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Court : Allahabad

Decided On : Oct-13-1931

Reported in : AIR1932All327

Appellant : BashiruddIn and anr.

Respondent : Emperor

Judgement :

Niamatullah, J.

1. These are two applications for transfer of two cases, one pending in the Court of the Joint Magistrate, Bareilly, and the other in that of the City Magistrate of that District. The case pending in the former Court is one under Section 60-A, Excise Act, against the applicant Bashiruddin, the other is one under Sections 332 and 225, I.P.C. against both the applicants, Bashiruddin and Nizamuddin, who are brothers.

2. On 12th July 1931 the person of Bashiruddin was searched for cocaine by the police at about 10 p. in. at a public place. This is alleged to have led to a scuffle between the applicants on the one side and some police constables on the other. It is not necessary for the purposes of these applications to describe in detail the events which happened on that occasion. Subsequently Bashiruddin was sent up for trial for an offence under the Excise Act before the Joint Magistrate and both the applicants were sent up to the Court of the City Magistrate for an offence

under Sections 332 and 225, I.P.C., as already stated. Though the two offences are alleged to have been committed in almost the same transaction, the arrangement of work in the district necessitated the two cases being laid before two different Courts.

3. The offence under Section 332, viz., voluntarily causing hurt to deter a public servant from his duty, is bailable, so is an offence under Section 225 unless the person to be apprehended or attempted to be rescued, is charged with, or liable to be apprehended for an offence punishable with transportation for life, or imprisonment for a term which may extend to ten years. To clear the ground, it may be stated at once, that the applicants were charged with a minor offence under Section 225 referred to above as they were alleged to have offered resistance to the apprehension of a person (Bashiruddin) charged with an offence under Section 60-A, Excise-Act, which is punishable with not more than two years' rigorous imprisonment. It follows that neither of them was accused of a nonbailable offence. Accordingly they were released on bail by the police who submitted a charge sheet on 17th July 1931 in the cage under Sections 332 and 225. The City Magistrate allowed them to remain on bail by an order dated 18th July 1931.

4. To describe the subsequent events in chronological order, it appears that the statements of two prosecution witnesses had been recorded under Section 164 and the accused applied on 3rd August 1931 for copies of such statements, and in the alternative, for inspection thereof, for the purpose of cross-examination of those witnesses. This application was refused. The evidence for the prosecution was finished on 6th August 1931 and the case was fixed for 14th August and subsequent days for, defence. An application was made on behalf of the accused on 8th August 1931 for summonses to the witnesses whom the defence proposed to examine. The Magistrate refused to summon four witnesses. On the same date the District Magistrate passed an order on the police report cancelling the bail. The applicants were arrested on 14th August 1931. The applicants moved the Sessions Judge for bail, representing that the circumstances in which they had been re-arrested had not been made known to them. The Government Pleader intimated that the applicants had been arrested in proceedings under Section 107,

Criminal P.C. This was on 21st August 1931, which is a material date as will hereafter appear. The learned Sessions Judge refused to interfere by an order of the same date. Proceedings under Section 107, Criminal P.C. were started on a police report dated 21st August 1931, which alleged that the applicants had threatene dcertain witnesses for prosecution and were, likely to commit a breach of the peace. Two applications were then made to this. Court for transfer of the cases to the Court of some other Magistrate outside the District of Bareilly. The affidavit filed in support of the application for transfer of the case under Sections 332 and 225, I.P.C., refers in greater detail to the facts mentioned above. No separate affidavit was filed in support of the application for transfer of the case under the Excise Act.

5. The grounds on which the case pending before the City Magistrate, Bareilly, is sought to be transferred and which, according to the applicants, create a reasonable apprehension in their minds that they are not likely to have a fair trial before that learned Magistrate are:

(1) That the Magistrate illegally refused copies of the statements under Section 164, and the inspection of these statements; (2) that the District Magistrate cancelled the bail, though the applicants were accused of bailable offences; and (3) that the City Magistrate improperly refused to summon four of the defence witnesses whose names were mentioned in the list appended to the application, dated 8th August 1931.

6. I proceed to consider these grounds seriatim. It is not disputed that the statements of two of the prosecution witnesses had been recorded under Section 164, Criminal P.C. and that the accused applied through their advocate for copies, or for inspection of such statements, to enable the accused to cross-examine those witnesses. The only order in writing which was endorsed on this application was: Under what provision of the law?' Whether an attempt was made to satisfy the City Magistrate that the accused were entitled to the copies and inspection of the aforesaid statements does not appear from the record, but it is not denied that the copies were not allowed nor the original statements were shown to the accused's advocate. The learned Magistrate has stated in his explanation

