CRIMINAL REFERENCE.

Before Mr. Justice Heaton and Mr. Justice Shah.

EMPEROR *v.* BHIMAJI VENKAJI NADGIR.*

1917. September 11.

Criminal Procedure Code (Act V of 1898), sections 197, 210 and 215—Committal proceedings—Evidence taken in absence of sanction to prosecute—Sanction produced before Magistrate on the day he passed an order committing the case—Committal order passed in view of the wishes of the parties and a Government Resolution—Order of committal not valid.

The accused, a Vatandar Patil, was charged with the offences of harbouring an offender and taking a bribe from him. Enquiry into the case was instituted and the whole of the evidence was taken in absence of a sanction to prosecute. The Magistrate committed the case to the Court of Session, relying on a Government Resolution and yielding to the wishes of the parties. The sanction was produced before the Magistrate on the day he committed the case. The Sessions Judge referred the case to the High Court as he was of opinion that the commitment was illegal :—

Held, quashing the order of commitment, that owing to the absence of sanction the whole of the proceedings before the Magistrate were without jurisdiction and totally invalid.

Held, further, that the Magistrate was not competent to commit the case to the Court of Session solely by the wish of the parties and the terms of a Government Resolution.

THIS was a reference made by V. M. Ferrers, Additional Sessions Judge of Dharwar.

The accused was the Vatandar Patil of Hubli. He was charged with the offences of harbouring two offenders, and of accepting a bribe from one of them.

The enquiry before the Magistrate was taken up in absence of a sanction under section 197 of the Criminal Procedure Code. The whole of the evidence was led before the Magistrate, who eventually committed the case to the Court of Session. The sanction to prosecute was produced before the Magistrate on the day he

* Criminal Reference No. 42 of 1917.

passed the order of commitment. The Magistrate committed the case on the following grounds:—

"The case is not exclusively triable by the Sessions Court but the accused is a Vatandar and relying on Government Resolution No. 8350, dated 15th December 1915, R. D., both the parties pray for the committal of this case and I have no hesitation in doing so."

The Additional Sessions Judge being of opinion that the commitment thus made was against law, referred the case to the High Court for quashing the conviction, observing as follows:—

The Magistrate's order is couched in the following terms:—

"This case is not exclusively triable by the Sessions Court; but the accused is a Vatandar; and relying upon Government Resolution No. 8350, dated 16th December 1915, Revenue Department, both the parties pray for the committal of this case, and I have no hesitation in doing so (sic.).

The first point of law which is suggested by this order is one of no little general importance.

It is provided by section 210, Criminal Procedure Code, that when upon such evidence being taken and such examination (if any) being made, the Magistrate is satisfied that there are sufficient grounds for committing the accused for trial he shall proceed as directed.

Now in the commitment order to which I am now soliciting their Lordships' attention the learned Magistrate has made no reference whatever to the only materials which the Code under which he was proceeding has directed him to consider. He has felt, it appears, 'no hesitation' in deciding an important question: but for his decision he gives no reason except a request made by the parties and a Resolution issued by the Revenue Department of His Majesty's

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Government. This Resolution has not been communicated to this Court, but I imagine that it cannot have been intended to fetter the free discretion of any judicial functionary in the exercise of his criminal jurisdiction.

Now I am by no means of opinion that Mr. Randive was necessarily wrong in committing this particular case. As to that I can have no opinion for I have not yet tried the case. But I am clearly of opinion that though Mr. Randive's conclusion may be right, his method of arriving at it is wrong. A Magistrate has duties laid upon him from which he cannot be dispensed by any order issued for the guidance of subordinate officers of the Revenue Department. To act upon such orders is certainly the duty of officers of that Department; and the Collector may with great propriety direct (as in this case he has directed) that 'the Court should be requested to commit the case to the Court of Sessions if the accused is not discharged.' The Collector may very well make this request but the Magistrate surely misapprehends his duty if he has 'no hesitation' in closing his eyes to the Code of Criminal Procedure and following blindfold a request made by those over whom he is exercising magisterial authority.

