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Court : Kolkata

Decided On : Dec-08-1930

Reported in : AIR1931Cal122

Appellant : Mt. Lachmi Devi and ors.

Respondent : Emperor

Judgement :

Rankin, C.J.

1. In this case, six women were found guilty of an offence under Section 188, I. P.C., and under Section 62-A (4), Calcutta Police Act 4 (B.C.) of 1866, and were sentenced each to simple imprisonment for four months under Section 188 I. P.C., no separate sentence being passed under the Police Act. It appears that the charge against them was that on Sunday 9th November last they were proceeding along a street singing a song and that, in this way they constituted a procession, 'they having had no license from the Commissioner of Police to take out this procession. The defence of the accused persons before the Presidency Magistrate was that they were going along singing a Bhajan song, that is to say, they were following one another at some distance in a certain amount of order but not very much and were engaged not in any political manifestation or anything harmful but merely in singing Bhajan songs. I understand that this sort of procession is not unknown and Bhajan song has a sort of religious significance. The view taken by the Presidency Magistrate was, however, that the petitioners were not merely

holding a kind of religious procession. He found that, when they were stopped by the police and asked to desist, they not only refused to desist but started shouting political cries, such as, Bande Mataram and Gandhiki Jai; and they having refused to discontinue what they were doing were taken to the thana. Thereafter, they have been tried and convicted as I have already stated.

2. The learned advocate for the petitioners at the time of obtaining this rule was asked by the Bench of which I was a member to ascertain whether upon the question of bail these petitioners would be willing to undertake to desist from singing this song or any other kind of song in procession until the question raised,, by the Rule could be determined. They having refused to give this undertaking, no order for bail was made at the time of the issue of the Rule. The petitioners have now been in prison for something under a period of one month.

3. At the hearing of the rule, Mr. Basu for the petitioners took four points. First of all, he contended that the order which his clients were convicted of violating was an illegal order not warranted by the enactments under which it purported to have been made, namely, Section 62-A of Act 4 (B.C.) of 1866 and Section 39-A of Act 2 (B.C.) of 1866, sections which are in identical terms. He contended that that order was much wider than was contemplated by these statutes. The order is dated 21st April 1930 and signed by the Commissioner of Police, Calcutta. It is. as follows:

To all to whom it may concern. Order under Section 61-A, Bengal Act 4 of 1866 and Section 39-A,. Bengal Act 2 of 1866. Whereas I consider that any procession or public assembly would at the; present time seriously endanger the public peace and public safety, now, therefore, I under the provisions of Section 62-A Clause (4), Bengal Act 4 of 1866 and Section 39-A Clause (4), Bengal Act 2 of 1866 and with the sanction of the Governor-in-Council do hereby prohibit any procession or public assembly within the town and suburbs of Calcutta with effect from the date of this order and until further notice except with the previous permission of the Commissioner of Police.

4. Upon that, Mr. Basu contended that these enactments did not justify any general prohibition or processions within the town and suburbs of Calcutta but

were intended to authorize the Commissioner of Police to prohibit some particular procession or type of procession apprehended as likely to take place. In the second place, he contended that, when an order is made by the Commissioner of Police, it is no doubt within the power of the Governor-in-Council to extend the period of seven days during which the order can be effective under the Act, but that it is not open to the Commissioner of Police with the previous sanction of the Governor-in-Council to make an order indefinite as to time of the character which has been made. The third point taken by Mr. Basu was that, for a prosecution under Section 188, I. P.C., it is necessary that there should be a complaint either by the public servant making the order or by some superior officer of his and that, in the present case, what happened was that the petitioners were sent before a Presidency Magistrate merely upon a police report. Mr. Basu contended therefore that the provisions of Section 195, Criminal P.C., had not been complied with. In answer to this criticism, Mr. Debendra Narain Bhattacharjee who appeared for the Crown referred us to an ordinance being Ordinance No. 5 of 1930 which by its Article 11 provides that

the Local Government may by notification in the local Official Gazette declare that any offence punishable under Section 188, I. P.C., or any offence of criminal intimidation when committed in any area specified in the notification 'hall, notwithstanding anything contained in the Criminal Procedure Code, be cognizable and non-bailable and thereupon the said Code shall while such notification remains in force be deemed to be amended accordingly.

5. Upon this, we were referred to a notification issued by the Government of Bengal stating that

in exercise of the power conferred by Section 2, Ordinance 5 of 1930, the Governor-in-Council is pleased to declare that any offence punishable under Section 188, I. P.C., and any offence of criminal intimidation when committed within the areas specified in the Government of Bengal notifications Nos. 826 P. D. and 830 P. D. dated 16th June 1930 shall, notwithstanding anything contained in the Code of Criminal Procedure, 1898, be cognizable and non-bailable.