furnished to this Court that as the statements under Section 164 did not form part of the record and the advocate for the defence failed to refer to any provision of law under which 'copies could be issued as a matter of right,' no copies were allowed. The explanation does not make any reference to the alternative prayer made on behalf of the accused that the statements under Section 164 might be shown to the advocate for the defence who desired to inspect them for the purpose of cross-examination. Statements recorded under Section 164, Criminal P.C. are public documents, being the acts of a Judicial Officer done under the provisions of the Criminal Procedure Code, and the public servant in whose custody those documents were, was bound to issue copies thereof. An accused is undoubtedly entitled to inspect statements of prosecution witnesses recorded under Section 164, Criminal P.C. Such statements can be used by the prosecution for the purpose of corroborating the witnesses. They can likewise be used by the defence for the purpose of contradicting such witnesses. Section 164, Criminal P.C. clearly provides that statements recorded under that section shall be forwarded to the Magistrate by whom the case is to be enquired into or tried. It is difficult to appreciate the remark of the learned City Magistrate that the statements in question were not on the record. If they were not till then before him he should have forthwith sent for them, and if they had not been previously forwarded to him they should have been before him without any further delay.

7. A part from this aspect of the case, the Magistrate trying the case has to protect the interests of the prosecution and the defence alike; even if the accused were not entitled as of right to inspect such statements, the Magistrate should have had no objection to exercising his discretion in favour of the accused in a matter of that kind. A Magistrate is expected to afford all facilities to the accused not only when he is compelled by law to do so, but also when he has a discretion in the matter and the ends of justice require that the accused should be apprised of what certain prosecution witnesses had previously stated in proceedings under Section 164, Criminal P.C. I am clearly of opinion, that the learned Magistrate should have directed copies of the statements under Section 164 to be given to the accused on payment by them of the usual fees and in. any case, should have allowed the advocate for the defence to inspect those statements.

8. As regards the second point the record' discloses certain facts which cannot be controverted. It has been already stated that the applicants were charged with, nonbailable offences and that the police and the Magistrate at the earlier stages of the case rightly allowed the accused to be on bail. On 7th August 1931 a report, purporting to be signed by the Kotwal of Bareilly and submitted to the District Magistrate through the Superintendent of Police, alleged that the two accused:

are proving very dangerous and troublesome and are constantly threatening the prosecution, witnesses for their lives.

9. The report concluded with a request that their bails might be cancelled. By an order dated 8th August 1931 the Superintendent of Police recommended to the District Magistrate that in the circumstances disclosed in the Kotwal's report bail 'should be cancelled. The District Magistrate passed the following order on 8th August 1931:

In view of the reports above I have no option but to cancel the bail of Bashiruddin and Nizamuddin, who must be arrested forthwith. The P.I. and G.P. should be informed; the former to obtain warrants of arrest from the Court and the latter to oppose any bail application in the Judge's Court.

10. The City Magistrate issued warrants, dated 8th August 1931, and, as already stated, the applicants were arrested on 14th August 1931. Apparently, the City Magistrate was moved by the Prosecuting Inspector to issue warrants as directed by the District Magistrate. There can be no doubt that the order of the District Magistrate who had no seisin of the case was without jurisdiction and in disregard of the law which did not empower even the trying Magistrate to cancel the bail in a case in which the accused were, as a matter of right, entitled to be on bail. The utmost which the Court before which the case was pending could order was to enhance the amount of bail. This procedure was neither suggested by anyone nor did the Court pass any order for enhancement of bail and arrest of the accused on their failure to furnish the enhanced bail. The trying Magistrate did not himself pass any order for cancellation of bail. The motion for the bail being cancelled was made in the report of the Kotwal who did not care to satisfy himself as to whether bail could be cancelled in the case in question. The Superintendent of Police did

not likewise pause to consider the question before recommending that the bails be cancelled. What is more surprising is that no report was made to the Magistrate before whom the case was pending and who alone was empowered to interfere with the existing bail. They preferred to move the District Magistrate over the head of the trying Magistrate. The District Magistrate, instead of forwarding the report of the trying Magistrate for appropriate orders, as was the least to be expected in the circumstances, assumed the jurisdiction to deal with the matter with which at that stage he had no concern whatever. He took it for granted that he had the power to cancel bail as he was asked to do by the S.P. and the Kotwal. It is not that he made a recommendation to the trying Magistrate that the bails be cancelled. His order is clear and absolute. The only extent to which his order sought the intervention of the trying Magistrate was that he directed the Prosecuting Inspector to obtain warrants of arrest from him. The learned Government Pleader was not able to reconcile the order of the District Magistrate with the provisions of the Criminal Procedure Code. The latter apparently acted on the assumption that as District Magistrate he could pass any order which any of his Subordinate Magistrates could pass in a case pending before him.

11. The learned District Magistrate did not realize the nature of his order till the Sessions Judge who was moved by the accused in the matter of bail made enquiries as regards the circumstances in which bail had been cancelled. It was then discovered that the District Magistrate's order was wholly ultra vires. The report of the Government Pleader which he submitted to the learned Sessions Judge in that connexion is an illuminating document and may be usefully quoted in extenso:

The accused since after their release on bail kept on threatening the prosecution witnesses for their lives and according to the numerous reports that were made to the police by the prosecution witnesses there was a grave and imminent danger of a breach of the peace from the accused. The accused were hence re-arrested to avoid breaches and commission of non-bailable offences by the accused as provided under Section 107, Criminal P.C., though, as ordered by the Magistrate, the bails were cancelled technically.

