In Re: Bonomally Gupta

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Court : Kolkata

Decided On : Aug-31-1916

Reported in : 38Ind.Cas.423

Judge : Lancelot Sanderson, C.J. and ;Chaudhuri, J.

Appellant : In Re: Bonomally Gupta

Advocate for Pet/Ap. : Mr. Sarkar

Judgement :

Lancelot Sanderson, C.J.

1. This matter came before the Court yesterday by way of an appeal from an order made by my learned brother Mr. Justice Chitty. The application made to him was that a Rule might issue to the officer in charge of the Alipore Central Jail, calling upon him to show cause why the petitioner should not be set at liberty or brought before the Court to be dealt with according to law.

2. The petitioner was tried at the Sessions, convicted by a majority of the Jury, and sentenced to a term of imprisonment.

3. The learned Judge refused the application and it was from that refusal that the application, which was really by way of appeal, was made to us yesterday.

4. The ground upon which the application was made was that the petitioner was illegally and improperly detained at the Alipore Central Jail, and, we are asked to exercise the jurisdiction, which is vested in us by Section 491 of the Code of Criminal Procedure.

5. The first question raised was whether this Court had jurisdiction in the circumstances of this case to issue a Rule, in view of the fact that the petitioner had been tried before a Judge and a Jury, that the Jury had given a verdict convicting him, and the learned Judge had passed a sentence upon him in accordance with law. It was argued by Mr. Sarkar, who appeared for the petitioner, that this Court had jurisdiction under that Section to issue a Rule under the circumstances of this case. The point as put to him whether this application was not in effect really an appeal from the decision of the Court by which the petitioner was convicted and Mr. Sarkar agreed that in effect it was. The point then arose whether, that being so, this Court had jurisdiction in view of Clauses 25 and 26 of the Letters Patent, whereby it is provided that 'there shall be no appeal from any sentence or order passed or made in any criminal trial before the Courts of the Original Criminal Jurisdiction which may be constituted by one or more Judges of the said High Court', with the exceptions which are specifically mentioned in Clauses 25 and 26.

6. This raises a point of great importance, and I should not like to express any definite opinion upon it until I have the advantage of hearing the point more fully argued than it was yesterday. I do not intend to express any definite opinion upon it on this occasion. I desire to make it clear that no words of mine should be taken to express an opinion which may in any way cut down, curtail or diminish the powers of this Court in any shape or form. I only mention the point to show that it did not escape my mind. The reason why I do not intend to express any opinion is that upon the facts I am clear that even if we had jurisdiction to interfere in this case, we ought not to do so.

7. Now, the facts upon which this application was made may be divided really into three classes: It is first alleged that after Counsel for the defence had finished his address, the Jury came out of the Court and some of them waited in the jurors

waiting room where there were some strangers. One of such strangers said that the case was suspicious and complicated or words to a similar effect. It is to be noted that this was after the speech of Counsel for the defence and I presume before the speech of Counsel for the prosecution in reply if there was one, at all events before the learned Judge charged the Jury and before they were directed by him to retire to consider their verdict. It is highly undesirable that a Jury in any case--much more so in a criminal case--should have any communication with anybody who is not a juryman upon the subject-matter of the trial. But the mere fact that when the jurors are either in a waiting room or perhaps on the way to the Court or out of the Court, one of them is addressed by a stranger to whom apparently the juryman makes no reply or whose remarks the juryman does not look upon as worthy of consideration, cannot have the effect of invalidating a trial.

8. The second ground on which the application was based was that after the Judge's charge, the Jury were locked up in the jury-room and a Police Officer was present in the room throughout and heard their deliberations. The jurymen who had given the information in this respect went on to say that there was no conversation with the Police Officer and that only one question was put to the Police Officer by one of the European jurors. It is to be noted that the juryman does not even go on to say that the Police Officer gave any answer to that question and Mr. Sarkar, learned Counsel for the petitioner, admitted that the question which was addressed to the policeman by one of the Jurors was in all probability a question of no importance--it might have been a question about the weather or something to that effect--a mere casual question which evidently had nothing whatever to do with this case. It was not even alleged that the Police Officer spoke in reply to the juryman. The only allegation was that one of the jurymen passed a casual remark to the Police Officer who was in charge. Now in my judgment that cannot be said to be any ground for invalidating the trial. The Section which deals with this matter is Section 300 of the Code of Criminal Procedure. It says: 'in cases tried by Jury, after the Judge has finished his charge, the Jury may retire to consider their verdict. Except with the leave of the Court, no person other than a juror shall speak to, or hold any communication with, any member of such Jury.' There is no evidence here that the Police Officer who was in charge of the Jury spoke or held any communication with any of the jurors. With

