(1936) 05 CAL CK 0040

Calcutta High Court

Case No: None

Netai Chandra Jana and Others		APPELLANT
	Vs	
Emperor		RESPONDENT

Date of Decision: May 14, 1936

Acts Referred:

- Bengal Suppression of Terrorist Outrages Act, 1932 - Section 25

Citation: AIR 1936 Cal 529 : 165 Ind. Cas. 162

Hon'ble Judges: Henderson, J; Cunliffe, J

Bench: Full Bench

Judgement

Cunliffe, J.

These are 9 appeals from convictions and sentences passed by a Special Magistrate sitting at Hooghly. The accused persons were put upon their trial on a number of different charges. They included, conspiracy to engineer a rising against the Government, conspiracy to commit offences under the Arms Act and, as to five of them, charges of committing dacoity in furtherance of the aims attributed to the terrorist movement. On the appeal being opened, a preliminary point was put forward by Mr. Gupta, Senior Counsel for the appellants, with which the other advocates for the appellants associated themselves. This point was directed to an attack upon the jurisdiction of the learned Special Magistrate, having regard to the case advanced by the Crown against the five appellants implicated directly in the dacoity. It was contended that these five persons with regard to the dacoity were originally charged, not u/s 395 of the Code, but u/s 396, the difference between the two sections being that the latter section, namely Section 396 is the provision in the Code which deals with the class of dacoity in which a murder has taken place. It was further argued that although at the trial the charge u/s 396 was dropped and the lower charge substituted, nevertheless, the substantive case for the Crown advanced against these five people was of such a character that if it were true, (which was of course denied by the appellants) they ought to have been placed upon

their trial for dacoity with murder.

2. The gravamen of this argument is based upon the wording of Section 25, Bengal Suppression of Terrorists Outrages Act, 1932'' the section under which the Special Magistrate was empowered to try the case. I think it will be convenient if I set out that section. It runs as follows:

Where in the opinion of the Local Government or of the District Magistrate, if empowered by the Local Government in this behalf, there are reasonable grounds for believing that any person has committed a scheduled offence not punishable with death (these are the important words "not punishable with death") in furtherance of or in connection with the terrorist movement, or an offence punishable under this Act, or u/s 6, Bengal Criminal Law Amendment Act, 1930, the Local Government or District Magistrate as the case may be, may, by order in writing, direct that such person shall be tried by a Special Magistrate.

3. Our attention was called to parts of the evidence produced before the learned Special Magistrate. This evidence showed that by reason of the dacoity two lives were lost owing to the action of the five appellants to whom I have referred. The prosecution maintained that as participators in the dacoity the five appellants had provided themselves with cotton wool, and also with a bottle of chloroform. It was said that by means of the chloroform applied to this cotton wool, these five accused asphyxiated the two persons who lost their lives, for the purpose of enabling the robbery to be committed. If that were correct, say the appellants, the crime which they committed was one which was certainly punishable by death u/s 396. It is further suggested that for the sake of convenience or for some other purpose, the Local Government directed that this trial should take place before a Special Magistrate rather than before a Court consisting of three Judges sitting together which it is said is the proper tribunal to try cases of this character. The answer made by the Crown to this argument is, firstly, that the language of the section shows that it is the opinion of the Local Government, erroneous or not, which is to govern trials under the special procedure and, secondly, that even if this is not so, the facts disclosed in the prosecution case do not reveal a true case of murder at all. I may say at once that it has always been a canon of the construction of the type of statute which curtails personal liberty that it should be construed most strictly and, if anything, inclining in favour towards the subject. A wholesome canon I think, and a principle which ought to be rigidly enforced in this Court, more especially when we consider that in this country we have no major Act such as Habeas Corpus upon our statute book.

4. Now, if we examine Section 25 closely, we find that the opinion of the Local Government before cases may be allotted to a Special Magistrate has to be taken upon several points. The first point is that there must be reasonable grounds for believing that a scheduled offence has been committed. A scheduled offence is that type of offence which, as far as this Act is concerned, is enumerated in the schedule to the Act. Section 2 of the Act lays this down; and the offences charged in the Court below are clearly within the ambit of the schedule in question. The next point upon which the Local Government is

required to give a preliminary opinion is whether the offence alleged to have been committed is one which is punishable with death. And the third and the last view which the Local Government has to express is, that the offences put forward by the prosecution must have been committed in furtherance of or in connexion with the terrorist movement.

5. Now, as I read the section, it empowers the Local Government to appoint a special Magistrate to try only those offences of a terrorist nature contained in the schedule which are not punishable by death. But it does not give power to the Local Government to send for trial before a Special Magistrate an offence which is punishable by death. It is interesting to note that in another Act contained in the Manual of Legislation which has been handed to me, in which are included a number of these special statutes demonstrating the scheme adopted by the authorities to deal with the terrorist movement, (I refer to the Bengal Criminal Law Amendment Act of 1925) that there is provision for the trial of persons who are said to have committed offences under a schedule which resembles very closely Schedule 2 to the Suppression of Terrorist Outrages Act schedule, but without the qualification introduced into the subsequent Act that they are offences not punishable by death. Under the provisions of the 1925 Act a person who has committed an offence punishable by death has the right to be tried by a tribunal of three Judges with senior qualifications. This is laid down in Section 4 thereof. We were invited therefore to say that the appellants could legally insist in the circumstances on being tried before such a tribunal rather than by a Special Magistrate who, according to Section 24, Bengal Suppression of Terrorist Outrages Act of 1932, need only be a Magistrate of the First Class or a Presidency Magistrate who has exercised his powers as such for a period of not less than 4 years.

