

Emperor Vs. Thaver Issaji Boree

Emperor Vs. Thaver Issaji Boree

SooperKanoon Citation : sooperkanoon.com/334129

Court : Mumbai

Decided On : Jul-05-1911

Reported in : (1911)13BOMLR635

Judge : N.G. Chandavarkar, Kt. and ;Hayward, J.

Appeal No. : Criminal Application for Revision No. 152 of 1911

Appellant : Emperor

Respondent : Thaver Issaji Boree

Judgement :

N.G. Chandavarkar, J.

1. The petitioner has been convicted by the Chief Presidency Magistrate of three offences, two under Section 353 of the Indian Penal Code, in that the assaulted two public servants, who are Abkara Officers, in order to prevent them from lawfully discharging their duty (sic) as duly as such servants and one under Section 186 of the same Code in that he voluntarily obstructed one of the said plainly (sic) servants in the lawful discharge of his public function

2. The facts (sic) found by the Magistrate on which this conviction is founded and which we receipt are shortly these. Sub-Inspector Munsin And Khaine (sic) of the Abkari Department ordered a Customs Constable named Paramesh Ajodhia to

search a man who had a red handkerchief (sic) in his and who was found in a street, because the chaught the nam was in possession. of cocaine without licence. The petitioner came up just at that moment in a treating manner (Section) and asked the Constable what he meant by searching this (the petitioner's) man, as he called him. The Constable aboved him his helds (sic) and test the petitioner then he because as the Customs Department. The petitioner thereupon give him a push with his hand and said to the Constable: ' cannot search him.' The Sub-Inspector, who witnessed all this, then went forward and warned the petitioner that he should not prevent a Government servant from discharging his duty, that he himself was a Sub Inspector in the Excise Department, and that he would search the man himself, as he had lawful authority in that behalf. He raised his sleeves with a view to search the man. The petitioner there upon gave the Sub-Inspector a blew with a clenched fist on his chest, shoved him, and said 'Soover, get away' The Sub-Inspector was about to fall but recovered his balance. In the meantime, taking advantage of this seafile, the man whom the Sub-Inspector wished to search abseconed with the result that these officers of the Abkari Department were not able to discharge their lawful duty, which they reasonably believed they were bound to perform in regard to that person under the provisions of the Abkari Act.

3. It is contended before us, in the first place, that the officers in question were not acting in the discharge of a lawful duty, as public servants, because, according to Section 38 of the Bombay Abkari Act, all searches under Section 37 of that Act, shall be made in accordance with the provisions of the Code of Criminal Procedure, and that no search could be made of any person, by any public officer, acting under law, without previously calling a panch and conducting a search in the presence of that panch. To that the simple answer is that there is no provision in the Code of Criminal Procedure which requires that a panch should be called in the case of the search of a person.

4. Then it is argued that the Abkari officers concerned cannot be said to have been acting in the discharge of their lawful duty, because their is an evidence that they bad Lad ' reason to believe' that person whom they intended to search was guilty of any offence againse the Abkari or any other Act. And in support of that

contention the learned Counsel for the petitioner has referred as to the provisions of Section 49 of the Bombay Abkari Act Where the words are 'reasonable ground of suspicios,' He is maintained on the Authority of *Empress of v. Rango Timaji* ILR (1882) 6 Bom. 402. that the reason to believe is not the same as) reason to suspect.' But in the peresent case, we must presume, from the facts found, that the Ablerd (sic) officers had 'reason to believe,' giving that expressed on the meaning attached to it in the ruling cited. The man (sic) whom they intended to search absconded, taking advantage of the action and conduct of the petitioner armies (Section); and it does not lie in the mouth of the petitioner after having contributed by his own conduct to his escape, to advance the defenses that there was no reasonable ground for believing that the man had cocaine without a licence. 'If a man by his own tortious act withhold the evidence by which his case would be manifested, every presumption to his disadvantage will be adopted.' (Smith's Leading Cases, 10th Edition, p. 353). We must presume that, if the man had been searched, cocaine would have been found in his possession, and that the action of the Abkari officers would have been justified by the discovery made in fact. But such discovery was prevented by the petitioner himself.

5. Next, even assuming that the search ought to have been made in the presence of a panch, here again it does not lie in the mouth of the petitioner to advance this defence also, because there is no reason to assume that the officers would have acted illegally, and would have not done all that the law required them to do, if they had not been obstructed. Supposing that the law required them to hold the search in the presence of a panch, here the petitioner by his conduct hardly gave them time enough for the purpose. The moment the Constable approached the man suspected, the petitioner interfered and facilitated his escape.

6. It is next urged that the Magistrate wrote his judgment after he had convicted and sentenced the petitioner; that therefore his judgment is illegal; and that the whole trial is void. Sections 366 and 367 of the Criminal Procedure Code require that the Magistrate should deliver his judgment at the time of passing sentence. But the question is whether, if such judgment is not written at the time sentence is passed, it invalidates the whole trial and amounts to an illegality. Whether a judgment written after sentence passed is an illegality or a mere irregularity must

depend upon the circumstances of each case. In the decision of this Court in *Queen Empress v. Kamthia Girdharia* (1) (1899) 1 Bom. L.R. 160 relied upon by Mr. Weldon, there was not a mere irregularity but illegality. There the Magistrate had passed sentence first, then he began to write his judgment, but before he could complete it he died. The result was that the superior Court had no materials on which to proceed, supposing the matter had been taken up in appeal. Therefore that decision can be supported upon the grounds just stated. But Mr. Weldon relies upon the decisions in *Bandanu Atchayya v. Emperor* ILR (1903) Mad, 237; and *Queen Empress v. Hargobind Singh* ILR (1392) All. 242; and Ors. decisions to the same effect. But the Calcutta High

7. Court has taken a different view in *Tilak Chandra Sarkar v. Baisagomoff* ILR (1896) Cal. 502.. We are of opinion that the legality or illegality of a judgment in consequence of its delivery after sentence passed, is a question which can only be answered by the light of the circumstances of each case, and we hold that in the present case the action of the Chief Presidency Magistrate amounted, if at all, to a mere irregularity, not to an illegality. At the same time, having regard to the fact that the Chief Presidency Magistrate was not bound to write a judgment under Sections 366 and 367, but instead of that he had merely to give his reasons briefly for the conclusion he had arrived, at (Section 370, Criminal Procedure Code) it is doubtful whether those reasons can be regarded as a judgment falling within Sections 366 and 367. But however that be, we need not express any decided opinion on that point in the present case, because, even assuming that the reasons he gives under Section 370 amount to a judgment to which Sections 360 and 367 apply, here no material prejudice and injustice have been caused, and therefore, the omission complained of cannot be regarded as an illegality. It is merely an irregularity cured by Section 537 of the Code.

8. As to the sentence, offences in respect of cocaine must be severely dealt with, and this is an offence relating to a search which the Abkari officers wished to make in regard to cocaine. The circumstances of the case are such that we do not think that the sentence passed by the Magistrate can be regarded as too severe. We, therefore, discharge the Rule.

