of Mahajan, J., because, according to him, if the proprietors of the Thola *alone* were in possession of the Shamilat of that Thola, then it could not be said that it was being used for the benefit of a part of the village community. It should be shown that people in the village, other than the proprietors of that particular Thola, were getting some benefit from the said land before it could be held that the same was being used for the benefit of a part of the village community, because if the proprietors of the Thola itself were in possession of that land and using it for themselves, they were merely exercising their own rights to which they were legally entitled in the land. It must be proved that the other villagers, who had no rights in the said land, were also using it or the land was being utilized for their welfare as well, before it could be said that it was used for the benefit of a part of the village community. It is, however, needless to decide this matter, because, as already held above, the plaintiffs have not been able to establish that the land was 'Shamilat Deh' within any of the clauses (1) to (5) of section 2(g) of the 1961 Act.

(18) In view of what I have said above, this appeal fails and is dismissed. In the circumstances of this case, however, I will leave the parties to bear their own costs throughout.

K.S.K.

REVISIONAL CRIMINAL

Before A. D. Koshal, J.

BIKKAR SINGH,—*Petitioner.*

versus

STATE OF PUNJAB,—*Respondent.*

Criminal Revision No. 1094 of 1968

December 9, 1969

The Punjab Excise Act (I of 1914)—Section 75(2)—Police report in an excise case put in a Magistrate's Court within one year of the commission of the offence—Magistrate not taking cognizance till after the lapse of one year—Prosecution—Whether said to be "instituted" within one year of the offence.

Held, that the expression "the prosecution is instituted within a year" in section 75(2) of Punjab Excise Act, 1914, means that the allegations constituting the charge against the offender are filed in a Magistrate's Court with a prayer that necessary action be taken. When that has been done the prosecution must be deemed to have been instituted, notwithstanding the fact that the Magistrate did not take any action in regard thereof but kept the report pending with him without any order till the lapse of one year. Taking of cognizance and the institution of the prosecution, as is clear from the language of sub-section itself, are two different things and even though the Magistrate concerned is yet to take cognizance of any offence brought to his notice by means of a police report, it cannot be said that the prosecution is not instituted as soon as the report is filed. The institution of the prosecution is an act attributable to the prosecuting agency and the Court has to take no part therein. (Para 9)

Petition under Section 439 of the Criminal Procedure Code for revision of the order of Shri R. L. Garg, Additional Sessions Judge, Jullundur, dated the 18th October, 1968 modifying that of Shrimati Harmohinder Kaur, Judicial Magistrate Ist Class, Phillaur, dated the 25th April, 1968, convicting the petitioner.

MRS. S. BINDRA, ADVOCATE, for the petitioner.

P. S. MAAN, ADVOCATE, FOR ADVOCATE-GENERAL (PUNJAB), for the respondent.

JUDGMENT

KOSHAL, J.—The petitioner was convicted on the 25th of April, 1968, by Shrimati Harmohinder Kaur, Judicial Magistrate, 1st Class, Phillaur, of an offence under section 61(1)(a) of the Punjab Excise Act and was sentenced to rigorous imprisonment for four months as well as a fine of Rs 100, the sentence in default of payment of fine being rigorous imprisonment for two months. His appeal was decided on the 18th of October, 1968, by Shri R. L. Garg, Additional Sessions Judge, Jullundur, who maintained the conviction as well as the sentence of fine and that imposed in default of payment thereof but reduced the substantive sentence of imprisonment to rigorous imprisonment for two months. To this Court the petitioner has therefore, come up in revision.

(2) The case for the prosecution may be stated thus. On the 6th of January, 1966, Head Constable Gurmohinder Singh (P.W. 2) received some secret information in pursuance of which he proceeded in a jeep towards village Dialpur in the company of Excise

Inspector Gurcharan Singh (P.W. 1) as well as some other police and excise officials. After this party had entered the area of the village, they sighted the petitioner coming from the side of his well with a canister on his head. He was stopped on suspicion and the canister was found to contain 318 ounces of a liquid a sample from which was later on analysed by the Chemical Examiner and was found to be illicit liquor.

(3) Both the above mentioned prosecution witnesses gave the same version of the occurrence as has been set out above.

(4) The stand of the petitioner was that he had been called from his house through a constable to that place in the village where a fair was being held and where the Head Constable was present and that he was falsely involved in the present case at the instance of Kartar Singh, a member of the village Panchayat, who was inimical to him (the petitioner). He added that from his house to the fair he was accompanied by Sadhu Singh and Sarwan Singh.

(5) The two Courts below accepted the testimony of the two prosecution witnesses at its face value and rejected a contention that no reliance should be placed on the same in the absence of corroboration from unofficial sources. The defence version was rejected mainly on the ground that neither Sarwan Singh nor Sadhu Singh had been produced in the witness-box and that there was no material on the record from which it could be deduced that Kartar Singh Panch had any influence with the Police.