6. As to the argument advanced by the Crown that, on a reasonable consideration, the facts disclosed in the prosecution case here do not disclose an offence on the part of the five persons which amounts to dacoity with murder, I cannot accept it. It would be improper for me to go with any particularity into the evidence; but I shall merely say this: that, prima facie, if for the purpose of committing a crime the persons who wish to commit that crime successfully make an attack upon their victims which results in death directly caused by that attack, prima facie it seems to me that a case of murder has been set up. I have no intention of giving illustrations of this principle; but if it were necessary I could do so. I therefore answer the contention put forward by the Crown at the risk of reiteration in this way, that Section 25 does not empower the Local Government to order a trial before a Special Magistrate where a case of murder is prima facie disclosed by the prosecution evidence; and secondly, that I do not agree that this offence, according to the prosecution case, is anything less than prima facie murder, as far as the five persons implicated are concerned. Holding this view of the law, the question remains: What have we power to do? I notice that the Bengal Suppression of Terrorist Outrages Act, which is a local Act, has a supplement, in the form of an All India Statute which deals inter alia with the right of appeal from the decisions of the special Courts which function under the local special legislation. Section 3, Supplementary Act, Sub-section (2), runs as follows:

An appeal under Sub-section (1) which provides for an appeal to this High Court shall be presented within thirty days from the date of the sentence and shall be disposed of by the High Court in the manner provided in Ch. 31 of the Code of the hearing of appeals.

7. (The reference to the word Code there, or rather I should say its definition, is that the Code means the Code of Criminal Procedure.) Now, I believe that the intention of the persons who framed that section which relates solely to procedure and is therefore one in which I can safely consider the intention of the framers was that this Court when hearing appeals in such cases should hear them in the ordinary way and with the ordinary powers which the appellate side of this Court has been given by Ch. 31, Criminal P. C. It seems to me that if we were not, by the language of the section, endowed with the full powers of an appellate Court under the Code, our powers, if they had been cut down, would necessarily have to be defined and defined strictly. But in my view the ordinary meaning of the language used in the section is that in hearing this class of appeals we retain our full rights of procedure and our full rights of alteration or acquittal, unless there is some specific language in some part of these Acts to which my attention has not been called which qualifies those rights.

8. We propose therefore to act as we should act in similar circumstances in an ordinary appeal. We think that the right course to adopt will be to set aside the convictions and sentences passed by the learned Special Power Magistrate. We are not forgetful that the argument based upon the construction to be put upon Section 25 was only advanced on behalf of five of the appellants and could only have been advanced on the facts of the case in favour of these five persons. Nevertheless we think that it would not be in the public interest, if we did not include in our order setting aside the convictions and sentences those four other appellants who, according to the case for the Crown, were closely associated with the five persons said to have been involved actively in the murder which the dacoity involved. It would be creating an invidious, position were we merely to confine our order to the first five appellants, and one can imagine that it would be still more embarrassing if we dealt with the appeal with regard only to the remaining four. We shall therefore include all the appellants in the order which I have just passed. There will be no order for bail; but we give learned Counsel for the appellants leave to re-apply to us within 10 days with notice to the Crown. Meanwhile the appellants will be treated as undertrial prisoners. We propose to extend the time for the bail application to 10 days from the date of the above final signature.

Henderson, J.

9. A preliminary objection has been taken on behalf of the appellants before us which raises the question whether in a case where the prosecution evidence, if true discloses an offence punishable with death, the local Government has jurisdiction to appoint a Special Magistrate under the provisions of Section 25, Bengal Act 12 of 1932. The question is not only a very difficult one but is also of the utmost importance not only to the public in general but to all those who are connected in any way, either directly or

indirectly, with the trial of persons charged with committing offences in furtherance of the terrorist movement. On behalf of the Crown the learned standing counsel met this objection by arguing that the opinion of the local Government in the matter is decisive and cannot be called in question. Now, it would be very difficult to say that the opinion of the local Government that the accused person has committed a certain offence cannot be called in question; because if that suggestion is rigidly followed out, a conviction must automatically follow and a Magistrate, as soon as he acquits an accused, is calling that opinion in question in the most emphatic manner possible. In my opinion the important words are "in furtherance of or in connexion with the terrorist movement." I certainly agree that it is not open to the appellants to suggest before us that this particular crime was not committed in furtherance of or in connexion with the terrorist movement. But I should certainly not be prepared to go so far as to say that the opinion of the local Government that they have committed a certain offence cannot be called in question. It is also clear that an opinion of the local Government merely that an accused person had committed an offence not punishable with death would not give jurisdiction to appoint a special Magistrate to try him. But in any view of this particular matter this is not the real point. The objection really goes much deeper than that and is to the effect that the section itself by its terms does not empower the local Government to appoint a Special Magistrate to try a case of this kind.

