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Dasarath Rai Vs. Emperor

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Court : Kolkata

Decided On : May-25-1909

Reported in : (1909)ILR36Cal869,4Ind.Cas.352

Judge : Caspersz and ;Ryves, JJ.

Appellant : Dasarath Rai

Respondent : Emperor

Judgement :

Caspersz and Ryves, JJ.

1. This is a Rule calling upon the District Magistrate to show cause why the conviction and sentence of the petitioners should not be set aside on three grounds: first, that the Joint Magistrate had no jurisdiction to try the appeal, inasmuch as he had taken cognizance of the complaint against the petitioners; secondly, that the offence for which the petitioners were tried was one within Section 447 of the Indian Penal Code, whereas they have been convicted under Sections 428 and 352, which is also contrary to the provisions of Section 246 of the Criminal Procedure Code; and, thirdly, that there is no finding as to the necessary intent under Section 447 of the Indian Penal Code. Cause has been shown by the learned Junior Government Pleader.

2. It appears that the complainant charged the petitioners with certain offences. On the 15th December 1908, Babu Durga Prosad, a Deputy Magistrate, who received the complaint and examined the complainant, recorded an order: 'Story seems doubtful. To Sub-Deputy Magistrate, Babu Rameswar Prosad, for favour of local investigation and report by 21st December 1908.' The Sub-Deputy Magistrate having examined witnesses submitted a report recommending the dismissal of the complaint. The matter came before Mr. Whitty, Joint Magistrate (then in charge of the criminal business of the sudder sub-division) who, without expressing any clear opinion hostile to the petitioners, thought that they ought to be summoned to stand their trial. In the opinion of Mr. Whitty, the Sub-Deputy Magistrate had not given satisfactory reasons for recommending the complaint to be dismissed. On the date fixed, the matter again came before Babu Durga Prosad, Deputy Magistrate, who took bail from the accused persons present in his Court. On the next date fixed, the 3rd February 1909, Mr. Whitty (as sudder Sub-divisional Magistrate) transferred the case for disposal to Mr. A.M. Rashad who convicted the petitioners under Sections 426, 352, and 447 of the Indian Penal Code, although they had been summoned to answer a charge under Section 447 only.

3. In these circumstances, we are of opinion that the Joint Magistrate, Mr. Whitty, had jurisdiction to hear the appeal. It is true that he summoned the petitioners as accused persons, but that was because he was in charge of criminal business as we have already mentioned. The cognizance of the case had already been taken on complaint by the senior Deputy Magistrate, and Mr. Whitty did not take action under Section 190, Sub-section (1), Clause (c) of the Criminal Procedure Code, as has been argued that he must have done. if he had no power to transfer the case from the file of Babu Durga Prosad, the irregularity is covered by Section 529(sic) of the Criminal Procedure Code. The objection is very technical and has no substance. Moreover, the Joint Magistrate (Mr. Whitty), not having expressed any judicial opinion upon the facts stated in the report of the Sub-Deputy Magistrate, was not incompetent to hear an appeal from the judgment ultimately convicting the petitioners. He was not debarred from so doing by the provisions of Section 556 of the Criminal Procedure Code. It may be mentioned in this connection that no objection was taken to Mr. Whitty's trying the appeal, either in the Court below or here, on the ground that he should not try the appeal because he had already

formed or expressed an opinion on the merits of the case hostile to the petitioners.

4. In the next place, in our opinion, it was open to the trying Magistrate to convict the petitioners of the offences of assault and mischief, although they had been summoned to answer a charge of criminal trespass only. The learned vakil relies on the note to Section 246 in Sir Henry Prinsep's 14th Edition of the Criminal Procedure Code; but it appears to us, on a plain construction of Section 246, that the Magistrate is not bound, when he thinks that other offences have been proved, to re-open the trial and follow the procedure of Sections 243 and 244. Such a view would necessitate a re-hearing of all the evidence in the same trial, and is clearly opposed to the manifest intention of the Legislature. It was held, under the Code of 1872, in the case of Mudoosoodun Sha v. Hari Dass(1874) 22 W. R., Cr., 40, that it is open to the Magistrate to 'convict an accused person, who has been summoned before him on the footing of a complaint, of any offence which is the subject of the definition in Section 148(now section i (h) of the Code), if he thinks that the facts established by the complainant and his evidence only amount to an offence within that section,' notwithstanding the terms of the summons in answer to which the accused appears in Court.

5. We think, therefore, that this Rule must fail upon the second ground also.

6. With regard to the third ground of this Rule, we think that the finding of the Deputy Magistrate as to the necessary intention of the petitioners is sufficient to convict them, and the conclusions at which the Joint Magistrate arrived, on appeal, were to the same effect.

7. The result is that we discharge this Rule, and direct the petitioners to surrender and serve out their punishment.

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