

S.B. Hossain Vs. Emperor

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Court : Kolkata

Decided On : Mar-04-1946

Reported in : AIR1947Cal29

Appellant : S.B. Hossain

Respondent : Emperor

Judgement :

ORDER

1. These are two Rules against convictions of 2 members of the Civic Guard by a Magistrate of Alipore which have been upheld on appeal by the Additional Sessions Judge, 24 Parganas. The petitioner S.B. Hossain has been convicted under Section 213/109, Penal Code and under Section 217, Penal Code and sentenced to 6 months' rigorous imprisonment under each section, the sentences to run concurrently. Hafiz Khan has been convicted under Section 213, Penal Code and also sentenced to 6 months' rigorous imprisonment. Briefly, the prosecution case is that one Hiralal was arrested on the night of 19th August 1944 carrying two bags of atta and flour weighing about 3 maunds which act prima facie appeared to be an offence as the carriage was within a rationed area. Two of the Civic Guards approached him and demanded a bribe of 8 rupees. They were then interfered with by other Civic Guards and eventually Hiralal was sent by the Group Commander Makhan Lal Ghosh (P.W. 5) to the District Commandant one Mr. Unsud Dowla who lived at a house called Barakuthi. A note Ex. 6 was sent along with Hiralal which was brought by the accused Hafiz Khan. The District

Commandant was asleep and the case was dealt with in his absence by the accused S.B. Hossain. After a talk between Hafiz and Hossain, Hiralal was allowed to go, the atta being kept in the Civic Guards barracks. His story is that he was told by Hafiz that if he paid Rs. 30 in all he would be let go completely.... The next morning he came back after borrowing the balance of Rs. 22 and paid it to Hafiz Khan and he was duly released and received his atta.

2. The proceeding started on 13-10-1944 as against S.B. Hossain by a letter written by the officer in charge of Watgunge thana to the Police Magistrate, Alipore, alleging commission¹ of an offence under Section 217, Penal Code; and as regards Hafiz Khan by an ordinary police challan being presented on the same date to the same Magistrate alleging an offence under Section 213, Penal Code. The Magistrate treated the letter regarding Hossain as a complaint under Section 217, Penal Code, and noting that he was present in Court passed an order for bail. Similarly in the case of Hafiz Khan the Magistrate noted that a charge-sheet had been received against him under Section 213, Penal Code, and passed an order for bail in default to jail custody. The witnesses were at first examined in the case on 25-11-1944. The two cases were tried together. On 23rd November the Additional District Magistrate sanctioned under Section 5(2), of the Civic Guards Ordinance prosecution of the Civic Guard officers, S.B. Hossain and Hafiz Khan under Sections 217,213/109, Penal Code. Subsequently on 4-1-1945 application was made to the Commissioner of Police pointing out that the Magistrate's sanction was not valid and he made an order sanctioning prosecution of the two accused under the sections named. By that time witnesses had been examined and charges had been framed in the case.

3. Before us Mr. Santosh Kumar Basu appearing for the accused S.B. Hossain challenges the validity of the proceedings on the ground that sanction was necessary for the prosecution, and that the sanction given after the institution of the proceedings was not sufficient to validate them; *Basdeo Agarwalla v. Emperor* . The trial Court took the view that the Magistrate's sanction was good and was in time. The lower appellate Court has held that no sanction at all was necessary. In our opinion, sanction was required for the proceedings under Section 217, Penal Code, and was not required for the proceedings under Section 213, Penal Code.

The very nature of the offence denoted in Section 217, Penal Code, makes it clear in our opinion having regard to the ratio decidendi in *Hori Ram Singh v. Emperor* that sanction for prosecution for this offence is clearly required. In that case a distinction is drawn between an offence under Section 477A, Penal Code when committed by a public servant and one under Section 409, Penal Code. The distinction between an offence under Section 217 and that under Section 213 or we may add under Section 161 or Section 162, Penal Code, appears to us to be precisely of the same nature as the distinction drawn in the case cited. Section 217, Penal Code, makes punishable a certain dereliction of duty quite apart from the question as to whether any bribe is paid to induce such dereliction. The dereliction must clearly from the nature of the definition of the offence be committed in the discharge of the functions of the person charged. So far as the requirement for sanction in the case of a charge under Section 161, Penal Code is concerned we refer to the case in *H.T. Huntley v. Emperor* and the same will apply equally with regard to an offence under Section 213, Penal Code, in our opinion. These cases were decided on the wording of Section 270, Government of India Act. Section 5(2), Civic Guards Ordinance, requiring sanction by the District Magistrate or the Commissioner of Police is almost identical in terms.