regard to the presence of the policeman in the jury-room, I have made enquiries and I ascertain that it is in accordance with the practice observed in this Court that the Police Officer who is put in charge of the Jury generally goes into the corridor near the jury-ro9m which is so situated that it opens on the corridor on one side: There is a door which leads from the Court and that door is locked. The Police Officer is generally stationed in the corridor, with the windows of the jury-room opening on that corridor. In my judgment it is highly undesirable that the Police constable should be stationed anywhere or in any position in which he can hear the deliberations of the jurymen. As far as I am concerned, I shall take steps in future that the Police constable should be stationed in such a place that he cannot hear any part of the deliberations of the jurors.

9. But in this case it is to be noted that it is not suggested that the fact of the Police constable being present has in any way affected the deliberations of the jurors, that he in any way interfered with them, or that the jurymen had felt inconvenience by his presence. No suggestion of that kind was made in the affidavit. I summarize it by saying that there is no suggestion in the affidavit that the accused was in any way prejudiced by the presence of the constable. When T say that it is highly undesirable that a Police Officer should be present in the jury-room, I am looking at the question mainly from the point of view of the jurymen themselves and I say that it is highly undesirable that anybody should be in a position where it is possible for him to know the form the deliberations of the Jury took or what view any particular juror expressed about the matter.

10. So far as regards the second ground, I can see no reason for interference.

11. The third ground is that when Mr. Moses, who was then acting as the Clerk of the Crown, entered the room where the Jury bad been locked no, he used words which were not exactly remembered by the jurymen who gave the information but the purport of which certainly was that they ought to come to a decision by that time and that the jurymen understood that they were required to expedite matters and that the complaint was that they had had enough time already. I said yesterday that I would communicate with the learned Judge and ascertain what actually took place. I anticipated that he had rent the Clerk of the Crown--as is

frequently done in a case like this, which was a heavy case and in which the Jury had taken considerable time to consider their verdict--to enquire if he could give them any further assistance upon any point, and I find my anticipations are entirely borne out by what the learned Judge has said. He has said: 'I finished my summing up somewhat late in the evening, and the Jury retired to consider their verdict. The facts pf the case were not complicated but there were no less than seventeen charges, i.e., forgery, using as genuine a forged document, cheating and abetment of those offences, in respect of three documents, and a sum of Rs. 960. When the Jury had been absent for about an hour and ten or fifteen minutes, I was anxious as to whether they thoroughly understood my direction about the various charges. I accordingly asked the Clerk of the Crown to go to them and enquire if they wanted further assistance. He returned with a somewhat indefinite reply that they were still considering their verdict or words to that effect. I then requested him to go to them again and call them into Court, which he did. I too returned to the Court at the same time and questioned the foreman. From his replies I gathered that they had already dealt with twelve charges and had five left to consider. He did not give me to understand that they required any further direction or assistance from the Court. They accordingly again retired and after a lapse of fifteen or twenty minutes returned to Court and delivered their verdict on each of the seventeen charges. I accepted the verdict of the majority (6 to 3) and sentenced the accused accordingly. My recollection is that the Clerk of the Crown only spoke to them twice, and though I did not hear what he said being in my Chambers, I had no reason to suppose that he did more than deliver my message on each occasion' I have asked the Clerk of the Crown if he agrees with what the learned Judge has said and he said that that was substantially so. I also asked him whether he carried out the learned Judge's directions and he said he did. I then asked him whether he did anything more than what the learned Judge had asked him to do. He said he did absolutely nothing more. Therefore, in my judgment, there was nothing which was contrary to the practice of the Court and propriety. I consider that in! a case like this--which must necessarily be somewhat troublesome in view of the fact that there were no less than seventeen charges--the learned Judge was only doing his duty when he sent the Clerk of the Crown to the Jury and asked them if he could give them further assistance on any of the

many points which were for their consideration. It seems to me that this application is totally misconceived and is based upon allegations which are not in accordance with the facts.

