

Judgment of the Lords of the Judicial Committee of the Privy Council on the consolidated Appeals of Loftus Otway Clarke v. (1) Brojendra Kishore Roy Chowdhury, and (2) Srimati Biswaswari Debi Chowdhurani, from the High Court of Judicature at Fort William in Bengal; delivered the 18th June 1912.

PRESENT AT THE HEARING:

LORD MACNAGHTEN

LORD ATKINSON.

LORD SHAW.

SIR JOHN EDGE.

Mr. AMEER ALI.

[DELIVERED BY LORD MACNAGHTEN.]

The pecuniary amount involved in this Appeal is comparatively trifling. But the case is one of grave importance, and their Lordships are compelled to add that, in their opinion, there has been a serious miscarriage of justice in both the Courts which dealt with the matter in India.

In April 1907, Mr. Clarke, the Appellant, was the District Magistrate of Mymensingh, an extensive district in the Province of Bengal. The principal suit, the result of which governs this consolidated Appeal, was brought by the first Respondent, as Plaintiff, claiming damages for trespass on the allegation that Mr. Clarke had illegally and wantonly searched his cutcherry, and that Mr. Clarke had not only acted illegally, but that he had acted out of personal malice and ill-will. The suit originally brought in the Court of the third Subordinate Judge of Mymensingh was transferred, at the Plaintiff's instance to the

High Court in its Extraordinary Original Civil Jurisdiction. It was tried by Fletcher, J. He found in favour of the Plaintiff and gave a decree for Rs. 500, but without costs. Costs were not awarded to the successful Plaintiff on account of the charge of personal misconduct which his Lordship held to be unfounded and grossly improper. Mr. Clarke appealed to the High Court in its appellate jurisdiction. The Plaintiff filed cross-objections reiterating his charge of personal misconduct. The Court of Appeal, consisting of the late Chief Justice and Harington, J. (Brett, J., dissenting) dismissed the appeal but without costs.

The result is that a magistrate placed in a very difficult position and called upon to act on a sudden emergency has been adjudged guilty of trespass and subjected to a fine though he seems to have acted properly, with courage and good sense, and strictly in accordance with the powers committed to him.

The facts of the case are not really in dispute.

Jamalpur is a sub-division of Mymensingh. The zemindars in that part of the country are Hindus, most of them, apparently, absentees living in Calcutta. The bulk of the population is Mahomedan. For some time before the occurrence which led to this suit, owing, it was said, to the measure known as the Partition of Bengal, there had been a good deal of disaffection and excitement in the district, and the relations between the Hindus and the Mahomedans were dangerously strained.

On the 21st of April 1907 there was a large fair or Mela held at Jamalpur. Some Hindus, apparently at the instance of the servants and agents of the Plaintiff and his co-sharers known collectively as the Gouruckpur zemindars, tried to prevent the sale of bideshi or foreign goods. The Mahomedans resented this attempt. There were serious disturbances out of which there

sprang up a bitter feeling between the Hindus and the Mahomedans. On the evening of the 27th of April some Hindus dressed or supposed to be dressed in Mahomedan clothes were observed wandering about the town. They were followed by a band of Mahomedans. The Hindus turned on the men following them and fired three or four revolver shots and a Mahomedan was wounded. An uproar followed. Mr. Barniville the Sub-divisional Magistrate of Jamalpur, and Mr. Luffman, the District Superintendent of Police, who were then in the Dak bungalow, hastened to the scene of disturbance. They met some Mahomedans carrying away the wounded man, and they received information that the persons who had committed this offence had fled in the direction of the cutcherries of the Gouruckpur zemindars. These cutcherries appear to be close together in an open piece of ground. Hard by is a temple of Thakurain Doya Moyee. An excited crowd of Mahomedans was collected there apparently bent on attacking the cutcherries. The Sub-divisional Magistrate and the District Superintendent of Police found 40 or 50 men armed with lathies. After they had disarmed them they were told that armed men were concealed in the temple. They went there. They found the doors locked and were refused admittance. The Sub-divisional Magistrate ordered the persons inside to open the doors assuring them of protection. In response several shots were fired from inside, and a man was wounded slightly. The two officers then withdrew after dispersing the Mahomedan crowd outside.

