8th. November, 1948

Judge :

The Hon. Mr. Justice W. Harding, B.Litt., LL.D.

The Police *versus* Joseph J. Scorey

Libel — Jurisdiction — Competence of the Criminal Court of Magistrates — Art. 379, 382 (3) and 440 of the Criminal Code — Art. 18 and 20 Chapter 117 Rev. Ed. — Census Act, 1948.

The maximum competence of the Court of Magistrates of Judicial Police sitting as a Court of Criminal Judicature is in respect of offences liable to imprisonment or hard labour up to three months. When the offence is punishable with more than that, the Court of Magistrates of Judicial Police must sit as a Court of Criminal Enquiry, as the first stage towards the ultimate trial by jury; saving the power of the Attorney General of sending for trial by that Court, sitting as a Court of Criminal Judicature any person charged with a crime punishable with imprisonment or hard labour up to six months, if the person concerned agrees, and saving also the power of the Attorney General to send for trial by that Court any person charged with a crime punishable with imprisonment or hard labour up to two years, irrespective of whether the person concerned agrees or not, under the Administration of Justice (Emergency) Regulations 1940.

What must be looked at for the purpose of determining the jurisdiction of the Court, is the offence as alleged in the summons, and not the offence which at a subsequent stage, may result from the evidence.

Section 18 of the Press Law contemplates the offence committed by whosoever, by the means mentioned in section 2 of that Law, directly instigates the perpetration of a crime, whilst in section 20

is contemplated the offence committed by whosoever, by the same means, directly incites any person to disobey the law. And this latter offence is made punishable with imprisonment for a term not exceeding six months.

A charge of instigating persons to disobey the Census Act 1948 cannot be construed as tantamount to a charge of instigating persons to perpetrate a crime. Wherefor such a charge comes under section 20, and not under section 18, of the Press Law; and as such, the punishment being, in case of conviction, that of imprisonment up to six months, the Court of Magistrates of Judicial Police sitting as a Court of Criminal Judicature is not competent to take cognisance of the charge, but must sit as a Court of Criminal Investigation.

When the Appellate Court finds that the offence attributed to the offender was not within the jurisdiction of the Inferior Court by which it was tried, but of another Inferior Court, it quashes the judgment and refers the case to the competent Court.

Defendant was charged before the Criminal Court of Magistrates for the Island of Malta with having, by means of an article in the "Bulletin", a newspaper whereof he is the editor and proprietor, direcly incited persons to disobey the law, to wit, section 8 of the Census Act, 1948, which empowers enumerators to enter any house at any time during a specified period, and section 10 (1) (a) of the same Act, which makes it an offence liable to a fine not exceeding £100 for any person to refuse or neglect to comply with, or act in contravention of, any of the provisions of that Act. The Court below, in its judgment of the 14th. May, 1948, found defendant guilty and sentenced him to a fine (multa) of £50, and moreover ordered the suspension of the publication of the newspaper afore mentioned for a period of two months;

Before this Appellate Court defendant set up the plea that the copy of the newspaper containing the incriminating article was at no time properly exhibited, and that consequently, as the Court below did not have before it the article in respect of which the charge was made, it could not in any way find defendant guilty. This plea was rejected by this Court in its preliminary judgment given on the 1st. September, 1948, a copy of which is now at page 64 of the record;

Both before the Lower Court as well as before this Court, defendant also set up a plea to the jurisdiction. This plea was rejected by the Court below in its afore mentioned judgment, which also covered the merits of the case. In his appeal petition, and during the hearing before this Court, defendant reiterated his plea to the jurisdiction, and asked that the judgment of the First Court thereon be revised. From the point of view of procedure, therefore, there is no obstacle to defendant pressing his aforesaid plea before this Appellate Court, such as there would have been in terms of section 440 Ch. 12, if he had not raised the plea before the Magistrate, or if, after having raised the plea, he had either expressly or tacitly waived it;

It is now proper to enquire in what this plea to the jurisdiction is made to consist;

Defendant has argued that the jurisdiction falls to be determined in terms of the offence "as alleged" in the summons, and not in terms of the offence which may be established by the evidence. Following this rule, defendant contends that the charge as alleged in the summons falls under section 20 of Ch. 117, which envisaged the punishment of imprisonment for a term not exceeding six months. The Lower Court, therefore, should have sat not as a Court of Criminal Judicature, but merely as a Court of Enquiry, in terms of law. He, therefore, concludes that the judgment should be quashed;

After hearing the submissions of the appellant and the Crown, this Court considers as follows;

