

1941

*Present : Wijeyewardene J.*DE ZOYSA *v.* SUBAWEERA.866—*M. C. Avissawella, 22,072.**Public servant taking illegal gratification—Elements of offence—Penal Code, s. 158.*

Where the accused, a police constable, who had no official functions to perform at a police inquiry, dishonestly represented to a person that he would favour him at such inquiry and obtained a gratification from him,—

*Held, that the accused had not committed an offence under section 158 of the Penal Code.*

**A** PPEAL from an order of the Magistrate of Avissawella.

*O. L. de Kretser, C.C., for complainant, appellant.*

*N. Nadarajah (with him A. C. Alles), for accused, respondent.*

*Cur. adv. vult.*

April 4, 1941. WIJEYWARDENE J.—

This is an appeal with the sanction of the Attorney-General against an order of acquittal made by the Magistrate of Avissawella.

The accused was charged under section 158 of the Penal Code with having obtained an illegal gratification of Rs. 5 from one Podi Sinno as a motive for showing favour to Podi Sinno in the exercise of his official functions at an inquiry to be held at the Yatiyantota Police Station on September 12, 1940.

The facts of the case may be stated briefly as follows:—Podi Sinno sent a petition P 1 of August 31, 1940, to the Assistant Superintendent of Police, Avissawella, against one Podiya. The petition stated that "Podiya are doing act of mischief against the petitioner and trying to harm by the aid of several others without given to possess the land . . . and damaging the plantation . . .". The petition also referred to a pending civil cas in the Court of Requests, Avissawella, in respect of that land and filed by the petitioner against Podiya. The Assistant Superintendent of Police forwarded the petition to the Sub-Inspector of Police, Yatiyantota, "for attention at Station." The Sub-Inspector fixed the inquiry for September 12, and on September 11,

ordered the accused, a police constable, to request the petitioner and Podiya to attend the inquiry. The accused communicated the message of the Sub-Inspector to the petitioner on September 11, and then according to Podi Sinno asked him for "a pagawa (bribe) to help him in the petition inquiry". He asked Podi Sinno for Rs. 5 and when Podi Sinno gave him Rs. 3 he returned it after assaulting Podi Sinno with his umbrella and abusing him. Podi Sinno had then to borrow Rs. 2 from a friend and thus make up the Rs. 5 wanted by the accused. Under cross-examination Podi Sinno stated, "I gave the money because I found that the accused would abuse me and assault me if I did not do so".

He added on being re-examined, "when I handed over the Rs. 5 to the accused I did not remember that the accused had earlier promised to do me some favour in the inquiry".

I shall consider the various questions arising in this case accepting the finding of the Magistrate that the accused asked Podi Sinno for a bribe to help him in the petition inquiry.

Now section 57 of the Police Ordinance states that it is the duty of a Police Officer, *inter alia*—

- (i) to use his best endeavour and ability to prevent all crimes, offences and public nuisances ;
- (ii) to preserve the peace.

That section, however, should be read subject to section 71 of the Police Ordinance which enacts, "No Police Officer shall receive any complaint of any petty offence or take into custody any person brought to him accused of such petty offences as trespass, assault, quarrelling or the like". Now the petition P 1 is the usual kind of petition sent by villagers who desire to have a civil dispute settled summarily through the intervention of the Police. In fact the Sub-Inspector of Police who held the inquiry on September 12, referred Podi Sinno to his remedy in a Civil Court. The Sub-Inspector states that he took up this particular inquiry on September 12, as that was the day fixed by him for "petty inquiries" at the Police Station. Even assuming that the inquiry held by the Sub-Inspector was an official inquiry which the Police were entitled to hold, the further question arises as to the functions of the accused at that inquiry. The accused took no part in that inquiry. There is no evidence to show that he could have even expected to take a part however small at that inquiry. The evidence makes it clear that it was a summary inquiry made by the Sub-Inspector of Police in the hope that such an inquiry would induce the parties either to settle their disputes before him or seek redress in a Civil Court. The position then appears to be that the accused who knew that he had no official functions to perform at the inquiry dishonestly represented to Podi Sinno that he was going to show favour to Podi Sinno in the exercise of his official functions at the petition inquiry and thereby attempted to obtain Rs. 5 as a motive for showing favour to him in the exercise of such functions. Could the accused be then said to have committed an offence punishable under section 158 of the Penal Code ?

In *Venkiah* (1924) *Madras Law Journal* 662 a man was charged under section 161 of the Indian Penal Code—corresponding to section 158 of our Code. The charge was that he received a bribe of Rs. 20 from a villager on the understanding that he would get the villager some land on darkhast in his capacity as Karnam. Acquitting the accused Jakson J. said:—

“In a charge under section 161, Indian Penal Code, it must be shown that the accused took the bribe as a motive for doing an official act. But getting darkhasts is not the official act of a Karnam. He may have cheated the villager into thinking that he was the official who granted the darkhasts . . . . He might have been charged perhaps with offering to influence the Tahsildar or some higher official . . . . There is a nice distinction between what is criminal and what is departmentally reprehensible and this distinction must be carefully borne in mind.”

In *Venkatarama Naidu* (1929) 59 *Madras Law Journal* 239, a person was charged with offering a bribe to a public servant and having thereby abetted the commission of the offence under section 161 of the Indian Penal Code. In that case the accused had applied to become a policeman. On the orders of the District Superintendent of Police the accused went before the Reserve Inspector who found that the accused was below the regulation height and rejected his application. “The accused thereupon tendered a five-rupee note to the officer, no doubt in the hope that the officer would reconsider his decision and make a report to the District Superintendent of Police to that effect.” The High Court (Coutts Trotter C.J. and Pakenham Walsh J.) acquitted the accused holding that no offence under the section is committed where the public servant to whom the bribe is offered is, at that time, *functus officio* as to the matter in respect of which the bribe is offered.

There are also certain dicta in *Ajudhia Prashad* (26 *Criminal Law Journal*, 1367) which seem to support the view taken in the Madras cases.

A contrary view has been taken by the Allahabad High Court. In *Ajudhia Prashad* (1929) 51 *Allahabad* 467 Dalal J. held that it was sufficient to constitute the abetment of an offence under this section if there was an offer of a bribe to a public servant in the belief that he had an opportunity or power in the exercise of his official functions to show the offerer a desired favour even although the public servant had in reality no such power. Dalal J. disapproved of the decision in *Venkiah* and thought that the decision would not have been given if the Madras High Court had not overlooked illustrations (c) to section 161 of the Indian Code corresponding to illustration (b) to section 158 of our Code. He said, referring to that illustration:—

“I am not aware of the existence of an official whose official duty it is to exercise influence with Government to obtain a title . . . . Such an illustration of an impossible official duty is purposely given to indicate the purpose of the legislation that, even where an act is not within the exercise of the official duty of a public servant (such as the exercise of influence to obtain a title), if a public servant erroneously

represents that the particular act is within the exercise of his official duty he would be liable to conviction under section 161 if he obtained a gratification by inducing such an erroneous belief in another person."

I am unable to read this illustration in the sense in which it has been read in the Allahabad case. I think that illustration is merely intended to illustrate the last "explanation" under section 158 which states that "a person who receives a gratification as a motive for doing what he does not intend to do or as a reward for doing what he had not done comes within these words."

I hold that the accused has not committed an offence punishable under section 158 in attempting to obtain Rs. 5 on a promise to help Podi Sinno at the petition inquiry.

I dismiss the appeal.

*Appeal dismissed.*