12. This report is dated 21st August 1931, and it is significant that the police submitted another report on that date repeating the allegations contained in the report of the Kotwal dated 7th August 1931, already referred to, and prayed for proceedings under Section 107, Criminal P.C., being taken against the accused. Reading the report of the Government Pleader to the Sessions Judge, and that of the police for proceedings under Section 107, the inference is irresistible that an effort was made to legalize the order of the District Magistrate cancelling the bail. The report of the Government Pleader is extremely misleading. It creates an impression that the accused had been really arrested in proceedings under Section 107, which according to him had already been started, when the District Magistrate directed the re-arrest of the accused and that the order of cancellation of bail was in fact an order of arrest in pursuance of Section 107, Criminal P.C. That the bails were cancelled technically is meaningless. The order was not only passed but carried into effect. The fact that the report initiating proceedings under Section 107 was not made till 21st August 1931, when the Government Pleader made his report, was suppressed. The District Magistrate never had Section 107, Criminal P.C., in his mind. No order under Section 112, Criminal P.C., had been drawn up. No notice of those proceedings was served on the accused. On the whole it was a dis-ingenious attempt to mislead the learned Sessions Judge into the belief that the accused had been arrested in pursuance of a legal process. It would have been a more straightforward course if the learned Sessions Judge had been told that an error of law had been committed by inadvertence.

13. I have before me the record of the case under Section 107 proceedings which were started, as already stated, on 21st August 1931, and the Joint Magistrate to whom the case was made over called upon the accused by an order of 24th August 1931 to show cause why an order for security should not be passed against him. It is only after this order that the arrest of the accused in proceedings under Section 107 could take place in terms of the proviso of Section 114, Criminal P.C. Unless the Joint Magistrate's order dated 24th August 1931, already referred to can relate back to the arrest of the accused previously made on 14th August, which is an impossible position, the detention of the applicants from 14th to 24th August was illegal. The accused [may be all that the Bareilly police say they are but they are undoubtedly entitled to be proceeded against according to

(law and not to be deprived of their (liberty except in due course of law.

14. The City Magistrate in issuing warrant of arrest in pursuance of the order of the District Magistrate cancelling bail should have realized his own responsibility in the matter. He did not consider whether a warrant of arrest could be issued over his signature, he himself, not having passed any order cancelling the bail. He should have at least drawn the attention of the District Magistrate to the legal question involved in the procedure which the District Magistrate proposed to adopt.

15. The third point has reference to the City Magistrate's order refusing to summon four of the defence witnesses. He refused to examine one witness on the ground that he had already been examined and cross-examined. The defence desired production by the witness, who is a police officer, of certain diaries, etc. Prima facie the Magistrate's order refusing to summon the witness for the purpose specified in the application was proper. The accused or their advocate should have given reasons to the satisfaction of the Magistrate that the production of diaries and other police papers was necessary for the purpose of their defence. It does not appear whether the Magistrate called upon the accused to give reasons for summoning the witness and the papers which he was required to produce. As regards the other three witnesses the learned City Magistrate ruled them out as 'irrelevant.' His order does not give sufficient particulars to enable me to decide whether the evidence which those witnesses were expected to give was relevant or otherwise. The learned Magistrate has also characterized the action of the defence in summoning 'these witnesses as vexatious.' As the record stands, the view that those witnesses were 'desired to be summoned for the purpose of vexation, is not justified.

16. Having regard to all the circumstances of the case I think it is expedient for the ends of justice that the case pending before the City Magistrate, Bareilly, which is triable by a Court of Session, though not exclusively, be committed for trial of that Court. Accordingly I direct under Section 526(1)(e)(iv) that the City Magistrate may commit the case pending before him to the Court of Session after completing the inquiry preliminary to commitment.

17. As regards the case under the Excise Act pending before the Joint Magistrate the application for transfer is groundless. The affidavit filed on behalf of the applicants in the other case (no separate affidavit was filed in support of the application for transfer of the case pending before the Joint Magistrate) contains no grievance against any proceeding taken by the Joint Magistrate, or against any order passed by him. It has however been mentioned in the course of hearing before me that the Joint Magistrate did not stay proceedings after an order of stay was passed by this Court and communicated to him by the advocate of the accused. An application was made on 24th August 1931 by the advocate for the defence intimating that an order of stay had been passed by this Court. The Joint Magistrate noted an order on that application that proceedings would be stayed when the stay order reached his Court, or when any evidence was produced in support of the allegation. This was in my opinion a proper order. The learned Joint Magistrate was perfectly within his rights to insist on satisfactory proof that an order had been passed by this Court before he himself passed an order of adjournment. In these circumstances I refuse to transfer the case under Section 60-A, Excise Act, pending against the applicant Bashiruddin in the Court of the Joint Magistrate, Bareilly.