Nafar Sabdar Vs Emperor

Court: Calcutta High Court

Date of Decision: June 1, 1932

Judgement

Costello, J.
This matter comes before this Court as an application under Sections 435 and 439 of the Code of Criminal Procedure. Three

persons, Nafar Sardar, Tafar Sardar and Safar Sardar, had been convicted on the 5th December, 1931, by a magistrate, 1st class, at Alipore, u/s

186 of the Indian Penal Code and sentenced to pay a fine of Rs. 30 each or in default to undergo three weeks" rigorous imprisonment. They then

moved the Sessions Judge of Alipore with the object of obtaining from him a recommendation to this Court that the conviction should be set aside.

2. Before the learned Sessions Judge, they took the point which constitutes the main contention put forward before me in the present proceedings.

Put shortly, that was that prior to the actual trial, as a result of which they were convicted, the accused persons had already been, in effect,

acquitted of the charge brought against them. The Petitioners having failed before the learned Sessions Judge, the present application is made to

this Court.

3. The grounds originally taken were two in number and they are stated in these terms:?

(1) for that the order of the learned magistrate, directing the release of the Petitioners and purporting to be a termination of the proceedings against

them, having been passed in a summons case, the trial of the Petitioners on identical facts was barred by the provisions of Section 403 of the

Criminal Procedure Code;

(2) for that the order, directing the release of the Petitioners, having been made in a summons case, had the effect of an order of acquittal and, as

such, the subsequent trial on identical facts was bad in law.

4. These two statements together in effect constitute the first ground on which this application is based. The second is in these terms:?

for that on the findings arrived at by the learned magistrate himself, that the circumstances relating to the non-examination of competent witnesses

were unusual and that there was no satisfactory explanation for such non-examination, the Petitioners were entitled to the benefit of the

presumption that the witnesses, if examined, would not have supported the case for the prosecution.

5. In course of the argument before me, a third point has been raised, namely, that the findings of the learned magistrate are not sufficient to show

that any offence had been committed under the provisions of Section 186 of the Penal Code.

6. Before proceeding to deal with these three points, I must refer to the facts: The complainant was a naib nazir attached to the court of the Munsif

otAlipore. The three accused persons were the judgment-debtors in connection with three cases, being Nos. 50 of 1931, 51 of 1931 and 52 of

1931, in all of which one Annapoorna Debee was the decree-holder. The case for the prosecution was that, on the loth January, 1931, the

complainant received, in his capacity as naib nazir, three warrants authorizing him to attach the moveable properties of the judgment-debtors. On

the 1st February, 1931, the complainant proceeded to the house of the accused persons in company with five peons and five men provided by the

decree-holder for the purpose of attaching the judgment-debtors'' moveables. The naib nazir produced the warrants and showed them to the

accused who were at the time sitting together. He read out their contents and demanded the amounts due in respect of the three decrees. It

appears that the accused persons took half an hour''s time for the purpose of procuring the money. At the end of that time the complainant

repeated his demand, but the accused persons failed to comply with the demand. Thereupon, the naib nazir proceeded to make his way towards

the inner part of the debtors'' house in order to attach the moveables. He seems to have sent forward a man named Abinash, one of the agents of

the decree-holder, for the purpose of identifying the moveables. By that time, a number of men, said to be as many as 30 or 40, had collected in or

about the house of the debtors. They were armed with lathis and other weapons and shouted ""beat"" ""beat"" and actually some of them pushed and

knocked down the man Abinash and some of them, including the three accused, declared that they would kill or break the head of anybody

coming into their house to attach the moveables. Thereupon, the men provided by the decree-holder fled and the naib nazir, his peons and one

local chaukidar proceeded to the khamar of the accused, but, owing to the attitude of the accused persons, no attachment could be effected. In

brief, this was the case alleged against the accused.

