

In Re: an Attorney

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Court : Kolkata

Decided On : Aug-29-1913

Reported in : (1914)ILR41Cal446

Judge : Jenkins, C.J., ;Stephen and ;Chaudhuri, JJ.

Appellant : In Re: an Attorney

Judgement :

Jenkins, C.J.

1. We will hear the application on the merits.
2. Mr. B.C. Mitter. This application for sanction to prosecute is made under Section 195 of the Code of Criminal Procedure: we have nothing to do with Section 476. All that the applicant for sanction need establish is 'that there is a prima facie case against the person to prosecute whom sanction is prayed for--the question is not whether guilt is proved, but whether there are prima facie grounds for removing a bar to the institution of criminal proceedings in which the question of guilt can be determined:' In re Raoji Sakharam (1905) 7 Bom. L.R. 732. On the materials before the Court, it cannot be contended that a prima facie case against the attorney under Sections 193 and 196 of the Indian Penal Code has not been made out.
3. Mr. Eardley Norton. The principles which should guide the Court in determining whether sanction to prosecute should be granted are: (i) whether the application is

in the interests of justice, and (ii) whether there is a probability of conviction. The Court must consider the evidence before granting sanction. All the evidence proposed to be used at the prosecution, should be placed before the Court, when applying for sanction. The authorities vary between requiring a reasonable ground of belief that conviction will follow, and a strong prima facie case; the prima facie case must be so strong, that if unanswered, it must lead to conviction: Ram Prosad Roy v. Sooba Roy (1897) 1 C.W.N. 400 In the matter of Chundra Kanta Ghose (1888) 3 C.W.N. 3, Queen-Empress v. Kuppu (1884) I.L.R. 7 Mad. 560 Vasteva Putturaiya v. Lakshmi Narayana Kachinithaiya (1883) 2 Weir 178 Vythiyanatha Aiyar v. Vythiyanatha Aiyar (1883) 2 Weir 179 Kali Charan Lall v. Basudeo Narain Singh (1907) 12 C.W.N. 3 Venkatesa Ayyangar (1902) I.L.R. 26 Mad. 193 Queen v. Baijoo Lall (1876) I.L.R. 1 Calc. 450, 455 Queen v. Khooda Sonthal (1866) 6 W.R. Cr. 11 Mahomed Bhakku v. Queen-Empress (1896) I.L.R. 23 Calc. 532 Habibur Rahman v. Munshi Khodabux (1906) 11 C.W.N. 195 Pampapati Sastri v. Subba Sastri (1899) I.L.R. 23 Mad. 210 In re Patee Kunhammed (1902) I.L.R. 26 Mad. 116, In the matter of the petition of Gauri Sahai (1883) I.L.R. 6 All. 114, In re Bal Gangadhar Tilak (1902) I.L.R. 26 Bom. 785. More than mere suspicion is required that the offence has been committed, before the Court will grant sanction: In the matter of the petition of Khepu Nath Sikdar v. Grish Chunder Mukerji (1889) I.L.R. 16 Calc. 730 Mudhoo Soodun Sundial v. Suroop Chunder Sirkar Chowdhry (1849) 4 Moo. I A. 431, 440 Cheyt Ram v. Chowdhree Nowbut Ram (1858) 7 Moo. I.A. 207, 221 Ramamani Ammal v. Kulanthai Natchear (1871) 14 Moo. I.A. 346, 354 Mahomed Buksh Khan v. Hosseini Bibi (1888) L.R. 15 I.A. 81 Mohammad Mehdi Hasan Khan v. Mandir Das (1912) L.R. 39 I.A. 184, 190. It follows the Court will not grant sanction to prosecute, where the prosecution must end in an acquittal. There can be no conviction on the charge of perjury, on the uncorroborated testimony of one witness: Queen v. Lal Chand Kowrah Chowkeedar (1866) 5 W.R. Cr. 23 Queen v. Bakhoree Chowbey (1866) 5 W.R. Cr. 98 Queen v. Issen Chunder Ghose Patri (1870) 14 W.R. Cr. 53 Emperor v. Bal Gangadhar Tilak (1904) I.L.R. 28 Bom. 479, 498 Russell on Crimes, 7th edition, Vol. I, p. 508, Woodroffe's Evidence Act, 5th edition, p. 837. In the present case, if a prosecution is instituted, the only evidence for the prosecution, will be the testimony of Nripendra Chandra Gupta. The Court

will presume the Crown has no further evidence, as nothing further has been placed before the Court in this application. The Court will take into consideration that by the present procedure, namely, the interposition of the Public Prosecutor, the attorney is deprived of his right to an action for malicious prosecution, which would have been open to him, had the prosecution been initiated by a private person. The affidavit sworn by the attorney and filed in the proceedings under the Letters Patent cannot be used against him in these proceedings, as those proceedings were of a quasi criminal nature, and the attorney was in the position of an accused person: *Queen-Empress v. Subbayya* (1889) I.L.R. 12 Mad. 451 In *re Barkat* (1896) I.L.R. 19 All. 200, *Emperor v. Bindeshri Singh* (1906) I.L.R. 28. All. 331.

