NARAYANDAS BHAGWANDAS MADHAVDAS

v.

THE STATE OF WEST BENGAL

1959

May 7.

(JAFAR IMAM and J. L. KAPUR, JJ.)

Criminal Trial—Cognizance of an offence, when taken—Issuing of search warrant and warrant of arrest, if amount to taking cognizance—Attempting to take currency notes out of India—Foreign Exchange Regulation Act, 1947 (VII of 1947), ss. 19(3) and 23(3). Code of Criminal Procedure, 1898 (V of 1898), ss. 153, 155, 200-203 and 204.

On September 7, 1952, the appellant went to Dum Dum Aerodrome to board a plane for Hong Kong. On his search by the customs authorities a sum of Rs. 25,000 was recovered from him which he had not declared in his declaration form and for which he had no permit from the Reserve Bank of India for taking out of India. On September 11, 1952, the Reserve Bank authorised Inspector Mitra to move the Additional District Magistrate, 24 Parganas under s. 19(3) of the Foreign Exchange Regulation Act, for permission to proceed against the appellant. On September 16, 1952, Mitra applied to the Magistrate for a search warrant and for a warrant of arrest and both warrants were issued. The appellant was arrested and released on bail with a direction to appear before the Magistrate on September 19. On September 19, the Magistrate granted bail to the appellant but refused him exemption from personal attendance before the Court and granted time till November 19, 1952, for completing the investigation. This time was extended upto January 2, 1953 and then upto February 2, 1953. In the meantime on January 27, 1953, Mitra was authorised under s. 23(3)(b) of the Act to file a complaint against the appellant. The complaint was filed on February 2, 1953, before the Additional District Magistrate who transferred the case to a Magistrate I Class for trial. On the same day the Magistrate I Class recorded the presence of the appellant, allowed his application for reduction of security and fixed March 26, and 27, 1953, for evidence. Upon conclusion of the trial the Magistrate acquitted the appellant but on appeal the Calcutta High Court convicted him. The appellant contended that the entire trial was without jurisdiction as the Magistrate had taken cognizance of the offence on September 16, 1952, without there being a complaint in writing by a person authorised as required by s. 23(3) of the Act.

Held, that cognizance of the offence was taken by the Additional District Magistrate on February 2, 1953, after the complaint had been filed and the trial was valid. As to when cognizance is taken of an offence will depend upon the facts and circumstances of each case. Mere issuing of a search warrant or warrant of arrest for the purposes of investigation did not, by

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themselves, amount to taking of cognizance. Cognizance was taken when a Magistrate applied his mind for the purpose of proceeding under s. 200 and subsequent sections of Ch. XVI of the Code of Criminal Procedure or under s. 204 of Ch. XVII of the Code. In the present case cognizance was taken when on February 2, 1953, the Additional District Magistrate applied his mind to the case with a view to issuing a process and sent the case for trial to another magistrate.

Superintendent and Remembrancer of Legal Affairs, West Bengal v. *Abani Kumar Banerji*, A.I.R. (1950) Cal. 437 and *R. R. Chari* v. *The State of Uttar Pradesh*, [1951] S.C.R. 312, applied.

The facts found clearly established that the appellant attempted to take out of India the currency notes in question, and such attempt was also an offence. The High Court had rightly rejected his explanation that he had applied to the Reserve Bank for a permit to take the currency notes out of India and that as the permit had not been received he had handed over the notes to the customs authorities for safe custody.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 12 of 1957.

Appeal from the judgment and order dated September 5, 1956, of the Calcutta High Court in Government Appeal No. 7 of 1954, arising out of the judgment and order dated April 3, 1954, of the Court of 1st Class Magistrate at Alipore.

Ishwar Lal C. Dalal and *I. N. Shroff*, for the appellant.

H. J. Umrigar and *R. H. Dhebar*, for the respondent.

1959. May 7. The Judgment of the Court was delivered by

Imam J.

