

1948

Present : Basnayake J.

JUAN APPU *et al.*, Appellants, and FERNANDO (Inspector of Police, Maradana), Respondent.

S. C. 1,551-1,552—M. C. Colombo, 27,603.

Penal Code—Giving false information—When prosecution should be instituted—Section 180.

A prosecution under section 180 of the Penal Code should not be instituted in respect of information given under sections 121 or 122 of the Criminal Procedure Code except after the informant has been given an opportunity of establishing his charge. Even then no prosecution should be instituted unless there is unmistakable evidence that the information is false and that it was given with the requisite intention or knowledge.

A P P E A L from a judgment of the Magistrate, Colombo.

S. W. Jayasuriya, with *K. C. de Silva*, for the 1st accused, appellant.

G. E. Chitty, for the 2nd accused, appellant.

R. A. Kannangara, *Crown Counsel*, for the Attorney-General.

Cur. adv. vult.

June 8, 1948. BASNAYAKE J.—

The first appellant, one Kathiri Aratchige Juan Appu, has been convicted of committing an offence punishable under section 180 of the Penal Code and sentenced to undergo a term of three months' simple imprisonment and in addition he has been ordered to pay a fine of one hundred rupees. In default of payment he is to undergo a further term of three months' simple imprisonment. The second appellant, one H. W. de Silva, has been convicted of the offence of aiding and abetting the first, and a like sentence has been imposed on him.

The first appellant is a fitter who lives in room No. 14 in a row of tenements at Paranawadiya Passage with his wife and five children. The room is about 12 ft. × 12 ft. ; it has no verandah either in front or behind ;

and has only one door. The second appellant describes himself as a merchant of Negombo. According to the report under section 148 (1) (b) of the Criminal Procedure Code made by Chief Inspector J. H. A. Fernando, he is described as of No. 55, Maligakanda, Maradana.

This prosecution is the sequel to a complaint lodged by the first appellant at the Maradana Police Station on March 13, 1947, at about 7 P.M. It was recorded by police constable Wanasinghe (No. 3064). The material portion of it reads :

“ On March 10, 1947, at about 10.30 A.M. when I was at home a gentleman known to me as Lanka Mahathmaya residing at Colpetty address unknown came to my house with a woman named Alice and requested me to allow her to stay in my house for a few days as she has to go to General Hospital to see a patient daily. I consented to his request and she was putting up with me. Last evening at about 5 P.M. when I returned after work I found her not at home. My wife and son had not returned after work. I questioned my children and they told me that she went away and did not return thereafter. I waited for her till about 7.30 P.M. but she did not turn up. My wife and son returned after work at about 5.30 P.M. When questioned they denied any knowledge. I felt suspicious as she did not turn up and examined my belongings to find out whether anything has been removed. When I examined my trunk box, I found the following missing from it :—Two pieces of rose coloured voile cloth (a saree cut into two) each measuring about 2½ yards valued about Rs. 15 ; an ash coloured piece of cloth with white lines 3 yards cut into two and stitched together valued Rs. 12 ; one used tin of Johnson Baby Powder valued 75 cents. The powder tin has a dent mark at the centre on one edge. A white jacket with laces attached to the hands and neck valued Rs. 3 and one rose coloured celluloid comb, about 7 inches long valued 50 cents. I can identify all the articles if seen. I suspect them to have been stolen by Alice Nona. When inquired Alice Nona informed me that she is from Gampaha. She did not give me her address. I do not know as to where she has gone to. I went to Colpetty in search of the gentleman to inform of her absence but could not get at him. I searched for her all over but received no information of her whereabouts. Failing all attempts I came to inform Police.”

At the time the complaint was recorded the second appellant was present and in fact he came along with the first appellant and it was he who informed Wanasinghe that the first appellant had a complaint to make. After recording the complaint Wanasinghe proceeded to investigate it accompanied by both appellants. He went to the house of the first appellant, examined his trunk and recorded the statement of his wife. No further action appears to have been taken till March 19, 1947, when both appellants came to the Police Station and met Wanasinghe. The first appellant made a further statement which he recorded. In consequence of this statement Wanasinghe went with them to a house in Sea Avenue, Kollupitiya, to look for the woman Alice, but did not find her there. In consequence of a statement made by one Laura Rajasuriya they went to the house of one W. D. A. Fernando at Kollupitiya where they found

her. Alice's box was examined in the presence of the first appellant who claimed a white jacket, a light orange cloth, and a green comb found in it as his property. Alice was taken into custody and she was detained at the Maradana Police Station from 5.40 P.M. till 10.20 P.M. that night when she was released on the orders of Chief Inspector Fernando. This order was made after W. D. A. Fernando, Lanka Mahatmaya, and one H. K. de Zilwa, a brother-in-law of the second appellant, had seen Chief Inspector Fernando and asked for Alice's release.

