

Nek Ram Vs. Emperor

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Court : Allahabad

Decided On : Oct-16-1930

Reported in : AIR1931All273; 129Ind.Cas.267

Appellant : Nek Ram

Respondent : Emperor

Judgement :

Bennet, J.

1. This is an application on behalf of one Nek Ram asking that either a charge framed against him should be cancelled or that the case should be transferred to another Magistrate. The facts of the case, so far as relevant to this application, are shown by the record and an affidavit. On 27th July 1930 it is admitted that Birendra, a young man of twenty years, who is also an accused, took two rupees and went to a shop of Ram Babu at a short distance from the shop of the applicant Nek Ram. Birendra is a servant of Nek Ram and works in his shop which is for drugs. Ram Babu found that the two rupees were false and he handed the boy Birendra over to the police. The defence is that two customers had come to the shop of Nek Ram before it was open at twelve o'clock and that these customers had given the two rupees asking that the boy Birendra should bring change, and that these two customers subsequently disappeared when Birendra was arrested and a crowd collected. It was also the defence of Nek Ram that he was not

present at the shop at the time when Birendra left the shop to get the Rs. 2 change. It is of considerable importance in the case to see at what stage the story about the two customers was put forward. In the police diary it was stated by Tulla, a witness for the prosecution, as follows:

Yehi rupie the jo Birindar Kumar ne rezgari ke lene ki lie mudai Ram Babu he die the aur un logon he kahne par ke yeh kharab malum hote hain wuh kahan se laya hai to kaha ke do gahak ae hain unko bhang kharidna hai, rozgari ki unko zarurat hai.

2. This shows that, according to Tulla, Birendra put forward the story of the two customers at the time of his arrest. When Tulla gave evidence before the Magistrate he stated:

I did not question Birendra. Birendra did not tell me that the change of two rupees was wanted for two customers who wanted some bhang. I did not say this to the Sub-Inspector.

3. When this statement was made in cross-examination the defence counsel asked for a copy of the statement in the diary in order to use it to contradict the witness. The Magistrate makes the following statement in regard to this incident:

It is true that after reading Tulla's statement I allowed a copy of the same to be given to the accused, but immediately after I was asked by the Prosecuting Inspector to reconsider my order on the ground that there was nothing in the statement to call for a contradiction, I carefully went through the statement again and found nothing contradictory therein. This was the reason why I refused to issue a copy thereof.

4. I am quite unable to understand the mental process by which the Magistrate arrives at the conclusion that there is no contradiction between the statement of Tulla in the diary and the statement of Tulla in Court. To my mind it is obvious that there is a very material contradiction. That being so, I consider that the Magistrate was entirely wrong in refusing to grant the copy of the diary. The question arises whether this action of the Magistrate was due to some mental incapacity on his

part to understand whether there was a contradiction or not or whether it was due to some other cause. I do not consider that a Magistrate of some experience who knows Urdu as his mother tongue would be unable to appreciate the fact that there was a contradiction. Accordingly I consider that the Magistrate was influenced by some other cause and I consider that he must have made this order because he was in some way prejudiced against the [accused. That being so, I consider that the application for transfer is well founded, and accordingly on this ground [alone I consider that there is sufficient reason to transfer this case. Section 162, 'Criminal P.C., is imperative and states as follows:

Provided that, when any witness is called for the prosecution in such enquiry or trial, whose statement has been reduced in writing as the aforesaid, the Court shall, at the request of the accused, refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by Section 145, Evidence Act, 1872.

5. It is clear that this proviso does not state that it is for the Magistrate to 'make up his mind whether there is any contradiction, and if he considers that a contradiction is established to grant a copy, and if he does not consider that a contradiction is established to refuse a copy. The only discretion given to the Magistrate is contained in the second proviso as follows:

Provided, further, that, if the Court is of opinion that any part of such statement is not relevant to the subject matter of the enquiry or trial or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, it shall record such opinion (but not the reasons therefore) and shall exclude such part from the copy of the statement furnished to the accused.

6. This proviso shows that in all cases a copy of the statement in the diary must be granted. It is only certain portions of that statement which may be excluded in the discretion of the Court. Those portions are portions which are inexpedient in the public interest. I consider that the clause 'inexpedient in the public interest' governs both the previous clauses. It is not suggested by the Magistrate that there was anything in the statement of Tulla which would be inexpedient in the public

interest to disclose. Accordingly the Magistrate had no right whatever to refuse to grant this copy on the ground that no contradiction was in his opinion established. The next ground on which a transfer is asked is contained in para. 17 of the affidavit as follows:

As I have also received information that the City Magistrate had suggested to the Superintendent of Police, that 1 should also be challaned.

7. The explanation of the Magistrate on this point is as follows:

I assure you on my honour as a gentleman that never asked or suggested to the Superintendent of Police to challan Nek Ram. The fact is that after going through the police diary and seeing the counterfeit coins (which were struck) I came to the conclusion that the investigation was not properly made. For this reason I returned the papers to the Superintendent of Police, who probably, after considering the whole case, challaned Nek Ram as well.

8. In this explanation the Magistrate) states that he came to the conclusion that the investigation was not properly made. It is not suggested that he means that any witness for the prosecution was not called who should have been called. Apparently what he means is that he came to the conclusion that Nek Ram should be prosecuted. When the Magistrate came to that conclusion his proper course was to pass an order under Section 190 (1) (c), Criminal P. C, ordering the prosecution of Nek Ram. In that case the provisions of Section 191, Criminal P. C, would apply, and it would be open to Nek Ram to ask that the case should be transferred to another Magistrate. Instead of doing this the Magistrate sent] the papers, and by this apparently he means his judicial file as well as the police papers, to the Superintendent of Police. The Magistrate has not mentioned any written order with which he sent the papers, nor is there any written order on the Magistrate's file or the file of the police papers. There is a written order of the Magistrate dated 20th August 1930, asking the Superintendent of Police to return the file. I am unable to understand why the Magistrate should have sent the file to the Superintendent of Police, unless some oral suggestion was made by the Magistrate to the Prosecuting Inspector or someone else that the Superintendent of Police should examine the file with a view to the prosecution of Nek Ram. I note

that, although the Magistrate has stated that he did not make such a suggestion to the Superintendent of Police, he has not stated that he did not make the suggestion to the Prosecuting Inspector or to some one else. In any case it is clear that the Magistrate had the prosecution of Nek Ram in his mind at the time he sent the papers. For the purpose of transfer, that I consider is sufficient. It was not correct for the Magistrate to take such an action instead of making an order under Section 191(1) (c). The only object in the Magistrate acting as he did must have been to deprive Nek Ram of his right of transfer under Section 191, Criminal P.C. I consider therefore that on this ground also it is proper that this case should be transferred to the Court of another Magistrate.

9. In regard to application that this Court should cancel the charge sheet and order further proceedings to be dropped, I consider that it is not proper that this Court should weigh the merits of a case against an accused at this stage of the proceedings. Accordingly I consider that it is sufficient that an order of transfer should be made; and accordingly I direct that this record be returned to the District Magistrate of Agra and that he should direct that this case should be hoard by some Magistrate other than Mr. Wali Bakht. The Magistrate who hears the case should grant accused a copy of the statement of Tulla in the diary and recall Tulla for cross-examination on that statement, and have it proved by the Sub-Inspector who took it down.