

State Vs. Mohammad Naim

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Court : Allahabad

Decided On : Oct-23-1961

Reported in : 1962CriLJ125

Judge : A.N. Mulla, J.

Appellant : State

Respondent : Mohammad Naim

Judgement :

ORDER

A.N. Mulla, J.

1. This is an application Under Section 561-A of the Code of Criminal Procedure filed by the State praying that certain observations made by me in. State v. Mohammad Naim, Criminal Misc. Case. No. 87 of .1961 be expunged

2. Mohammad Naim was a police officer who had fabricated the first information report in Criminal Appeal No 8 of 1961 and a notice was issued to him by me as to why a complaint should not be instituted against him Under Section 195, I. P. Code. Mohammad Nairn pleaded guilty and I reluctantly accepted his apology and discharged the notice issued to him. In this order I had rand certain observations With a view to draw the after Son of the State to the conditions that exist so that an attempt should be made to purity 'the administration. The State instead of giving

consideration to the observations which I made Seems to have come to the conclusion that these observations do not present a true picture and so It has come forward with this application.

3. The first question that arises is whether the judiciary is entitled to draw the attention of the executive regarding matters which affect the administration or justice or not, The Assistant Government Advocate, who appeared on behalf of the State, did not challenge this right. In an earlier case in which this Court had made similar observations and drawn the attention, of the executive to the attitude of the police force and expressed an apprehension that the public services were likely to be demoralized a similar application Under Section 561tA, Cri P. C. was presented by the State.

In that case, In re State of U. P. A.I.R. 1959 All 60 the Advocate General appeared on behalf of the State and he also conceded that the Courts of law can make observations touching public administration. I am, therefore, satisfied that a Court of law is entitled to make observations regarding public administration. As a matter of fact I am of the opinion that a Judge would fail in his duty if he does not draw the attention of the executive to the fact that criminal cases which are placed before the Courts are in a large measure traps and frame-ups and they are supported by fabricated evidence and by extorting confession through third degree methods and by disregarding the prohibitions contained in the Constitution of India to safeguard the rights of the citizens. It is unfortunate that the executive instead of giving due consideration to the observations of a Court of law prefers to doubt their accuracy and goes to the length of filing such an application.

4. I would like at this stage to say that the Courts of law have not been getting that co-operation from the executive which in a democratic State they are entitled to claim. According to the well-known principles and traditions of a democratic State where strictures are passed by a Court of law they are not challenged by the executive. But, it seems those who have filed this application are of the opinion that these traditions should not be followed in this country and a departure should be made. It is also surprising that the considered opinion, based on knowledge, given by a Judge of the High Court is questioned on the basis of some information

which obviously proceeds from interested persons. Truth, has a strange way of presenting different facts to different persons. The cow in the meadow gets a different picture of the scene from the bird on the tree and the eagle soaring in the sky forms a different picture of the scene than either of these two. But all these three see farther than the ostrich who has buried his head in the sand. I am not going to say who is the ostrich and who is the eagle, (I may be the ostrich) but I wanted to stress the point that truth in the final analysis depends upon the place occupied by the person who sees it and the range of his vision.

It is, therefore, difficult for me to understand how any one can question that the observations which I made were not the truth. I know the police force of my province better than the lines of my hand and I again reiterate that Mohammad Maimans are the rule in this force and not the exception. It would be a sad day indeed where Judges would be stopped from speaking the truth. If Judges cannot do so, who else can do it? I am, therefore, of the opinion that the State by presenting this application is presenting a deaf ear to the observations made by this Court which were made for the purpose of removing the defects which are faced by Courts of law in criminal cases again and again.

5. The question now arises whether I possessed sufficient knowledge to make these observations. If dealing with the police during the last 35 years on every working day of my life is not sufficient to give me this knowledge, I do not know what knowledge would be considered to be sufficient. I practised exclusively as a lawyer on the criminal side, and as a Judge I functioned exclusively on the criminal side. To make a modest estimate, not less than fifteen to twenty thousand criminal cases passed through my hands, I believe I possess average intelligence and if an experience of so many cases does not give any knowledge to me about the way how the police prosecutes its cases then it seems that very few men can possess this knowledge. It is painful for me to say, but I have noticed that the executive instead of cooperating with the judiciary has been taking steps which not only hamper the judiciary in its work but also tends to lower its prestige and dignity. Since the time I started functioning as a Judge I have been drawing the attention of the State to the corruption and malpractices which were rampant in the police force. As I worked exclusively on the criminal side, there was perhaps not a day

when I did not make some comments in one of my decisions.

