1938 *Present :* **Moseley, Keuneman and de Kretser JJ.**

ATTAPATTU *v.* PUNCHI BANDA.

45—P. C. Ratnapura, 17,623.

Criminal Procedure—Charge under section 180 of Penal Code—Plaint not sanctioned by Attorney-General nor instituted by Public Officer—Objection taken at close of prosecution—Powers of Supreme Court—Criminal Procedure Code, s. 425.

The accused was charged with having given false information to the Excise Commissioner an offence punishable under section 180 of the Penal Code. Proceedings commenced with a written report under section 148 (1) of the Criminal Procedure Code by a Superintendent of Excise. The plaint was not sanctioned by the Attorney-General but it bore the endorsement of the Excise Commissioner, "I sanction the prosecution". At the close of the case for the prosecution, Counsel for the accused took the objection, that the Court had no right to take congnizance of the case inasmuch as the provisions of section 147 (*a*) of the Criminal Procedure Code had not been satisfied. The Magistrate overruled the objection.

Held, that the Magistrate was right in proceeding to determine the case as the objection had been taken at a time when the irregularity could not have been cured.

Held, further, that the Supreme Court had power in such a case to act under section 425 of the Criminal Procedure Code where it is satisfied, that the irregularity had not occasioned a failure of justice.

Halliday v. Kandasamy (14 N. L. R. 492) followed; *Inspector of Police v. Meera Saibo (3 C. W. R. 149)* referred to.

THE accused-appellant was charged under section 180 of the Ceylon Penal Code with having given to the Excise Commissioner, a public servant, false information with intent to cause him to use his lawful power to the injury of an Excise Inspector. Proceedings were instituted on a report made by a Superintendent of Excise and across it there was the superscription "I sanction this prosecution. Signed S. H. Wadia, Excise Commissioner". The accused who was convicted appealed. The appeal was argued before His Lordship the Chief Justice who referred the matter to a Bench of three Judges. The terms of reference are set out in the judgment of Moseley J.

Colvin R. de Silva, for accused, appellant.—The finding of facts are not canvassed. The point to be decided is technical but substantial. At the close of the prosecution the Counsel for the accused submitted that the action was not properly constituted in that that the plaint was not filed with the sanction of the Attorney-General nor by the Excise Commissioner as required by section 147 (1) of the Criminal Procedure Code 1898. The person concerned in section 147 (1) (*a*) is the person to whom the complaint was made. It implies that the Court cannot determine an action unless its provisions are complied with. Hence when it is brought to the notice of the Court that they are not complied with, the Court has no jurisdiction to proceed with the action. The irregularity cannot be cured in the lower Court with the help of section 425 of the Criminal Procedure Code. Even if it was curable it should have been done when it had the right to do so and not after the close of the prosecution.

The purpose of the provisions of section 147 is to create a class of persons who alone can launch prosecutions under section 180 of the Ceylon Penal Code. It was held in *Inspector of Police v. Meera Saibo* [1] that section 147 had been enacted to prevent frivolous prosecutions. They are imperative as far as the lower Court is concerned.

Section 425 applies only when the Magistrate has acted in inadvertence. Section 537 of the Indian Criminal Procedure Code corresponds to section 425 of the Ceylon Code. See *Nilvatan Sen v. Jogesh Chundra Bhuttacharjee* [2].

J. W. R. Ilangakoon, K.C., A.-G. (with him *E. H. T. Gunasekera, C.C.*), for complainant, respondent.—Section 425 of the Criminal Procedure Code, 1898, imposes a prohibition or restriction on the Supreme Court. It is immaterial whether the objection has been taken in the lower Court or not. The only point to be considered is whether there had been a failure of justice. See *Halliday v. Kandasamy* [3], *Murphy v. Punchappu* [4], *Rodrigo v. Fernando and others* [5], and *Batuwantudawa v. Karunaratna* [6].

Cur. adv. vult.

