(1978) 09 CAL CK 0021

Calcutta High Court

Case No: None

The Superintendent and Remembrancer of Legal Affairs		APPELLANT
	Vs	
Mahendra Singh		RESPONDENT

Date of Decision: Sept. 6, 1978

Acts Referred:

- Arms Act, 1959 - Section 25, 27, 3, 39
- Constitution of India, 1950 - Article 22
- Criminal Procedure Code, 1973 (CrPC) - Section 190

Citation: (1979) CriLJ 545 : 83 CWN 184

Hon'ble Judges: R. Bhattacharya, J; Monoj Kumar Mukherjee, J

Bench: Division Bench

Judgement

Monoj Kumar Mukherjee, J.
This appeal, at the instance of the State of West Bengal, is directed against the judgment and order of the Assistant Sessions Judge, Jalpaiguri, acquitting the accused-respondent Mahendra Singh of the charges u/s 25/27 of the Arms Act, 1959.

2. The facts relevant for the purpose of disposing of the appeal can be put in a narrow compass.

3. On 8-9-68 the accused-respondent was arrested for having been found in possession of a pistol, some bullets and other articles for which a case was registered against him with the Siliguri Police Station by Sri Rameswar Singh. Town Sub-Inspector of Police. The accused was forwarded to Court on 9-9-68 with a forwarding memo. Sub-Inspector S. N. Dutta who took up the investigation examined witnesses, took sanction from the Deputy Commissioner for proceeding with the case and after completion of investigation submitted charge-sheet against the accused on 31-1-69. The learned Sub-divisional Magistrate took cognisance and

transferred the case to another learned Magistrate for disposal. During the pendency of the case, the case record,, along with other records, was destroyed in a fire on Jan, 8, 1970. Under orders of the learned Sessions Judge, Darjeeling, the case record, which contained the depositions of certain witnesses recorded during the committal enquiry, was reconstructed. The accused was thereafter committed to the Court of Session to stand his trial under Sections 25(1)(a) and 27 of the Arms Act, 1959. Several witnesses were examined to prove the case of the prosecution including the sanction accorded by the Deputy Commissioner. The learned Assistant Sessions Judge who tried the case formulated the following two points for decision :

(1) Whether sanction u/s 39 of the Arms Act was taken before prosecution was started and

(2) Whether the prosecution was able to prove the charges against the accused beyond all reasonable doubt.

4. The decision of the learned Assistant Sessions Judge on the first point was that the prosecution was initiated on and from 9-9-68 without requisite sanction and hence the prosecution was null and void. While deciding the first point the learned Judge made an ancillary observation that as the record was not reconstructed in presence of the accused, the accused could not get the opportunity to contradict the witnesses with reference to their statements originally recorded by the learned Magistrate, thereby causing great prejudice to him. In the above view of the matter, he did not enter into the merits of the case and acquitted the accused. The principal point, therefore, that falls for determination in this appeal is whether the acquittal of the accused, on the ground that the sanction was not proper and valid, is legally maintainable. Before we take up the legal aspect of this question certain facts are required to be detailed.

5. From the evidence of Kailash Chandra Singh (P. W. 1), an Assistant in the Judicial Department of the Deputy Commissioner of Darjeeling, we get that the original sanction got burnt at Siliguri and so he produced the office copy of the same. The office copy bore the signature of Sri P. R. Balasubramonium, who was the Deputy Commissioner at that time and his signature appearing thereon was proved by this witness and the sanction was marked exhibit 1. The evidence of the witness that the original got burnt at Siliguri was not challenged in cross-examination and it must, therefore, be held that grounds were squarely laid for reception of the office copy in evidence. Copies of the sanction (Ext. 1) bearing the date 25-1-69 were forwarded by Memo No. 161/1 (2)-J dated 28-1-69 to the Superintendent of Police, Darjeelimg, as also the Officer-in-Charge of Siliguri Police Station. The sanction shows that while sending a copy to the officer-in-Charge the case diary of the ''connected case was also sent back. All the facts required for according sanction are mentioned therein and there is no dispute that the sanction on the face of it was a proper sanction. From the evidence of Sub-Inspector S. N. Datta who investigated into the case, we get that before submission of charge-sheet he received the sanction from the

Deputy ''Commissioner. This part of the evidence of the Investigation Officer was also not (challenged. The evidence on record, (therefore, clearly proves that a proper is anction was given by the Deputy Commissioner and this was received by the Investigating Officer before submission of charge-sheet.

6. The question, therefore, now falls ''for determination is whether the "prosecution" was instituted after obtaining sanction in accordance with the provisions of Section 39 of the Arms Act, 1959, which reads as follows :

No prosecution shall be instituted against any person in respect of any offence u/s 3 without the previous sanction of the District Magistrate.