7. The naib nazir thereupon made a report to the Munsif, who was dealing with the execution matter, and he sanctioned the prosecution of the

accused persons and himself forwarded the report of the nazir to the Sub-Divisional Officer at Alipore, with a request that that report would be

treated as a complaint. According to the statement of the magistrate, as it appears in his judgment, the Sub-Divisional Officer by mistake

summoned the accused on the basis of the naib nazir''s report. When the matter came before the magistrate on transfer, on the 18th May, 1931, he

made an order on that date, which is the basis of the first ground of complaint made by the accused in the present petition. The order was in these

terms: ""The accused are released. ""File"". The magistrate''s only explanation of the matter appears in his judgment, which was delivered on the 5th

December, 1931, and it is in these words?

I filed the proceedings, as they were illegal u/s 195 of the Criminal Procedure Code, and directed the naib nazir to make a formal complaint in

writing if he wanted to proceed against the accused.

8. On the 18th May, 1931, the naib nazir made a formal written complaint to the Sub-Divisional Officer, on which the present proceedings are

based. A second summons was issued, as a result of which the trial of the accused was commenced before the learned magistrate on the 28th July,

1931. The matter proceeded by stages from that date onwards until final judgment was given on the date I have mentioned, that is to say, on the

5th December, 1931.

9. In the course of the proceedings, the naib nazir himself and three other witnesses gave evidence in support of the prosecution case, and the

accused, on the 10th October, 1931, seem to have called one witness for their defence. On the 11th November argument was heard on behalf of

the defence. It does not appear and indeed I do not think that it was seriously suggested that in course of the trial itself, any objection was taken to

the proceedings on the ground that there had already been made the previous order in the terms I have mentioned, namely, ""the accused are

released"". That point was, however, taken before the learned Sessions Judge, as I have already mentioned, and that is the point which has mainly

been relied upon in respect of the present application by Mr. Mukherji in the able argument he has addressed to me on behalf of the three accused

persons. Mr. Mukherji has urged that the action of the learned magistrate on the 18th May, 1931, was one not warranted by any provision in the

Code of Criminal Procedure and indeed was not only irregular but illegal.

10. In order to ascertain whether that contention can be substantiated it is necessary to examine somewhat closely what it was that actually

happened when the matter came before the learned magistrate on the first occasion. The Petitioner''s account of it is stated in paragraph 5 of their

petition?

On the date fixed for the hearing of the case, that is to say, on the 18th May, 1931, when the complainant, the naib nazir, his witnesses and your

Petitioners were in attendance in court, the learned magistrate, Mr, A.C. Mukerji, on looking into the papers on the record made the following

order without assigning any reasons therefor?" The accused are released. File.

11. It is argued on behalf of the Petitioners by Mr. Mukherji that that is not an order which the learned magistrate was competent to make under

any provision of the Criminal Procedure Code, and, in the circumstances, it must be taken in effect to have been an order made under the terms of

Section 247 of the Criminal Procedure Code. That Section reads as follows:?

If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or on any day subsequent thereto to

which the hearing may be adjourned, the complainant does not appear, the magistrate shall, notwithstanding anything hereinbefore contained,

acquit the accused.

12. I pause here in order to point out that Mr. Mukherji has argued that, although the complainant was in fact present upon the day appointed,

there was, to all intents and purposes, no complaint before the magistrate and therefore the matter should have been dealt with upon the footing

that, in the eyes of the law, there was no complainant present, and the magistrate ought to have acquitted the accused when he made the order:

''The accused ''are released'', and that order ought to be taken as equivalent to an order of acquittal. In that connection Mr. Mukherji has relied

upon the case of Kolandaswami Pillai v. Rajaratna Mudaliar (1929) 32 Cr. L.J. 27; 127 Ind. Caa. 645. That was a case in the Madras High

Court and the head note summarized the case in these words:?

A judgment-debtor escaped from the custody of the amin who had arrested him. The learned Subordinate Judge gave permission to the amin to

prosecute him. Meanwhile the decree-holder complained and the complaint was dismissed erroneously as incompetent. Then the amin lodged his

complaint. Held that the previous acquittal was an effective bar to the fresh complaint, as the decree-holder was competent to make a complaint.