4. Section 195 of the present Code of Criminal Procedure may be traced through the following phases: Regulation III of 1801, Section 2; Regulation VII of 1813, Section 3; Regulation XVII of 1817, Section 14; Beaufort's Criminal Digest 1857, Part I, Book VII, Chapter II, paragraphs 4467 et seq.; Act XXV of 1861; Act X of 1872, Section 468, Act X of 1882, Section 195.

5. Mr. B.C. Mitter, in reply.

Cur. adv. vult.

Jenkins, C.J.

6. This is an application under Section 195 of the Code of Criminal Procedure for sanction to prosecute an attorney for offences alleged to have been committed under Sections 193 and 196 of the Indian Penal Code, in or in relation to a proceeding in this Court.

7. Without such sanction no Court can take cognizance of these alleged offences.

8. The proceeding was one under Clause 10 of the Letters Patent, heard by the present Bench. Though the application failed for reasons peculiar to it, the Court thought there were matters in the case which called for further enquiry with a view to possible criminal proceedings. Action could not be taken under Section 476 of the Criminal Procedure Code, for it has been decided that a Presidency Magistrate

is not a Magistrate of the first class, a decision that discloses a defect in the law that stands in urgent need of amendment. In the circumstances the papers were placed before Mr. Hume, the Public Prosecutor, for such action as he might think fit. As Public Prosecutor he has now applied to us through the Standing Counsel for sanction to prosecute.

9. Mr. Jackson has raised on behalf of the attorneys, what he has described as preliminary objections: The first is that Mr. Hume is not the Public Prosecutor. But Mr. Hume is the Public Prosecutor in Calcutta and the course adopted in relation to him is in accordance with the established practice of this Court.

10. Section 4(t) of the Criminal Procedure Code enacts that 'Public Prosecutor' means any person appointed under Section 492, and includes any person conducting a prosecution on behalf of Her Majesty in any High Court in the exercise of its Original Criminal Jurisdiction. Section 492(1) provides that the Governor-General in Council or the Local Government may appoint generally or in any case or any specified class of cases in any local area one or more officers to be called Public Prosecutors. Counsel cited this section and asserted as a fact that Mr. Hume had not been appointed. No foundation for this statement has been disclosed and it is absolutely incorrect; for there is a Government Resolution of the 6th of July 1909 appointing him to this post. I have dealt with this matter at length because it questioned Mr. Hume's tenure of a public office of great and constant importance, but I do not wish it to be understood that even if Mr. Jackson's erroneous assertion had been correct, it would have furnished any answer to this application.

11. Then counsel declared that this Bench was disqualified because it was the prosecutor. What Bench could give the sanction he did not deign to tell us. But he quoted several English authorities in support of the proposition that no one can be prosecutor and judge in one and the same case. This proposition requires no authority in its support, but it has nothing to do with this application; he might as well have quoted the judgments of Oleron. This Bench is neither prosecuting nor trying an accused; it is merely considering whether the bar to the cognizance of certain alleged offences should be removed by its according the required sanction.

Under the express terms of Section 195 of the Code of Criminal Procedure, it is this Bench and this Bench alone that can give the required sanction. And before leaving this part of the case I must protest against the use attempted to be made of the judgment (1913) I.L.R. 41 Calc. 113 of this Court delivered on the proceedings under Clause 10. Counsel read a passage from it and maintained that it showed that this Court had determined at that stage that there should be a prosecution of his client. We had not at the moment a copy of the judgment before us. Later we obtained the original, and then we discovered that the passage read had absolutely nothing to do either with his client or an application under Section 195. It formed part of the concluding section of the judgment in which, without in any way dealing with the circumstances of the particular case, we indicated what we considered would be the proper procedure to follow, not in applications under Section 195, but in future applications under Clause 10 of the Letters Patent. This is obvious to any one, and I cannot conceive how counsel should have attempted to use the passage in the way he did. That there was an intention to mislead the Court I cannot believe; but that there was grave lack of care is obvious.

