The Empress Vs. Donnelly

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Court : Kolkata

Decided On : Jun-21-1877

Reported in : (1877)ILR2Cal405

Judge : Markby and ;Prinsep, JJ.

Appellant : The Empress;In Re: Donnelly

Respondent : Donnelly;

Judgement :

Markby, J.

1. The petitioner appealed to the Sessions Judge of Hooghly, who on the 28th of May affirmed the conviction and sentence. The petitioner then applied to this Court to set aside the conviction as illegal: first, because the Magistrate had no power to revive the prosecution against the petitioner after she had been discharged; and, secondly, because the Magistrate could not appear as a witness in a case in which he was the sole judge. On the argument of the case, it was also contended that there was no evidence which would support a conviction.

2. As regards the last point, we intimated at the close of the argument for the petitioner, that there was some evidence. Of course we express no opinion whatever as to the sufficiency or otherwise of that evidence; that is a matter into which this Court does not enter upon an application of this kind, nor is it desirable

to comment upon this evidence; but I may say with reference to an argument used by Mr. Jackson, that, in my opinion, that evidence does not consist solely of the comparison of handwriting made by the Magistrate.

3. I proceed now to examine the grounds of law taken in the petition.

4. With regard to the power of the Magistrate to revive proceedings against an accused person who has been discharged under Section 215, the law provides by that section that a discharge under it is not equivalent to an acquittal, and does not bar the revival of the prosecution for the same offence. By Section 142, also, any Magistrate duly empowered in any case which he is competent to try or commit for trial may, without any complaint, take cognizance of any offence which he suspects to have been committed, and may issue process to compel the suspected persons to appear. These two sections appear, no doubt, to leave the Magistrate, if properly qualified, free to revive any case he likes, whether the discharge be illegal, whether it be improper upon the evidence, whether it appears to the Magistrate that another offence has been committed than that charged, or whether fresh evidence which was not previously forthcoming has come to his knowledge. And the Magistrate could, under the sections, revive not only any case heard by himself, but any case heard by another Magistrate subordinate to himself: and having revived it, he could, under Section 44,[1] send it back to the Magistrate who ordered the discharge for enquiry or trial. And this is precisely the same where there is a discharge under Section 195 [2] upon an enquiry by a Magistrate with a view to commitment to the Sessions or to the High Court. For all cases of discharge, therefore, the Magistrate would, under the section, appear to have the most absolute and uncontrolled power of reviving the proceedings against the accused.

5. That this, however, was not the intention of the Legislature is obvious from the provisions of Sections 295 and 296. A special proceeding is provided by Section 295 for the case in which an order (which in my opinion includes an order of discharge) is found to be illegal. All that the Magistrate can then do is to report the proceeding for the orders of the High Court. So by Section 296, if it appears to the Magistrate that some other offence has been committed than that of which the

accused person has been discharged, he may direct the subordinate Magistrate to enquire into that offence; but this he can only do in a case which, when before that Magistrate, was a sessions case. If the Magistrate at the same time possessed the unlimited power of reviving proceedings in all cases of discharge and sending them down to his subordinates for further enquiry, which Sections 44, 142, 195 and 215 at first sight appear to give him, these provisions would be wholly meaningless.

