In this particular case, then, the lessor, having failed to make any binding agreement for the stamping of the documents by the lessee, had two courses open to him. On the one hand he could, as a prudent man would, have stamped forthwith the duplicate which remained in his possession. Or on the other hand he could do nothing in the hope that if any dispute should arise regarding the document it would arise in such a way as to force the lessee and not himself to put the document in evidence. He chose to take the latter course but unfortunately for him the dispute has arisen in such a way as to force him to put the document in evidence and I fail to see why he should recover from the lessee an expense which arose from his own lack of ordinary prudence dating from long before the commencement of the dispute between the parties. The amount of costs allowed by the Magistrate will consequently be reduced to £4 16s. 0d.

As regards the costs of this appeal, the appellant has in effect failed on two issues and succeeded on two others. It is accordingly a case where the costs should be apportioned which I do by ordering that each side pay its own costs.

POLICE *ats.* PRASAD.

[Appellate Jurisdiction (Seton, C.J.) September 19, 1946.]

Penal Code Cap. 4—*s.* 193 (*c*)—*loitering near premises for a disorderly purpose—whether immoral purpose disorderly—whether section applies if disorderly purpose actually carried into effect.*

Prasad was noticed by a constable standing in the gateway of a private residence committing an act of masturbation. He was facing the house and what he was doing was not visible from the road.

HELD.—(1) Proof that a person is found near premises committing masturbation is proof that he was there for a disorderly purpose within the meaning of s. 193 (c) of the Penal Code.

(2) The offence defined by s. 193 (*c*) of the Penal Code may include cases where the purpose alleged has in fact been carried into effect.

Cases referred to :—

(1) *R. v. Berg and ors.* [1927] 20 Cr. Ap. 38.

(2) *Hayes v. Stevenson* [1860] 3 L.T. 296 ; 25 J.P. 39 ; 37 Dig. 364.

APPEAL by the police against dismissal of a charge by a Magistrate.

E. M. Prichard, for the appellant : In dismissing this charge the learned Magistrate observed " So far as the evidence goes it is clear that the act of masturbation was being committed and therefore it was not 193 (*c*) but 193 (*d*) which applied, but the prosecution say that the act was not visible from a public place so that there was no offence against (*d*)". There is a certain difficulty about the logic of that observation but whatever it means it scarcely suggests that the Magistrate applied himself to the real question—whether the facts proved

included all the ingredients of the offence charged. I understand, though the record does not show it, that the Magistrate did refer to one authority (*Hayes v. Stevenson*). That case was decided under the Vagrancy Act of 1824[1] which declared " every person found in or upon any dwelling house . . . for any unlawful purpose " to be deemed a rogue and vagabond. It was held that an unlawful purpose means a purpose to commit an offence punishable as a crime and not a mere offence against morality—no doubt a correct decision but not an authority as to the meaning of " disorderly purpose ". Obviously it means something other than " unlawful purpose ". This appeal stands or falls on the meaning of the word " disorderly ". It should receive its English meaning which includes " violating moral order " (Shorter Oxford Dictionary 2nd Edition) " not regulated by the restraints of morality ; unchaste " (Webster). There is no authority on its meaning in this particular context but the latter dictionary meaning was approved with certain reservations in *R. v. Berg & ors.* Presumably a purpose is either orderly or disorderly ; in view of the meaning of the word disorderly is masturbation orderly ?

A. I. N. Deoki, for the respondent : I do not wish to dispute my friend's interpretation of the word " disorderly ". Once his purpose has been put into effect a person should not and, it is submitted, cannot be charged with the purpose only. If the respondent committed an offence it must be under s. 196—(*d*)—but the police admit that they are unable to prove such an offence.

E. M. Prichard, for the appellant: My learned friend does not contest the existence of any fact alleged in the charge.

The Court.—Is not the position under the code left very vague—a possibility of a charge under two sections for the same offence ?

E. M. Prichard, for the appellant: Nothing would have suited my learned friend better than to have persuaded the police that the charge should be under s. 193 (*d*). He would then have proved that nothing incriminating could be seen from the road and his client would have been acquitted. That shows that the possibility of two charges does not exist on the facts.

SETON, C.J.—The respondent was charged in the Magistrate's Court with having been found loitering near the premises of Mr. Frost of Brewster Street, Suva, at such time and under such circumstances as to lead to the conclusion that he was there for a disorderly purpose, to wit, to masturbate, contrary to s. 193 (*c*) of the Penal Code. The respondent pleaded not guilty and was defended by Mr. Deoki. The charge was dismissed, as will appear hereafter, without the defence being called upon ; consequently, nothing herein is to be taken as an expression of opinion as to whether or not the facts alleged were proved to be true.

At the trial, a constable gave evidence that he was sitting in a car in Amy Street when the respondent came past him and went and stood in a small gateway leading to Mr. Frost's house about six yards away. He was standing between the gate posts facing the house. Suspecting what the respondent was doing, although he could not see clearly the

[1] 5 *Geo.* 4 *c.* 83.

constable got out of the car and went up to him ; when he reached him, the constable found him in the act of masturbating and, on being challenged, the respondent admitted the fact. In addition to the constable, a police recruit gave evidence ; he said that he had come on the scene when the constable was arresting the respondent and he gave an account of a conversation he had had with the constable in the presence of the respondent.

This evidence concluded the case for the prosecution and Mr. Deoki on behalf of the respondent, then submitted that his client had no case to answer. He said that in the first place the charge should have been laid under s. 193 (*d*) and not under s. 193 (*c*), and secondly that, since the prosecution admitted that the respondent could not be seen from a public place, no offence had been committed under s. 193 (*d*). The learned Magistrate accepted this view of the matter and dismissed the charge.

The Crown appeals and Mr. Prichard in support of the appeal has contended that the charge was properly brought under s. 193 (*c*) and that what the accused was said to have been doing, proved that he was at the spot in question for a disorderly purpose. Mr. Deoki, on the other hand, in reply, insisted that s. 193 (*c*) did not apply in the circumstances of this case He did not contest the fact that if the accused did what he is said to have done, his act came within the meaning of the word " disorderly " but he said that s. 193 (*c*) only applied to cases where the accused is suspected of having a disorderly purpose in view and not to a case where the disorderly purpose is actually carried into effect.

I do not think that so fine a distinction as this can be drawn. In most cases before a purpose is executed, there must be a period of time, if only a matter of seconds, when a person may be properly described as being in a place in order to execute such purpose. In the present case, for example, the respondent, when he passed the constable, was not doing anything to which exception could be taken, it was his coming to a standstill between the gate posts and his subsequent actions which led the constable to the conclusion that the respondent was there for a disorderly purpose but he was not able to verify his conclusion until he went forward and investigated what the respondent was doing.

The appeal will be allowed and case will return to the lower Court for re-trial by another Magistrate.