(6) The first contention raised before me on behalf of the petitioner is that the failure of the Head Constable to join non-official persons as witnesses of the recovery said to have been made from the petitioner was fatal to the prosecution case, especially when it is admitted on all hands that a fair was being held at village Dialpur on the 6th of January, 1966. The contention must be overruled for the simple reason that the police party suddenly came upon the petitioner and surprised him in the act of transporting liquor. They had thus no occasion to seek the assistance of other persons, official or non-official, before effecting the recovery. It is no doubt true that the Head Constable had started on a raiding mission to be fulfilled at Dialpura but then what he was normally expected to do was to reach that village, to join some respectables

as members of his party, and then to effect the necessary raids. Before reaching the village he was not expected to take any steps to seek the help of non-officials who would witness the recoveries to be effected later on and if he suddenly came face to face with the petitioner and suspected him of carrying contraband, it would be his duty to seize both and set the law in motion. In the circumstances the failure of the prosecution to provide corroboration from non-official sources to the testimony of the Head Constable and the Excise Inspector is of no consequence.

(7) I am also at one with the two Courts below in rejecting the defence evidence as untrustworthy. Sarwan Singh and Sadhu Singh have not been produced and there is no evidence in support of the plea that Kartar Singh Panch was inimical to the petitioner. It is also noteworthy, as mentioned by the learned Additional Sessions Judge, that Gurcharan Singh (D.W. 1) did not depose that the constable who took away the petitioner from the village was accompanied by Kartar Singh, even though that is exactly the case set up by the petitioner. Nor is there anything to show that the Panch had any influence with the Head Constable so as to be able to prevail upon him to falsely implicate the petitioner in this case.

(8) In view of what I have said above, I have no hesitation in acting upon the testimony of the Head Constable and the Excise Inspector about whom there is no presumption, merely because they happen to be officers engaged in detection of crime, that their testimony is not to be relied upon without corroboration from non-official sources.

(9) The occurrence in this case, as already stated, took place on the 6th of January, 1966. The police report under section 173 of the Code of Criminal Procedure was put into Court on the 5th of December, 1966, and the order that the challan be registered and the accused be summoned was made by the learned Magistrate no earlier than the 10th of October, 1967. On the basis of these facts it is contended by learned counsel for the petitioner that his prosecution is incompetent by reason of the provisions of sub-section (2) of section 75 of the Punjab Excise Act which are to the following effect:

"(2) Except with the special sanction of the State Government, no Magistrate shall take cognizance of any offence

> punishable under this Act unless the prosecution is instituted within a year after the date on which the offence is alleged to have been committed."

It is not denied that the police report above mentioned was put into Court within a year of the alleged commission of the offence but it is urged that the prosecution could not be said to have been "instituted" within the period prescribed under sub-section (2) cited above unless the learned Magistrate had taken some concrete steps in pursuance of it. With this contention I do not find myself in agreement. All that is laid down is that "the prosecution is instituted within a year" which means that the allegations constituting the charge against the offender are filed in Court with a prayer that necessary action be taken. When that has been done, the prosecution must be deemed to have been instituted notwithstanding the fact that the learned Magistrate did not take any action in regard thereto but kept the report pending with him without any orders. It is to be noted that the taking of cognizance and the institution of the prosecution, as is clear from the language of sub-section (2) itself, are two different things and even though the Magistrate concerned is yet to take cognizance of any offence brought to his notice by means of a report under section 173 of the Code of Criminal Procedure, it cannot be said that the prosecution is not instituted as soon as the report is filed. The institution of the prosecution is an act attributable to the prosecuting agency and the Court has to take no part therein.

(10) Reliance on behalf of the petitioner has been placed on *Rasulbakhsh Motan Jat* v. *Crown* (1), and *S. Suppiah Chettiar* v. *Chinnathurai and another* (2). In the Karachi case the word "instituted" occurring in section 29 of the Indian Arms Act (XI of 1878) which runs thus :

> "Where an offence punishable under section 19, clause (F), has been committed within three months from the date on which this Act comes into force in any province, district or place to which section 32, clause 2, of Act XXXI of 1860 applies at such date or where such an offence has been committed in any part of British India not being such a

(1) I.L.R. 1943 Karachi 524.
(2) A.I.R. 1957 Mad. 216.