IMAM J.—This is an appeal on a certificate granted by the Calcutta High Court. Two points have been urged before the Bench of the High Court which granted the certificate. The first was that the search conducted by the Customs officials which had resulted in the detection of the currency notes on the person of the appellant had not been a legal search and consequently no proceedings could be based on the purported detection made. This point was rejected by the Bench. The second point urged on behalf of the appellant was that on September 16, 1952, when the

Magistrate issued the warrant of arrest against the appellant he could not have done so without having previously taken congnizance of the offence. Since, however, the authorization required under s. 23(3) of the Foreign Exchange Regulation Act (VII of 1947) was not obtained till January 27, 1953, the cognizance taken by the Magistrate on September 16, 1952, was without jurisdiction. If the initiation of the proceedings was without jurisdiction, the conviction could not stand. The High Court thought that the contention of the appellant raised a question of law and granted the requisite certificate for appeal to this Court.

The prosecution case was that on September 7, 1952, the appellant went to Dum Dum Aerodrome with a view to boarding a plane for Hong Kong. The plane was due to leave the airport at 8-30 a.m. The appellant had to go through the customs formalities before he could board the plane. On an enquiry by the Customs Officers as to whether he had any other articles besides what he had declared in the declaration form, the appellant answered in the negative. His baggage was then examined but no objectionable article was detected therein. The Customs Officers, however, noticed a pouch of somewhat unusual size which aroused their suspicion. Thereafter, the appellant was subjected to personal search. When they were about to search his person he let drop his trousers. The appellant was requested to lift up the trousers and wear them again which he did. On the search of the trousers a sum of Rs. 25,000 in Indian currency notes was discovered in two secret pockets. They were concealed from below the surface and opened from the inside. On September 11, 1952, the Reserve Bank of India authorized Inspector S. B. Mitra of the Special Police Establishment, Calcutta, to make a representation to the Additional District Magistrate, 24 Parganas (hereinafter referred to as the Addtional District Magistrate) for permission to proceed against the appellant as required under s. 19(3) of the Foreign Exchange Regulation Act, 1947. Mitra thereupon applied to the Additional District, Magistrate on September 16, 1952, for a search warrant

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to be issued which was allowed. Mitra on the same date also applied to the same Magistrate that a warrant of arrest might be issued against the appellant. This was also allowed and a warrant of arrest was issued by the Additional District Magistrate and appellant was thereafter arrested and released on bail with a direction to appear before the Additional District Magistrate on September 19. On September 19, he was released on bail by the Additional District Magistrate in the sum of Rs. 50,000 with 10 sureties of Rs. 5,000 each. On November 19, the appellant asked for exemption from attending the court on the successive dates fixed for the case but the application was refused. On January 27, 1953, the Reserve Bank of India authorized Mitra to file a complaint against the appellant. On February 2, 1953, a complaint was filed against the appellant charging him with an offence under s. 8(2) of the Foreign Exchange Regulation Act read with s. 19 of the Sea Customs Act and Notification No. FERA 105/55 RB, dated February 27, 1951.

Thereafter, the appellant was tried by another Magistrate, Mr. Sinha, who acquitted him under s. 258 of the Code of Criminal Procedure. The currency notes which had been seized by the Customs Officials were directed to be relassed. Against the appellant's acquittal the State of West Bengal preferred an appeal to the High Court. The High Court allowed the appeal and convicted the appellant of the offence with which he had been charged. He was sentenced to pay a fine of Rs. 1,000, in default to suffer rigorous imprisonment for three months. The order of the Magistrate directing the release of the currency notes was set aside.

The main submission made on behalf of the appellant before us has been that the Additional District Magistrate having taken cognizance of the offence on September 16, 1952, and as the provisions of s. 23(3) of the Foreign Exchange Regulation Act had not been complied with, the entire proceedings before him and the Magistrate who tried the case were without jurisdiction. The subsequent authorization by the Reserve Bank on January 27, 1953, and the filing of

the complaint on February 2,1953,could not make legal proceedings which had already commenced without jurisdiction. It was also urged that the facts found did not attract the provisions of s. 19 of the Sea Customs Act (8 of 1878) as it could not be said that at the moment the appellant was searched by the Customs Officials, he was taking out of India across any customs frontier as defined by the Central Government the currency notes in question. It was also urged that explanation offered by the appellant was accepted by the trying Magistrate and the High Court ought not to have set aside the acquittal of the appellant, there being no good ground why his explanation should not have been accepted.