4. So far as S.B. Hossain is concerned, it is clear that the only complaint before the Magistrate was of an offence under Section 217 Penal Code. There was no mention in the complaint of bribery and the Magistrate, clearly took cognisance of the charge under that section only. In view of the decision in it must be held that all proceedings so far as they concern this accused were null and void and the subsequent sanction either of the District Magistrate assuming that to have been valid or later that of the Commissioner of Police were insufficient to validate them. This point is not disputed by Mr. Sen appearing on behalf of the Crown. So far therefore as this accused is concerned, we must hold that the whole proceedings were bad and should be quashed. So far as the accused Hafiz Khan is concerned, we have expressed the opinion to the learned Advocate Mr. Sadhan Chandra Gupta appearing on his behalf that the fact that Hafiz Khan has been tried along with another person proceedings against whom were totally invalid has at any rate been a matter of prejudice to him and that if the proceedings are to be started again against the accused S.B. Hossain that the accused Hafiz Khan should not

be in a worse position and that in that view of the matter we would set aside his conviction and direct a retrial. Mr. Gupta appearing on behalf of the accused Hafiz accepts that position.

5. Before parting with the case we would make one or two observations arising out of matters argued before us. In the first place, the lower Courts appeared not to have kept clearly in mind the precise terms of Section 213, Penal Code. They have found certain facts, and held that this amounts to proof of an offence under Section 213, Penal Code as committed by Hafiz and as abetment of that offence as committed by Hossain. In view of the fact that their finding is that it was the accused S.B. Hossain who released Hiralal, it would seem that the proper view would be that the offence committed by S.B. Hossain was one under Section 213 and Hafiz Khan was an abettor. Again it has been urged that for a conviction under Section 213, Penal Code, it must be shown that Hiralal had committed the offence and in support of this view reliance is placed on the case in *Girish Myte v. Queen Empress* ('96) 23 Cal. 420 (421). We must confess that that decision seems to fail to take into consideration the words in Section 213 'or of his not proceeding against any person for the purpose of bringing him to legal punishment'. However we mention the point as indicating the difficulties in making use of the Sections 213 and 217, Penal Code in respect of the facts alleged in this case. Section 213 is the section applicable when the person accepting the gratification is not a public servant. If he is a public servant, there would appear to be no advantage in referring to this section and the offence might more properly be dealt with as one under Section 161 or 162, Penal Code, as is appropriate. The facts in this case as alleged are facts showing the commission of an offence under Section 161, Penal Code, by S.B. Hossain and under Section 162 or 161/109, Penal Code, by Hafiz Khan and there seems to be no advantage in framing charges under any other sections. In making these remarks of course, we are not to be deemed in any way committing ourselves to any view on the facts. In these revision matters we are not concerned with questions of fact. We are only here dealing with the actual facts as found to be proved in the trial under consideration.

6. The result is that the Rules are made, absolute. The conviction of Hafiz Khan is set aside and he is directed to be retried. The conviction of S.B. Hossain is held to

be void for want of jurisdiction and the sentence is set aside. If further proceedings are to be taken against him it will be necessary for a complaint under the appropriate sections as decided by the prosecuting authority with such sanctions as are necessary to be placed before the Magistrate having jurisdiction. If Section B. Hos3ain is to be proceeded against it is desirable that the cases of the two accused should be heard together. The hearing should be by some Magistrate other than Mr. Chanda. S.B. Hossain is discharged from his bail. Hafiz Khan will remain on the same bail pending his retrial.

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