

The Queen Vs. ZuhiruddIn and ors.

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Court : Kolkata

Decided On : Mar-23-1876

Reported in : (1876)ILR1Cal220

Judge : Richard Garth, C.J., ;L.S. Jackson, ;Macpherson, ;Pontifex and Morris, JJ.

Appellant : The Queen

Respondent : ZuhiruddIn and ors.

Judgement :

Richard Garth, C.J.

1. I am happy to say, that since last evening, some papers have been discovered, which will render any further discussion of this rule unnecessary.

2. It appears, that in 1869, in a case which in its circumstances very closely resembled the present, it was decided by no less than nine Judges of this Court, that the proper course was to apply to the Court, sitting in its judicial capacity upon affidavits, in the usual way; and I am extremely glad to find that no less distinguished a Judge than Mr. Justice Louis Jackson, was one of the Judges who took part in that decision. This was the case of The Queen v. Pogose referred to by Mr. Woodroffe. An application in that case was made by Mr. Herschel, the Officiating Sessions Judge of Dacca, to the Registrar of this Court, suggesting that an order should be obtained for the transfer of the proceedings to the High Court for trial. I will read his letter, dated the 11th of June 1869.

I have the honour to request that you will lay before the Hon'ble Judges of the High Court the following circumstances and solicit orders thereon for me. The Magistrate of Dacca has committed the four principal Armenian residents of this city on a charge of misappropriating a large sum of money, the property of the wealthiest Armenian of Dacca, on his decease. The charge is brought on behalf of Government on the motion of the Educational Department, who claim the money as intended for a school. Technically the Government is prosecutor also under Section 68. The case is as important a case as well could occur in the eyes of the educated classes of Dacca; and the decision of it is naturally looked forward to with great interest. But it appears to me advisable that it should be tried at Calcutta, and not here. My jury list is very ill adapted for such a case. (The letter then went into details to show the difficulty of obtaining a proper jury in the district to try the case, and suggested that the case should be transferred to the file of the High Court.)

3. Upon this letter being received by the Registrar, it appears to have been laid before the Chief Justice, Sir Barnes Peacock, who recorded upon it, the following minute: 'It appears to me that the Court ought not to interfere upon the application of the Sessions Judge made by letter. If Government (or the prosecutor, if the case is not prosecuted by Government), or any of the accused think fit to apply to the Court by motion supported by affidavit or affirmation, the Court will decide what ought to be done.--June 16th, 1869. (Signed) B. Peacock.' This view of the learned Chief Justice was concurred in by the Judges of the Court as under: 'I agree with the Chief Justice.'--J.P. Norman. 'And I.'--C. Hobhouse.--G. Loch.--H.V. Bayley. 'I agree.'--D.N. Mitter. 'Seen.'--W. Markby.--E. Jackson. And further it was agreed to, as I have already mentioned, by my learned colleague, Mr. Justice Louis Jackson.

4. This decision having been arrived at in 1869, it appears to us to set the matter at rest; and I think that Mr. Macrae, on the part of Government, will feel that he cannot with propriety contest the point further.

5. Mr. Macrae assented.

Jackson, J.

6. I wish to add a few words by way of explanation of what seems to be an inconsistency on my part.

7. My acquiescence in the course taken on that occasion was in this degree marked, that while the other Judges had merely attached their initials in token of their concurrence, I wrote a separate note, and that note is in these words: 'I quite agree with the Chief Justice that such an application could only be entertained, if made in the way stated by him. I take the opportunity of pointing out that it has been a very common practice for Sessions Judges to make recommendations for the transfer of cases from one district to another by letter, and that cases have often been so removed by a mere letter based on such recommendations. It may be worth considering, whether some rule ought not to be laid down for dealing with such applications. The same thing also happens in respect of civil cases.'

8. It would seem, therefore, that I not only concurred in that view, but considered it desirable that the Court should lay down a formal rule, which should regulate the procedure in such cases, and should be a notice and a guidance to Judges and Magistrates when they should think fit to make such references in future. Immediately afterwards I left the country and was absent for four or five months, during which time no one took any steps in the matter. The result was that no formal rule was made, and this case appears to have passed out of sight. Two years afterwards I had the honour to succeed to the charge of the English Department, and found that, notwithstanding this case, the practice continued to be such as it had formerly been, and therefore the course I took in this case was in strict conformity to the old practice which had not been departed from, notwithstanding this case.

9. I do not hesitate to say that the procedure suggested by Sir B. Peacock is the proper one when there are parties concerned; but the practice being such as I have stated, I consider myself justified in making the order which I did.

Garth, C.J.

10. I desire to add that I personally do not regret that this matter has been thoroughly ventilated and discussed in open Court. It is extremely desirable that

the public should fully understand that in this country there is the same law for the Government as for the subject; and that there is not one course of practice for the Crown, and another for the prisoner. Wherever the rights of the subject are concerned, it is quite right that the matter should be dealt with by us in open Court in our judicial capacity, and that each application should be made, supported by affidavit or affirmation, in the regular way.

11. In the present case the rule will be made absolute to set aside the order complained of, and the Crown will be at liberty, if so advised, to make a substantive application to the Court for the transfer of the case to some other district.

Macpherson, J.

12. I concur in thinking that the Crown has shown no good cause against the rule; and that the rule should be made absolute.

Pontifex, J.

13. I also agree.

Morris, J.

14. I also agree.

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