
(1870) 02 CAL CK 0013

Calcutta High Court

Case No: Miscellaneous Criminal Case No. 6 of 1870

In Re: Surendra Nath
Roy and Others

The Queen

APPELLANT

Vs

RESPONDENT

Date of Decision: Feb. 18, 1870

Judgement

Phear, J.

It seems to me clear from Mr. Monro's own explanation of the course of this case, that he has committed in it serious deviations from the procedure laid down by the Criminal Procedure Code, and that he has, in some of the stages of the case, shown a want of discretion, which is to be lamented; but, on the whole, I think that the rule ought to be discharged, because I entirely acquit Mr. Monro of having, in any part of this protracted inquiry, been actuated by any improper feeling towards the prisoners, or by any other desire than that of doing his duty as a judicial officer. It is very much to be deplored that the practice which Mr. Monro has taken to be accordant with the provisions of the Criminal Procedure Code, should at this day obtain, as we are told it does, in a zilla so close to the capital as Nuddea.

2. It cannot be questioned, I think, that the custody of the prisoners was, from the time of the first arrest up to the 2nd of November, illegal. Mr. Monro says he supposed that the step he took in causing their arrest was sanctioned by section 68, Criminal Procedure Code, but I am very distinctly of opinion that that section applies only to cases in which the private individual, who is injured or aggrieved, or some one on his part, does not come forward to make a formal complaint. It is a provision of the law for enabling a public official to take care that justice may be vindicated, notwithstanding that the persons individually aggrieved are unwilling or unable to prosecute; and even in such cases, the jurisdiction of the Magistrate to arrest requires, for its foundation, knowledge of the fact of an offence having been committed, and that knowledge, I apprehend, must be either personal or derived from testimony legally given.

3. But here Mr. Monro commences his explanation by stating not only that the brother of Nabin Roy had made a complaint in the first place to the Joint-Magistrate, but that Mr. Monro's own subsequent proceedings were in effect instituted upon information given by this man to the police and to himself. That being so, the case obviously might, and ought to have been conducted upon one or other of the bases afforded by section 66 and by section 135. There was no occasion whatever for Mr. Monro to take upon himself the character of a public prosecutor.

4. There is, in my judgment, no doubt that the law is just as jealous of personal liberty in India as it is in England, and that liberty cannot rightly be taken away except under circumstances which are clearly prescribed by positive law. Now the warrant of arrest which Mr. Monro issued, and under which the petitioners were taken into custody, was grounded upon the information informally given by the brother of the missing man. The man Nabin was still missing, and upon the police report and the statement of the missing man's brother, who appeared before me at Muragacha, I issued an order to Surendra Nath Roy, whose ryots the accused were, forwarding a warrant for their arrest, and directing him to produce them as persons accused of "dacoity." This is Mr. Monro's own statement.

5. As at present advised, I don't think that the report of the police, or any statement of the missing man's brother, which falls short of an actual formal complaint, or of a statement made on oath, is sufficient in law to give the Magistrate jurisdiction to issue his warrant. I need not point out the mischief that would be likely to ensue if a Magistrate were justified on the mere report of the police in arresting any person whom they wished to incriminate. In a particular case, namely when an offence is committed in his presence, a Magistrate may, no doubt, without complaint or sworn testimony, order the arrest of the offender; but this is by virtue of section 110, and the separate specification of this power in the Code goes far to show that section 68 does not bear the construction which Mr. Monro has put upon it. The cases in which the police may arrest without a warrant, are prescribed with minuteness in the Criminal Procedure Code, and it appears to me that the more extensive power conveyed by a warrant must proceed from the exercise of a judicial discretion, either on the Magistrate's own view, or upon materials furnished by some other person, under such circumstances as will render the person responsible for putting the law in motion, i.e., furnished by him either in the capacity of prosecutor or by statement on oath.

6. Again, the address of the warrant in this case is unfortunate. It is directed not to any police officer, but to Surendra Nath Roy, the person at whose instigation, according to the theory of the police, the alleged kidnapping originated, and even if the Magistrate did not take the police view on this point, Surendra. Nath was clearly a person so closely connected with the parties who were supposed to be implicated, that he was soon arrested as an accomplice. Doubtless, section 77 of the Criminal Procedure Code⁽²⁾ and the corresponding section of the amended Act⁽³⁾ do give the Magistrate power to issue a warrant to an unofficial person. But in the enactment itself is to be found an indication of the circumstances under which the Legislature intended that power to be exercised,

namely, when the Magistrate is without the assistance and services of competent persons charged with ordinary police duties, and responsible by virtue of their offices for the proper execution of a process of this sort; and above all when the urgency is imminent.

7. But whether or not the first arrest was made without legal foundation, unquestionably the subsequent commitment to hajut and the remands based, as these were, on no evidence whatever, were entirely invalid. The force of the warrant of arrest is at an end when the prisoner is brought before the Magistrate. The Magistrate cannot lawfully commit to prison, or remand a prisoner who is before him, without sufficient grounds, and in the complete absence of evidence there can be no grounds.

