

Jageshar Vs. Emperor

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Court : Allahabad

Decided On : Jul-29-1929

Reported in : AIR1929All932

Appellant : Jageshar

Respondent : Emperor

Judgement :

Sen, J.

1. A complaint was instituted on 16th March 1929 by one Jageshar Chamar under Section 323 and 426, Penal Code and Section 24, Act 1 of 1871 against Umar Khan, Muhabat Khan and Talib Khan in the Court of Munshi Nazir Ahmad Abbasi a Deputy Magistrate with First Class powers. Mr. Abbasi is a Sub-Divisional Magistrate in the district of Mirzapur. On the very day that the complaint was instituted, he transferred the case to Mr. Lakshmi Chand Raizada, a Special Magistrate with Third Class powers for the disposal of the case. The complaint was registered in the Court of the Special Magistrate on 2nd April 1929. The complainant and his witnesses were examined on 16th and 24th April 1929. The accused were represented by counsel. The accused had an opportunity to cross-examine the witnesses for the prosecution and they fully and freely availed themselves of this opportunity. In the course of the cross-examination no attempt whatsoever was made by the accused to put any question either to the

complainant or to the witnesses as may be suggestive of the fact that the complaint was inspired by one Afzal Khan who is alleged to be a servant of the Maharaja of Benares. It has not been stated and it has not been disclosed by the record that Mr. Lakshmi Chand Raizada during the progress of the proceedings before him had betrayed any leaning towards the prosecution and against the accused or had raised any difficulties which might be calculated to prejudice the defence.

2. Before the charge was framed, all the three accused were examined. The Magistrate pointedly put a question to the accused as to what could be the reason of the complaint being preferred against them. The answer was that the complainant was the asami and the ploughman of one Raj Bahadur Khan who was on terms of enmity with the accused and that the accused persons were the victims of this enmity. It is remarkable that in the statements of the accused there is not a breath of a whisper that Jageshar was not the real complainant in the case and that the real complainant was one Afzal Khan who bore a grudge against the accused.

3. The charge was framed on 22nd April 1929.

4. It may be assumed that Afzal Khan is a servant of His Highness the Maharaja of Benares. It is not challenged that Mr. Lakshmi Chand Raizada is a Tahsildar in the Benares State. On 23rd April 1929, Muhabat Khan, one of the three accused applied to Mr. Nazir Ahmad Abbasi for the transfer of the case from the Court of the Special Magistrate to any other Court on the ground that the complaint of Jageshar had been filed in conspiracy with Afzal Khan, who was on hostile terms with the accused, that the aforesaid Afzal Khan was running the case for the prosecution, that he was a servant of the Maharaja of Benares and commanded a particular influence upon Mr. Lakshmi Chand Raizada so that there was no reasonable prospect of a fair and impartial trial in his Court.

5. The procedure adopted by Mr Abbasi was improper and illegal in every way. He gave no notice to the complainant of the application. He gave no opportunity to him to show cause against the projected order. He recorded no reasons for transfer. He summarily transferred the case to the Court of Munshi Syed Dilawar

Ali, a Tahsildar Magistrate with second class powers. To quote the words of Mr. Abbasi he 'quietly' transferred the case. This quietness on the part of the Sub-Divisional Magistrate appears to have created a considerable amount of disquietude in the mind of the complainant, who on 5th May 1929 lodged a petition in the Court of Mr. Muhammad Taki the learned Sessions and Subordinate Judge of Mirzapur for revision of the order of Mr. Abbasi directing the transfer. Mr. Muhammad Taki Khan has very properly referred this case to this Court with his recommendation that the order of transfer should be annulled. The learned Sessions Judge is clearly right and his recommendation ought to be given effect to.

6. The powers given by Section 528, Criminal P.C., are very extensive but the wide discretion that the Magistrate is clothed with should be sparingly exercised. It should only be exercised where it is absolutely necessary to meet the demands of justice. But before an order of transfer is made, it is proper and it is just that the notice of the application for transfer together with a copy of the affidavit, if any, should be served upon the opposite party and an opportunity afforded to the latter to show cause why the application for the transfer should not be granted. Where the trial of the accused has proceeded in one Court, where the complainant and his witnesses have been examined, where these witnesses have been tried and tested by cross-examination and the trial Court has framed a charge against the accused presumably on the ground that a prima facie case has been made out, the case ought not to be removed from the file of the trial Court and transferred to another Magistrate unless a very strong case has been made out to justify the transfer.

