

**Basdeo Agarwalla Vs. Emperor**

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**SooperKanoon Citation :** [sooperkanoon.com/327159](http://sooperkanoon.com/327159)

**Court :** Mumbai

**Decided On :** Jan-19-1945

**Reported in :** (1945)47BOMLR392

**Judge :** Patrick Spens, Kt., C.J., ;Varadachariar and ;Zafrullah Khan, JJ.

**Appellant :** Basdeo Agarwalla

**Respondent :** Emperor

**Disposition :** Appeal allowed

**Judgement :**

Patrick Spens, Kt., C.J.

1. The appellant in this case was charged with two offences alleged to have been committed on April 20, 1944, contravening the provisions of clause 9(a) and 13(d) of the Drugs Control Order, 1943. He was convicted on June 29, 1944, and sentenced to a term of four months' rigorous imprisonment and a fine of Rs. 1,000, or in default to a further term of four months rigorous imprisonment. Against this conviction he appealed to the High Court of Judicature at Fort William in Bengal, and on November 13, 1944, his appeal was dismissed, although the sentence of imprisonment was reduced from four months to one month. A certificate under Section 205 of the Government of India Act, 1935, was granted and hence the appeal to this Court. The Drugs Control Order, 1943, provides by Clause 16 as follows :

No prosecution for any contravention of the provisions of this Order shall be instituted without the previous sanction of the Provincial Government....

2. In purported compliance with the provisions of Clause 16, the Provincial Government of Bengal made an order sanctioning the prosecution of the appellant by a document dated May 23, 1944, in the following terms:

Whereas it appears from a report of the Deputy Commissioner of Police, Enforcement Department Calcutta that. Basudev Agarwalla, son of Anandram Agarwalla. of 185 Harrison Road, Calcutta, c/o Messrs. Umashankar & Co., Ltd., sold on April 20, 1944, 6X1 c.c. ampoules of Emetine Hydrochloride containing 1 gr. each to Babu H. N. Roy, Sub-Inspector of Excise employed on drugs control work for Rs. 13 in contravention of Clause 9 of the, Drugs Control Order, 1943, the Provincial Government, in exercise of the power conferred by Clause 16 of the said Order, sanction the prosecution of the aforesaid... Basudev Agarwalla under Sub-rule (4) of Rule 81 of the Defence of India Rules.

(Sd.) Section Banerji,

Secretary to Government of Bengal.

3. It was argued before us that the sanction in the above form did not comply with the provisions of Sections 49 and 59 of the Government of India Act, 1935. It was suggested that under those sections the sanction must be expressed to be given by the Governor and that it was improper that the Provincial Government should have purported to sanction the prosecution. This argument was apparently based on what were assumed to have been the views of the majority of this Court in *King Emperor v. Sibnath Banerjee* (1944) F.C.R. 1. But as pointed out in that case where special statutory powers are conferred and specific provision is made in the statute as to the manner in which the powers are to be exercised, they should be exercised by the authority and in the manner specified in the statute and in strict conformity with the provisions thereof. In this case the provisions of Clause 16 expressly authorise the previous sanction of the Provincial Government, and accordingly in our judgment no valid objection can be taken to the form of the sanction purported to be given in this case.

4. It was then argued that on the facts of this case the prosecution had been instituted prior to the giving of the sanction in question and that accordingly having regard to the very definite provisions of Clause 16, the proceedings and conviction must be null and void.

5. From the Order Sheet of the Chief Presidency Magistrate's Record it appears that the appellant was produced before the Chief Presidency Magistrate on May 2, 1944, and a challan under Rules 81(4) and 121 of the Defence of India Rules filed on that day. Thereupon the Chief Presidency Magistrate made; an order transferring the case to another Magistrate. Later, on the same day, the appellant was brought before that Magistrate who adjourned the case to May 16, 1944, for evidence and made an order directing that the appellant should give bail in Rs. 200 to appear on May 16. On May 16 it was noted on the Order Sheet that sanction had not been received. None the less the Magistrate made further orders directing that the case be adjourned to May 24 for evidence, that the prosecution witnesses be summoned for that day and for bail as before. Against the entry of May 24, 1944, a note appears in the margin of the record 'sanction filed', and the entry proceeds to record that three prosecution witnesses were examined and further adjournment ordered. Thereafter the case is recorded as proceeding in the usual way up to conviction and sentence on June 29, 1944.

6. From this it is clear that the sanction was not filed until May 24, 1944, but that in the meantime from May 2 onwards, the prosecution had been put in motion and various steps taken by the Magistrates. It would appear that when the absence of sanction was noted, it was considered to be a matter of little importance, which it could be assumed would be put right in due course, and which should not interrupt the ordinary course of a prosecution.

7. In the High Court also it appears to have been considered that this point raised little more than a mere technical objection and that, as the more material part of the prosecution proceedings did not take place until after the sanction had been received, it was possible to ignore the fact that the proceedings had been instituted without such a sanction. In this Court too we were asked to treat the matter on much the same lines, being invited to hold that whilst, no doubt, all that

had been done in the matter prior to May 24 was without jurisdiction, that could be severed from the subsequent proceedings and the latter be regarded as separate and fresh proceedings properly sanctioned. In this connection we were also referred to Sections 196 and 197 of the Code of Criminal Procedure and cases decided in connection with such sections. But having regard to the difference in the wording of the sections in question as compared, with the wording of Clause 16 of the Drugs Control Order, 1943, we were unable to get any material assistance from such cases.

8. In our view the absence of sanction prior to the institution of the prosecution cannot be regarded as a mere technical defect. The clause in question was obviously enacted for the purpose of protecting the citizen, and in order to give the Provincial Government in every case a proper opportunity of considering whether a prosecution should in the circumstances of each particular case be instituted at all. Such a clause, even when it may appear that a technical offence has been committed, enables the Provincial Government, if in a particular case it so thinks fit, to forbid any prosecution. The sanction is not intended to be and should not be an automatic formality and should not so be regarded either by police or officials. There may well be technical offences committed against the provisions of such an Order as that in question, in which the Provincial Government might have excellent reason for considering a prosecution undesirable or inexpedient. But this decision must be made before a prosecution is started. A sanction after a prosecution has been started is a very different thing. The fact that a citizen is brought into Court and charged with an offence may very seriously affect his reputation and a subsequent refusal of sanction to a prosecution cannot possibly undo the harm which may have been done by the initiation of the first stages of a prosecution. Moreover in our judgment the official by whom or on whose advice a sanction is given or refused may well take a different view if he considers the matter prior to any step being taken to that which he may take if he is asked to sanction a prosecution which has in fact already been started.

9. In our judgment the words of Clause 16 of this Order are plain and imperative, and it is essential that the provisions should be observed with complete strictness and where prosecutions have been initiated without the requisite sanction, that

they should be regarded as completely null and void, and if sanction is subsequently given, that new proceedings should be commenced ab initio. Only so can the protection intended for the citizen be assured. In our judgment the prosecution in this case was clearly instituted without the previous sanction required by Clause 16, and it is not possible to sever the proceedings prior to May 24 from those occurring on and after this date. Consequently, as, when the sanction was obtained, no new start was made, the whole proceedings in this case are null and void.

10. The appeal must accordingly be allowed and we direct the case to be remitted to the High Court, and declare that in place of the conviction recorded against the appellant an order shall be made quashing all the proceedings for want of jurisdiction. The appellant will be released from his bail and the fine if paid will be refunded.

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