13. Mr. Justice Jackson, in the course of his judgment, said:

The amin could have prosecuted without reference to the Subordinate Judge and the Subordinate Judge simply passed the order depart men tally

giving the amin a chance of rehabilitating his character. Meanwhile the decree-holder complained. When his case came up for trial the court held

that his complaint was incompetent and acquitted the accused. He was, no doubt, acquitted owing to the Sub-Magistrate''s total misunderstanding

of an Allahabad case which was not in Indian Law Report. In the present case the decree-holder or any other person residing in India was

competent to complain, the court was competent to try, and the acquittal is an effective bar u/s 403 of the Code of Criminal Procedure.

14. Mr. Mukherji has also referred to the provisions of Section 403 of the Code of Criminal Procedure, which enacts that a person who has once

been convicted or acquitted cannot be tried again for the same offence. This in fact embodies the English principles of criminal jurisprudence,

contained in the words ""autrefois convict"" and ""autrefois acquit"". Mr. Mukherji has argued that the explanation added to the Section would indicate

that only those matters therein referred to can be treated as not amounting to an acquittal, and that, therefore, although the order of the learned

magistrate releasing the accused persons was not in terms an ""acquittal"", it must be taken as amounting to such. I need hardly say that, if, in fact,

there had been an acquittal within the terms of Section 403, without any question, none of these persons could have been tried again for the same

offence. But, in the present instance, it is not contended that there was anything in the nature of a trial or any kind of investigation with regard to the

facts of the case. The magistrate said that he was not prepared to treat the report which the naib nazir sent to the Munsif and the Munsif, in his turn,

forwarded to the Sub-Divisional Officer, as a proper complaint. Therefore, one must hold that, on the first occasion on the 18th May, 1931, there

was no complaint addressed to the magistrate. The magistrate came to the conclusion that he was not in a position to take cognizance of the case

merely upon the report forwarded to the magistrate and, accordingly, he let the accused go, but, at the same time, extended to the naib nazir an

opportunity of putting his grievance in proper form and of laying before the court a formal complaint.

15. Now, it seems to me that I must accept the explanation of the matter given by the learned magistrate himself, both in the course of his judgment

and in the statement which he has made for the purpose of the hearing of the present proceedings. From that explanation of the learned magistrate,

it appears to me that it cannot be reasonably said that he ""acquitted"" the accused persons of the charge made against them in the report of the naib

nazir.

16. On the contrary, what he did, in effect, was that he declined to take cognizance of the matter as it then stood but postponed it over in order to

give the complainant an opportunity of putting forward a complaint in proper form addressed to the criminal court in the ordinary way. In my

opinion, the order of the 18th May, 1931, is much more in the nature of an order falling within the latter part of Section 247, Criminal Procedure

Code, which gives the magistrate an option to adjourn the hearing of a case when the complainant does not appear, to some other day. The actual

wording of that part of the Section is this:?

Unless for some reason he thinks proper to adjourn the hearing of the-case to some other day.

17. It may be that, because the order does not fall exactly within the wording of that Section, that it is proper to deal with the matter on the footing

that the action taken by the learned magistrate was, strictly speaking, outside the four corners of the Criminal Procedure Code altogether. What he

really did in the early stage was in effect to say that there was, at that time, nothing before him, upon which he could properly proceed to put the

accused persons upon trial, and, thereupon, he thought fit to give the complainant an opportunity of altering the actual form of the document which

contained a recital of the facts upon which charges were to be based. I do not think that the matter is really covered by the decision of Mr. Justice

Jackson in the Madras case to which I have referred, because the case against the accused persons in that case, was actually ""dismissed."" It is

obvious, to my mind that in the present case, when the learned magistrate made the order of release, he had no intention whatever of ""acquitting

these three accused persons, of the offence alleged against them; on the contrary, his real intention was that they should ultimately be tried for such

offence. Therefore, although there may have been some defect in form or even an irregularity in the method adopted by the learned magistrate, I

think, I ought not to hold that the accused persons have been in any way prejudiced or that what was done conflicted with natural justice. Upon

that view of the matter, it would not be right, in any event, that I should exercise the power which the court possesses in a matter u/s 439 of the

Code of Criminal Procedure for the purpose of quashing these convictions on account of irregularity.