The version of the appellant as to how the sum of Rs. 25,000 in currency notes was with him was that he was not searched at all at the Customs barrier. He had taken out the currency notes in question from his trouser pocket and handed over the same to the Customs Officers stating the circumstances under which he was carrying the same on his person and asked for a receipt. The Customs Officers instead of giving him a receipt falsely charged him with smuggling the currency notes out of India without any permit. According to the appellant, he had applied to the Reserve Bank of India at Calcutta for a permit and had sent an application for that purpose to one Joshi in Calcutta. He failed to receive the permit upto the last moment. His intention was to hand over the money to the Customs Officers for safe custody. In other words, the appellant's version, in substance, was that as he had failed to get the permit upto the last moment he voluntarily handed over the currency notes in question to the Customs Officers at the customs barrier for safe keeping. He had at no time any intention to carry out of India the said currency notes without a permit. This version of the appellant was accepted by the trying Magistrate who acquitted him. The High Court, however, did not accept his version.

It was urged that the appeal is before us on a certificate and as the High Court had come to a different

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finding on a question of fact to what the trying Magistrate had found, it was open to the appellant to urge that he was entitled to question the findings of the High Court. It is true that the High Court has taken a different view to that taken by the trying Magistrate and has rejected the appellant's case that he had voluntarily handed over the currency notes in question to the Customs Officers in the circumstances mentioned by him and that he had no intention to take that money out of India without a permit. Nonetheless, the finding of the High Court is on a question of fact. We can see no particular reason in this case to go behind the findings of fact arrived at by the High Court. The High Court gave very good reasons for accepting the evidence of the prosecution witnesses as to the circumstances in which the currency notes in question were recovered from the appellant when his person was searched. An important circumstance which might have supported the appellant's case, namely whether he had applied to the Reserve Bank of India for a permit to take out of India currency notes to the extent of Rs. 25,000 was considered by the High Court. It found, on the evidence of the Superintendent of the Reserve Bank, that the Reserve Bank received no application from the appellant before September 7, 1952, nor had the Reserve Bank granted the permission to the appellant to take any currency notes out of India. It was on September 16, that the Reserve Bank had received an application of the appellant forwarded by one G.C. Joshi by his letter dated September 15, 1952. The application of the appellant bore the date September 2, 1952. The High Court thought that there were grounds for suspecting that this application was antedated. The High Court came to the conclusion that there was no evidence to show that any such application was writen or submitted on September 2, 1952. It does seem extraordinary that if the appellant had sent the application to Joshi on September 2, 1952, that Joshi should not have sent on that application to the Reserve Bank till September 15, 1952. It is to be remembered that the incident had already taken place on September 7, 1952, and in that

connection on September 15 and 16, 1952, Inspector Mitra of the Special Police Establishment, Calcutta had applied for a search warrant and a warrant of arrest respectively against the appellant. On arrest, under the terms of that warrant he was released on bail by the police with a direction to appear before the court on September 19. The appellant had therefore ample opportunity to concoct an application for a permit after September 7, and to antedate it getting Joshi on September 15, 1952, to forward the same to the Reserve Bank. It is inconceivable that a person who was leaving for Hong Kong and wished to carry such a large sum of money as Rs. 25,000 in currency notes would have applied on September 2, when he was actually to fly on September 7, 1952. Further it would not be unreasonable to suppose that the appellant would have so timed his arrival at Calcutta as would have enabled him to make the necessary enquiries from Joshi or the Reserve Bank whether the permit asked for had been granted. It is impossible to believe that he had arrived at Calcutta and had gone direct to the Dum Dum Aerodrome without making any enquiry from Joshi at least whether the permit asked for had been granted. Normally one would expect the appellant to reach Calcutta in sufficient time to make the necessary enquiries and in the absence of a permit having been granted to have left the currency notes for safe custody with Joshi or some other trusted person. It is an entirely unacceptable story which the appellant put forward that he waited upto the last moment at the aerodrome for the necessary permit and not having got it requested the Customs Officers to keep the currency notes for safe custody. It is significant that the appellant did not examine Joshi as a witness in support of his case. It is not unlikely that if he had done so some inconvenient results would have followed in consequence of close questioning of Joshi regarding the entire transaction. We have, therefore, no reason to think that the High Court had erred in suspecting that the application to the Reserve Bank was antedated. On this finding it is apparent that the very foundation of the defence of the appellant is false. That the appellant did not hand