6. In the fourth place, Mr. Basu contended that, upon the evidence in this case the Presidency Magistrate had no materials or no sufficient materials before him for holding that the disobedience of the order caused or tended to cause a riot or affray and that consequently he was not empowered in any event to sentence the petitioners to four months' imprisonment and also that even if he came to the conclusion that there had been disobedience of a lawful order which caused or tended to cause obstruction to any person lawfully employed, the limit of punishment was one month's simple imprisonment or a fine which might extend to Rs. 200 or both.

7. It will be convenient for purposes of exposition to say that the second of the four objections which I have mentioned does; not seem to me to be insuperable. I think it is true that the Calcutta Police Act contemplates that an order may be made by the Commissioner of Police which will subsist for seven days without further sanction and I think it contemplates that, at or before the end of the seven days, the Governor-in-Council may by his action extend the period. Further if the Governor in Council does extend the period, there is authority for saying that the period may be extended in the manner which is now before us, namely, by extending it until further order : see *Emperor v. Bhure Mal* A.I.R. 1923 All. 606. I am however not of opinion that there is any objection to the sanction of the Governor in-Council being taken at the time of the making of the order. It is not necessary but I see nothing from the language of the statute or from the subject-matter to make me think that the mere fact that action by the Governor-in-Council was taken contemporaneously of the making of the order would make that order bad. That objection cannot therefore be sustained. I come now to the main point in the case which I have stated as being the first of the points taken by Mr. Basu. Let us put aside any question of extension of the original order by the action of the Governor in Council and let us consider whether such an order as we have before us can be made under the Act by the Commissioner of Police. If it can be made it will last only for seven days, and at the end of that period no doubt it can be extended upon proper steps being taken by the Governor-in-Council. Now, for this purpose, it is necessary to study carefully the sections of the Calcutta Police Act of 1866.

8. The sections with which we are concerned, namely Sections 62, 62-A and 62-B, were substituted for the section which stood as Section 62 in the original Act. I mention this merely to show that we are dealing not with the language of the Act of 1866 but with the language of Section 16 of the Act of 1910 which was the date of the amending Act--the Calcutta and Suburban Police Amending Act 3 (B. C.) of 1910. Now, looking to Section 62 we find a power in the Commissioner of Police to make rules for the regulation of certain matters with the previous sanction of the Lieutenant-Governor now the Governor-in-Council. Among the things which may be regulated in this way is ' regulating traffic of all kinds in streets and public places."

9. Section 62 (3) says:

Every rule and alteration of a rule under Section 62 shall be published in the Calcutta Gazette and in the manner prescribed by this Act for the publication of public notices.

10. That has reference to Section 102-A, Calcutta Police Act, as it now stands. The next Section 62-A deals with various matters. First of all, come certain powers given to the Commissioner of Police and subject to his orders to every police officer of a rank not inferior to that of Sub-Inspector. With a view to securing the public safety or convenience, any such police officer may give directions for securing, among other things, the orderly conduct of persons constituting processions and assemblies in streets. He may also prescribe the routes by which and the times at which any such procession may or may not pass. In the same way he may regulate and control music, the beating of drums and other instruments, the blowing of horns or other noisy instruments in any street or public place. That is a power given to any police officer not inferior to Sub-Inspector to give direction when he considers that such direction is necessary to secure public safety or convenience. In Sub-section (2) we find a group of powers which the Commissioner of Police may subject to the control of the Governor-in-Council exercise whenever he may consider it necessary to do so for the preservation of the public peace or public safety. These powers are all powers of prohibition under the control of the Governor-in-Council. The Commissioner of Police by this section

may prohibit the carrying of swords or other offensive weapons in a public place, the collection or preparation of stones or missiles, the exhibition of figures or effigies in any public place the public utterance of cries, singing of songs or playing of music. It is to be observed that, in making these prohibitions, not only is the Commissioner of Police subject to the control of the Governor-in-Council but that the sub-section very carefully provides that these prohibitions are to be made by notification to be promulgated or addressed to individuals. This brings me to the third subsection. Again the power is given subject to the control of the Governor-in-Council. Again the prohibitions to be made by the Commissioner are to be made by notification publicly promulgated or addressed to individuals, and, under this subsection the Commissioner may in that way prohibit the delivery of public harangues, the use of gestures or mimetic representations and the exhibition of pictures and certain things. He may do this whenever and for such time as he may consider necessary Sub-section 4 is the one with which we are immediately concerned:

The Commissioner of Police may also by order in writing prohibit any procession or public assembly whenever and for so long as he considers such prohibition to be necessary for the preservation of the public peace or public safety: provided that no such prohibition shall remain in force for more than seven days without the sanction of the Governor-in-Council.

