection which we are considering is based only on the first proviso to the section, and that proviso is, I think, limited to territorial jurisdiction, and has no bearing upon the question of jurisdiction to try an offence committed on

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the high seas. For the proviso enacts that no charge as to any offence shall be inquired into in British India unless the Political Agent, if there is one "for the territory in which the offence is alleged to have been committed," certifies that the charge ought to be inquired into in British India; that is to say, the offence which the proviso contemplates is, I think, an offence contemplated to have been committed within some territory. This word, territory, in my view excludes the notion of the high seas and it occurs in the earlier paragraphs of the section where it is confined to the territories of a Native Prince or Chief in India. Mr. Gupte contends that the words as to territory are not repeated in the latter limb of this proviso which was added by the Code of 1898 and which consists of the words "and where there is no Political Agent, the sanction of the Local Government shall be required." But the omission of the words as to territory from this limb of the proviso does not in my opinion alter the case. The words "where there is no Political Agent" would mean in their context where there is no Political Agent for the territory in which the offence is alleged to have been committed, so that in all cases the contemplation of the Legislature is that the offences shall have been committed in some territory or other. There is no reason whatever to suppose that the words added in the Code of 1898 were intended to limit the meaning of the words as to territory already occurring in the proviso. Indeed there is good reason to think that the addition of the words in 1898 was intended to remove the difficulty which had previously existed in cases where offences had been committed, for instance, in such places as Goa, where there is no Political Agent: see *Queen-Empress v. Daya Bhima*⁽¹⁾.

⁽¹⁾ (1888) 13 Bom. 147.

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On these grounds I am of opinion that the objection to jurisdiction fails. The rule, therefore, must be discharged, the convictions and sentences being confirmed.

SHAH, J.:—I agree. I desire to add that I accept the interpretation put by my learned brother upon the first proviso to section 188 of the Code of Criminal Procedure, upon which Mr. Gupte has relied. I am clear that the proviso refers only to offences which are said to have been committed in any territory, and not to offences committed on the high seas. In coming to this conclusion I assume that the word 'place' in the first paragraph of the section includes high seas within its ambit. The construction of the proviso is in no way dependent upon the meaning of the word 'place' in the beginning of the section. I wish to make it clear that in holding that the proviso does not apply to offences said to have been committed on the high seas, I do not suggest that the first paragraph of the section would not apply to such offences.

Rule discharged.

R. R.