I frequently passed strictures against the investigating officers. The observations made by me in the case of Mohammad Nairn were only in line with the earlier observations made by me in other cases. It was only an accident that they received greater attention than my earlier observations. It is, therefore, painful for me to say that those police officers and other public servants against whom I made these strictures in many cases did not suffer at all because of the strictures passed by me. I know a few cases in which these officers were even promoted and that 1-00 by superseding some of their seniors. This experience is shared by many of my brother Judges. It is, therefore, obvious that the executive seems to think that the public services are its special concern and the Courts of law have no right to criticize them and if these criticisms are made, they can safely be ignored. The basic fallacy in the mind of the executive seems to be that they alone form the State and the Judges are not the State, Anyhow the fact that this application has been resented in this case is not mainly due to the observations made by me but to the fact¹ that somehow these observations gained a larger publicity.

6. The petition before me in its essence comes to this. The executive comes forward as the champion of the police force and says 'These are mother's own darling innocent babes and you have called them mischievous and naughty boys. Please withdraw your remarks'. The mother is entitled to have a different opinion about her children, but no judicial mind can prefer the opinion of the mother regarding her children as against the opinion of impartial outsiders. The mother duck may go on thinking that many of its ugly ducklings are swans but it should not expect others to do so. Either there is a great deal of divergence between the knowledge of the executive and the knowledge of the judiciary or (I do not want to entertain this thought) the executive conscience is far more elastic than the judicial conscience. A Judge cannot silence the voice of his conscience.

7. This petition presents a strange anomalous position. The State functioning as a judiciary makes certain observations and the State through the executive wants these remarks to be expunged. As observed by me above the basic fallacy in the mind of those who presented this application is that when these observations were

made they were not made by the State. It is true that under the law the State can seek relief against the orders passed by a Communicator of law, but this right is exercised by the State in order to advance the interests of law and an appeal or a revision is filed by the State when it finds that a decision was wrongly given by a Court of law. This right cannot be equated with the right of coming forward as the champion of an individual or a group for having some observations expunged.

The observations made do not affect the rule of law and, therefore, no remedy can be sought by the executive of the State. These observations are made when the Judge is functioning exclusively in his judicial sphere and any attempt; to interfere amounts to an invasion of judicial territory by the executive which cannot be permitted. The function of the executive is to see that it carries out the law as enacted by the legislature and the duty of the Courts of law¹ is to see that the executive does so within the framework of the laws that are enacted. The executive cannot be permitted to stand between the judiciary and the people of the country in the judicial sphere and the people include the public servants also.

8. Approaching the question from another angle I again come to the opinion that the State cannot present this type of application, .What is a democratic State? To quote the words of John Adams.

A legislative, an executive, and a judicial power comprehend the whole of what is meant and understood by .Government. It is by balancing each of these powers against "the other two, that the efforts in human nature towards tyranny can alone be checked and restrained and any freedom preserved in the constitution.

It is well known that power feeds the ego and tries to snatch more power. In non-democratic forms of State the judicial, legislative and executive powers are all combined and they are roiled in a few hands. On the other hand a democratic State realizes that there should be a system of foaling, and checks for otherwise power become, an instrument of oppression. The function of the judiciary is to see that the legislature and the executive comply with the mandates of the constitution. They have to be vigilant all time; specially against executive ambition. It is in this background that the executive's claim to come forward as the champion of any individual or group should be considered.

9. The democratic State visualizes a change in the executive frequently,. It has, therefore, evolved the basic principle that the public servants are to be loyal to the State and not to the group in power. It is for this reason that the public servants though they can exercise their right to vote in favour of a political group cannot by word or action show their allegiance to any group. The executive, therefore, cannot be permitted to do anything which would make the public servants more loyal to the group in power than the Other groups.

If the executive is permitted to come forward as the champion of the public servants, there is a likelihood that the public servants would begin to feel that while the judiciary is out to pass strictures against them, they are protected by the executive of the moment. They will, therefore, being human beings, come closer to that executive. Their loyalty to the State would be in a way affected by their greater allegiance to the executive which comes forward as their protector. A known protector would normally be preferred against an unknown group who may protect them in the same manner or not. A sort of fiduciary relationship that of a guardian and ward is likely to be established and thus to a certain extent they would become partisans of a political group. They would also look upon the executive as of greater importance than the judiciary. They would disregard the strictures passed by the judiciary on the belief that they have only to please the executive to escape the consequences of these strictures. The public services would thus be demoralized and instead of being loyal to the State they would become loyal to the group in power. This violates the basic conception of a democratic State.