According to the learned Judge the sanction was to be obtained at the time when the accused was produced before the learned Magistrate on 9-9-68 as the "prosecution" was instituted against the accused when he was forwarded to the Magistrate. In other words, according to the learned Judge the prosecution started with the institution of the case with the Police and, therefore, the sanction was required to be obtained at the time when the accused was produced before the learned Magistrate on 9-9-68. In arriving at his such conclusion the learned Judge has referred to various decisions placed before him. On going through the cases referred to by the learned Judge we find that most of the cases were irrelevant to the point raised before him and the case of AIR 1945 16 (Federal Court) , on which the learned Judge relied upon, was misread and misapplied by him as the sanction there was accorded after submission of charge-sheet.

7. Mr. Roy. the learned Advocate appearing for the accused respondent in support of the judgment has referred before us to a decision of the Supreme Court in the case of Maqbool Hussain Vs. The State of Bombay, wherein "prosecution" has been defined to mean an initiation or starting of proceedings of a criminal nature before a Court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure. The above decision, in our view, instead of supporting the observations of the learned trial Judge goes against the same. We are of the view that the institution of a "prosecution" where a case is started by the Police can be by submission of a report in final form in accordance with Section 173 of the Cr.P.C. 1898 and not before that. We need not dilate on or delve into the matter further as the point is no more res integra, so far as our Court is concerned in view of the Bench decisions in the cases of Ismail Khan v. Emperor (AIR 1927 Cal 721 : 28 Cri LJ 817, Emperor Vs. Pritam Singh, and Panchu Gopal Ghose v. King (AIR 1955 NUC (Cal) 546). The sanction that was accorded in the present case before submission of the charge-sheet therefore was a valid sanction and the Court ought to have acted on such sanction.

8. The matter can be viewed from another angle. The accord of sanction is not a mere formality. It is to be accorded or refused after applying judicial mind to the entire facts and circumstances of a case which can only be collected during

investigation by the investigating agency. It necessarily follows that the insistence of sanction at the time of institution of the case or apprehension of the accused during investigation, would be wholly illogical. In either view of the matter, therefore, the learned Assistant Sessions Judge was clearly wrong in holding that the prosecution had been instituted on or from 9-9-68, that is, the date of arrest of the accused and acquitting the accused on the ground that sanction was not obtained before such institution.

9. As we have already mentioned the learned Judge has made an ancillary observation about the prejudice caused to the accused for his inability to take contradiction from witnesses examined during trial with reference to their statements made during the committal enquiry. It is not in dispute that the records were destroyed in a fire and this necessitated reconstruction of record. According to the learned Judge this reconstruction was made without complying with the relevant provisions of the Criminal Rules and Orders and as such the reconstruction itself was bad. It is needless to say that the evidence in the committal enquiry could be used for the purpose of contradicting a witness or for all purposes u/s 288 of the Cr.P.C. 1898. The record does not indicate that either of the parties intended to avail of Section 288 of the Cr.P.C. 1898. The record on the other hand indicates that the accused-respondent availed of the opportunity of contradicting P. W. 5 with reference to his statement made before the learned Magistrate. For the purpose of contradicting a witness u/s 145 (162 ?) of the Cr.P.C. it does not require that the statement, with reference to which the witness was being contradicted, has to be recorded in presence of the accused. It is of course true that the evidence in a Court of law, whether during enquiry or trial, has to be recorded in presence of the accused but then, there is nothing on record to indicate that the accused had in any way been prejudiced or that he raised any grievance on that score. On the contrary, as we have already stated, the witnesses were contradicted with reference to their statement before the committing Magistrate treating the same as having been correctly recorded. In such circumstances, the apprehension raised by the learned Judge that the accused was prejudiced in his defence for his inability to contradict the witnesses with reference to their statement in the committing Court does not appear to be a genuine apprehension.

10. In view of the discussion as above, we allow the appeal, set aside the judgment and order of the learned Assistant Sessions Judge acquitting the accused and remand the case back for retrial.

11. We are fully aware of the fact that the case is a long pending one and the order of remand after a lapse of 8 years will cause hardship to the accused, but considering the fact that the learned Judge did not enter into the merits of the case we are left with no other alternative.

12. Mr, Roy submits that the learned Trial Court may be directed to deal with the case on remand on the evidence already on record, as otherwise the prosecution

may fill up the lacuna in its case, if there be any. We direct the learned Assistant Sessions Judge to dispose of the case in accordance with law on the basis of the materials already on record by delivering a judgment after giving the parties an opportunity to argue their respective cases. The learned Assistant Sessions Judge shall try to dispose of the case within two months from the date of receipt of the records.

