

Muhammad Nur Vs. Emperor

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Court : Allahabad

Decided On : Dec-17-1909

Reported in : 5Ind.Cas.21

Judge : Piggott, J.

Appellant : Muhammad Nur

Respondent : Emperor

Judgement :

Piggott, J.

1. The applicants in this case have been convicted by a Magistrate of the 1st Class of an offence punishable under Section 401, Indian Penal Code, and the sentences passed on them have been confirmed by the learned Sessions Judge of Moradabad on appeal. When these applicants were first placed before the Magistrate on March 17th, 1908, one Majida was in the dock with them as a co-accused. Evidence for the prosecution was recorded on this date and again on March 27th and on April 7th against the applicants along with Majida and the case came up for farther hearing on April 21st, no charge having yet been framed. On that date Majida was not placed in the dock along with the other accused persona and the Court was informed that the Public Prosecutor withdrew from the prosecution of the said Majida who was then tendered as a witness against the other accused. Objection was taken on behalf of the defence to the examination of

Majida as a witness and the Magistrate said he would pass orders the following day. On April 22nd accordingly the case came up again and the Magistrate passed an order, the important words of which are: 'The Court Inspector having withdrawn prosecution, Majida is no more an accused person and he can be examined as a witness'. The evidence of Majida was taken on that date, and again on May 12th and on May 13th, a charge was framed on May 19th and the case was decided on July 2nd 1909. I think it worth noting that between April 22nd and May 19th the whole of the prosecution witnesses previously examined had been recalled and further examined or cross-examined or tendered for cross-examination by the defence. It is not denied on the one hand that the withdrawal of the prosecution as against Majida was made by an officer duly authorised to do so, and was a valid proceeding under the first part of Section 494 of the Criminal Procedure Code, nor on the other hand that the conviction of the applicants now before me was largely based on the evidence given by Majida.

2. The conviction is assailed on revision on the allegation that the evidence of Majida was, under the circumstances stated, wholly inadmissible as against the applicants and the particular grounds pressed upon me are that there had been no formal order of discharge passed in respect of Majida, under the provisions of Section 494(a), Criminal Procedure Code, and that Majida was still in police custody when his evidence was taken. This latter plea I may at once set aside as baseless in fact. It is quite clear from the questions put to him in cross-examination that Majida was not in custody while giving evidence on May 12th and 13th and I have no doubt the Sessions Judge is correct instating that the man had in fact been released from custody before examination as a witness commenced on April 22nd. The argument to the contrary is based upon a rough estimate given by Majida himself while under cross-examination of the length of time that he had been in custody and the defence made no attempt to press the point home by asking the witness plainly whether .he was, or was not in custody when first put in the witness box.

3. The argument in support of the first plea is based on the ruling in Banu Singh v. Emperor 34 C. 1353 : 10 C.W.N. 926 : 4 Cr. L.J. 145. The point of law considered by the learned Judges, in, that case was complicated by the fact that there had

been a wholly irregular and invalid tender of a conditional pardon, to the accomplice witness in, the case then before them. Moreover, a consideration of the judgment as a whole shows that the Court carefully refrained from affirming definitely that the evidence of the accomplice in that case was wholly inadmissible. Reference was made to two Bombay rulings, *Queen-Empress v. Mona Puna* 16 B. 661 and *Queen-Empress v. Durant* 23 B. 213, which are based upon the principle that there is no objection in law, to the evidence of an accomplice in respect of whom no order of discharge or acquittal has yet been passed being, taken in a case, provided only that the said accomplice is not being tried along with the accused persons in the case in which his evidence is tendered. If it were necessary for me to decide this case upon this point only, I should be prepared to accept the rulings of the Bombay High Court subject to the reservation, that the value, though not the admissibility, of the evidence of an accomplice might be seriously affected by considerations arising out of the, position in which the witness himself stood (with reference to his possible prosecution for the same offence) at the time when his evidence was taken.

4. In the present case it, is sufficiently clear that no such peculiar considerations; arise. There had been a valid and effective withdrawal of the prosecution as against Majida and the position of the; witness, could not, be adversely affected even if the Court be held not to have complied with the clear provisions of Section 494(a) of the Criminal Procedure Code. I am of opinion, however, that there had been a virtual, though informal, compliance on the part of the Magistrate with the said provisions. As I have said already, I am satisfied that Majida was in fact discharged from custody and the order which I have quoted shows that the Magistrate trying the case had taken judicial notice of the withdrawal of the prosecution against Majida and held him to be 'no more an accused person' in the case before it. The omission to use the formal words 'I discharge this accused' would be at most an irregularity curable by the provisions of Section 537 of the Criminal Procedure Code. The memorandum of the Magistrate's proceedings on April 21st and 22nd as well as the first paragraph of the memorandum of appeal presented by the applicants to the Sessions Court show that they, quite understood at the time that Majida had been discharged. The point taken before the Magistrate and the Court of Session was not that Majida was not a competent

witness for want of a formal order, of, discharge but that the Magistrate had no power to discharge him and then to call him as a witness. This last plea is clearly unsustainable and the application for revision as now presented to this Court, therefore, fails. It is hereby dismissed.

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