10. Now, the objection, if sound, is a perfectly reasonable objection. If the appellants are said to have committed an offence punishable with death they would ordinarily be entitled to a trial by a jury or, at any rate, in view of certain special legislation, by three Commissioners. They are at liberty to attach any value they please to such a privilege, if it be a privilege. It is of course very easy to"say or to suggest that the procedure adopted in this case is really to the advantage of the appellants; because the greatest risk they run is that of a sentence of 7 years" imprisonment. But it seems to me that the only persons capable of weighing the respective advantages or disadvantages of trial before different types of tribunals are the accused persons themselves and it is only their opinion in the matter which is entitled to any serious consideration. The objection is not one that would be taken in a light-hearted manner. Indeed in the course of the present argument, we pointed out to Mr. Gupta the risks that his clients would run in the event of our giving effect to this objection; but after consulting the learned Advocates instructing him he informed us that in his opinion the objection ought to be pressed. In such circumstances, in my judgment, if the appellants can show that the order was made without jurisdiction they are then entitled to demand any appropriate relief which we have it in our power to give them.

11. Now, I entirely agree with my learned brother that, if the appellants are to be deprived of the right of trial before a jury or before Commissioners to which they attach a certain value, the words depriving them of that right must be absolutely clear and specific. I can find no such words in this section. In considering the intention of the legislature we cannot close our eyes to the fact that special legislation was passed to provide for the trial of

serious offences including offences punishable with death. There can also be no doubt that the Special Magistrate has no power to try such an offence. I should, therefore, find it very difficult to believe that the intention of the legislature was to give the local Government power to ignore the most serious part of the crime altogether simply to give jurisdiction to a Special Magistrate. Another difficulty is that it would imply that the Local Government have it in their power to decide finally that a particular accused person has not committed an offence punishable with death. There is no such power clearly conferred upon them and I find it impossible to say that they have the right to send a case of this kind to be tried by a Special Magistrate. For these reasons, particularly because there is no specific provision for empowering a Special Magistrate to deal with this type of case, I agree that the order made was without jurisdiction.

12. The next question which we have to determine is what orders we can and what order we ought to pass. We are then confronted with another very difficult question, that is to say, what powers we have, sitting to hear appeals from the decision of a Special Magistrate. That matter was determined by Sub-section (2), Section 3 of Act 24 of 1932 and the decision rests upon the meaning to be given to the words "in the manner." Those ''words might apply merely to procedure or go further and apply to the method in which the appeal is to be disposed of. I think it might be argued with some show of reason that the natural interpretation of those words would be that the Court in the exercise of certain limited powers in appeal was to follow the procedure laid down in Ch. 31, Criminal P. C. But the difficulty in accepting such an interpretation is that this Act of the Indian Legislature confers no powers on us whatever, and if Sub-section (2) merely deals with procedure, we can do nothing more than issue notices and listen to arguments. For example, it cannot be denied that this Supplementary Act does not confer upon us any power to reduce a sentence. From time to time this Court in hearing appeals from the decisions of Special Magistrates has reduced sentences and, so far as I know, it has never been suggested that in so doing the Court was acting without jurisdiction. In my view, therefore, the only possible interpretation of this subsection is that the intention was to confer upon us the powers of an appellate Court hearing appeals under the provisions of Ch. 31 of the Code. If that be so, the irresistible conclusion is that we have all the powers referred to in Section 423.

13. Now, if we have the powers conferred by that section, we have the right in suitable cases to order a re-trial by a Court of competent jurisdiction subordinate to us or to commit the accused persons to trial by the Court of Session. The moment that position is reached the appellants are not limited to showing that the appointment of the Special Magistrate is without jurisdiction; they are also entitled to go further and show that the order made by the Magistrate, though not without jurisdiction, was improper and liable to be set aside. In fact their position is exactly parallel to that of an accused person who has been improperly tried by a First Class Magistrate for a minor offence when he ought really to have been committed to the Sessions. In such cases, so far as I know, it has always been held that, even though the order of the Magistrate is not strictly without jurisdiction, it

is an improper order and this Court has never had any hesitation in setting such an order aside in a proper case and directing the accused person to be committed to the Sessions. So far as the present case is concerned, I agree with my learned brother that the trial was without jurisdiction and that, therefore, the proper order to pass is merely one setting aside the convictions and sentences, leaving it to the Local Government to take such further steps, if any, as they may be advised. But had I not reached the conclusion that the appointment of the Special Magistrate was without jurisdiction, I should still have been prepared in view of the facts to which my learned brother and I have referred, to say that the order was an improper one and that the appellants ought to be tried either by the Court of Session or by a Special Tribunal.