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over the currency notes of Rs. 25,000, at the customs barrier but was searched when the customs formalities were gone through is not only deposed to by a number of witnesses holding responsible positions but is deposed to by P.W. 4, Panna Lal Dey, Money Exchanger of Dum Dum Airport. Panna Lal Dey's evidence was accepted by the High Court and after having examined his evidence we are satisfied that there is no reason to distrust his testimony. Reference has been made to some of the evidence on a question of fact in order to satisfy ourselves whether the finding of the High Court was correct. We are satisfied that the finding of the High Court is the only view which could reasonably be taken in a case like this.

It is true that the appellant had not taken the currency notes in question out of India across any customs frontier as defined by the Central Government. He had, however, clearly attempted to take the same out of India. In such a case no question of his crossing the customs frontier arises. That an attempt to take out the currency notes in question is an offence punishable under the Sea Customs Act is clear from the provisions of s. 167, Item 8. The Foreign Exchange Regulation (Amendment) Act 1952 (VIII of 1952), came into force in February 1952. By this Act s. 23B was introduced into the Foreign Exchange Regulation Act. Section 23B makes punishable an attempt to contravene the provisions of the Foreign Exchange Regulation Act or any rule, direction or order made thereunder. Furthermore, this point was not taken before the Bench which granted the certificate of fitness for appeal to this Court. Be that as it may, the facts found clearly established that the appellant attempted to take out of India the currency notes in question. He had entered the customs enclosure and had signed the declaration form. He had been questioned as to whether he had any other article than those mentioned in the declaration form which he wished to declare and he had answered in the negative. On his personal search he dropped his trousers on the ground. He was asked to pick up his trousers and wear them again. On search of the trousers Rs. 25,000,

in currency notes were found concealed in the inner pockets. The appellant had his ticket to proceed to Hong Kong by a plane which was due to leave Dum Dum Airport at 8-30 a.m. and the customs formalities were done in connection with that flight. If the appellant had successfully cleared himself from the customs formalities all that was left for him to do was to board the plane which would take him out of India. These circumstances establish beyond all reasonable doubt that the act of the appellant had gone beyond the stage of preparation and was clearly an attempt to carry the sum of Rs. 25,000, in currency notes out of India without a permit from the Reserve Bank. We cannot accept the argument made on his behalf that the act of the appellant, on the facts found, amounted merely to preparation and not an attempt.

The main submission on behalf of the appellant was directed towards establishing that the entire proceedings before the Additional District Magistrate and the trying Magistrate were without jurisdiction as cognizance of the offence had been taken on September 16, 1952, in contravention of the provisions of s. 23(3) of the Foreign Exchange Regulation Act, there being on that date no complaint in writing made by an officer authorised in that behalf by the Central Government or the Reserve Bank of India by a general or a special order. It is, therefore, necessary to see, in the circumstances of the present case, on what date cognizance of the offence was taken. In order to ascertain this certain provisions of the Foreign Exchange Regulation Act and the Code of Criminal Procedure will require consideration. Under s. 19(3) of the Foreign Exchange Regulation Act a District Magistrate or Magistrate of the first class may, on a representation in writing made by a person authorized in this behalf by the Central Government or the Reserve Bank and having reasons to believe that there had been contravention of any of the provisions of that Act, issue a search warrant. Inspector Mitra was so authorized by the Reserve Bank on September 11, 1952, and in pursuance of that authorization applied to the Additional District Magistrate for the issue of a search warrant. Under