This particular case may be of no particular importance, but a wide prospect can be surveyed through a very insignificant aperture. Magistrates are continually being requested to commit cases to this Court, and advocates have wit enough to present these requests in a form insidiously flattering to the Court of Session. There are various private reasons why a Court in permanent session at a central station is preferred to the itinerant Court of an officer with other duties; but there are other public reasons why it is extremely undesirable that any case should be committed to the

Sessions which can be adequately dealt with by a Magistrate. By such committals Government is put to unnecessary expense in road and conduct money, assessors are put to needless trouble and the lapse of time which often occurs before a Sessions trial introduces special risks of failure of justice. And while there are in every case these general reasons why a Magistrate should hesitate before committing to the Sessions a case which he can try himself, there is in the present case a special cause of which the learned Magistrate was not oblivious, although the remembrance caused him 'no hesitation.'

By section 60 of Bombay Act III of 1874, a conviction by a Court of Session entails upon a representative Watandar consequences which would not follow from a conviction for the same offence in the Court of a Magistrate. A decision to commit a case to the Sessions is a decision of much consequence to the accused: and it is a decision which (in my opinion) a Magistrate should not take without more methodical animadversion than is revealed by the brief order now under reference. By section 197, the Local Government is empowered to 'specify the Court before which the trial is to be held.' When the Local Government leaves this power unused, and prefers to instruct a pleader 'to move the Magisterial Court concerned' the inference is that the Local Government desires to evoke a considered opinion from the Magisterial Court: but in this case no opinion of this kind appears to have been elicited. The Magistrate has merely given effect to what he supposes to be the policy of Government. But that policy he has apparently misapprehended. Had the sanctioning authority definitely decided that this case should be tried by the Court of Session, then the Court of Session would have been specified in the sanction. The policy of Government appears, on the

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truer construction, to be, that the attention of the Magistrate should be invited to the consequences of a committal, and that he should then, with more than ordinary caution, consider whether to commit or not.

The first point of law, which, with due submission I propose for the consideration of their Lordships, is this:—

'That the learned Magistrate, in deciding to commit to this Court this case, which is not exclusively triable by this Court, has abdicated the discretion which the law intended him to exercise: that he has neglected to advert to those materials upon which alone he is authorised to found his conclusions: and that he has allowed his course to be deflected by considerations of an extra-judicial and technically irrelevant kind.'"

The Reference was heard.

A. G. Desai, for the accused.—The proceedings before the Magistrate are bad, as there is no "previous sanction" in this case, as required by section 197 of the Criminal Procedure Code. The whole of the proceedings before the Magistrate practically came to an end in absence of the sanction. It was produced only on the day the Magistrate passed the order of commitment: see *Reg.* v. *Rama bin Gopala*[1] and *Queen-Empress* v. *A. Morton & Moorteza Ali*.[2]

S. S. Patkar, Government pleader, for the Crown.—This point has been raised here for the first time. It was not taken in the Sessions Court or before the Magistrate. The accused raised no objection in either of the lower Courts as to the late production of the sanction; he cannot be allowed, at this stage, to question the validity of the commitment: see section 532 of the Criminal Procedure Code.

[1](1864) 1 Bom. H. C. R. 107.

[2] (1884) 9 Bom. 288 at pp. 295, 299.

Desai, in reply.

HEATON, J.:—We understand that the accused person in this case who is charged with harbouring an offender and receiving a bribe from him and who has been committed to the Court of Session at Dharwar, is a Vatandar Patil and consequently that he could not be prosecuted except with the sanction provided by section 197 of the Criminal Procedure Code. It is on this understanding that the judgment of this Court is based.

We start, therefore, with this, that a previous sanction was under section 197 essential to confer jurisdiction on the Magistrate to take cognizance of the offence. Now as a matter of fact he took cognizance of the offence and proceeded some way with his enquiry before any sanction was signed by the sanctioning officer. For he began to take evidence in the case on the 5th of April and the sanction was not signed until the 12th. So obviously there was no previous sanction. The defect becomes still more glaring when we learn, as happens to be true in this case, that the sanction itself was not placed on the record of the case until the 2nd of May, which was the very day on which the order of commitment to the Court of Session was made. Nor do the papers in the case give any justification for supposing that the sanction actually came into the hands of the Magistrate before the 2nd of May. So that although the law requires a previous sanction, the Magistrate had taken cognizance of the case and proceeded with it without that sanction and he had, so far as we can gather, proceeded to record the whole of the evidence without being aware that any such sanction existed. It is unfortunate but it seems to us that this being so, the whole of these proceedings are without jurisdiction and must be regarded as totally invalid.