12. As regards the other part, the learned Judge says: 'as to the presence of the sergeant in charge of the Jury in the jury-room I have no personal knowledge. No comment was made upon it at the time, either in this case or in any of the other cases in this last calendar.'

13. In dealing with the question of the Police Officer, I ought to have mentioned that the form of the oath a Police Officer is required to take is this: 'You swear that you shall well and truly keep this Jury in a convenient and private place. You shall not allow any one to speak to them, neither shall you speak with them unless if they are asked by the Court whether they are agreed upon their verdict. So help you God.'

14. We have only the information which has been laid before us on behalf of the petitioner in this case, and he does not suggest any facts to show that the Police Officer did not act in accordance with the oath.

15. Finally, I draw attention to the fact that the application is based upon information which is alleged to have been given by three of the jurymen to the brother of the petitioner. I think that the Jury are ill advised to talk with anybody except their fellow-jurymen about the case. Whether the case is still going on or after the case is over, I think the Jury would be ill-advised to have communication with anybody except their fellow-jurymen as to what happened in the jury-room; whether the Court ought to listen to allegations made by individual jurors after they have given their verdict in such a case as this, I have considerable doubt. But in order that there should be no suggestion that the accused has not had full hearing and consideration in this case, we have accepted the affidavit which was based upon the statements of these individual jurymen. Upon the question whether we ought to accept the statements of individual jurymen I would refer to what was said by Sir William Erie, to which my attention has been drawn by my learned brother, Mr. Justice Chaudhuri, in Beg. v. Murphy (1869) 2 P.C. 585 : 6 Moore P.C. (N.S.) 177 : 38 L.J.P.C. 53 : 21 L.T. 598 : 17 W.R. 1047 : 16 E.R. 693, the passage to

which I refer being at page 549, where he says: There is also the further objection, that the supposed informant had been one of the jurymen and the Courts here have at times expressed a reluctance, which we consider salutary, against receiving the separate statements of any of the individuals who had in combination formed a Jury, in order to impeach the verdict.' This is in accordance with the expression of opinion given by many learned Judges in the Courts in England. Since the case was argued yesterday I have had no time to search for the cases myself, but I have no doubt that there can be found in the books expressions of opinion in even stronger language than that used by Sir William Erie in the case to which I have referred. It is a dangerous thing for a Court to rely upon anything except the verdict of the Jury, and we might get into serious difficulty, if we were to listen to the statements of individual jurymen made to this or that person, after they had performed their duty and delivered their verdict.

16. However, in order that there might be, as I have said, no suggestion that the accused had not received justice in the case we admitted the statements, and we have considered them. In my judgment, there is no ground in the petition which would justify us in interfering in this case. Therefore, we refuse to grant a Rule and dismiss the appeal.

Newbould, J.

17. I agree with my Lord, the Chief Justice.

Chaudhuri, J.

18. I agree with the judgment just delivered by the learned Chief Justice and hold that the appeal must be dismissed.

19. I entertain very great doubt whether Section 491 of the Criminal Procedure Code is at all applicable to a case of the character which was put before Mr. Justice Chitty. I am inclined to hold that it is not. The reasons why I do not express' myself more definitely are, firstly, it is not necessary to do so having regard to the facts of the case; and secondly, because this question was not fully argued before us.

20. So far as trials in our Original Criminal Jurisdiction are concerned, the right of appeal or revision is limited by the Letters Patent, Clauses 25 and 26. Section 491, Criminal Procedure Code, appears in a chapter headed 'Directions of the nature pf a habeas corpus.' I think it is well established that a writ of that nature is not granted to persons convicted or in execution under legal process, including persons in execution of a legal sentence after conviction on indictment in the usual course. It is not granted where the effect of it would be to review the judgment of one of the superior Courts, which might have been reviewed on a writ of error, or where it would falsify the record of a Court which shows jurisdiction on the face of it. I may refer to the case of In re Newton (1855) 24 L.J.C.P. 148 : 16 C.B. 97 : 3 C.L.R. 1122 : 1 Jur. (N.S.) 591 : 139 B.R. 692 : 100 R.R. 630. In that case upon an indictment charging felony committed within the jurisdiction of the Central Criminal Court, a prisoner who had pleaded 'not guilty' was tried, convicted and sentenced to imprisonment. After sentence an application was made to the Court for a writ of habeas corpus for his discharge upon an affidavit showing that the offence was not committed within the jurisdiction as alleged. It was held by the learned Judges that the record was an estoppel, and the writ was refused. Jervis, C.J., in delivering his judgment said: 'No doubt, in some respects, this is a case of importance; but no authority has been cited to show that we can entertain the application,' 'and the reason for no authority having been cited is, most probably, that the point was never before raised, because there is nothing in it.' Justice Cresswell held, 'if the Court entertained an application of that character, it should next be asked to inquire into the truth of any other fact averred upon an indictment and found by the Jury, which after trial, it might be said, had not been proved.' The Judges agreed that there was no authority to warrant interference by the issue of such a writ. I may also refer to the case of Rex. v. Suddis (1801) 1 East 306 : 102 E.R. 119. There Lord Kenyon, C.J., said: 'We are not now sitting as a Court of Error to review the regularity of their proceedings, nor are we to hunt after possible objections.' Justice Grose held, 'It is enough that we find such a sentence pronounced by a Court of competent jurisdiction to enquire into the offence, and with power to inflict such a punishment. As to the rest we must, therefore presume omnia rite acta.' Justice Lawrence held. It is enough that the Court had authority to award such a sentence.' The return was, that the party was detained in custody,

