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Court : Allahabad

Decided On : Oct-13-1931

Reported in : 139Ind.Cas.330

Judge : Niamatullah, J.

Appellant : Bashir-ud-dln 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 of the Excise Act against the applicant Bashir-ud-din, the other is one under Sections 352 and 352. Indian Penal Code, against both the applicants, Bashir ud din and Nizam-ud-din, who are brothers.

2. On the 12th July, 1931, the person of Bashir-ud-din was searched for cocaine by the Police about 10 p.m. at a public place. This is alleged to have led to a scuffs 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 Bashir-ud-din 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, Indian Penal Code, 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 reliable, to 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 of 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 (Bashir-ud din) charged with an offence under Section 60-A of the Excise Act, which is punishable with not more than two years rigorous imprisonment. It follows that neither of them was accused of a non-bailable offence. Accordingly they were released on tad by the Police who submitted a charge sheet on the 17th July, 1931, in the case under Sections 33a and 225. The City Magistrate allowed them to remain on bail by an order dated the 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 161 and the accused applied in the 3rd August, 1831, 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 the 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 the 18th 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 the 14th August, 1931. The applicants moved the Sessions Judge for bail re-presenting 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 Procedure Code. This was on the 21st August, 1831, 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 Procedure Code, were started on a Police report dated the 21st August 1931, which alleged that the applicants had threatened certain 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 out-side the District of Bareilly. The affidavit filed in support of the application for transfer of the case under Sections 332 and 22 Indian Penal Code, 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:

6. (1) That the Magistrate illegally refused copies of the statements under Section 164, and the inspection of those statements;

7. (2) That the District Magistrate cancelled the bail, though the applicants were accused of bailable offences; and

8. (3) That the City Magistrate improperly refused to summon four of the defence witnesses whose names were mentioned in the 18th August, 1931.

9. I proceed to consider these grounds serially. It is not disputed that the statements of two of the prosecution witnesses had been recorded under Section 164, Criminal Procedure Code, 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 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 of the Criminal Procedure Code, 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 Procedure Code, 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 Procedure Code, 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. Apart from this aspect of the case, the Magistrate trying the case has to protect the interests of the prosecution and the defence alike even in the case where the accused were not entitled as 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 the proceedings under Section 164, Criminal Procedure Code. 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.

10. 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 non-bailable offences and that the Police and the Magistrate at the earlier stages of the case rightly allowed the accused to be on bail. On the 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. The report concluded with a request that their bails might be cancelled. By an order dated the 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 the 8th August, 1931.

In view of the reports above I have no option but to cancel the bail of Bashir-ud-din and Nizam-ud-din, 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.

11. The City Magistrate issued warrants, dated the 18th August, 1931, and, as already stated, the applicants were arrested on the 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 any one 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 Superintendent of Police 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.

12. The learned District Magistrate did not realise 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 connection is an illuminating document and may be usefully quoted in extensor.

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 Procedure Code, as ordered by the Magistrate, the bails were cancelled technically.

13. This report is dated the 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 the 7th August, 1931, already referred to, and prayed for proceedings under Section 107, Criminal Procedure Code, being taken against the accused. Beading 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 legalise 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 had already been started, when the District Magistrate directed the rearrest of the accused and that the order of cancellation of bail was in fact an order of arrest in pursuance of Section 107, Criminal Procedure Code. That bails were cancelled technically Vis 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 the 21st August 1931, when the Government Pleader made his report, was suppressed. The District Magistrate never had Section 107, Criminal Procedure Code, in his mind. No order under Section 112, Civil Procedure Code, had been drawn up. No notice of those proceedings was served on the accused. On the whole it was a disingenuous, 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 straight forward course if the learned Sessions Judge had been told that an error of law had been committed by inadvertence.

14. I have before me the record of the case under Section 107 proceedings under which were started, as already stated, on the 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 Procedure Code. Unless the Joint Magistrate's order dated the 21th

August 1931, already referred to, can relate back to the arrest of the accused previously made on the 14th August, which is an impossible position, the detention of the applicants from 14th to 24 the 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.

15. The City Magistrate in issuing warrant of arrest in pursuance of the order of the District Magistrate cancelling bail should have realised 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.

16. The third joint 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 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 Advocates 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 characterised the action of the defence in summoning these witnesses as 'vexations'. As the record stands, the view that those witnesses were desired to be summoned for the purpose of vexation, is not justified.

17. 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.

18. 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 communication to him by the Advocate of the accused. An application was made on the 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 of the Excise Act, pending against the applicant Bashir-ud-din in the Court of the Joint Magistrate Bareilly.