In terms of law (sec. 379 Ch. 12), every Court of Judicial Police, consisting of a magistrate, has a twofold jurisdiction, namely, as a Court of Criminal Judicature, for the trial of offences which fall within its jurisdiction, and as a Court of Enquiry in respect of offences which fall within the jurisdiction of a higher tribunal. As a Court of Criminal Judicature, the Court of Judicial Police is, in terms of section 382, competent to try all contraventions and all crimes liable to the punishments established for contraventions, to a fine (multa), or to imprisonment or hard labour for a term not exceeding three months, with or without the addition of a fine (multa), or interdiction. The Attorney General may send for trial by the said Court any person charged with a crime punishable

with imprisonment or hard labour for a term exceeding three months but not exceeding six months, if there is no objection on the part of such person. Moreover, under the Administration of Justice (Emergency) Regulations 1940 (Govt. Not. 377/1940), the Attorney General may send for trial before the Court of Judicial Police sitting as a Court of Criminal Judicature any person charged with an offence punishable with imprisonment or hard labour for a term exceeding three months, but not exceeding two years. Sect. 401 Ch. 12 goes on to state that, with regard to offences liable to a punishment exceeding the jurisdiction of the Court of Judicial Police as a Court of Criminal Judicature, the Court of Judicial Police shall proceed to the necessary enquiry;

These provisions, therefore, amount to this: the maximum competence of the Court of Judicial Police is in respect of offences liable to the punishment of imprisonment or hard labour up to three months; when the offence is punishable with more than that, then the Court of Judicial Police must sit as a Court of Criminal Enquiry as the first stage towards the ultimate trial by jury. However, under the ordinary law (sec. 382 (3) Ch. 12), the Attorney General may send for trial by the Court of Judicial Police sitting as a Court of Criminal Judicature, any person charged with a crime punishable with imprisonment or hard labour up to six months, if the person concerned agrees. Furthermore, under the emergency law, the Attorney General may send for trial by the Court of Judicial Police sitting as a Court of Criminal Judicature any person charged with an offence punishable with imprisonment or hard labour up to two years, irrespective of whether the person concerned agrees or not. The normal maximum jurisdiction of the Court of Criminal Judicature is, therefore, in respect of offences punishable with imprisonment or hard labour up to three months; when that limit is exceeded, then normally the Court of Judicial Police should sit only as a Court of Criminal Enquiry. Sitting as such, and on the conclusion of the enquiry, the latter Court sends the record to the Attorney General, who may avail himself, in the appropriate cases, of the power of sending the person charged to trial before the Lower Court as a Court of Criminal Judicature, either under section 382 (3)

Ch. 12, afore quoted, or under the emergency law, also afore quoted. He may also either issue a "nolle prosequi", or file a bill of indictment, bringing the person concerned to trial before His Majesty's Criminal Court;

In the present case, of course, there can be no question of the Attorney General having exercised any of these two powers, as, once the Lower Court sat as a Court of Criminal Judicature, there was no occasion for the record to be remitted to the Attorney General, who might have then acted in exercise of these powers. The issue, therefore, narrows itself down to this: was the offence with which defendant was charged punishable with more than three months' imprisonment or hard labour? If it was, then the plea must succeed;

In proceeding further to examine the merits of the plea, it is well to state, at the very outset, that what must be looked at, for the purpose of the plea to the jurisdiction, is the offence "as alleged" in the summons, and not the offence which, at a subsequent stage, may result for the evidence. To go beyond the wording of the summons is to run counter to section 383 Ch. 12, which expressly and unequivocally lays down that in determining the jurisdiction regard must be had to the "alleged" offence. What, therefore, is the "alleged" offence? Counsel for the appellant contends that the offence as charged is that contemplated in section 20 of Ch. 117. On the other hand, Crown Counsel contends that the offence as charged is that under 18 Ch. 117;

These two sections run as follows;

Section 18:— "Save as otherwise expressly provided in this Ordinance, whosoever shall, by the means mentioned in section 2, "directly instigate the perpetration of an offence", shall for the mere fact of such instigation, be liable.....";

Section 20:— "Whosoever shall, by the means mentioned in section 2, "directly incite any person to disobey the law", shall, for the mere incitement, be liable, on conviction, to imprisonment for a term not exceeding six months";

The Prosecution and the Defence agree (and certainly there is no room for disagreement on that point) that, if the charge as alleged comes under section 18, then the punishment, as regulated according to the different cases in section

8, is such that the present case would be triable by the Lower Court as a Court of Criminal Judicature;

The "quaestio juris" is, consequently, whether the charge "as alleged" in the summons, falls under section 18 or under section 20. What difference there is between the offences contemplated in these two sections is obviously not a matter for enquiry in this case;

Now, the charge as framed in the summons is as follows:— "With having at Hamrun and elsewhere, by means of an article in the paper "The Bulletin" no. 6562 (daily 373) issue of Friday, the 2nd. April, 1948, of which you are the editor and proprietor, which article appeared at the front page and under the heading "Census Nose Parkers About Soon", and the subheading "No Castle Now", containing the paragraph at the end beginning with the word "the most important thing of all is" and ending with the words "may save unnecessary hardship and complaint", directly incited persons to disobey the law, to wit, section 8 of the Census Act 1948 (Act II of 1948), which empowers enumerators to enter any house at any time during a specified period, and section 10 (1) (a) of the same Act, which makes it an offence liable to a fine not exceeding £100 for any person to refuse or neglect to comply with, or act in contravention of, any of the provisions of the same Act";