In my opinion the executive cannot be permitted to play this role, for it would not only undermine the prestige of the judiciary, but will also demoralize the public services. Even now sometimes the public servants are not as much respectful to the judiciary as they should be in: a democratic State in which the spheres of the judiciary and the executive are well demarcated. In my Opinion the presentation of this type of application is an overstepping of the limits of the executive sphere and an encroachment upon the judicial prerogative. If this right is accepted, it would lower the dignity of the judiciary and make the executive paramount which is repugnant to the conception of a democratic State. The hall of democracy is supported by three pillars, the legislature, the executive and the judiciary and if

any one pillar is raised to a greater height than the other two pillars, the structure is bound to fall down.

I am, therefore, of the opinion that a relief can be given only to an aggrieved party Under Section 561-A Cr. P. Code and the State cannot come forward as the champion of an aggrieved party. The statute can only be interpreted in keeping with the basic and fundamental principles of a democratic state.

10. I had dealt with this point in an earlier decision given by this Court, which I have already cited above. It was observed at page 71 : A.I.R.1959 All 69.

It seems that those who at the moment act on behalf of the State instead of focussing their attention on the danger pointed out, came to the conclusion that these observations were not justified. It is open to these persons to live in 'Shangrila', but the Courts of law cannot afford to go there. Their duty is to state the truth as they find it. And if truth hurts, they cannot soften it by mixing it with falsehood. We need not dilate on this point, for the Advocate General conceded that the Courts of law can make observations touching public administration, if the matter comes before them as a 'justiciable issue'. We have already mentioned the manner in which this question came before the Court.

The next question is whether the State can come forward as an applicant Under Section 561-A Cr. P. Code. We asked the Advocate General to place some law or authority on this point before us, but he admitted that he could not lay his hands on any such authority. We also failed to find any law to support the proposition that the State can file such an application. The State is an abstract conception and no objectionable remarks can be passed against the State. The State can neither be injured nor aggrieved by any observations made by the Court. The right to approach the High Court Under Section 561-A Cr. P. Code can be exercised only by an aggrieved party.

When we asked the Advocate General as to how the State was an aggrieved party, he stated that the State has filed this application to protect the public services and the Members of the Legislative Assembly from an unwarranted disparagement. In other words, the State has come forward as the champion of

others- in our opinion it would not be a proper Use of our inherent powers if We give relief in 'those cases where the injured person himself is no party to the proceedings. This relief cannot be given to those who seek it as representatives of injured persons, but it can be given only to the injured persons themselves.

Section 561-A Cr. P. Code does not contemplate the case of 'A' being pleaded by 'B' and 'B' cannot be permitted to convince the Court that 'A' has been injured. The High Court can invoke these extraordinary powers to give relief only to one injured person, if they seek redress....

There is another aspect of the case which strengthens us in our opinion that the State has no locus standi to be an applicant Under Section 561-A Cr. P. Code, The State represents the Courts of law also and one of its duties is to defend the decisions given by competent Courts established by law. Does the law contemplate that the relief Under Section 516-A can be given to an applicant ex parte. without any one opposing the grant of such relief? This question in our opinion must be answered in the negative. It is not possible to accept that relief under the extraordinary provisions of Section 561-A Cr. P. Code should be given against a final order and there should be no one to oppose the relief sought. Who is to do so, if not, the State? It would have been a strange sight indeed if we had called upon the Government Advocate to support the observations sought to be expunged, The State cannot be permitted to take up this dual role of challenging the order as well as defending it. We are, therefore, of the opinion that relief Under Section 561-A Cr. P. Code cannot be claimed by the State, for the State being an abstract conception can never be an aggrieved person.

11. I have cited the extracts extensively so that I may not have to repeat the same arguments, I will only point out that these observations indicate that the position of the State, when it comes up in appeal or revision against the order of a Court, is entirely different than in an application Under Section 561-A Cr. P. Code. The State has not to support the order of the Court when it files an appeal or a revision.

12. The learned Assistant Government Advocate advanced only one contention before me. He contended that the remarks sought to be expunged were not on a

justifiable issue but were obiter dicta and so the observations made above do not apply to this case. In my opinion the distinction cannot be drawn. Since the time the Courts of law have started giving decisions 'obiter dicta' has found a place in decisions. As a matter of fact the obiter idea brings in relief the dicta contained in the decisions. Every obiter dicta cannot be expunged. Only that obiter dicta which amounts to an over-statement or which does not form part of the 'Ratio Decidendi' of the decision and its deletions is also necessary in the interests of justice can be expunged. The interests of justice can never demand that 'truth' should be expunged because the executive holds a different opinion.

