

Emperor Vs. Maria Basappa

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Court : Mumbai

Decided On : Oct-10-1924

Reported in : AIR1925Bom135; (1924)26BOMLR1240; 85Ind.Cas.149

Judge : Marten and ;Fawcett, JJ.

Appeal No. : Criminal Reference No. 78 of 1924

Appellant : Emperor

Respondent : Maria Basappa

Judgement :

Marten, J.

1. This is a reference by the District Magistrate of Dharwar recommending that the proceedings now pending against the present accused in the Court of the First Class Magistrate of Gadag on a charge of murder under Section 302 should be quashed on the ground of the illegality of the proceedings.

2. The accused was admittedly an approver in a murder case in which he was granted a full pardon under Section 337 of the criminal Procedure Code. That being so, that pardon was a bar to any criminal proceedings being taken against him in respect of his complicity in the murder subject to any other provisions of the Criminal Procedure Code. Those other provisions will be found in Section 339

which provides that where such a pardon has been tendered, and the Public Prosecutor certifies that in, his opinion any person who has accepted such tender has not complied with the condition on which the tender was made, such person may be tried for the offence, in respect of which the pardon was so tendered.

3. Admittedly here the Public Prosecutor has given no such certificate, but notwithstanding that the learned Sessions Judge of Dharwar at the termination of the trial directed that the approver be put before a Magistrate, and that the Public Prosecutor be authorised to file a complaint against the approver and he ordered that the approver should be discharged and re-arrested and remanded to prison and should be produced before a Magistrate when called upon.

4. That is the order on which the present complaint before the Magistrate is founded. The letter of reference points out that the very complaint itself is wanting in the necessary condition before it can be enquired into, viz., the certificate of the Public Prosecutor under Section 339. In our opinion that objection is a sound one. The order of the learned Sessions Judge would seem to have been made per incuriam and in our opinion it cannot be supported.

5. If one looks at the matter in principle, there is all the more reason to construe these sections strictly. The accused under one section has been given a pardon. It, therefore, he is subsequently to be tried for his life, it is only fair and proper that the specific directions of the Code which enable that to be done should be strictly complied with. We get here a specific condition, viz., that the Public Prosecutor has to make a certain certificate. This he has not done. How then in common fairness can the accused be now prosecuted for this crime? It seems to me that although there may be other reasons for the insertion of this particular provision, the Public Prosecutor is the proper person to give such a certificate. I take it that in the districts he has very much the same sort of duties to perform in criminal matters as the Advocate General of Bombay has for the Bombay Presidency as a whole or the Attorney General has in England. He has access to all information in the possession of Government in relation to any offence, and consequently he is often in a much better position to say whether a particular prosecution should be withdrawn or proceeded with than the Judge whose duties are solely confined to

the evidence before him.

6. It is conceivable that on the evidence admissible before him, a particular trial Judge may come to a particular conclusion. It is equally possible that if it was admissible at a trial to have all possible information placed before him whether it was strictly speaking legal evidence or not, he would have arrived at a different conclusion. However that may be, to my mind there can be only one construction possible of this section, and that construction is not the one which the Assistant Public Prosecutor of Dharwar who has come here in person to support the learned Sessions Judge's decision has asked us to adopt.

Nor if one turns to earlier decisions before the recent statutory amendment necessitating a certificate from the Public Prosecutor, does it appear that a Sessions Judge in former days could properly have adopted the course which the learned Sessions Judge has taken in the present case. We have been referred to three cases, viz., Emperor v. Kothia I.L.R. (1906) 30 Bom. 611 : 8 Bom. L.R. 740, Emperor v. Gangua I.L.R. (1915) All. 331 and Emperor v. Abani Bhushan I.L.R. (1910) Cal. 845. These are all cases before the recent amendment, and they all go to show that the proper person to sanction the prosecution of an approver on the ground that he had broken his pardon is the District Magistrate and not the Sessions Judge. The judgment in Emperor v. Gengua is particularly clear on that point. However, that is now obsolete law. So we need not go into that nor discuss the case to the opposite effect in Chanan Singh v. The Crown I.L.R. (1919) Lah. 218, which the Assistant Public Prosecutor of Dharwar drew our attention to.

7. In our opinion the proceedings in question here are illegal, and the rule nisi should be made absolute. We will also direct that the present complaint be withdrawn and that the approver be discharged from custody.

Fawcett, J.

8. I concur. It has been urged in support of the learned Sessions Judge's order that he has inherent jurisdiction in spite of the provisions of Section 339, Sub-section (1), to make that order. No doubt it has been laid down by this Court in In Re: Ganesh Narayan Sathe I.L.R. (1889) 13 Bom. 600 that as a general rule it is

the right, and in some cases also the duty, of any person having knowledge of the commission of an offence to set the law in motion, even though he is not personally interested or affected by the offence. But that general rule is of course subject to statutory exceptions, and the present case is, in my opinion, clearly one of them. The pardon that was given to the approver prima facie acts as a bar to any prosecution of the approver for the offence in respect of which the pardon was tendered, or in respect of any other offence of which he appears to be guilty in connection with the same matter, except so far as the legislature may authorise a prosecution in such a case, and the effect of Sub-section (1) of Section 339, as it now stands, is clearly to make the certificate by the Public Prosecutor the sole basis of a prosecution of an approver. It is not suggested that there are other provisions, such as Chapter XXXV of the Criminal Procedure Code, under which a Sessions Judge's order directing a complaint can be justified and the general rule of construction applies, expression unius est exclusio alterius. Therefore it is only under the conditions specified in Sub-section (1) of Section 339 that the approver can be prosecuted, as the Sessions Judge proposes to prosecute him.

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