6. It is this difficulty of reconciling the provisions of Sections 295 and 296 with the extensive powers conferred by the earlier sections that seems to mo to render it necessary to put some restriction upon the literal meaning of those earlier sections; and taking the whole Act, the only conclusion I can come to is, that the Legislature did not intend that the Magistrate should, as a general rule, have any power at all of revision over the proceedings of subordinate Magistrates in cases of discharge. Section 296 gives that power in one special case only. If a Magistrate, therefore, thinks a discharge illegal or improper, it must be brought before the High Court; in the first case, by a report of the Magistrate under Section 295; in the second case, by an application under Section 297; when the High Court will, if the discharge was improper, order the accused to be tried or committed for trial. On the other hand, if there is any fresh evidence forthcoming, which was not before the Court when the first enquiry was held, then there is no necessity to revive the previous proceedings at all, and the Magistrate can proceed without any reference to the High Court. This seems to mo to be a reasonable construction of the Act, and it is the only way in which I can reconcile all its provisions. That distinction was, I believe, first suggested in a reference by the Officiating Sessions Judge of Sylhet in the case Hari Singh v. Danish Mahomed 20 W.R. 46. The learned Judges of this Court do not there say whether they approve of that distinction, but they affirm the order of the Magistrate who had remanded the case for a fresh enquiry upon the ground of there being 'further evidence procurable which was not before the Court when the order of discharge was given,' and not as the Sessions Judge points out on the ground of there being a 'failure of justice.' But in a subsequent case I.L.R. 1. Calc. 282 three Judges of this Court held that a Magistrate could not, of his own motion, revive a case where the accused had been discharged without examining all the witnesses for the

prosecution. 1 was a party to this judgment, and of course it was not our intention to overrule the decision of the late Chief Justice and Mr. Justice Glover in 20 Weekly Reporter. We could not do so; and it seems to mo that these decisions are reconcilable in the way I have mentioned. I, therefore, hold that a Magistrate cannot, by his own order, revive proceedings where no further evidence is procurable which was not before the Court on the first occasion.

7. The only question, therefore, is, whether in this case there was, on the second occasion, any such further evidence. I think there was not. Indeed, I confess I have great difficulty in understanding what the first evidence is said to be. The petitioner was charged with using a defaced stamp; the envelope of the letter upon which the stamp was, was before the Court on the first occasion, and it is not denied that the stamp was also before the Court on that occasion; but it is said that a certain word, which was at that time written partly upon the stamp and partly upon the letter, was not before the Court as evidence. How that is possible I really cannot understand. I agree with the Sessions Judge entirely that this evidence was before the Magistrate on the first occasion, but its effect had been overlooked.

8. As to the second point, whether the conviction is illegal because the Magistrate himself gave evidence, that question seems to mo to resolve itself into this. Is a sole Judge of law and fact competent to decide a case in which lie has himself given evidence?

9. It has been strongly contended on the part of the Crown that ho is so, and that there is no impediment in law to a Judge giving evidence, and then disposing himself of the case by his sole opinion. 'No instance of this kind has, however, been found, and no authority of any Judge or text-writer has been cited in support of such a proposition. The English cases (they are very few and very old) do not go further than to establish that a person having to exercise judicial functions may give evidence in a case pending before him when such evidence can and must he submitted to the independent judgment of other persons, exercising similar judicial functions, sitting with him at the same time per Norman, J., in Queen v. Mukta Singh 4 B.L.R.A. Cr. 15. No case in England is cited in which even under these circumstances a Judge has been called as witness in a trial on which he was

sitting later than the trial of Lord Stafford.

10. Two cases are cited as having occurred in this country--one the case of Queen v. Tarapersaud Bhuttacharjee N.A. Rep. 1857 pt. ii p. 83 and the other the case before Mr. Justice Norman above referred to. That learned Judge went into the matter on that occasion very fully; and having carefully considered his judgment, I have come to the conclusion that he did not intone to carry the law beyond that which he lays down as the result of the English cases. He is very careful to point out that, in the case before the Into Nizamut Adawlut, the trial took place with the assistance of a Muhammadan law officer, who might have given a futwa acquitting the prisoner, and that if he had done so the Judge who gave that evidence could not have convicted him, but could only have referred the matter to the Nizamut Adawlut. Then he says at p. 19: 'Prior to the enactment of the Code of Criminal Procedure, when a Sessions Judge was trying a case with the assistance of a Muhammadan law officer, it would seem from the case cited and from the analogy of the English cases referred to, that the Judge might have given evidence in a case tried before himself. By the substitution of a system of trial with assessors, a different species of cheek was introduced. The assessors give their opinions, which the Judge is bound to record. The Judge must transmit an abstract of a trial to the High Court, and on perusal of such abstract the Court may call for the record.'