The Sub-divisional Magistrate wired at once to the Commissioner of the Division and the District Superintendent of Police sent a telegram to Mr. Clarke to the following effect :

“ Serious riot just averted, come at once.”

Mr. Clarke received this telegram at 2 a.m. on the morning of the 28th of April. He started for Jamalpur by the first train, and arrived there at 10 a.m. On his arrival he found the following telegram from the Commissioner headed "Urgent" :--

"Barniville has wired for available armed police by special train, saying serious disturbance impending. What do you know? Can you send Gurkhas from Mymensingh to be replaced if required by men from here.—Dacca."

Mr. Clarke, who had spent most of his time after the Mela disturbance between Jamalpur and Mymensingh, and knew the state of feeling in the district, took counsel with the Superintendent of Police and the Sub-divisional Magistrate. From what he heard and from what he knew himself he came to the conclusion that it was his duty to search the cutcherries. And accordingly he did so, accompanied by the Sub-divisional Magistrate, the Police officer, and a force of police. The Plaintiff's cutcherry was found locked. It seems that the jamadar in charge of the building had locked it up, and left at 1 p.m. There was no one on the ground to open the doors. So the doors were forced open. Boxes in the cutcherry were also opened and their contents taken out. The actual search within the building was made by the police, but Mr. Clarke had charge and direction of the whole proceeding. He remained outside.

There was nothing of an incriminating nature found in the cutcherries.

The question and the only question on this Appeal is whether Mr. Clarke was authorised by law to make the search. That depends on the provisions of the Code of Criminal Procedure and on nothing else.

It cannot be denied that a serious offence had been committed against the public tranquillity and that under the ~~Code of Criminal Procedure~~

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(which defines offences against the public tranquillity and is summarised in Chapter viii. of Schedule II. of the Code) every member of the unlawful assembly from which the shots proceeded was equally guilty of the offence. Nor can it be disputed that it was the duty of the District Magistrate to enquire into that offence.

Now Section 177 of the Code provides that every offence shall ordinarily be enquired into, and tried by a Court within the local limits of whose jurisdiction it was committed. Mr. Clarke, by virtue of his superior rank, superseded the Sub-divisional Magistrate of Jamalpur, and properly assumed jurisdiction there.

An enquiry under the Code is a proceeding distinct from a trial. There is no definition of the word "enquiry" in the interpretation clause, Section 4. But there is this explanation of the term as used in the Code :—

"(k.) Enquiry includes every enquiry other than a trial conducted under this Code by a Magistrate or Court."

Section 36 is in the following terms :—

"All District Magistrates, Sub-divisional Magistrates, and Magistrates of the first, second, and third classes have the powers hereinafter respectively conferred upon them and specified in the third schedule. Such powers are called their 'ordinary powers.'"

Schedule III., referring back to Section 36 defines the "ordinary powers" of Provincial Magistrates beginning with Magistrates of the third class. Every Magistrate of a higher class is invested with all the "ordinary powers" of a Magistrate of the class immediately below that to which he belongs, with further powers appertaining to Magistrates of his own grade.

Among the "ordinary powers" of a Magistrate of the third class specified in Schedule III. is :—

"(8.) Power to issue search warrants. Section 96."

In Section 96 the following provision occurs :—

"Where the Court considers that the purpose of any enquiry, trial, or other proceeding under this Code will be

“ served by a general search or inspection, it may issue a search warrant.”

Then Section 105 provides as follows :—

“ Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search warrant.”

It seems clear from these sections and Schedule III. that Mr. Clarke was authorised by the Code to direct a search of the Plaintiffs' cutcherry in his presence if he considered it advisable to do so.

Now the learned Trial Judge disposes of Mr. Clarke's defence in rather a summary manner. Beyond referring to Section 105 he does not consider or refer to any one of the sections on which the defence is based, nor does he deal with Schedule III. at all. All that the learned Judge says on this part of the case is this :—

“ It is obvious in the present case the Defendant was not competent to issue a search warrant under the provisions of the Criminal Procedure Code. The Defendant was not acting as a Court within the meaning of Section 94 of the Criminal Procedure Code, as there was no proceeding pending before him.”