12. Then it seemed to the learned Advocate that there had been an improper proceeding in connection with the application under Clause 10 of the Letters Patent. That application was heard before three Judges. In the interval between the close of the arguments and delivery of judgment, and while the case was still pending, matters were brought to the notice at the Court which called for immediate enquiry, as, if true, it meant that a serious offence had been committed. One of our members was unable to attend Court owing to illness, necessitating his absence from Calcutta under medical orders. Delay would have been most undesirable, for it would have allowed the possibility of subsequent growth to the prejudice of the person implicated; and so, the enquiry was conducted on the earliest possible occasion before the other two in the sense that witnesses were examined and cross-examined before them on oath.

13. On the return of the third Judge this evidence was placed before him and considered by all three with the result that it was determined to place the papers before the Public Prosecutor. This evidence was, however, excluded from consideration in dealing with the application under Clause 10. In our opinion Mr.

Jackson's objection to this procedure is without substance and fails. Mr. Jackson having placed before us these preliminary points left the discussion of the merits to his junior, who has presented to the Court this part of the case.

14. Mr. Norton has analysed the whole of the materials before the Court and minutely discussed them as also the crowd of decisions on Section 195. In effect his argument was that we could only deal with this application as though it were a trial, and therein lies its fallacy. We are not trying the guilt or innocence of his client; we are merely considering whether the statutory bar imposed by Section 195 of the Criminal Procedure Code should be removed and the law allowed to take its ordinary course. That section provides that no Court shall take cognizance of (amongst other things) any offence punishable under Section 193 or 196 of the Indian Penal Code when such offence is committed in or in relation to any proceeding in any Court except with the previous sanction or on the complaint of such Court. The section is expressed in the widest terms, and vests in the Court an absolute and unqualified discretion.

15. Not one jot or one tittle can be taken away from or added to the plain and express provisions of the Legislature by any decision of the Court; nor can this discretion vested by the section in the Court be crystallized or restricted by any series of cases: it remains free and untrammelled, to be fairly exercised according to the exigencies of each case.

16. The reports abound with expressions of opinion evoked by the peculiar circumstances of the case in which they arise. If they are all to be read into the section as of universal application, then the enactment of the Legislature will pass out of recognition. And if in addition to that we were to yield to Mr. Norton's arguments, we should establish that an application for sanction must be conducted on the same lines as the criminal trial, which may be its sequel. I cannot assent to this, and I prefer to take my stand on the section itself.

17. When a tribunal, it has been said, is invested by Act of Parliament or by Rules with a discretion, without any indication in the Act or Rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view to indicating the particular grooves in which the discretion should run, for if

the Act or Rules did not fetter the discretion of the Judge why should the Court do so? Gardner v. Jay (1885) L.R. 29 Ch. D. 50, 58. And in the same spirit we find Lindley L.J. declaring 'It appears to me wrong in principle for any Court or Judge to impose fetters on the exercise by themselves or others of powers which are left by law to their discretion in each case as it arises': Saunders v. Saunders [1897] P. 89, 95.

18. So far from the section supporting the propositions for which Mr. Norton has contended, we find that in fact no notice need issue of the application, and the accused person need not even be named. And if the sanction is followed by a prosecution its validity cannot be questioned in the enquiring or the trying Court.

19. There are, however, certain rules of prudence to which any Court exercising its discretion would have regard, and pre-eminent among them, possibly a compendious statement of all, would be the rule that the Court will be astute to see that there shall be no abuse of the administration of criminal justice. No one therefore would be permitted to use the penal law merely to satisfy his own private ends or personal spite; that would be to misuse it.

20. Tracing this statutory bar back through the Criminal Procedure Codes of 1882, 1872 and 1861 and the Regulations of 1817 and 1813 to the Regulation III of 1801, Section 2, we find that this has been the underlying principle, and though its application may have been extended, it still remains the guiding rule.

21. Every precaution to ensure this result has been observed in this case. The Bench thought that further enquiry was necessary as the result of what had come to light before it. In accordance therefore with the practice of the Court the papers were placed in the hands of the Public Prosecutor. He has considered them and after due deliberation has determined that the case was one in which he ought to ask for sanction. This he has done through the Standing Counsel. The Public Prosecutor can have absolutely no personal interest in the matter, nor has the Standing Counsel, and I repel as wholly undeserved the attack that has been made, and (in my opinion) made without any justification on Mr. Hume. Much latitude is allowed to counsel in such matters but abuse of the other side is at all times a perilous controversial weapon.