11. The learned Judge seams, therefore, to think that the presence of the assessors brings the case within the rule which lie had derived from the English cases. Whether this is quite correct is, I think, open to some question; and it is not quite consistent with what the learned Judge had himself asserted in an earlier part of his judgment. But that appears to me to have been the view at which the learned -Judge ultimately arrived.

12. In the absence, therefore, of any authority for the position that a sole Judge of law and fact may give evidence, and then decide a case in which he has been a witness, I refuse to give any countenance to what appears to me to be a most objectionable proceeding. Every one admits that it is highly objectionable for a Judge to give evidence even when there are other Judges besides himself. For my

own part, I consider these objections so formidable that I would gladly see the practice of calling a Judge as a witness abolished in all cases. Put these objections are greatly increased when the Judge who testifies is a sole Judge. The case is entirely in his hands. He has no one to restrain, correct, or cheek him. If he gives evidence upon any matter of importance, the party against whom his evidence tells could not venture to test his credibility either by cross-examination, or contradict it by other testimony. I need say nothing of the indecency of such a proceeding; no one dare venture to defend it. The Judge would therefore give his evidence without the usual safeguards against false testimony--a position which has been over and over again repudiated.

13. It was contended by Mr. Bell that the appeal to a higher Court was a check upon the Judge. To some extent it may be so, but not a sufficient one. The Appeal Court would deal with the evidence including that of the Judge. But in my opinion the evidence of the Judge being practically incapable of challenge or contradiction ought not to be oven taken. Moreover, a Court of Appeal is not a check in the same way that Judges sitting together are a check upon each other. I am, therefore, of opinion that a Judge who is a sole judge of law and fact cannot give his own evidence, and then proceed to a decision of the case in which that evidence is given, and that upon this ground, also, the conviction is bad; but as Mr. Justice PJAINSTU' has some doubts about quashing the conviction on this ground, it is better that our judgment should proceed upon the first ground only.

14. The conviction and sentence are set aside. No application has, however, been made to us to order further proceedings, and we do not consider it necessary, of our own motion, to direct any further proceedings against the accused.

Prinsep, J.

15. It is unnecessary to repeat the facts connected with the case now before us, as they have been already fully stated.

16. It is sought to set aside the conviction passed by the Magistrate on three grounds: first, because the evidence is not sufficient in Jaw; secondly, because the Magistrate, being a witness for the prosecution, is not competent to try it as the

sole judge of law and fact; thirdly, because, having discharged the accused, under Section 215 of the Code of Criminal Procedure, the Magistrate was not competent to revive the proceedings and try the accused.

17. On the first point, I entirely agree with my learned colleague that there is evidence which, if believed, is sufficient for the conviction of the petitioner. That evidence, as pointed out by Mr. Justice Mahkby, does not consist solely of a comparison of handwriting, and I am not prepared also to assent to the proposition contended for by Mr. Jackson, that to establish an inference from a comparison of handwriting the evidence of an expert is absolutely necessary. Of course it is most desirable; but to lay this down as an absolute rule would, in nearly every ease in this country, exclude such evidence because experts are not procurable. The powers given to Appellate Revisional Courts are sufficient to correct any misapplication of such evidence.

18. But before leaving this part of the case, I desire to state emphatically that I express no opinion on the value of that evidence or on the guilt or innocence of the petitioner.

19. On the second point, I consider that the authorities quoted in the judgment of Mr. Justice Norman in Quean v. Mukta Singh 4 B.L.R. A. Cr. 15 are conclusive that one who is sitting as a sole judge is not competent also to be a witness. No case has been quoted in which this has over occurred, and the inexpediency of such a rule as well as its possible evil results, are too obvious to call for explanation. The case cited by Mr. Bell does not establish this rule, or go further than to state that a Judge is not competent to state in the judgment or to consider facts which can only come from the mouth of a witness.