In the beginning of this decision I have already observed that I made no over statement and the observations were made on the basis of my knowledge. Judges by training and habit are accustomed to make observations in a careful manner and they do not do so in a light 'hearted manner. It they be their painful duty to make certain observations in order to focus attention on a matter, but they do not pass strictures without weighing it in their own mind that the strictures are justified. The terminology used by me by itself indicates that I had weighed my words, for I had stated that I was making these observations with full responsibility.

13. As regards the other point, whether they form part of the 'Ratio Decidendi' of the decision or not, I find that in the context of the decision they explain why I accepted the apology of Mohammad Nairn. I wanted the executive to clean the pond, for action against individual fish was considered to be inadequate. I am, therefore, of the opinion that the observations made by me are also necessary to understand why J was prepared to accept the apology tendered before me.

14. In view of what I have observed above it is really not necessary for me to consider the other pleas raised in the application presented before me, but as these other contentions are advanced I have to deal with taken briefly.

15. In my opinion it is a part of the duty of the courts of law to try that the streams which feed the river of law do not remain foul and polluted, for it adversely affects the administration of justice. Those who are responsible for preserving this application do not seem to agree with this point of view. The executive seems to be of the opinion that a festering sore on the body should be kept bandaged and

hidden like a guilty secret in the heart. As a member of the Judiciary I am entitled to disagree with this view. I think; that such a festering sore should be treated with a lancet by those who are entitled to use it and the treatment can be started only when it is admitted that the sore exists. It was, therefore, necessary to draw the attention of the executive to the festering sore. If the executive authority does not admit the existence of this sore, it is its own concern, but it has no right to ask the judiciary to close its eyes and not to point it out.

The spurious plea, that such observations are likely to lower the entire Indian nation in the eyes of the other countries and are likely to endanger the security and safety of the State and lower the morale of the public services is not only irrelevant, but the whole plea is absolutely unfounded. I do not underrate the information or the intelligence of the foreign countries, as this plea seems to indicate.

16. As regards the complaint that the remarks are all too sweeping in character, there is a presumption that the evil is not equally sweeping. If out of these two any one can be said to be more extensive and sweeping, it is the evil itself and not the observations which describe that evil. It is contended that the remarks apply to all members of the Indian Police force without any exception and, therefore, they should be held to be sweeping. I have read my decision again and I find that this is a clear misreading of my decision. When one talks of the desert, one does not necessarily mention the few oases in the desert, for it can be presumed that every desert chafes these oases. Still I have repeatedly mentioned that there are honorable exceptions in the Police force and this has been done at several places in the decision.

Such an exception cannot be mentioned in every sentence, but if the whole decision is read, any honest reader would find that 'there is no wholesale denunciation but only a denunciation of the overwhelming majority of the police force. As according to my knowledge the majority of the police force falls within the description given in the impugned extracts, I cannot accept that the remarks are too sweeping in character. They express exactly what I intended to say and what I knew and believed to be true. I will, however, make one clarification. These

observations were made in refract of the Police force of Uttar Pradesh only for I have no personal knowledge of the Police, force of other provinces.

17. The next plea that they are likely to endanger the security and safety of the State is not understandable to me at all. If drawing attention to the fact; that a great number of the Indian Police force are committing breaches of the law and attempts should be made and this evil should be stopped is likely to endanger the security and safety of the State then I, must confess that the meaning of the words 'scurry' and 'safety' are different in the executive dictionary and the judicial dictionary. Law cannot be divorced from order to be a democratic State. Security and safety exist in a seta worship and an autocracy also, but security and, safety of a democratic State. depends upon the establishment of a rule of law Order follows the rule of law and does not precede it. The moment order is divorced from law, it will sound the death-knell of the republic State, for in such a situation a dictatorship may come into being.

If law and order are, to be divorced then a greater emphasis should be, on the. law and not on order. If there is no order, but there is an insistence on the observance of law, the situation is redeemable, for by increasing the forces of law an order can be created. But once the law is not followed and order is sought to be secured by committing a breach of the law then the State ceases to be a democratic State and naked autocracy takes its place. Those who believe that (order can be secured without the observance of law stand on the same footing as those who claim that peace can be attained and preserved by resorting to violence. I, on the other hand, believe that violence breeds violence and lawlessness begets lawlessness. It appears the maddest of mad theories to me that order can triumph over disorder only if the officers of law outstrip the forces of disorder in their lawless and disorderly conduct. So long as the Constitution of India exists the executive cannot in the interest of security and safety of the State defy the rule of law.

If the executive feels that within the framework of 'the Constitution the security of the State cannot be preserved, then it is for them to ask the legislature to amend the Constitution', So far I dealt only with the legal aspect of this plea factually also this plea is not entertainable. If order can be secured only by the methods

mentioned above then it is a misnomer to call, it order, No chaps can be worse than the order, I, therefore, do not find any substance in the argument that the observations made by me are lechery to endanger the security of the State.