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this section the search warrant is issued for the purposes of conducting investigation under that Act. On September 16, Mitra applied for a warrant of arrest against the appellant. This application was obviously made under the Criminal Procedure Code. The offence which the appellant is alleged to have committed was a non-cognizable offence. Under s. 155(2) of the Code of Criminal Procedure, no police officer shall investigate a non-cognizable offence without the order of a Magistrate of the first or second class having power to try such a case or commit the same for trial, or of a Presidency Magistrate. Inspector Mitra's application definitely states that he in asking for permission to investigate a non-cognizable offence under s. 155, Cr. P.C. The order of the Additional District Magistrate directing the issue of a search warrant and the word "permitted" contained therein we consider, in the context of the application, to mean that he granted the sanction for investigation as asked for. Under s. 155(3) of the Code a police officer being permitted to investigate a non-cognizable offence may exercise the same powers in respect of the investigation as an officer incharge of a police station may exercise in a cognizable case, except that he has not the power to arrest without a warrant. It was necessary therefore for Inspector Mitra to obtain from the Additional District Magistrate a warrant of arrest. It is clear, therefore, that upto September 16, 1952, the Additional District Magistrate had not taken cognizance of any offence.

On September 19, 1952, the appellant appeared before the Additional District Magistrate who recorded the following order:—

"He is to give bail of Rs. 50,000 with ten sureties of Rs. 5,000 each. Seen Police report. Time allowed till 19th November, 1952, for completing investigation."

On November 19, 1952, on perusal of the police report the Magistrate allowed further time for investigation until January 2, 1953, and on that date time was further extended to February 2, 1953. In the meantime, on January 27, 1953, Inspector Mitra had been authorized under s. 23(3)(b) of the Foreign Exchange Regulation Act to file a complaint. Accordingly, a

complaint was filed on February 2, 1953. The Additional District Magistrate thereon recorded the following order:

"Seen the complaint filed to day against the accused Narayandas Bhagwandas Madhavdas under section 8(2) of the Foreign Exchange Regulation Act read with Section 23B thereof read with Section 19 of the Sea Customs Act and Notification No. F.E.R.A. 105/51 dated the 27th February, 1951, as amended, issued by the Reserve Bank of India under Section 8(2) of the Foreign Exchange Regulation Act. Seen the letter of authority. To Sri M. N. Sinha, S.D.M. (Sadar), Magistrate 1st class (spl. empowered) for favour of disposal according to law. Accused to appear before him."

Accordingly, on the same date Mr. Sinha then recorded the following order:—

"Accused present. Petition filed for reduction of bail. Considering all facts, bail granted for Rs. 25,000 with 5 sureties.

To 26th March, 1952 and 27th March, 1952 for evidence."

It is clear from these orders that on September 19, 1952, the Additional District Magistrate had not taken cognizance of the offence because he had allowed the police time till November 19, 1952, for completing the investigation. By his subsequent orders time for investigation was further extended until February 2, 1953. On that date the complaint was filed and the order of the Additional District Magistrate clearly indicated that he took cognizance of the offence and sent the case for trial to Mr. Sinha. It would also appear from the order of Mr. Sinha that if the Additional District Magistrate did not take cognizance, he certainly did because he considered whether the bail should be reduced and fixed the 26th and 27th of March, for evidence. It was, however, argued that when Mitra applied for a search warrant on September, 16, 1952, the Additional District Magistrate had recorded an order thereon, "Permitted. Issue search warrant." It was on this date that the Additional District Magistrate took cognizance of the offence. We cannot agree with this submission because the petition of Inspector Mitra clearly states that "As this is non-cognizable offence, I pray that you will kindly permit