20. But in the present case I am not inclined to set aside the proceedings on this ground, because it seems to me that Mr. Pellew's evidence was immaterial, and that if it be put out of consideration, there is evidence which, if believed, would be sufficient for the conviction of the petitioner.

21. On the last point as to the competency of a Magistrate to revive a case after ho has passed an order of discharge under Section 215, I find that several decisions

of this Court restrict this power to cases in which there may be some fresh evidence forthcoming. Had this point been before us for the first time, I should not be disposed to question a Magistrate's competency provided that lie is invested with the power described in Section 142; but I do not feel justified in the present case in adhering to that opinion, which is opposed to that of so many Judges of matured experience.

22. That there is no evidence which can properly be called fresh evidence is to my mind clear. The Magistrate considers that, on the definition of 'evidence' and 'document' in the Evidence Act, he is entitled to consider the word ' stamped' written across the obliterated stamp to be fresh evidence, because his attention was not directed to it; but I find it impossible to disconnect the word 'stamped' from the actual stamp which admittedly was in evidence, or to hold that anything which a Magistrate or Judge may accidentally overlook, and which it is difficult to understand how he could not have seen, can be deemed to be fresh evidence when his attention is especially directed to what is practically a part of it. In this case, also, the Magistrate's own statement as a witness leaves it in doubt whether his attention was not drawn by the Postmaster to the word 'stamped.'

23. Then the statement of the cook recorded only after the order of discharge, is, it is contended, fresh evidence. But oven if it was not previously recorded, it is clear that the nature of that statement was known to the Magistrate from the Police report on which he discharged the accused. He alludes to that statement in his letter to the Postmaster reporting the result of the case, and he did not think it necessary to examine that witness, who had been bound over by the Police to appear before him.

24. Under these circumstances, I concur in quashing the conviction and proceedings taken subsequent to the order of the Magistrate discharging the accused, holding that, under the rulings of this Court, the Magistrate was not competent to revive the case; and I further am of opinion that we should not, on our own motion, direct the proceedings to be revived.

25. The order will render it unnecessary to consider the propriety of the sentence passed.

[1]

[Section 44: The Magistrate of the District or any Magistrate of a division of a District,

may make over any Criminal case taken up by him on suspi-

Transfer of cases to Sub- cion, or brought before him on complaint, or on report by the

ordinate Magistrate. Police, for inquiry or trial to any Magistrate subordinate to him

to be dealt with to the extent of the powers with which the

Subordinate Magistrate may have been invested under the provisions hereinbefore contained.

The Magistrate making the reference may, if the case was brought forward on complaint, before such reference, examine the complainant as prescribed in this Act; but if he does not do so, the Magistrate, to whom the ease is referred shall proceed as if the complaint had been made to him.

The order of reference shall be recorded in a proceeding, and, if the ease has been brought forward on the report of a Police Officer, shall be recorded on such report; and all processes issued for causing the attendance of the accused person or the witnesses shall direct them to attend before the Magistrate to whom the case has been referred.

The Magistrate making the reference may, if he thinks proper, retransfer to his own file the case referred under paragraph one of this section, and when ho has done so, and not; before, may proceed therein.]

[2]

[Section 195: When a Magistrate finds that there arc not sufficient grounds for committing

the accused person to take his trial before the Court of Session

When accused person to or High Court, or for remanding him, ho shall discharge him,

be discharged. unless it appears to the Magistrate that such person should be

put on his trial before himself in which case he shall proceed

under Chapter XVI, XVII or XVIII of this Act.

Explanation I.--The absence of the complainant, except when the offence may lawfully be conpounded, shall not be doomed sufficient ground for a discharge, if there appear other evidence of a nature rendering a trial desirable.

Explanation II.--A discharge is not equivalent to an acquittal and does not bar the revival of a prosecution for the same offence.

Explanation III.--An order of discharge shall not ordinarily be made until the evidence of the witnesses named for the prosecution has boon taken.]