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It follows that the commitment to the Court of Session is invalid and that it must be quashed, and we make that order making it clear that the whole of the proceedings must start again from the very beginning if further proceedings are to be taken against this present accused.

We have not, it will be observed, dealt with the particular points on which the Additional Sessions Judge referred this case to us. They are points of interest and his statement of them is clear and forcible. It is not essential no doubt that we should express any opinion on them but one of these points is of such importance and arises frequently enough to make it desirable to say something. That point is based on this: that the Magistrate committed this case to the Court of Session for reasons which appear in his own words as follows:—"The case is not exclusively triable by the Sessions Court, but the accused is a Vatandar and relying on G. R. No. 8350, dated the 15th of December 1915, Revenue Department, both the parties pray for the committal of this case and I have no hesitation in doing so." It appears to me that when a Magistrate comes to consider whether he shall or shall not commit a case, he has to consider the gravity of the offence; the punishment with which in his opinion it ought to be met and the section under which he charges the accused person. He may no doubt properly consider any special difficulties in the case or that it is a matter of some peculiar public importance, and no doubt other matters also might enter into his consideration, such as the wish of the parties. But a Magistrate must not determine this important matter whether he is to commit the case or to try it himself solely by the wish of the parties and the terms of a Government Resolution. No resolution whatever that the Executive Government has issued can properly control or determine the

discretion of a Magistrate in such a matter; for the Government have no authority whatever to interfere with this discretion which is imposed on the Magistrate by the law and must be exercised by him.

SHAH, J.:—I agree that the order of commitment should be set aside. It is not denied in this case that a sanction under section 197, Criminal Procedure Code, is necessary. The sanction was granted by the Collector on the 12th April, and it was produced before the Committing Magistrate on the 2nd May. The proceedings had already commenced before the 12th April, and the order of commitment was made on the 2nd May. Therefore the proceedings before the Committing Magistrate including the order of commitment must be set aside. This will be without any prejudice to any proceedings that may be properly taken hereafter against the accused.

In this view of the case it is not necessary to consider the point raised by the Additional Sessions Judge as to the form of the sanction.

As regards the other ground upon which this order of commitment is liable to be set aside, I desire to add that it was the duty of the Magistrate to determine under the Code of Criminal Procedure on entirely judicial considerations whether the accused should be committed to a Court of Session or not. In the present case he has taken into consideration a Government Resolution and expressed no opinion of his own in committing the case to the Court of Session. It is not necessary for me to state in detail what he may properly consider in committing the accused to a Court of Session. That is a question, with which the Committing Magistrate has to deal on the evidence in the case. It is necessary to point out that it is not open to him to take the Government Resolution into consideration in dealing with the question. This case affords an

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illustration of the manner in which such a Resolution is apt to be used. It is also necessary to point out that section 60 of the Bombay Hereditary Offices Act (III of 1874) to which the Government Resolution relates, cannot be used as a ground for committing any case to a Court of Session. That section gives certain powers to the Government to deal with the Vatan when a representative Vatandar or any deputy or substitute appointed by him is convicted by a Criminal Court not inferior to a Court of Session of any offence referred to in the section. That would indicate that when a person of the above description is properly committed to, and convicted by, a Court of Session the Government may exercise the powers conferred by that section. The question whether a particular case should be committed to a Court of Session should be decided by the Committing Magistrate without any reference to the section, or to the Government Resolution relating to the section just as the question of conviction must be decided without any reference to it.

The powers of Government under section 197, cl. (2) of the Code of Criminal Procedure stand altogether on a different footing and my remarks have no application to any directions which may be properly issued under that clause. It is not suggested that the Government have specified the Court before which a trial is to be held in this case under section 197 (2) of the Criminal Procedure Code.

Answer accordingly.

R. R.