18. With regard to the second point put forward by Mr. Mukherji the position seems to be this. The prosecution, as I have said, called the

complainant himself and three other witnesses, who were some of the persons provided by the decree-holder. It is said that there were altogether,

not only the five peons who accompanied the naib nazir, but also another naib nazir present at the time when the three sardars were alleged to have

obstructed the complainant in the execution of his duty. Mr. Mukherji has argued that it was the duty of the prosecution to have called those six

persons or at least some of them, in addition to the several witnesses who were actually called and in support of his argument he called my

attention to the view taken of the matter by the learned magistrate who tried the case. Upon this point, the learned magistrate says:?

There are two other matters which require consideration in connection with this case. These are circumstances bearing on the case. One is that the

five peons accompanying the nazir and another naib nazir going to a neighbouring house to attach moveables; who admittedly saw the occurrence,

have not been examined in this case. One of the peons was present in court but still he was not examined. The other point is that the names of two

of the prosecution witnesses, namely, Meghnath and Chintamani, have not been mentioned either in the report of the nazir to the Munsif which was

treated as a complaint in the original proceedings or in the petition of complaint in this case. The nazir was asked to explain these circumstances,

which are no doubt unusual, but he failed to explain them satisfactorily.

19. The learned magistrate was then referring to the omission of the names of the witnesses in the original report. One cannot imagine that the naib

nazir was himself asked to explain why the other five peons were not in fact put into the witness-box. He then said:?

The defence asked me to draw inferences adverse to the prosecution from these circumstances, but, regarding the first point, I think the peons,

being subordinate to the nazir, are no better than the decree-holder''s men and the other naib nazir, being a brother officer of the complainant,

would not have improved the prosecution case, if he had been examined. If the complainant cannot be believed, another naib nazir or the

subordinate peons are not likely to be believed.

20. Then he says:?

If it was a fact that the witnesses not examined would have given a different version of the story, the defence might have examined them when a

defence witness has been examined in the case:

21. by which he meant, no doubt, that, seeing that the accused had called one witness on their behalf, they could have equally well have chosen to

call some of the peons also. Then he continues:?

Or the defence could have asked me to examine them as court witnesses. The complainant has said that he thought it unnecessary or superfluous to

examine them in the case.

22. It seems to me that the view taken by the learned magistrate was reasonable in the circumstances!. The prosecution had called four witnesses,

who testified to the facts, and they chose to rest their case upon the evidence of those witnesses. The learned magistrate came to the conclusion

that the evidence was satisfactory and worthy of credit, and that their testimony ought to be accepted. I do not feel disposed to hold that the

magistrate was bound, of necessity, to hold that if the other six possible witnesses or some of them had been called, their evidence would

necessarily have rebutted the evidence of the four witnesses actually called. The learned magistrate took this view and I agree with him. It could

scarcely have added much weight to the prosecution case if those witnesses had been called, because their testimony would probably have been

challenged on the ground that they were bound to be partisans for the prosecution. It is obvious that, if there had been any real reason for

supposing that if they would not have given evidence in favour of the prosecution, it was open to the defence to call these persons or to ask for

them to be called as court witnesses. It seems to me that it puts the matter too high to suggest that the accused persons have any legitimate cause

for grievance, because the prosecution did not elect to re-inforce the case which they had already made. In any event, the learned magistrate

appreciated and dealt with the point that other witnesses were perhaps available yet not called. The learned magistrate seems to have taken the

view that it was somewhat abnormal that the other witnesses were not called, but nevertheless, having fully considered the matter, he came to the

conclusion that the absence of their evidence did not materially affect his opinion of the case. I am not at all inclined to hold that the matter ought to

be treated as if the evidence of the five persons who were not called as witnesses would necessarily have been contrary to or inconsistent with the

evidence for the prosecution actually given. But at any rate, the point was fully considered by the learned magistrate. It follows, therefore, that this

point is not one of sufficient gravity as to justify this Court in saying that the conviction of the accused was not in accordance with law or one

unwarranted upon the facts proved.