> district, province or place, no proceedings shall be instituted against any person in respect of such offence without the previous sanction of the Magistrate of the District or, in a Presidency town, of the Commissioner of Police."

was under interpretation and it was held that proceedings could be said to have been instituted within the meaning of the section only when a Magistrate took cognizance of the offence concerned under section 190 of the Code of Criminal Procedure. That section is materially different from the one with which we are concerned and which specifically makes a distinction between the taking of the cognizance of any offence punishable under the Punjab Excise Act and of the institution of the relevant prosecution. If the interpretation of the word "instituted" occurring in sub-section (2) of section 75 of the Punjab Excise Act were the same as placed upon the word in the Karachi case, the sub-section would become wholly unintelligible for it would then mean that no Magistrate shall take cognizance of any offence punishable under the Punjab Excise Act "unless he has taken cognizance thereof within a year after the date ....". It is quite clear, therefore, that the word "instituted" in the said sub-section cannot be given the same meaning as was given to it in the Karachi case.

(11) In the Madras authority the word "instituted" as occurring in section 3(5) of the Workmen's Compensation Act was under consideration. That section states :

> "Nothing herein contained shall be deemed to confer any right to compensation on a workman in respect of any injury if he has instituted in a civil court a suit for damages in respect of the injury against the employer or any other person; and no suit for damages shall be maintainable by a workman in any court of law in respect of any injury— (a) if he has instituted a claim to compensation in respect of the injury before a Commissioner; or (b) if an agreement has come to between the workman and his employer providing for the payment of compensation in respect of the injury in accordance with the provisions of this Act."

(12) The claimant in the case filed a claim in respect of the concerned injury before a Commissioner but withdrew it before proceedings were commenced against the opposite party. It was held

by Ramaswami, J., that there was no bar under section 3(5) above quoted to the claimant instituting a suit in the civil court. Ramaswamy, J., noted that the term "instituted" occurring in the section had not been judicially defined. He was, therefore, of the opinion that the following definitions of "institute" appearing in Ramanatha Aiyar's Law Lexican might be usefully borne in mind :

> "Institute : Set on foot; commence, 'Instituted' in respect of legal proceedings means, commenced : *Blackborne* v. *Blackborne*, (3). To begin an action; to accuse; to appoint an heir by will. A counter claim is a 'proceeding instituted' (*Hoodbars* v. *Cathcart* (4), 'Institute' when applied to legal proceedings, signifies the commencement of the proceedings. When we talk of 'instituting an action' we understand bringing an action. Criminal proceedings cannot be said to be 'instituted' until a formal charge is openly made against the accused by complaint before a Magistrate."

Ramaswami, J., went on to observe :

> "The word 'instituted' in S. 3(5) of the Workmen's Compensation Act can therefore be taken as meaning 'setting on foot an enquiry' and is more than a mere filing of a claim."

He concluded :

> "Bearing these principles in mind, if we examine the facts of this case, inasmuch as the dependent did nothing more than file a claim and withdrew it before the proceedings were commenced and which commencement would only be with effective taking of notice to the opposite side, there has been no such election as would debar the workman's dependant from instituting a suit in the Civil Court and which as the plaint shows was under the Workmen's Compensation Act and the Fatal Accidents Act."

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(3) (1868) 37 LJ (P and M) 73 IP and D 563 (x).

(4) (1895) 1 Q.B. 873 (Y).

(13) This conclusion goes to show that the interpretation put by Ramaswami, J., on the word "instituted" as occurring in section 3(5) of the Workmen's Compensation Act was arrived at in the special context in which that word occurs in that section and that the interpretation cannot be adopted as a matter of course when the word occurs in a different context in which, in my opinion, it makes appearance in sub-section (2) of section 75 of the Punjab Excise Act and in which the definition given by Aiyer with reference to criminal proceedings is more in point. According to that definition:

> "Criminal proceedings cannot be said to be 'instituted' until a formal charge is openly made against the accused by complaint before a Magistrate."

(14) It cannot be denied that as soon as a report under section 173 of the Code of Criminal Procedure is put before a Magistrate, a formal charge comes into existence against the accused and according to the definition just above given, it must be said that criminal proceedings are "instituted" against him.

(15) In any case the language of sub-section (2) of section 75 of the Punjab Excise Act must be interpreted as it stands and without reference to the language of other provisions of law enacted in a different context and possibly with a different object in view. As already stated, the stage of the institution of a prosecution is reached certainly *before* cognizance of the offence involved is taken by the Magistrate and the taking of such cognizance is no part of the institution of the prosecution.

(16) In view of the meaning which I attach to the provisions of sub-section (2) of section 75 of the Punjab Excise Act, the contention that the cognizance of the offence by the Magistrate was barred must be overruled, as the sub-section provides a time-limit only for the institution of prosecution and none for the taking of such cognizance.

(17) As a result of the above discussion, I must hold that the conviction of the petitioner is well-based. The sentence awarded to him is also not excessive and, in the result, the petition fails and is dismissed.

N.K.S.