If these observations have aroused the consciousness of the people against the ihram of the police, it is a good reaction and not a bad reaction.

18. The third plea that it would lower the morale, of the pulled services is almost ridiculous. It is an extraordinary plea that if the police is told to follow the rule of law it would demoralize them- Jerk again (the meaning of the word 'demoralization' seems to be different in the executive terminology and the judicial terminology. If the morale of the Police can only be kept up by permitting them to commit all sorts of breaches of law then at least so far as the judiciary, is concerned, it cannot subscribe to this view.

It is an amazing plea that uses the judiciary presents a blind eye to the misdeeds of the Police and it is given full licence to ride the spiral of crime its morale would go down. If this is true, then in my opinion the sooner the Police force is disbanded the better. In my opinion the presentation of this application is far more likely to demoralize the Police force than the observations made by me. This application would encourage the wrongdoers to pursue their misdeeds with impunity for it may be read as a clear signal to them to go ahead, as the executive is willing to put its seal of approval upon their criminal and illegal activities.

19. As a matter of fact I am of the opinion that if these remarks are expunged they would demoralize the judiciary. It would be the end of judicial independence if the judiciary can make only those, observations which are approved by the executive. It is true that for a smooth running of the machine of the State there should be cooperation between the judiciary and the executive but in the judicial sphere this co-operation can be only on the terms laid down by the judiciary and not on the terms laid down by the executive.

20. There is another mistake committed by those who are responsible for presenting this application. This seems to be a presumption on their joint part that I alone am of the opinion expressed to this decision. If the executive authority had

cared to sound the other judges Or other courts of law, it would have been surprised to find that the view expressed by me is shared by a large number of them. They may not have expressed those views in the same terminology in which I expressed them, but their estimate of the police force is no different from mine. Where a large number competent persons hold a view it is idle to contend at the estimate made by them is not correct and the opinion of the executive is really a true estimate. Where there is a difference, of the estimates, it is the opinion of the people which decide the question- Has the executive tried to find out what the people think about the police force and whether their estimate is also the same given in any decision or it corresponds with the estimate made by the executive?

21. Again, in my opinion the stock of the Indian Police force will not rise merely by expunging these remarks from a sheet of paper. You cannot expunge them from the hearts and minds of the people. These remarks represent not only the considered view of the judiciary but I have good evidence to believe that they represent) the verdict of the people also. It is not my province to offer any advice, but instead of trying to have these remarks expunged it would have been more profitable if an attempt had been made to bring about a reformation in the police force and thus remove the existing impression from the minds of the people.

22. In the end I would like to observe that since the time the Courts of law were established there have been Judges who came to the same view which I have expressed and this is to be found in their decisions. I have only followed the footsteps of those past Judges. It seems to me that such observations were given due consideration hitherto the year 1947, the year of our independence, but since the year 1947 the opinion of the Judges seem; to be losing ground and the executive is gradually becoming more and more unmindful of these opinions. No applications Under Section 561-A Cr, P. Code were presented against judicial observations before 1947S but now on repeated occasions such applications are presented.

23. There are three extracts which are sought to be expunged, the have already disposed of extracts (b) and (c) and in my opinion no case is made out for expunging these observations. So far as extract (a) is concerned, I would have

agreed to expunge it, if the aggrieved party had approached me. This extract runs as follows :

If I had felt that with my lone efforts I could have cleaned this Augean stable, which is the police force, I would not have hesitated to wage this war single handed.

I find that this sentence has been misunderstood by a large number of people and it could have been misunderstood in that manner. I also find that though I used the term 'Augean stable' in the context of mythology to describe a Herculean task, this term is also vises metaphorically as a term of abuse. I had no intention of abusing any body and it can be inferred that I abused the police force, I would have been willing to expunge; this observation. Another part of this observation which has been misunderstood was when I observed that I was making 'lone' efforts- A meaning has been placed upon it as if I was the only judge who was out to punish the erring members of the police force. This was again no the meaning in which I used the word 'Lone'.

I had in my mind the attitude of the executive authority when I used the word 'lone.' I have already mentioned above that even where strictures were passed by the Judges, they were occasionally ignored and the erring officers were promoted. It Was in this context that I used he word 'lone'. I have no idea that it would be inferred from (his (expression that I was referring to my brother judges. For these reasons I would have expunged these observations, if an aggrieved party had presented an application before me, but I cannot accept the championship of the State for the aggrieved persons for reasons given by me above.

24. I, therefore, dismiss this application.