

Sheikh Piru Vs. King-emperor

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Court : Kolkata

Decided On : Feb-02-1925

Reported in : AIR1925Cal616

Appellant : Sheikh Piru

Respondent : King-emperor

Judgement :

Cuming, J.

1. I agree with the order which my learned brother proposes to pass and desire to add some word of my own because I have noticed a tendency of late to abuse the provisions of Section 109, Criminal Procedure Code and to use it in a manner in which it was never intended to be used.

2. Any one acquainted with Calcutta is aware that there is a large floating population mostly of the coolie class. These people have no place of abode. They spend the night in verandahs and doorways and eat where they can. During the day they work as coolies. For such people to prove to the satisfaction of the Court that they have work is well nigh impossible. The only people who could give any evidence on the point are probably not known to the person proceeded against for they are possibly employed by several persons in one day as casual labourers whose name and residence is unknown to them and who certainly would not remember they had employed them.

3. They may be working quite honestly but it is very difficult and if not impossible to prove it. To call on such persons to give security is to perpetrate a farce. No one is going to stand surety for a homeless coolie.

4. Logically such persons would be spending the rest of their lives in doing various terms of one year imprisonment for failing to give security, for obviously as soon as they came out of jail they would be in the same position as before and have to be again called on to give security under Section 109, Criminal Procedure Code which they could not furnish.

5. The mere fact that a person has previous conviction is not of itself sufficient reason for calling a man to give security under Section 109, Criminal Procedure Code. Even old convicts must be given a chance. In the present case all that we have against the appellant is that on seeing the constable he tried to conceal himself. Old convicts, whether they are lawfully engaged or otherwise, naturally shun the police and I do not think that this of itself shows he was where he was found for some unlawful purpose. He admits he has no home which is the condition of a very large number of perfectly honest persons. He explains he works as a Coolie, a fact extremely difficult to prove. I do not think that this is a fit case to call on the appellant to give security under Section 109.

Mukerji, J.

6. Of late we have been receiving an unusually large number of appeals from prisoners who have been sent to jail by the Presidency Magistrate of Calcutta on failure to furnish security under the provisions of Section 118 read with Section 109, Criminal Procedure Code and we regret to observe that we have found that many of these cases have either been inadequately enquired into or are cases in which: the provisions of the law have been altogether misapplied. We cannot but attribute this state of things to a misapprehension as to the true import of Section 109, Criminal Procedure Code and ignorance of the procedure which the amending Act of 1923 has introduced into the Code.

7. Under Section 406, Criminal Procedure Code an appeal lies to the High Court from an order under Section 118, Criminal Procedure Code passed by a

Presidency Magistrate, requiring security for keeping the peace or for good behaviour. Section 362 of the Code lays down how the record should be made of the evidence of witnesses and of the statement of the accused in such cases. Sub-section (a) of Section 362, Criminal Procedure Code provides for exemption in the matter of recording evidence and framing of charges in respect of non-appealable cases. Section 117, Criminal Procedure Code lays down that enquiries in cases of security for good behaviour should be held in the manner prescribed for conducting trial and recording evidence in warrant cases, except that no charge need be framed. In many of the cases that have come up before us, these provisions of the law have not been borne in mind. Happily in the present case the record seems to be quite in order.

8. In cases under Sections 107 to 110, Criminal Procedure Code the proceedings drawn up against the accused correspond to the charge and give him notice of the case he has to meet. The proceedings drawn up against the accused in the present case were in these words:

Whereas it appears from the Report of the Sub-Inspector F. L. Rao of section G. Town that you Sheikh Piru are found within the jurisdiction of the Chief Presidency Magistrate of Calcutta having no ostensible means of subsistence and could not give a satisfactory account of yourself' etc.

9. The learned Magistrate's judgment runs thus:

Accused was loitering on Strand Road at 3 A.M. and caught by a constable as he attempted to conceal himself. Accused is a confessed old offender with eleven convictions (5 for theft alone). He has no work or place to live in. Fit object to be bound down under Section 109, Criminal Procedure Code.

10. Now Section 109 consists of two clauses. Clause (a) relates to taking of precaution for the purpose of concealment. It is alleged that the accused attempted to conceal himself on the approach of a constable; the constable says so. The proceedings did not however relate to this clause, and I am not prepared to uphold the order on a finding in respect of a matter which was not alleged against him in the proceeding. Moreover mere attempt at concealment on the

approach of a constable is nothing. An old offender cannot be expected to face a constable if found at that hour of the night. The appellant may have attempted to conceal himself to avoid observation but as held in the case of *Satish Chandra Sarkar v. Emperor* (1912) 39 Cal. 456, that does not bring the accused within the mischief of the Section. I also agree in the view expressed by Shamsul Huda, J. in the case of *Rashu Kabiraj v. King-Emperor* (1917) 27 C.L.J. 382, that Clause (a) of Section 109 refers to a continuous act and does not apply to a case where there is a momentary effort at concealment to avoid detection or arrest. In my opinion passing under a false name or taking precautions to conceal one's presence or identity at a place amounting to a continuous course of conduct is what is meant by the clause. Moreover such precautions for the purpose of concealment must be taken with a view to commit an offence. There is no finding nor any circumstance in the present case justifying an inference to this effect.