7. An order of transfer entails a dislocation of work. Why should the complainant be exposed to the necessity of fresh expenditure in another Court in having to pay the fee of his counsel and the expenses of his witnesses? Why again should the complainant and his witnesses be exposed to the worry and trouble of being taken through the process of examination-in-chief and cross-examination over again before the point is reached when the Magistrate has to consider whether the charge should be framed at all? In every case where evidence has been recorded and charge framed, the transfer of the case to another Magistrate necessarily

involves a prolongation of the trial. It means waste of so much of the public time which has already been occupied in the trial Court. And even in cases where the parties are reasonably inclined and are agreed that the proceedings should continue before the Court in which the case has been transferred from the point reached in the original Court, it cannot be predicated with certainty that no harm is done. The original Court had the manifest advantage of having the witnesses before it and was in a better position to deal with the case than that which was before it only as a dead record.

8. Mr. Abbasi has submitted what he calls an explanation. There can be no doubt that the present case is a plain case of error of judgment on the part of Mr. Abbas. It would have been fair and it would have been courageous on his part to own his mistake; and he might well have spared himself the trouble of trying to invent an explanation, where there could have been no explanation in fact.

9. In the matter of the petition of Umrao Singh v. Fakir Chand [1881] 3 All. 749, it was held by a very eminent Judge of this Court that when an application was made to the Magistrate of the district for the withdrawal of a case from a subordinate Magistrate by one of the parties to such another Court, notice of such application should be given to the opposite party and an opportunity should be afforded him, if desirous of doing so, to show cause against its being granted. This proposition was founded upon Section 47, Act 10 of 1872. Section 528 of the present Criminal P.C., is the result of the amendment made by Act 18 of 1923. It is true that this section does not in terms require either the issue of notice or a record of reason by the Magistrate. But it is but natural justice that notice of the application should be given to all the parties vitally concerned with the matter and that an opportunity should be granted to them to contest the application if they so desire. It is also necessary that the Magistrate should record his reasons for the transfer so as to bring out the fact that it was not an autocratic move or an arbitrary order but was a judicial pronouncement, in view of the peculiar facts of the case with the object, which is essentially the supreme object in such case-meeting the ends of justice.

10. Mr. Abbasi submits that the omission to issue notice was not illegal as it did not contravene any mandatory provision of law. Mr. Abbasi is referred to the ruling cited above. He ought to have loyally obeyed the directions contained in the aforesaid ruling. The learned Deputy Magistrate tries to support his order upon the ground that the proceedings right up to the framing of the charge may very well be ignored because the accused has a further right of cross-examination and that fresh examination-in-chief before another Court would not take more than two hours. He ought to have put this question to himself as to why should the complainant and his witnesses be made to race over the same course for a second time? Why should the complainant, a poor chamar, be exposed to additional expenses by an unnecessary prolongation of the case? The want of notice, in some cases, may amount to no more than an irregularity. In the present case the complainant is beyond all reasonable doubt prejudiced by this omission to issue notice to him. Mr. Abbasi defends his position with the observation that he has transferred the case to a more experienced Magistrate. The efficiency of the Tahsildar Magistrate is not in issue in the present proceedings and it is not necessary for this Court to differ from Mr. Abbasi's estimate as regards the capability and experience of Mr. Dilawar Ali But there is nothing on the record to suggest a doubt about the efficiency or honesty of Mr. Lakshmi Chand Raizida. No reflection against his efficiency or honesty was ever called for and this ought to have been avoided.

11. From what has already been stated it is abundantly clear that the story that the complaint was the result of a conspiracy between Afzal Khan and the witnesses for the prosecution is clearly an afterthought. This Court agrees with the view of the learned Sessions Judge, that this part of the affidavit of Muhabat Khan is clearly false. It cannot, moreover, be assumed that Mr. Lakshmi Chand Raizada from the very fact that he was a Tahsildar in the employ of the Benares State would be wanting in his sense of responsibility for the conscientious discharge of his duties as a Magistrate. The finding of the Deputy Magistrate to the contrary is based upon very scanty and insufficient materials and no reliance ought to have been placed upon the affidavit of Muhabat Khan, more specially in view of the fact that no opportunity had been given either to the complainant or to the Magistrate concerned to meet the application.

12. The result is that I accept the reference, set aside the order of Mr. Nazir Ahmad Abbasi dated 23rd April 1929 and direct that the trial of the case must proceed in the Court of Mr. Lakhmi Chand Raizada.

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