8. I regret, as I have already mentioned, during the hearing of the case, that Mr. Monro, on receiving the order of the High Court with regard to releasing the prisoner on bail, which order reached him while he was presiding in Court, did not at once make it public; even if it be supposed, as suggested by Mr. Paul, that none of the parties concerned were present in the Magistrate's Court at the time. I say, I regret it, because publicity in these cases is the highest safeguard which the Magistrate has for preventing any misconception as to his motives and conduct.

9. After the 2nd of November, the case changed. At that time evidence was produced before the Magistrate, on which he could rightly, in the exercise of his judicial discretion, hold that the persons charged ought to be committed to prison, either to await trial, or for safe custody, during the adjournment of the inquiry. And it is because I think that this is the case, that I feel the strongest ground taken up by the petitioners fails them. For I am not prepared to say that because the arrest and custody previous to the 2nd of November was, in my opinion, illegal, therefore all the subsequent proceedings are void and ought to be quashed. It appears to me that the petitioners now stand committed for trial, under orders of a competent officer made after hearing evidence, which was judicially received and recorded. I cannot, therefore, say that they ought not to be tried on the charge on which he has so committed them.

10. There are other matters which have been referred to in the argument before us, and which have, I don't say unnecessarily, occupied a considerable time in discussion; but I don't think that we are required to direct our attention to them in detail now.

11. It does seem to me, however, that a very unduly lengthened period did elapse in this case, between the first apprehension of the prisoners and their commitment for trial, and I am disposed to think that an officer in Mr. Monro's position would have exercised the better discretion if he had taken care not to drag the parties stage after stage, as he did, following him, in his tour through the Mofussil. It was surely open to him in more ways than one to have provided that the case should have been heard and decided promptly at Krishnaghur. Even if he had been right, as I think he is not, in the supposition that the proceeding was one based on section 68, and that the case could not therefore be made over to any Subordinate Magistrate for investigation, still there was no sort of obstruction

in his way to prevent him from taking it up himself, at the principal town, or at any other convenient spot in the district, and completely disposing of it in the same place. The movements of a Magistrate during his cold weather tour are not so strictly prescribed by an inexorable rule of necessity, that Mr. Monro could not have reasonably managed, in this case, to take all the evidence at one station.

12. The detention of the prisoners in the thanna was certainly, under the circumstances of the case, to say the least of it, not judicious; and the direction to Surendra Nath, while he was out on bail, to remain in Krishnaghur, was absolutely without authority, and should not have been made.

13. I also cannot think that the examination of Harish Ghose's witness was conducted in such a way, and under such circumstances, as to give complete confidence to the minds of the petitioners in the Magistrate's fairness and impartiality, with reference to the investigation. And, on the whole, I cannot avoid the conclusion, after a full consideration of the facts of this case, that although there is nothing now imputable to Mr. Monro such as to disqualify him from trying the case between the Crown and the prisoners, there was still very much before the explanation which he has submitted to this Court was made public to render the prisoners justly apprehensive that they would not receive an unbiased and impartial trial at his hands. Therefore, although I have said that I think the rule ought to be discharged, I also think, under the circumstances, that it should be discharged without costs.

Mitter, J.

I am of the same opinion.

* The order passed by Mr. Monro on this petition was as follows:--"The four men, Dwarik Ghose, Paika Hari, Harish Ghose, and Mahesh Hari, have been arrested in a case, which is at present pending enquiry before the Police. The case is one of kidnapping and illegally confining a Tehsildar; the kidnapped man has not been found; there is no knowing what has become of him. It is quite possible that he has been murdered. I do not, therefore, feel justified in accepting bail for the accused, who may, at any time, find themselves on their trial for murder, until it is clearly shown that Nabin is alive, and that they had nothing to do with his being abducted with the intention that he should be unlawfully confined (Section 368.) At present there seems sufficient grounds to implicate than in such an unbailable offence. Bail is, therefore, refused."

** On the 4th November, Mr. Monro recorded the following as his opinion:--"The statement of Nabin Roy, if true, does raise a strong presumption of the guilt of the accused, and would, if the question of committal were at the present stage of the proceedings raised, require the committal of the accused."

(1) Act XXV of 1861, s. 68.--"Except as is otherwise provided in Chapter XI of this Act, the Magistrate of the district, or a Magistrate in charge of a division of a district, may, without any complaint, take cognizance of any offence which may come to his knowledge, and may issue a summons, or in cases where a warrant may issue, a warrant of arrest against the person known or suspected to have committed such offence, in the same manner as if a complaint had been made against such person."

(2) Act XXV of 1861, s. 77.--"A warrant shall ordinarily be directed to a Police Officer, but the Magistrate issuing a warrant may, if immediate service be necessary, and no Police Officer immediately available, direct the warrant to any other person."

(3) Act VIII of 1869, s. 77.--"A warrant shall ordinarily be directed to a Police Officer, but the Magistrate issuing a warrant may, if he see fit, direct it to any other person."