11. The proceedings relate entirely to Clause (b). That clause is divided into two parts. Want of ostensible means of subsistence and inability to give a satisfactory account of one's self. Either of those, if proved justifies an order under Section 118 read with Section 109, Criminal Procedure Code. The Magistrate's finding is that the appellant has no work or place to live in. I take it that by this finding he means to suggest that the requirements of this clause have been satisfied though I should have desired the finding to be more clear as more precisely indicating whether the case comes under which of the parts or under both of them.

12. The expressions, who has no ostensible means of subsistence and 'who cannot give a satisfactory account of himself' are widely different from each other. In practice, they are very often taken as meaning one and the same thing and this leads to a misapplication of the provision of the section. As observed in the case of *Satish Chandra Sarkar v. Emperor* (1912) 39 Cal. 456, the whole object of the latter part of Cl, (6) is to enable Magistrate to take action against suspicious strangers lurking within their jurisdiction, for the greatest criminal in the world is not liable to be questioned as to his presence in his own home unless there is some specific outstanding charge against him. The expression 'give a satisfactory account of himself' does not mean that the person should satisfy the Magistrate how he spends his time, but it means that he has to satisfactorily account for his

presence within the limits of the Magistrate's jurisdiction. It means that if a person is present within such limits or is present at a place within such limits to which place he does not belong, and there are circumstances justifying a suspicion that he is there not for an innocent purpose, he has got to explain his presence. In the present case the accused's explanation was that he came to Calcutta about a month and a half before and that he worked as a coolie but had no fixed abode. If true, it is a satisfactory explanation as to his presence and, if true the accused must be taken to have given a satisfactory account of himself. The Magistrate how-over finds that the accused has no work and no place to live in. This does not mean that the accused had not come to Calcutta., as he stated, to work as a coolie or that he did not work as such at any time within this period, but was in Calcutta for some ulterior object. I am therefore of opinion that the accused cannot be said to have failed to give a satisfactory account of himself.

13. So far as the want of ostensible means of subsistence is concerned, the Magistrate, as I have said, finds that the accused has no work or place to live in. This finding is based upon a statement recorded by the learned Magistrate as having been made by the Inspector of Police, who together with the constable, are the only two witnesses, examined by the prosecution in the case. The witness said that the appellant could not show any work or place of abode. The statement is more in the nature of an opinion of the witness rather than a statement of facts from which the question as to whether the accused did any work or how he earned his living could be determined by the Magistrate. The accused no doubt has no fixed abode; but hundreds of persons pass their nights lying on footpaths, and lodges in the northern quarter to the town, and if they earn an honest living they do not make themselves amenable to the provisions of Section 109, Criminal Procedure Code. A man with so many previous convictions cannot be expected to work otherwise than as a cooly or have any better employment and that only off and on and pass his nights in such shelters as he may be lucky enough to find. The Inspector only says that the accused could show no work. What he means by it is by no means clear. He does not say whether he questioned the accused as to the places where he may have worked during the period that he was in Calcutta or made any enquiries there. His statement rather indicates that about the time when the accused was arrested he could show no work in which he was engaged that is

to say that he was out of employment at the time. That he could not show any work does not necessarily mean that he had no ostensible means of livelihood. The accused was undefended. The Inspector does not say what enquiries he made as to the place or places where the accused alleged to have worked as coolie and the Court did not think it necessary to elicit the particulars as it should have done.

14. I am not satisfied that it has been proved in the case that the accused had no ostensible means of subsistence or that he failed to give satisfactory account of himself. I regret to say that I have often found the salutary provisions of Section 109, Criminal Procedure Code turned into a sort of an engine of oppression upon old convicts who are thrown helpless upon the world with none to take them in their employ or help them to turn out an honest penny for their living. In the case of *Queen-Empress v. Pooran Agarwalla* (1900) 5 C.W.N. 28, this Court pointed out that the fact that a man does not work or that he was convicted previously for bad livelihood does not justify a Magistrate, without being satisfied from the evidence that since his release he has no ostensible means of livelihood, to order him to furnish securities for good behaviour.

15. For the above reasons I think the order is not justified by the evidence and the circumstances and it should be set aside. I accordingly direct that the accused be discharged and set at liberty.