On Appeal the late C.J. and Harington, J., took the same view and dealt with the matter much in the same way. After citing Section 105 the learned C.J. proceeds as follows :—

“ The Magistrate can only act under this section where he is competent to issue a search warrant. That takes us to Section 96. That section applies to the issue of a search warrant by the Court. Here the Defendant was not acting as a Court, and all that Section 105 enacts is that instead of the Court issuing a search warrant the Magistrate may direct a search to be made in his presence. It is reasonably obvious why this power is given to a Magistrate, but the section does not assist the present Defendant.

The opinion of Harington, J., is to the same effect. He says :—

“ In my opinion Section 96 only authorises the Magistrate to issue a search warrant when sitting as a Court, *i.e.*, when some proceeding under the Code has been

“initiated before him. And this view is strengthened by
 “the form of the search warrant given in Schedule V, which
 “recites that information has been laid or complaint has
 “been made.

If his Lordship had read to the end of the form in Schedule V, he would have seen that it disposes of his theory altogether. The form contemplates the issue of a search warrant before any proceedings of any kind are initiated and in view of an “enquiry about to be made.”

It would seem that the Trial Judge and both the learned Judges who formed the majority of the Court of Appeal were misled by the use of the word “Court” in Section 96. For the sake of brevity the Code uses the terms “Court” and “Magistrate” generally if not always as convertible terms. Section 6 headed “Classes of Criminal Courts” enacts that:—

“Besides the High Courts and the Courts constituted
 “under any law under this Code for the time being in force
 “there shall be five classes of Criminal Courts in British
 “India, namely:—

“I. Courts of Session.

“II. Presidency Magistrates.

“III. Magistrates of the First Class.

“IV. Magistrates of the Second Class.”

“V. Magistrates of the Third Class.”

Section 36 taken in conjunction with Schedule III, places the matter beyond all doubt. The ordinary powers of all Provincial Magistrates are declared to be those “hereinafter conferred upon them and specified in the third schedule.” That means: conferred upon them by the Act and specified in the third schedule to the Act. As appears by the schedule the power to issue search warrants is specified among the “ordinary powers” of all Provincial Magistrates, but the only Section conferring the power is Section 96 to which the schedule itself refers.

It seems to their Lordships therefore clear that what Mr. Clarke did was warranted by the Code. If that be so there is an end of the case.

Two other points were discussed by the Trial Judge and the learned Judges of Appeal at much greater length than the ground on which the real defence to the action was based. It seems that the Defendant or his advisers not content with relying on the Code of Criminal Procedure, unwisely perhaps prayed in aid Section 25 of the Indian Arms Act, 1878, and also Act No. XVIII. of 1850, entitled "an Act for the protection of Judicial Officers." The one seems inapplicable ; the other in the present case wholly unnecessary. Their Lordships are disposed to agree with the majority of the Court of Appeal that Mr. Clarke not having complied with the preliminary condition prescribed by the Arms Act cannot defend his action under that Statute. On the other hand they have no doubt that Mr. Clarke in directing a general search of the Plaintiff's cutcherry in view of an enquiry under the Code of Criminal Procedure was acting in the discharge of his judicial functions, and they think that if it had been necessary he might have appealed for protection to the Act No. XVIII. of 1850.

Their Lordships think that there was no foundation for the suit. Mr. Clarke's action under the circumstances was quite justified. The charge of personal misconduct advanced and reiterated without any shadow of proof deserves the severest reprobation.

Their Lordships will therefore humbly advise His Majesty that this Appeal ought to be allowed, the Order of the Court of Appeal discharged, and the suit dismissed with costs in both Courts.

The Respondent must pay the costs of the Appeal.

In the Privy Council.

LOFTUS OTWAY CLARKE

v.

(1) BROJENDRA KISHORE ROY CHOWD-
HURY; AND (2) SRIMATI BISWES-
WARI DEBI CHOWDHURANI.

DELIVERED BY LORD MACNAGHTEN.

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