December 19, 1938. MOSELEY J.—

This appeal originally came before Abrahams C.J., who referred it to a Bench of three Judges. The facts of the case appear in the order of reference, which is as follows:—

"The appellant in this case was charged under section 180 with having given to a public servant, to wit, the Excise Commissioner, Mr. Wadia, information which he knew or believed to be false, intending thereby to cause the Excise Commissioner, or knowing it to be likely that he would cause the Excise Commissioner, as a public servant, to use his lawful power to the injury or annoyance of an Excise Inspector. Proceedings apparently were instituted on a report made by D. V. Attapattu, Superintendent of Excise, in terms of section 148 (1) (*b*) of the Criminal Procedure Code, and Mr. Attapattu signs himself as complainant. This report bears the superscription. 'I sanction this prosecution. Signed S. H. Wadia, Excise Commissioner'. This was done presumably in an attempt at compliance with section 147 (1) (*a*) which states that no Court shall take cognizance of certain offences, this offence among others, except with the previous sanction of the Attorney-General or on the complaint of the public servant concerned or of some public servant to whom he is subordinate. Now it is obvious that this indication of sanction on Mr. Wadia's part does not constitute this the complaint of Mr. Wadia as the public servant, concerned, and further, as the sanction of the Attorney-General had not been obtained, there was therefore a statutory bar to the Court proceeding with this trial. However, section 425 of the Criminal Procedure Code enables this Court on appeal or revision to permit such an irregularity provided that no failure of justice has been occasioned. But it has been pointed out by learned Counsel for the appellant, who in fact conducted the defence in the lower Court, that before proceeding to call his defence he argued that the prosecution was wrongly constituted and must therefore fail inasmuch as there was no complaint of the public

[1] (1916) 3 C. W. R. 149.
[2] (1896) 23 Cal. 983.
[3] (1911) 14 N. L. R. 492.
[4] (1921) 23 N. L. R. 274.
[5] (1909) 1 Cur. Law Rep. 129.
[6] (1922) 4 Cey. Law Rec. 64.

servant to whom the complaint was made. It was also pointed out to the Magistrate that the sanction of the Attorney-General, which otherwise would have been an efficient substitute for the complaint of Mr. Wadia, had not been obtained either. Counsel for the defence went on to argue that it was too late now to go on inasmuch as section 425 gave authority to the Appeal Court and not to the Court of trial to cure this irregularity if no miscarriage of justice was in fact occasioned. The Magistrate in a somewhat elaborate order treated this objection as raising merely a trifling irregularity and he stated that the accused cannot claim that he has in the least bit been prejudiced by the failure of the complaint to be signed by the actual complainant or to obtain the previous sanction of the Attorney-General. It seems to me that the learned Magistrate was either endeavouring to anticipate the decision of the Court of Appeal or was usurping the functions of the Court of Appeal, it does not matter which. But the question really is whether the objection having been taken at as late a stage as after the close of the case for the prosecution it can now be said that the Magistrate was wrong in not adjourning the proceedings for the sanction of the Attorney-General to be obtained. Can this Court, where an accused person demands that the provisions of the law should be complied with, investigate the matter and decide whether this failure to obtain the sanction of the Attorney-General did in fact occasion a miscarriage of justice? I am inclined to think that the objection was taken at so late a stage as to preclude the accused now from contending that the provisions of the law ought to have been complied with as soon as he made the objection, no matter at what stage he took it. If this were not so, an accused person might deliberately permit the case for the prosecution to develop and then when he discovered that he had no genuine answer to it endeavour to postpone his conviction by demanding the right to a strict compliance with the law. But so far as I can see, the matter is *res integra*. The only case that was cited to me, and it was also cited in the lower Court (*Inspector of Police v. Meera Saibo*[1]), although of some use in elucidating the exact situation, nevertheless does not cover the point.

I think this matter is of sufficient importance to go before a larger Bench for decision, and I accordingly direct that the case be listed for argument before a Bench of three Judges ".

What, in effect, we are asked to decide is whether the learned Magistrate was right in proceeding to determine the case after it had been brought to his notice that the requirements of section 147 (1) (*a*) had not been complied with.

Counsel for the appellant relied upon the opening words of section 147 (1)—" No Court shall take cognizance . . . . ", and invested the term " cognizance " with the meaning of " hearing and determining ". Once the fact of non-compliance with the requirements of the section was discovered, said he, the Court had no jurisdiction to overlook the omission and proceed to determination of the case. It is beyond argument that the powers conferred by section 425 of the Criminal Procedure Code may only be invoked by a Court of appeal or revision, and Mr. de Silva contended that it was not for the Magistrate to consider the possibility of the

[1] *3 C. W. R. 149.*

exercise of those powers by this Court. He submitted that the omission was not properly curable in the trial Court, and that if in practice it was curable, that could only be done before the case for the prosecution was closed.