R. Bhattacharya, J.

13. I quite agree with my learned Brother, but I want to make some addition to what has already been stated in his judgment.

14. In this case Mr. Roy has strenuously argued in support of the learned Assistant Sessions Judge that the Criminal prosecution in this case started with the production of the accused before the learned Magistrate of the Criminal Court. The main question, therefore is what would be the meaning of the word "prosecution" appearing in Section 39 of the Arms Act, 1959. Mr. Roy has referred us to the case of Maqbool Hussain (1953 Cri LJ 1432) (SC) already mentioned by my learned Brother. To properly appreciate the real import and meaning of the word "prosecution", we are to remember certain matters. First of all, the word "investigation" has been defined in Section 4 of the Cr.P.C. 1898, with which we are now concerned in the present case. "Investigation" includes all proceedings under the Cr. P, C. for the collection of evidence conducted by a Police Officer or by any person other than a Magistrate who is authorised by the Magistrate in this behalf. Next let us come to Part V of the Code which relates to information to the Police and their powers to investigate. In this part we get Section 173 in Chap. XIV. According to this section the Investigating Police Officer after investigation shall make a report to the Magistrate before whom the investigation proceeding remains. According to this section, either he wife report that there is no evidence against the accused and he may pray for discharge of the accused or he may submit a report about the evidence against him and for adjudication of the case against him. Part V of the Code relates to proceedings in prosecution and in Chapter XV of the Part we get the provisions as to the jurisdiction of the Criminal Courts in enquiries and trials. The next relevant section would be Section 190 in Chap. XV of the Code. This section speaks about the taking of cognizance of offences by the Magistrate either upon a complaint of facts constituting an offence filed by a party or upon a report in writing of such facts made by a Police Officer or upon information received from any person other than a Police Officer or upon his knowledge or suspicion that such offence has been committed. Reading the scheme of the Cri. P. C. we, therefore, find that as soon as a person is arrested by a police upon information, he is produced before the Magistrate and from that time onwards the Police Officer investigates as to the complaint or information he gets and on the basis of which he has produced the accused before the Magistrate, This stage of investigation or this investigation proceeding is not really a prosecution. If on the evidence or materials collected by

the Police it is found that there is sufficient evidence, then a prosecution will be started on the police report and if there is insufficiency of evidence, the police will not proceed and will make report accordingly. But when the Police Officer submits a charge-sheet which is popularly known as chalan on the basis of evidence found against the accused for launching prosecution, the learned Magistrate will consider the report and he may take cognizance of the offence according to Section 190 of the Code and then with the submission of the police report for initiation of proceedings against the accused the prosecution starts. The provisions in Part V of the Cr.P.C., 1898 relates to the investigating stage, whereas those in Part VI of the Code speak about the proceedings in prosecution. The head-note "Proceeding in Prosecution" appearing under Part VI of the Coda supports the view and the scheme that prosecution starts with the submission of the police report. The investigating stage is quite different from the actual prosecution.

15. Mr. Roy has, however, relied upon the rase of Maqbool Hussain (1953 Cri LJ 1432) (SC) that has been dealt with by my learned brother. In this connexion two other Supreme Court cases may be considered and they are S.A. Venkataraman Vs. The Union of India (UOI) and Another, and Thomas Dana Vs. The State of Punjab, . Although those decisions are not connected with the Arms Act but in connexion with Article 22 of the Constitution, the meaning of prosecution was clearly stated in those decisions. On reading those decisions and the principles laid down, it is quite clear that the prosecution referred to in Section 39 of the Arms Act, 1959, must be a criminal case started before a Criminal Court for adjudication of the charge or the allegations made against him on the basis of evidence taken on oath and that the said Court must be authorised to take the evidence on oath according to law. This definition or the meaning of prosecution quite fits in with a case under the Arms Act.

16. Here in the present case, the accused was produced before the learned Magistrate after arrest under the provisions of the Arms Act and certainly he was produced for the purpose of investigation and investigation was started, During investigation the evidence was collected and the Investigating Officer obtained sanction from the lawful authority and the said authority on consideration of the materials collected during investigation granted the sanction. This sanction was certainly granted before the report in final form was submitted by the Investigating Officer to the Magistrate. When this sanction had been obtained before the charge-sheet in the present case was submitted, certainly the condition of Section 39 of the Arms Act has been fulfilled because it was obtained and produced before the learned Magistrate prior to the submission of the chargesheet against the accused which was the basis of and the first step in the prosecution started against the accused.

17. In this view of the matter, we must hold that the learned Assistant Sessions Judge did not properly appreciate the provision of law and hence he came to a wrong conclusion regarding the meaning of "prosecution.