11. By Sub-section (5), the Commissioner of Police subject to the order of the Governor-in-Council may by public notice temporarily reserve for any public purpose any street or public place and prohibit persons from entering the area so reserved save under conditions. Sub-section (6) makes a person liable to penalty according as he offends against the prohibition of one character or another as mentioned in the previous subsection. If the prohibition is under Sub-section (4) then the person contravening the order is liable to imprisonment with or without hard labour for a term which may extend to one month or to fine which may extend to one hundred rupees or to both. The only other matter which need be noted is that under Section 62-B in the case of certain offences, any Magistrate or any police officer may require any person acting or about to act 'contrary thereto' to desist or abstain from such action and in case of refusal or disobedience may

arrest such person. The present case would come under Clause (b) because it provided that:

in the case of a notification issued under Clause (4) of the said Sub-section (2) or in the case of an order issued under the said Sub-section (4) any Magistrate or any police officer of or above the rank of Sub-Inspector

not any Magistrate or any police officer 'may require any person acting contrary thereto to desist' and so forth.

12. Now it appears to me that it is most important in order to arrive at a proper construction of Sub-section (4) to notice in the first place, that the power given by Sub-section (4) is a power to be exercised when it is necessary for the preservation of the public peace or safety. Secondly, that the Commissioner of Police does not require the previous sanction of higher authority, and thirdly and this is more important that whereas Sub-section (2) and Sub-section (3) expressly provide for notification publicly promulgated or addressed to individuals Sub-section (4) merely requires the existence of an order of the Commissioner of Police so long as it is an order in writing. In a case to which we were referred, namely, the case of *Leakat Hossain v. Emperor* [1913] 40 Cal. 470 it was expressly pointed out by the Division Bench that there was no necessity for the publication or promulgation of the order in writing under Sub-section (4). The clause now in question:

requires that an order made thereunder should be in writing but it does not require that public notice should be given of it.

13. Now, interpreting Sub-section (4) with the light to be derived from its context in the section we have to ask ourselves whether it is contemplated by Sub-section (4) that the Commissioner of Police should be able to issue an order in writing holding good for seven days prohibiting all public processions in the city and suburb of Calcutta. I am of opinion that the subsection gives him no such power and that the phrase

The Commissioner of Police may by order in writing prohibit any procession or public assembly,

has reference to some particular procession or processions upon a particular occasion or having a particular character or object which it is necessary to prohibit for the preservation of the public peace]or public safety. It is to be observed that processions and public assemblies are dealt with in the same breath. If it is open to the Commissioner of Police to make an order in writing prohibiting any procession in Calcutta, it is equally open to him to make an order in writing prohibiting any public assembly in Calcutta. It is open to him to do so of his own accord. He does not require to publish his order, he has merely to make the order. In my judgment no such power was contemplated by the statute. Apart together for harmless processions such as processions at funerals, harmless public assemblies such as the ordinary service on a Sunday morning in a church, and so forth, one would not expect to find an order prohibiting all processions or prohibiting all public assemblies to be made in writing for which there is no provision that it should be promulgated to the public. I have no doubt therefore that the order which has been made in this case was in excess of the power conferred by the statute and not in conformity therewith. A closer examination of the order itself confirms me in this opinion. It will be observed that the order recites that the Commissioner of police considers that any processions or public assembly would at the present time seriously endanger the public peace and public safety and that having gone on to prohibit any procession, or public assembly within the town of Calcutta and the suburbs of Calcutta, it concludes with the words "except with the previous permission of the Commissioner of Police.' It would therefore seem that in some cases it is contemplated that a procession or public assembly can be permitted within the town or suburbs of Calcutta without danger to public peace and safety. But the terms of this prohibition show that in purporting to follow the ipsissima verba of Sub-section (4) the Commissioner of Police has, in effect, substituted a system of license or permission. Now, a system of license or permission is familiar in certain circumstances under Police Act of 1861, but there is no possible construction of the subsection before us, namely Sub-section (4), Section 62-A of the Act of 1866, which can be read as giving a power to the Commissioner of Police to license or permit procession or public assemblies. In

my judgment therefore the first point taken by Mr. Basu is correct and the order which is the basis of this procession is altogether bad.