The Attorney-General argued that it was immaterial whether the objection was taken in the lower Court, and therefore, presumably, if objection were taken, it was immaterial at what stage of the proceedings it was taken. He cited the case of *Halliday v. Kandasamy* [1], in which the applicability of section 423 (the purport of which is similar to that of section 425) was considered. In that case Lascelles C.J. said:—

> "It was said that the section should only apply when no objection was taken to the jurisdiction in the Court of first instance. But there is nothing in the section or in the context which lends the slightest support to this suggestion. To engraft such a proviso or exception on the section would, in my opinion, be an unjustifiable encroachment on the province of the Legislature."

It seems to me that these observations, with which I respectfully agree, are equally applicable to section 425. If this proposition is accepted, it seems unreasonable to differentiate between the various stages of a proceeding at which objection might be taken.

Counsel for the respondent proceeded to argue that the provisions of section 245 are imperative and that this Court is prohibited from interfering with the judgment of the lower Court unless the irregularity complained of has occasioned a failure of justice. In this connection it may be borne in mind that although the complaint of which the Court took cognizance was not that of the officer concerned, it has in fact received his written sanction. In *The Inspector of Police v. Meera Saibo* [2], the prosecution was based upon a report made by the police, on the face of which was an endorsement signed on behalf of the Government Agent by the Office Assistant to the effect that the prosecution was authorised. It is true that in that case the Government Agent, in addition to authorising the prosecution, actually appeared in Court and gave evidence. De Sampayo J. had "no doubt that the purposes of section 147 were practically satisfied". He went on to say, "The objection was taken only at the close of the case, and the irregularity in no way occasioned any failure of justice". Our attention was also drawn to the cases of *Manuel v. Kanapanickan* [3] and *Murphy v. Punchappu* [4], in each of which the application of section 425 was approved in the absence of a failure of justice. A similar view was taken by Wood Renton J. in *Rodrigo v. Fernando and others* [5], and by Bertram C.J. in *Batuwantudava v. Karunaratna* [6].

The obvious intention of section 147 is to protect private persons from frivolous and vexatious prosecutions. If, in the present case, there had existed grounds for believing that prosecution was frivolous or vexatious, the validity of the complaint would have been queried by the defence at the outset and the irregularity discovered. We are, however, informed

[1] *14 N. L. R. 492.*
[2] *3 C. W. R. 149.*
[3] *14 N. L. R. 186.*
[4] *23 N. L. R. 274.*
[5] *1 Cur. Law Rep. 129.*
[6] *(1922) 4 Cey. Law Rec. 64.*

by Counsel for the appellant that the irregularity was not discovered until after the close of the case for the prosecution. At no time has it been suggested that the prosecution was frivolous or vexatious.

Two Indian decisions were also brought to our notice. In *Mozumdar v. Mozumdar* [1], it was held that section 537 of the Indian Criminal Procedure Code (the counterpart of our section 425) could not refer to a case in which the want of sanction was directly brought to the notice of the Magistrate " at the commencement of the proceedings before him ". The compelling inference is that it does apply when the irregularity becomes apparent at a later stage.

In *Nilratan Sen v. Jogesh Chundra Bhuttacharjee* [2], Banerjee J. said, " When an objection is taken on the ground of there being a material error, omission or irregularity before a case is finally disposed of, and while there is time to correct the same, it would be unreasonable to hold that section 537 intends the error, omission or irregularity to be allowed to remain uncorrected ". In the case before us the case for the prosecution had closed and the time for correcting the irregularity had therefore passed. The only way in which it can be corrected is before this Court. The learned Magistrate, in my view, adopted the proper course in proceeding to determine the case.

I can see no reason for interfering with the conviction on the ground advanced or on any other ground.

The appeal is dismissed and the conviction and sentence affirmed.

KEUNEMAN J.—I agree.

DE KRETSER J.—I agree.

Appeal dismissed.