23. The last point taken by Mr. Mukherji was not included in the original ""grounds"" on which the petition was based, but was raised in the course

of the argument. It was to the effect that the findings of the learned magistrate were not sufficient to establish that any offence u/s 186 of the Penal

Code had been committed. That Section of course deals with the offence of obstructing a public servant in the discharge of his duty. The finding of

the learned magistrate, commented upon by Mr. Mukherji, is in these words:?

Apparently the accused forbade the naib nazir to attach their moveables and threatened him with violence in order to prevent him from doing so.

This is tantamount to voluntary obstruction to a public servant in the dis charge of his lawful duties.

24. Mr. Mukherji has sought to persuade me to adopt the view that the shouts and threats uttered by the accused persons ought not to be

considered as constituting a voluntary obstruction. It is true that there is some authority for the proposition that mere threats by themselves will not

amount to obstruction within the meaning of Section 186. Mr. Mukherji relied upon the case of Darkan v. Emperor (1928) 110 Ind. Csa. 101 ; 29

Cr. L.J. 646., in which Sir Shadi Lal, Chief Justice of the Lahore High Court, set aside a conviction u/s 186 for the reasons which had been

recorded by a Sessions Judge in course of a report made in the case. That learned Judge said:?

All that the magistrate finds is that Musammat Darkan abused the process-server and said that she would not let him attach the cattle. Now the

word ""obstruction"" as used in Section 186 means ""physical obstruction,"" i.e., actual resistance or obstacle put in the way of a public servant. The

word implies the use of criminal force, and it appears that mere threats or threatening language would seem to be insufficient. King-Emperor v.

Gajadhar (1910) 7 All. L. J. 1174; 8 Ind. Cas. 823. and Emperor v. Aijaz Husain (1916) ILR 38 All. 506.

25. It seems to me, however, that the question of whether an offence u/s 186 of the Penal Code has or has not been committed must depend upon

the peculiar facts and circumstances of each case. No doubt, in some instances, mere threats may not of themselves be sufficient. The real question

is whether the action or attitude on the part of the persons alleged to have obstructed a public servant in the performance of his functions was of

such a nature as to obstruct, that is to say, to stand in the way so as to prevent him in carrying out the duties which "he had to discharge- Where it

is solely a matter of threats, they must be of such a nature as so to affect the public servant concerned as to cause him to abstain from proceeding

with the execution of his duties. It seems to me obvious that threats of violence, made in such a way as to prevent a public servant from carrying

out his duty, would easily amount to an obstruction of the public servant, particularly if such threats are coupled with an aggressive or menacing

attitude on the part of the persons uttering the threats and still more so if they are accompanied by the flourishing or even the exhibition of some

kind of weapon capable of inflicting physical injury. Threats made by a person holding an offensive weapon in his hand must be taken to be just as

much an obstruction as that caused by a person actually blocking a gateway or handling a public servant in a manner calculated to prevent him

from executing his duty.

26. It seems to me impossible to lay down any hard and fast rule as to what does or does not constitute an obstruction within the meaning of

Section 186 of the Penal Code. Each case must be decided upon its own particular facts and circumstances.

27. In the present case, the learned magistrate has definitely found that the accused persons threatened the naib nazir with violence in order to

prevent him from attaching their moveables. Actually the attitude of the accused persons did have the effect of causing the nazir to abstain from

attaching the moveables. It follows, therefore, upon the view which the learned magistrate took as to the facts, that there was ample material upon

which he could convict the accused persons of the offence with which they were charged. In spite of the very forceful argument put forward by

Mr. Mukherji on behalf of his clients, who are the accused persons in these proceedings, I find myself unable to interfere upon any of the grounds

he has put forward. This Rule is, therefore, discharged.