14. I will guard myself against any misapprehension that may arise from the circumstance that, until a procession is formed or begun, it is difficult to identify it or regard it as a particular procession. I have no doubt that the order which was held good in Leakat Hossain's case (1) already referred to was in substance such an order as is contemplated by Sub-section (4). The point is that the subsection is dealing with a prohibition upon particular occasions, the circumstances being such as to make it necessary for that occasion to prohibit, the procession and I do not want it to be thought that this subsection can be evaded by people who might merely say that of several or many people who intend to take out for a particular occasion a procession or processions the Commissioner of Police is obliged to pick out one or more of them and prohibit his procession leaving the others unaffected. This subsection is to be interpreted in a practical and reasonable way and I express no hesitation at all in saying that the type of order that was supported in Leakat Hosain's case (1) does not appear to me to be ultra vires. On this view, it is strictly speaking, unnecessary to refer to the two remaining points which were made by Mr. Basu, but I think it desirable nevertheless to refer to them both. I fail to see that the ordinance to which we have been referred, Ordinance No. 5 of 1930 and the notification thereunder making the offence under Section 188, I.P.C., cognizable and non-bailable, get rid of the requirements imposed by Section 195, Criminal P.C. It has to be remembered that Section 190 of the Code does not now stand exactly as it stood before 1923, and, if we follow out the consequences of making an offence under Section 188 cognizable and non-bailable, we find that a police officer can arrest without warrant and we find that a police investigation may be commenced in respect of the offence. That brings us up to the point which is represented by Section 173, Criminal P.C. When the investigation is completed, the officer in charge of the police station by virtue of Section 173 is to forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in a certain form. An offence which is within the terms of Section 195 is not an offence which any Magistrate is empowered to take cognizance of upon a police report. By Section 195, Sub-section (1), Clause (a), no Court shall take cognizance of any offence punishable under Sections 172 to

188, I. P.C., except on the complaint in writing of the public servant concerned or of some other public servant to whom he is subordinate. Now, as Section 190 stood before 1923, there was a doctrine to the effect that a report by the police in a non-cognizable case was not a police report within the meaning of Clause (b), Section 190, Sub-section (1) and the definition of complaint in the Penal Code which excluded from the category of complaint a report by a police officer was held not to prevent a report in a non-cognizable case from being regarded as a complaint. That state of the law has been materially altered and it seems to me that it is not now possible to say that merely by making this class of offence cognizable and non-bailable, the necessity has been dispensed with of having a complaint in such a case as this by the superior of the public servant whose order has been disobeyed.

15. The last point with which I deal is that, in the present case, the Magistrate: has said that the offence of these petitioners tended to cause an affray. The reasons for this conclusion have to be sought however in the evidence. It would appear in this case that these women were going down a street at not a very busy time and were not conducting themselves in any way which, apart from the prohibition of processions, would have been regarded as an offence to the public or to any political party or to any other section of the public. It is true that when they were asked to desist they appear from the Magistrate's finding to have been singularly unreasonable. It is true also that, when they were invited in this Court to forego singing in procession until it could be determined whether the prohibition of such conduct was lawful, they took the somewhat curious course of insisting either on being kept in jail or on acting on the footing that the order of the Commissioner of Police was bad. Still there must be some definite evidence under Section 188, I.P.C. to justify the Magistrate in classifying them under one group or another of the cases with which Section 188 deals. It is to be observed that under Section 188 mere disobedience of an order does not constitute an offence in itself. There must be a disobedience of the order and then it must be shown that the disobedience has a certain consequence or tends to some result. If it merely tends to cause obstruction, though simple obstruction, then a month's simple imprisonment may be given. If it tends to cause affray, the imprisonment may extend to six months. The Magistrate in this case proceeds upon this

consideration:

I came to the conclusion' he says in his explanation 'that the disobedience of the order tended to cause an affray as there were people at the time and there was a likelihood of a conflict between the police and the public as has often happened in the present times...

16. Even if we have regard for this purpose to what was likely to happen when the petitioners were arrested, I cannot think that it can be right under Section 188, I. P.C., to classify them in the graver category merely upon the general consideration that now-a-days if anyone is arrested it may lead to a riot or affray. I do not think that this part of the decision, of the Magistrate is properly based upon the evidence. The' result is that this rule is made absolute and the applicants before us must be acquitted and discharged from imprisonment.

Mallik, J.

17. I entirely agree.

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