22. Mr. Hume has conducted the Criminal work of the Crown in Calcutta for more years than I can tell, and since 1909 he has held the important office of Public Prosecutor. The probity and uprightness with which he has discharged those duties have won for him the esteem of the Bench, and it is with complete confidence in his absolute integrity that cases such as the present are entrusted to him.

23. Mr. Norton's more robust advocacy does not ordinarily exhaust itself on technical objections, but even he could not shake off the temptation of suggesting one or two. Thus he advanced the remarkable theory that as the proceedings under Clause 10 were quasi-criminal, his client was an accused, and incapable of making a sworn statement which could form the basis of a charge under Section 193 of the Indian Penal Code. The objection is without foundation. An attorney can most certainly make an affidavit by way of answer to a rule issued against him under the Court's disciplinary jurisdiction, and for a false statement in such an affidavit he is criminally liable. To hold otherwise would be to subvert the law as it has always been understood and might have most mischievous results.

24. I purposely refrain from discussing the merits of the present case: it would be wrong that I should. But I hold that the circumstances justify and demand the removal of the bar to cognizance being taken of the offences alleged, and that sanction should be accorded, for the prosecution of the attorney under Sections 193 and 196 of the Indian Penal Code.

Stephen, J.

25. I agree with all that the Chief Justice has said and I concur in the order he suggests.

26. I will only add a few words as to what I understand to be the duty of a Court on an application being made to it under Section 195 of the Criminal Procedure Code. In the first place it must be borne in mind that such an application is an addition to the normal procedure, and not in substitution of any part of it. That is to say when a Court grants sanction the duty of the magistrate who takes cognizance of the offence is precisely the same that it is in a case where no sanction is granted. The

only effect of sanction is to permit him to proceed in the ordinary way, and his duties are not in the least affected by sanction being granted. From this it follows that there is no reason why the Court to whom the application for sanction is made, should perform any of the acts that will fall within the scope of the magistrate's duty if sanction is granted: and there is a very good reason why it should not, namely, that the same thing should not be done twice, and Section 195 certainly does not say that it should. If the bounds beyond which the Court is not to go are as indicated what remains for the Court to do? There is no doubt that it is to see that certain charges are not to be improperly made its discretion in regard to this is as wide as the Legislature have known how to make it and this is the only duty it has to perform. I agree with the Chief Justice that this discretion cannot be limited by judicial decisions; and I shall not therefore attempt to illustrate, still less to define, what I mean by 'improperly.' The course of Legislation referred to by the Chief Justice is instructive in regard to this. I am not certain whether the Regulations can be said to distinguish between the cases where a Court orders a prosecution, as under Section 476, and those where it sanctions one, as under Section 195. But the distinction certainly appears in the Code of 1861 and has been perpetuated in subsequent legislation: and it seems to me of some significance that that Code was passed in 1861 two years after the Vexatious Indictments Act had been passed in England the object of which was certainly to prevent what I have called improper prosecutions, and nothing else.

27. I have only to add that, in my opinion, the scope of the Court's enquiry in such a matter as this is more narrowly limited than has sometimes been supposed to be the case. I am further of opinion that proceedings under this section should frequently, or even usually, be *ex parte*.

Chaudhuri J.

28. Chapter XV. of the Criminal Procedure Code lays down rules governing proceedings in prosecutions. Part B prescribes the conditions requisite for the initiation of proceedings. Section 190 gives the general rule how magistrates may take cognizance of any offence. Section 195 limits the rule in respect of certain specified offences, and when such offence is committed in or in relation to any

proceeding in any Court, the previous sanction or complaint of such Court, or some other Court to which such Court is subordinate, is made a condition precedent. The power to grant such sanction is given, in the first instance, to the Court concerned. It is evidently discretionary and being so it has not to be exercised without caution and discernment.