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me to investigate the case under section 155 Cr. P. C." That is to say, that the Additional District Magistrate was not being asked to take cognizance of the offence. He was merely requested to grant permission to the police officer to investigate a non-cognizable offence. The petition requesting the Additional District Magistrate to issue a warrant of arrest and his order directing the issue of such a warrant cannot also be regarded as orders which indicate that the Additional District Magistrate thereby took cognizance of the offence. It was clearly stated in the petition that for the purposes of investigation his presence was necessary. The step taken by Inspector Mitra was merely a step in the investigation of the case. He had not himself the power to make an arrest having regard to the provisions of s. 155(3) of the Code of Criminal Procedure. In order to facilitate his investigation it was necessary for him to arrest the appellant and that he could not do without a warrant of arrest from the Additional District Magistrate. As already stated, the order of the Additional District Magistrate of September 19, 1952, makes it quite clear that he was still regarding the matter as one under investigation. It could not be said with any good reason that the Additional District Magistrate had either on September 16, or at any subsequent date upto February 2, 1953, applied his mind to the case with a view to issuing a process against the appellant. The appellant had appeared before the Magistrate on February 2, 1953, and the question of issuing summons to him did not arise. The Additional District Magistrate, however, must be regarded as having taken cognizance on this date because he sent the case to Mr. Sinha for trial. There was no legal bar to the Additional District Magistrate taking cognizance of the offence on February 2, 1953, as on that date Inspector Mitra's complaint was one which he was authorized to make by the Reserve Bank under s. 23(3)(b) of the Foreign Exchange Regulation Act. It is thus clear to us that on a proper reading of the various orders made by the Additional District Magistrate no cognizance of the offence was taken until February 2, 1953. The argument that he took cognizance of the offence on September 16, 1952, is without

foundation. The orders passed by the Additional District Magistrate on September 16, 1952, September 19, 1952, November 19, 1952, and January 2, 1953, were orders passed while the investigation by the police into a non-cognizable offence was in progress. If at the end of the investigation no complaint had been filed against the appellant the police could have under the provisions of s. 169 of the Code released him on his executing a bond with or without sureties to appear if and when so required before the Additional District Magistrate empowered to take cognizance of the offence on a police report and to try the accused or commit him for trial. The Magistrate would not be required to pass any further orders in the matter. If, on the other hand, after completing the investigation a complaint was filed, as in this case, it would be the duty of the Additional District Magistrate then to enquire whether the complaint had been filed with the requisite authority of the Reserve Bank as required by s. 23(3)(b) of the Foreign Exchange Regulation Act. It is only at this stage that the Additional District Magistrate would be called upon to make up his mind whether he would take cognizance of the offence. If the complaint was filed with the authority of the Reserve Bank, as aforesaid, there would be no legal bar to the Magistrate taking cognizance. On the other hand, if there was no proper authorization to file the complaint as required by s. 23 the Magistrate concerned would be prohibited from taking cognizance. In the present case, as the requisite authority had been granted by the Reserve Bank on January 27, 1953, to file a complaint, the complaint filed on February 2, was one which complied with the provisions of s. 23 of the Foreign Exchange Regulation Act and the Additional District Magistrate could take cognizance of the offence which, indeed, he did on that date. The following observation by Das Gupta, J., in the case of *Superintendent and Remembrancer of Legal Affairs, West Bengal* v. *Abani Kumar Banerji* (1) was approved by this Court in the case of *R. R. Chari* v. *The State of Uttar Pradesh* (2) :—

(1) A.I.R. (1950) Cal. 437.

(2) [1951] S.C.R. 312.

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"What is taking cognizance has not been defined in the Criminal Procedure Code and I have no desire to attempt to define it. It seems to me clear however that before it can be said that any magistrate has taken cognizance of any offence under section 190(1)(a) Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter—proceeding under section 200 and thereafter sending it for inquiry and report under section 202. When the magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g., ordering investigation under section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence."

It is, however, argued that in Chari's case this Court was dealing with a matter which came under the Prevention of Corruption Act. It seems to us, however, that that makes no difference. It is the principle which was enunciated by Das Gupta, J., which was approved. As to when cognizance is taken of an offence will depend upon the facts and circumstances of each case and it is impossible to attempt to define what is meant by taking cognizance. Issuing of a search warrant for the purpose of an investigation or of a warrant of arrest for that purpose cannot by themselves be regarded as acts by which cognizance was taken of an offence. Obviously, it is only when a Magistrate applies his mind for the purpose of proceeding under s. 200 and subsequent sections of Chapter XVI of the Code of Criminal Procedure or under s. 204 of Chapter XVII of the Code that it can be positively stated that he had applied his mind and therefore had taken cognizance.

In our opinion, the proceedings before the Additional District Magistrate and the trying Magistrate were with jurisdiction and the trial of the appellant was legal.

The appeal is accordingly dismissed.