

Emperor Vs. Kutroo

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Court : Allahabad

Decided On : Mar-05-1925

Reported in : AIR1925All434

Appellant : Emperor

Respondent : Kutroo

Judgement :

Walsh, J.

1. In our view this appeal succeeds on the merits, but not upon the point of law upon which the Government sought by the appeal to challenge the decision of the learned Judge. This miscreant, as he appears to be, having the reputation of a badmash likely to be engaged in dacoities, was suspected of having arms and ammunition in his house. Thereupon a patwari, who, by the rules applicable to Kumaun, entitled to exercise the powers of a police officer, searched his house with witnesses and found gun-powder, some dynamite, and a detonator and fuse. He was thereupon convicted and sentenced to nine months rigorous imprisonment and a fine of Rs. 50. He appealed and took the point that there had been no proper search because there had been no order under Section 25 of the Arms Act, and because the search was not made in the presence of an officer specially appointed or by virtue of his office under Section 30. We agree with this view for reasons which we will state in a moment, but the learned Judge overlooked the

fact that in spite of the search having been made under circumstances which rendered it not lawful, the appellant had nonetheless been found guilty on perfectly plain evidence of the offence with which he was charged. In allowing the appeal and quashing the conviction the learned Sessions Judge, although he did not say so, by implication committed himself to the further proposition, namely that where the search is illegal, a person cannot be convicted even though the evidence against him is conclusive. This is not the law. The point is covered by authority, particularly in this Court in the case of Emperor v. Syed Ahmad (1913) 35 All. 575, a decision of a single Judge with which we agree. In that case the search was illegal. Cocaine was found in the house of the accused and he was properly convicted. In this case the appellant was properly convicted, even although, for reasons which I am about to give, the search was illegal. In my view the argument upon which the appeal on behalf of Government has been based overlooks the significance of the term 'in the course of any proceedings instituted.' I think it better not to speculate as to why these words are there, except to say that possibly the legislature thought that where an act, like the possession of arms, was equivocal, and might be innocent or might be unlawful, that question depending on the existence of a license, unlimited right of search ought not to be conferred on the police. But I entertain no doubt that their effect is to cut down the general power of search under Section 165 by a police officer. The provision is applicable where a search is to be made under the Code of Criminal Procedure, in respect of such an offence as this, in the course of any proceedings instituted in respect of, such offence. The ordinary meaning of that language is, in the course of any legal proceedings which have already begun. The use of the expression 'instituting proceedings' in this Act is made plain by the preceding section where it is clearly used in reference to the commencement of some legal proceeding in a Court. That this view is the ordinary meaning of the English legal terminology is supported by the decision in Thorpe v. Priestnall (1897) 1 Q.B. 159. Under these circumstances I am clearly of opinion - no proceedings have been instituted - that the patwari who made the search in this case, was not legally authorised to make it. I may add, although it is not necessary for our decision that in my opinion the words 'in the presence of some officer specially appointed' mean that there must be at least two persons, namely the person making the search, and the officer specially appointed

within the meaning of Section 30 who is present at the search.

2. The appeal must, therefore, be allowed and the conviction restored, but inasmuch as the Government in the special circumstances of this case does not press for further imprisonment than that already undergone, we inflict punishment of one month and uphold the fine of Rs. 50. The accused having already served one month, need not surrender.

Boys, J.

3. I agree. The first section to which reference has been made is Section 25 of the Arms Act. I entirely agree with the view of Mr. Justice Piggott in the case of Babu Ram v. Emperor (1918) 16 A.L.J. 721, that that section is intended to apply to the particular class of cases where there is some unlawful purpose alleged regardless of whether or not the person whose house is to be searched has a license for the possession of the arms. In this case, however, it is not even suggested that any action was taken under that section. It is necessary, therefore, to look elsewhere for other powers of search if actually the search is to be justified. It is clear that Section 30 of the Arms Act does not itself give any power of such to anybody. It is confined to a statement that when a search is being conducted under the Code of Criminal Procedure or the Presidency Magistrates Act 'in the course of any proceedings instituted in respect of an offence punishable under Section 19(f), such search shall be conducted in the presence of a particular officer : ' it merely places certain restrictions on such powers of search as may otherwise exist under the provisions of the Code of Criminal Procedure. We are not concerned with the Presidency Magistrates Act and we have, therefore, to turn to the Code of Criminal Procedure. Sections 105 and 95 relate to the powers of a Court and it is not suggested here that any Court conducted or caused to be conducted any search. The Crown have, therefore, to fall back upon Section 165 of the Code of Criminal Procedure. There is nothing in the Arms Act to limit the powers of an investigating officer under Section 165 except the two qualifications introduced by Section 30 by the words 'in the course of any proceedings instituted in respect of an offence punishable under Section 19(f)' and by the requirement of the presence of a particular officer.

4. It is clear that in the case to which I have already referred, *Babu Ram v. Emperor* (1918) 16 A.L.J. 721, no reference was made to the words 'in the course of any proceedings instituted.' I should be prepared to hold that those words, even if the section stood by itself, meant that the officer appointed by Government could only search when some case had already been instituted in Court. It is the ordinary meaning of the language. But we are further confirmed in that conclusion, and it is rendered inevitable, by the use of similar words in Section 29 drawn to our attention by Mr. Hamid Hasan on behalf of the accused. The same meaning, must, in the absence of any strong reason to the contrary - and there is no such reason, - be given to similar words in two contiguous sections of the same Act; and as to the meaning of the words in Section 29, it is even more clear that there can be no doubt, for if a proceeding can be said to have been instituted within the meaning of Section 30 as claimed by the Crown when nothing has happened beyond a report to the police (in this case the patwari having the powers of a police officer) as to the suspected possession of arms, that meaning must be also given to the words in Section 25 and would result in holding that section to enact that no report must be made of an offence under Section 19(f) without the previous sanction of the District Magistrate. Further it is clear that the language of Section 30 is analogous to that of the last clause in Section 108 of the Code of Criminal Procedure 'no proceedings shall be taken'; in Section 132 of the same Code 'no prosecution shall be instituted'; in Section 188 'any proceedings taken.' I agree with Mr. Justice Walsh that it seems likely that the words 'in the course of any proceedings instituted' were inserted with the intention of restricting the powers of an investigating officer in making searches for arms where, even particularly where, there was no known unlawful purpose. Such restriction does not wholly deprive the authorities of power to search or to cause a search to be made merely because there is no known 'unlawful purpose' bringing the case within Section 25 and no proceedings already instituted in Court bringing the case within Section 165 of the Code of Criminal Procedure controlled by Section 30 of the Arms Act. A Magistrate acting as a Court could proceed under Sections 96 and 105. This is sufficiently clear from the Privy Council case : *Clarke v. Brajendra Kishore Roy Chowdhuri* (1912) 39 Cal. 953.

5. That is, however, in any case a question only of expediency. I agree with the order proposed by Mr. Justice Walsh.

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