

Emperor Vs. Sripal and ors.

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Court : Allahabad

Decided On : Oct-10-1933

Reported in : AIR1934All17; 147Ind.Cas.1028

Appellant : Emperor

Respondent : Sripal and ors.

Judgement :

ORDER

Iqbal Ahmad, J.

1. This is a reference by the learned Additional Sessions Judge of Gorakhpur at Basti recommending that the order of the District Magistrate of Basti dated 16th April 1933, directing further enquiry into a criminal case, in which the accused were released by the Trial Magistrate under Section 249, Criminal P.C. be quashed. Certain persons were sent up for trial by the police under Section 13, Gambling Act. The Magistrate inspected the place, where the gambling was alleged to have taken place, and come to the conclusion that it was not a public thoroughfare. He, accordingly, re-fused to take further evidence and passed an order on 1st March 1933, releasing the accused under Section 249, Criminal P.C. The case was again put before the Magistrate on 10th March and, on that date, a report made by the Prosecuting Inspector was perused. The case was again taken up by the Magistrate on 17th March and, on that date, he adjourned the case to

enable the Prosecuting Inspector to enable the case, after the Prosecuting Inspector and the Superintendent of Police had inspected the alleged place of gambling. On 8th April the Prosecuting Inspector produced a map, and stated that he and the Superintendent of Police had inspected the spot, and that a pagdandi (footpath) runs at a distance of three or four hundred yards from the place where the gambling had taken place, and that that place was visible from the footpath. The learned Magistrate then dictated the following order on the order sheet:

I am unable to agree that the gambling took place by a public pathway in spite of the so-called pagdandi shown as 'B' in the map produced today. It was not shown to me when I was on the spot.... If it existed it must have been brought to my notice when I was dictating my notes on the spot. The standing crops have now been harvested and every mend or any way through the field may be called a pathway, but that cannot be a 'public' pathway.... I think it will be against the facts to find a public thoroughfare where it does not exist.... My inspection note, unrebutted as it is, is conclusive at present. I would have gladly acceded to the Prosecuting Inspector's request that I should transfer the application to the Sub-divisional Officer. But I have got no power to make such a transfer. Of course, if the application had come to me from the Sub-divisional Officer the matter would be different.... It makes no difference if the Prosecuting Inspector applies to the Sub-divisional Officer or to the District Magistrate to have the case reinstated if there are good grounds for doing so Rejected.

2. A petition was then filed by the Prosecuting Inspector on the same date, viz., on 8th April, in the Court of the District Magistrate. It was styled as an application for reopening the case the proceedings where or had been stayed by the lower Court under Section 249, Criminal P.C.

3. The District Magistrate held that the order of the trial Magistrate under Section 249, Criminal P.C. does not bar further proceedings according to law, and, accordingly, we directed that further proceedings against the accused be taken, and made over the case to the Sub-Divisional Magistrate for disposal. This order, as appears from the explanation submitted by the learned District Magistrate, was passed by him under Section 436, Criminal P.C. On an application in revision

being filed by the accused, the learned Additional Sessions Judge was of the opinion that the learned District Magistrate had no jurisdiction to set aside the order passed by the Trial Magistrate under Section 249, Criminal P.C. in the exercise of the revisional powers vested in him by Section 436 of the Code and, accordingly, has made the present reference. The learned District Magistrate has submitted an explanation and, in the course of that explanation, he maintains that his order directing further enquiry into the case was perfectly legal. He has pointed out that, as an order under Section 249, Criminal P.C. neither amounts to an acquittal nor to a discharge, the Magistrate, who passed the order and who stayed proceedings under that section, is not barred from starting proceedings afresh against the accused. He therefore maintains that, if the trial Magistrate could start proceedings afresh there is no reason why the District Magistrate, to whom the trial Magistrate is subordinate should not be empowered to order further enquiry into a case, the proceedings in which were stayed by a Subordinate Magistrate under Section 249, Criminal P.C.

4. The reference made by the learned Additional Sessions Judge cannot be accepted for the simple reason that the learned Sessions Judge had no jurisdiction to entertain the application in revision filed in his Court. It is provided by Clause (4), Section 435, Criminal P.C., that if an application under that section has been made either to the Sessions Judge or the District Magistrate, no further application shall be entertained by either of them. In the case before me an application was, as already stated, made in the Court of the District Magistrate and that application must be treated as an application under Section 435, Criminal P.C. The Sessions Judge therefore was not competent to entertain the application in revision filed by the accused. It follows therefore that the reference by him to this Court was without jurisdiction, I therefore refuse to accept the reference. But as I have examined the record and, as I have come to the conclusion that the order of the District Magistrate was illegal and, that there is no adequate ground to disturb the order passed by the trial Magistrate under Section 249, Criminal P.C. I have decided to set aside the order of the District Magistrate in the exercise of my revisional jurisdiction.

5. On examining any record under Section 435, Criminal P.C., the District Magistrate can proceed either under Section 436 or Section 437 or Section 438, Criminal P.C. Section 437, Criminal P.C. which deals with the power to order commitment in cases triable exclusively by a Court of Session, and Section 438, Criminal P.C., which provides for the submission of report by the Sessions Judge or District Magistrate to the High Court have obviously no application to the case before me. It is manifest therefore that the District Magistrate, in passing the order noted above, purported to act under and indeed in his explanation he admits that he did act in exercise of the powers vested in him under Section 436, Criminal P.C. That section vests a District Magistrate with the jurisdiction to order further enquiry into a complaint which has been dismissed under Section 203 or Sub-section 3 of Section 204 of the Code, or into the case of any person accused of an offence who has, been discharged. An order under Section 249 Criminal P.C. is neither one of dismissal of a complaint under the aforesaid sections, nor is it an order of discharge, and, therefore, Section 436, Criminal P, C, has no application to such an order. It is true that even after the passing of as order under Section 249, Criminal P.C. fresh proceedings against the accused are not barred by any provision of law, but the revisional powers of the District Magistrate are governed and controlled by the sections of the Code enumerated above and, accordingly, the District Magistrate had no jurisdiction to quash the order under Section 249 and directing further enquiry into the case. It follows therefore that the order of the District Magistrate cannot be sustained.

6. The trial Magistrate in his order dated 8th April 1933, has given cogent and convincing reasons for holding that the place where the gambling is alleged to have taken place was not a 'public place' or a 'public thoroughfare' within the meaning of Section 13, Gambling Act. The footpath indicated in the map filed by the Prosecuting Inspector was, on his own showing, at a distance of about 300 or 400 paces from the gambling place. The mere fact, that that spot was visible to the members of the public who used the footpath, cannot make that spot a 'public place.' In order to be a public place or a public thoroughfare within the meaning of Section 13, Gambling Act, the place or the thoroughfare must either be open to the public or actually used by the public, and the mere publicity of the gambling place or its visibility from a public place or a public thoroughfare is not sufficient. I hold

therefore that the trial Magistrate was right in not proceeding further with the case. The result therefore is that I set aside the order of the District Magistrate dated 16th April 1933, and maintain the order passed by the trial Magistrate. Let the record be returned.

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