It is obvious that the disposal of the question at issue turns substantially on a comparison between the wording of the two sections afore quoted and the wording of the summons, and it is equally obvious that, for the purpose of this comparison, what really matters are the substantive or operative words contained therein;

There appears to be no doubt that the operative words in section 18 are "directly instigate the perpetration of an offence"—these are undoubtedly the words which embody the ingredients of the offence. Equally there can be no doubt that the operative words in section 20 are "directly incite any person to disobey the law", for in them are contained the ingredients of the offence;

Now, the wording of the charge, in that thereof which

contains the imputation, says "directly incited persons to disobey the law". These are the very words of section 20, and not of section 18;

It is true that the summons goes on to specify which law is referred to as that which persons were being incited to disobey, and to what punishment the contravention of that law was liable, but this does not take away the deciding factor that the words used in the summons to denote the charge are those used in section 20 to denote the offence, and not those used in section 18. It is proper to reflect that, if the framer of the summons had in mind section 18, nothing would have been easier for him than to word the summons in terms of that provision, for ex. thus: "with having indirectly instigated the perpetration of an offence, to wit, an offence under ss. 8 and 10 of the Census Act 1948, punishable with a fine not exceeding £100". Instead of that, whoever worded the summons chose the exact words of section 20 "with having directly incited persons to disobey the law";

There can be no question that, once what has to be looked at is the alleged offence, it follows that it would be illegal, in judging on the issue of jurisdiction, to go beyond the terms of the summons;

The reason given by the Magistrate in dismissing the plea is, in the opinion of this Court, and with due respect to the Magistrate, faulty exactly in this respect. It goes beyond the wording of the summons. In fact, the Magistrate in effect said this: the charge against the accused is that of disobeying the law; this disobedience is made to consist in an offence against the Census Act; therefore the charge as framed is tantamount to the charge of instigating the perpetration of an offence. That is, the Magistrate, on the strength of an inference, said that the words of the summons (which are those of section 20) were equivalent to the other words used in section 18, and concluded that the charge was based on this latter section. It would seem to be more proper to say that the words used in the summons are the self-same words used in section 20, and that therefore the charge, as framed, comes under the section, particularly when it is borne in mind that whoever framed the summons, as has already been noted, could easily have worded

it in terms of section 18, had he wanted to do so;

The Magistrate's reasoning would also have the undesirable effect of a complete interchangeability between the two sections. In fact, if it can be argued that the words of section 20 are tantamount to the words of section, 18, the inverse proposition would also hold good in the case of a charge originally framed in terms of section 18. It is clear that the correct procedure would be to use the words in section 18 whenever it is desired to bring a charge under that section, and to use the words in section 20 if it is wanted to charge a person under this section. Then it would be the task of the Court to make such distinction between the two sections, and to bring the facts disclosed by the evidence under this or that section as the case may be;

This Court, therefore, holds that the charge as alleged in the summons is a charge under section 20. In terms of this section, the punishment is that of imprisonment up to six months. This maximum of punishment exceeds the jurisdiction of the Court of Judicial Police sitting as a Court of Criminal Judicature (summary jurisdiction), and therefore, in terms of sec. 401 Ch. 12, that Court ought to have sat as a Court of Criminal Enquiry and proceeded to the necessary enquiry;

This Court wishes to make it clearly understood that the only question which is being decided in the present judgment is one of procedure based on the offence "as alleged", that is, that on the basis of the alleged offence the Lower Court should have sat not as a Court of Criminal Judicature, but as a Court of Criminal Enquiry. This judgment is not concerned with the issue as to whether the defendant be or not guilty of an offence, nor is it concerned with the issue as to whether, in case the evidence should "ex hypothesi", disclose the commission of an offence, this offence falls under section 18 or section 20 of Chapter 117, or under any other law;

Now section 440 Ch. 12 lays down that, if the Appellate Court finds that the offence "attributed" to the offender (Maltese text "miġjuba fl-akkuża") was not within the jurisdiction of the Inferior Court by which it was tried, but that it was within the jurisdiction of another Inferior Court, the Su-

perior Court shall quash the judgment and refer the case to the competent Court;

For these reasons;

This Court disposes of the appeal as follows;

Upholds the plea to the jurisdiction set up by the appellant, quashes the judgment of the Court below, declares that the offence "alleged" in the summons is an offence under section 20, Ch. 117, and therefore outside the ordinary jurisdiction of the Court of Judicial Police sitting as a Court of Criminal Judicature, and refers the case back to the Court of Judicial Police sitting as a Court of Criminal Enquiry. The record, together with a copy of this judgment and the preliminary judgment of the first September 1948, is to be sent without delay by the Registrar of these Superior Courts to the Registrar of the Inferior Courts.