No proceedings were instituted against Alice on the charge of theft. But on April 22, 1947, Chief Inspector J. H. A. Fernando sent to the Magistrate's Court of Colombo a report under section 148 (1) (b) of the Criminal Procedure Code charging the appellants with the offences of which they have been convicted. It transpires from the evidence of Police Constable Wanasinghe that a report was made to the Magistrate of Colombo in respect of the complaint against Alice and that the record of this complaint bears M. C. Colombo, No. 26,340. Neither that report nor the record has been produced in these proceedings.

In these circumstances the prosecution against the appellants should not have been launched until the learned Magistrate had made his order in M. C. Colombo, Case No. 26,340, especially as the appellants had expressed their desire that the charge against Alice should be proceeded with.

A prosecution under section 180 of the Penal Code should not be instituted in respect of information given under section 121 or section 122 of the Criminal Procedure Code except after the informant has been afforded an opportunity of establishing his charge and even then no prosecution should be instituted unless there is unmistakable evidence that the information was false and that it was given with the intention or knowledge requisite for an offence under section 180 of the Penal Code. I regret I am unable to say that this case satisfies the standard I have laid down. The case rests on the evidence of W. D. A. Fernando, Lanka Mahatmaya, Alice, and H. K. de Zilwa, none of whom can be said to be disinterested witnesses. The defence has assailed not only their impartiality but also the impartiality of Chief Inspector Fernando at whose instance Alice was released and this prosecution was instituted. The evidence indicates that the allegations of the defence are not entirely unfounded. The appellants had indicated to the police officers concerned in this case in no unmistakable terms that they had no confidence in them. The first appellant had sent a petition to the Inspector-General of Police in connexion with this very matter while the second appellant had told Police Sergeant Fernando that he "would teach a lesson to the Police if the woman was not charged". In these circumstances Chief Inspector Fernando should have submitted this case to the Attorney-General for his sanction and not taken upon himself the decision to prosecute the appellants, even though the Magistrate's Court is not prohibited from taking cognizance of the offence on his complaint as an officer to whom constable Wanasinghe is subordinate.

Although the provisions of the Indian Criminal Procedure Code relating to sanction of prosecutions are not identical with the provisions

of our Code, I see nothing in our law which is repugnant to the rule stated in the case of *The Government v. Karimdad*¹. In that case the Court stated :

“ It is manifest justice that a man ought not to be tried for making a false complaint until he has had an opportunity of proving the truth of the complaint made by him ; and such opportunity should be afforded him, if he desire to take advantage of it, not before the police, but before the Magistrate.”

This principle has been followed in a large number of Indian cases. In the case of *Gyan Chunder Roy and others v. Protab Chunder Dass*², Prinsep J. lays down the proposition thus :

“ Before sanction to prosecute can properly be given, it is necessary that the proceedings on the original complaint should have terminated in a regular manner.”

This principle was adopted by Grenier A.J. in the case of *Kindersley v. David*³. The subsequent cases of *Assistant Superintendent of Police, Matara v. Gunsekere*⁴, *The King v. W. R. M. Dissanaikē*⁵, and *Goonetilleke v. Elisa et al.*⁶ wherein the rule is held not to extend to those cases do not in my view in any way affect its application to a case such as the one under consideration.

For the reasons I have stated above the convictions of the appellants are set aside. There is a further consideration to which learned Crown Counsel has drawn my attention, and that is, that the charge against the appellants should, if at all, have been laid under section 208 of the Penal Code and not under section 180. As the false complaint is in respect of an offence punishable under section 369 of the Penal Code which is punishable with a maximum of seven years' imprisonment, the learned Magistrate had no jurisdiction to try this case in his capacity as Magistrate.

The appeal is allowed and the convictions of the appellants are quashed.

Appeal allowed.