under the judgment of such a Court, which was the usual return and sufficient. Justice Le Blanc, in answer to the objection that it did not appear that the party had been charged with the offence of which he had been convicted,' said, 'it is sufficient for the officer having him in his custody to return to the writ of habeas corpus that a Court having a competent jurisdiction had inflicted such a sentence as they had authority to do, and that he holds him in custody under that sentence.' When the return states that the party who is alleged to be wrongfully detained is in execution of a sentence on indictment of a criminal charge, the return cannot be controverted. That seems well established in English cases. No case has been cited before us which supports such an application.

21. As regards irregularity in the proceedings not discovered till after verdict, I may refer to the case of Beg. v. Murphy (1869) 2 P.C. 585 : 6 Moore P.C. (N.S.) 177 : 38 L.J.P.C. 53 : 21 L.T. 598 : 17 W.R. 1047 : 16 E.R. 693. 'In that case after conviction and sentence of death passed and judgment entered upon the record an application was made to the Supreme Court, sitting in banco, for a Rule for a venire-de-novo on an affidavit which stated that one of the Jury had informed the deponent that pending the trial and before the verdict, the Jury having adjourned to an hotel had access to newspapers which contained a report of the trial as it proceeded, with comments thereon. The Supreme Court made the Rule absolute, considering that there had been a mistrial, and ordered an entry to be made on the record of the circumstances deposed to, that the judgment on the verdict should be vacated and a fresh trial had. On appeal to Her Majesty in Council, the Judicial Committee held that the order for vacating the judgment and for a venire-de-novo must be reversed. In delivering their Lordships' judgment Sir William Erie said: 'Their Lordships consider that the present case is in substance an attempt, by the exercise of a discretion, to grant a new trial on the ground that the conviction was considered to be unsatisfactory by reason of some irregularity in the conduct of the trial.' 'If irregularity occurs in the conduct of a trial not constituting a ground for treating the verdict as a nullity, the remedy to prevent a failure of justice is by application to the authority with whom rests the discretion either of executing the law or commuting the sentence.'

22. In answer to an observation made by the learned Chief Justice to the effect that after the conclusion of a trial and conviction when there was no appeal or revision allowed in law the proper authority to remedy a wrong was the Crown, Mr. Sarkar said that was 'a matter of grace' and the accused could not go up to the Crown as a 'matter of right.' He relied upon Section 491 as giving him the right to question the validity of the conviction. He admitted that he was practically asking for an appeal against the conviction The law, as it stands, does not allow an appeal and the accused cannot have one indirectly in this way. When there has been a miscarriage of justice as alleged in this case, the proper course is to carry the matter to the Crown for remedy. In addition to the case above? cited I may also refer to among others Queen-Empress v. Fox 10 B. 176 : 5 Ind. Dec. (N.S.) 502, in which Sir Charles Sargent, C.J., said: 'If an error has been committed in the order which is sought to be reviewed, the proper course will be to apply to the Government, who, if they are convinced that there has been an error, will, no doubt, exercise their prerogative of remitting the sentence which has been passed.'

23. I have explained why I am inclined to hold that this Court has no jurisdiction in a matter of this character, under Section 491 of the Criminal Procedure Code. Upon the facts, however, it is not necessary to base my decision upon that view of the law.