29. In the endeavour of the superior Courts to guide the discretion of subordinate Courts, judges have felt it necessary from time to time to enunciate some general principles. It is often difficult to overcome the temptation to do so, and it is equally difficult not to use ready made principles when they are available. One is prone to adopt them without careful scrutiny. Judicial decisions on Section 195 have thus multiplied. A great number of them have been cited before us and one cannot help feeling, that they have unduly over-burdened the requirements of the section, and obscured its plain intendment. The construction of a plain section ought not to be influenced by judicial decisions however numerous. General principles laid down in the shape of formulae tend to include things which were not originally intended to be included. When learned Counsel was placing these cases before us, one felt inclined to say to him in the words of Lord Eldon 'you have told us how far the cases have gone but will you now tell us where they are to stop.' It is quite time some one did say where they were to stop. In fact learned Counsel in this case was not prepared to go to the extent to which some of the cases had gone. He said there should be 'sufficient prima facie evidence and reasonable probability of conviction' adopting the language of Mr. Justice Bhashyan Ayyangarin *In re Paree Kunhammed* (1902) I.L.R. 20 Mad. 116, 117. In *Pampapati Sastri v. Subba Sastri* (1899) I.L.R. 23 Mad. 210 the learned Judges said that the real question was 'whether there was a prima facie case on which a prosecution could be instituted with a fair chance of success.' In *In the matter of Gauri Shahai* (1883) I.L.R. 6 All. 114 the Court held that before the Sessions Judge gave sanction he should have satisfied himself whether there were sufficient grounds for accusing the person and whether there were good prima facie grounds for suspecting him of abetting a false charge and for permitting a prosecution. In *Ram Prosad Roy v. Sooba Roy* (1397) 1 C.W.N. 400 the learned Judges began by saying that the Court before sanctioning a prosecution should be satisfied that 'in all probability a conviction will be the result,' but in the end said, that as the matter rested in that particular case

upon more or less evenly balanced testimony, and as it was 'impossible to foresee a conviction with anything approaching certainty' they set aside the sanction.

30. It is difficult to grade these decisions usefully when they range between suspicion of guilt and certainty of conviction, and the best guide one has is his own discretion.

31. The necessity for guarding against the misuse of the sanction by a private party against his adversary has always been felt. In *Radhanath Banerjee v. Kangalee Mollah* (1863) 1 Marsh. 407 Sir Barnes Peacock said that the object was 'to prevent persons from oppressing or harassing their adversaries.' In *Ramprasad Roy v. Sooba Roy* (1897) 1 C.W.N. 400 above referred to, the learned Judges said in 1897, 'The object of the law in allowing sanction to prosecute is to restrain the exercise of private spite and to insist on there only being prosecutions when the interest of public justice renders it necessary.'

32. In this case the Court following its long established practice directed the papers to be placed before the Public Prosecutor, who now applies for sanction. There is no question of private spite in the matter and there is no likelihood, so far as we can foresee, of the sanction being in any manner misused.

33. Other objects of the section have from time to time been enunciated, and one finds that recent cases have been more and more exigent. It is only necessary to compare the case of the *Queen v. Mahommad Hossain* (1871) 16 W.R. Cr. 37 with *Ramaprosad Roy v. Sooba Roy* (1897) 1 C.W.N. 400. Each case however must be dealt with it on its own merits, and governed by its own circumstances. Rules for the guidance of Courts in dealing with sanctions need not be treated as governing principles in all cases. If it was held to be the law that the sanctioning Court must be satisfied of the guilt of the accused, his trial might degenerate into a mere formality. It might obviously operate to his prejudice.

34. To sum up, the matter rests upon the discretion of the sanctioning Court, 'and it must be exercised within the limit to which an honest man, competent to the discharge of his office, ought to confine himself': per Lord Halsbury in *Sharp v. Wakefield* [1891] A.C. 173.

35. In the course of argument, the case of Khepu Nath Sikdar v. Grish Chunder Mukerji (1892) I.L.R. 20 Calc. 474 was cited in support of the contention that as there were contradictory affidavits in the case before us, an enquiry should be first held before granting sanction. This case I find was considered in Baperam Sarma v. Gouri nath Dull (1892) I.L.R. 20 Calc. 474 a case which was not cited, in which the learned Judges said 'although it may sometimes be well that a preliminary enquiry ought to be held, the adoption of a rigid rule to that effect would simply introduce into the criminal procedure in this country a new stage as a matter of imperative necessity, and as we understand the case of Khepunath Sikdar v. Grish Chunder Mukherji (1892) I.L.R. 20 Calc. 474 we do not think it was intended to introduce such a practice as the words used would seem to convey. We do not think that such a practice is rendered imperative by the law, and it is not desirable that it should be necessarily, and in every case introduced. 'In Mahomed Bhakku v. Queen Empress (1896) I.L.R. 23 Calc. 532 which was cited, Khepu Nath Sikdar's Case (1889) I.L.R. 16 Calc. 730 was followed with the observation that Baperam Surma v. Gouri nath Dutt (1892) I.L.R. 20 Calc. 474 was not in conflict with the view taken by the learned Judges. These were cases on Section 470, Criminal Procedure Code and speaking for myself I prefer to follow Baperam Surma v. Gouri nath Dutt (1892) I.L.R. 20 Calc. 474 which is supported by the decision of Sir Richard Garth in the matter of Mutty Lall Ghose (1880) I.L.R. 6 Calc. 308. In this case I do not think that any further enquiry need be held by us. I concur in the order made.