

Dawa Faqir Singh Vs. Emperor

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Court : Privy Council

Decided On : Jul-21-1938

Reported in : AIR1938PC266

Judge : Lords Wright, Romer, Porter, Sir Shadi Lal & Sir George Rankin

Appeal No. : Privy Council Appeal No. 38 of 1938 (From Lahore)

Appellant : Dawa Faqir Singh

Respondent : Emperor

Advocate for Pet/Ap. : J.M. Pringle, for Appellant; G.D. Roberts, W. Wallach and J. Megam, for the Crown. Solicitors for Appellant, T.L. Wilson and Co.; Solicitors for the Crown, Solicitor, India Office.

Judgement :

Lord Wright:

The appellant was convicted and sentenced on 28th May 1936, by the Special Magistrate of the District of Lahore under S. 120-B (conspiracy) and S. 471 (using as genuine a forged document known to be forged) of the Indian Penal Code. The sentence was a sentence of rigorous imprisonment for five years. The conviction and sentence were confirmed on appeal. The ground of this appeal is that the Special Magistrate had no jurisdiction to try the case, since it came within the provision of S. 337, Criminal P. C., and could only be lawfully tried in the

circumstances of the case by the High Court or Court of Session. This objection was over ruled by a decision of the High Court of Lahore and in effect it is from that decision that this appeal is brought. The facts which are so far as relevant not in dispute may be shortly stated. The appellant, an advocate of the High Court, acted as counsel for G.S. Kochar, who was plaintiff in a suit in the Court of the Senior Subordinate Judge based on a promissory note. The plaintiff succeeded against two of the defendants, both before the Subordinate Judge and on appeal. Meantime complaints had been made by Durga Das, the defendant, against whom the case was dismissed, that his signature to the promissory note had been forged. On 14th May 1928, the District Magistrate, acting on a police report, directed the issue of warrants against six persons, including the appellant and two other persons Sain Dass and Vishwa Mitter. On 3rd June 1928, the District Magistrate had brought before him Sain Dass, who was then in custody and read over to him a document which had been enclosed with a letter sent to him by the Local Government. The letter, which was in answer to a communication from the District Magistrate on the question of obtaining evidence from one or more of the accused persons, was in the following terms:

"Subject:-Grant of a promise of pardon to Sain Dass son
of L. Nagar Mal.

"Sir,

"In reply to your unofficial note No. 751, dated the 19th "May, 1928, I am directed by the Governor in Council to state "that Sain Dass may be offered a promise of pardon in the "terms of the enclosed draft.

"The said enclosed draft ran as follows:-

"'PROMISE.'

"Whereas Sain Dass son of L. Nagar Mal, caste Khatri, "Manager, Central Co-operative Bank, Karnal, has undertaken "to make a full and true disclosure of the whole of the facts "within his knowledge regarding the criminal activities of "B. Faqir Singh son of B. Bir Singh, Bhalla, Advocate, High "Court, Lahore and other

persons mentioned in the margin, "and whereas His Excellency the Governor in Council is "pleased to direct that on condition of the said Sain Dass "making such a full and true disclosure, no proceedings shall "be taken against him with respect to the said offences, the "Deputy Commissioner of Lahore is hereby authorised to "inform the said Sain Dass that no proceedings will be taken "against him if he makes a full and true disclosure of the "whole of the circumstances of the cases in question within "his knowledge and repeats the same when called upon to "do so in any court of justice.

"By order of the Governor in Council.

"[Sd.] H. M. COWAN,

"Simla. "Home Secretary to Government,

"Dated the 29th May, 1928. Punjab."

Sain Dass, when the draft was read over to him, accepted the terms. The District Magistrate then recorded the following order:-

"Sain Dass present. Conditions explained to him and accepted by him. Public Prosecutor is authorised to withdraw the case against him.

"[Sd.] S. H. PUCKLE,

"District Magistrate,

"3.6.28."

Mr. Puckle held the offices both of District Magistrate and Deputy Commissioner. The proceedings in the case were very delayed and protracted. Eventually, after various protests and objections by the appellant, the Public Prosecutor applied to Mr. Luthra, the Special Magistrate, to whom the case had been transferred and who was vested with the powers under S. 30 of the Code, for permission to withdraw from the prosecution of Sain Dass. The Special Magistrate by order dated 4th July 1932, allowed the Public Prosecutor to withdraw the case under S. 494, Criminal P. C. The appellant objected to this order on various grounds, in

particular that the case could only properly proceed under S. 337, whereas the prosecution were seeking to have the case tried otherwise than before the Sessions Judge as S. 337 would require. Sain Dass was thereupon called on 9th March 1933, as a witness for the prosecution before the Magistrate, Mr. Luthra. On 7th April 1933, another of the accused, Vishwa Mitter, was called before an Additional District Magistrate at Lahore, and a conditional promise of pardon was read over to him by the Magistrate, the same procedure being followed as in the case of Sain Dass. Vishwa Mitter accepted the offer. An application was then made to the special Magistrate, Mr. Luthra, for leave to withdraw the case against Vishwa Mitter under S.494 of the Code. Objection was made by the appellant on much the same grounds as in the case of Sain Dass, but the Magistrate made the order and in due course Vishwa Mitter gave evidence before the Magistrate.

On 26th May 1936 Mr. Luthra, having completed the prolonged proceedings, gave judgment acquitting two of the accused, but finding the appellant and one other of the accused guilty under Ss.120.B, 467 and 471, Penal Code, and imposing on the appellant and the other accused who was found guilty, a sentence of rigorous imprisonment for five years. This sentence was confirmed on appeal with a variation in respect of the conviction. During the proceedings it was clear that the Special Magistrate did not intend to commit the accused to the Sessions Court as required by S. 337. Not only did he sanction the discharge of Sain Dass and Vishwa Mitter under S. 494, but he framed charges against the appellant before the examination of the witnesses was completed, under S.254, instead of proceeding under Ss. 206,210, which apply to committal for trial. The appellant objected to this course, claiming that he was entitled to be committed for trial under S. 337, but his objections were overruled eventually by a Divisional Bench of the High Court consisting of Bhide and Coldstream JJ., who on 29th October 1934, delivered judgment, rejecting the objection with the result that the trial continued and was concluded before the Magistrate as already stated.

The question is whether S. 337 and the material Sections which follow have been brought into operation by what was done by the Magistrates when they offered a tender of pardon to the two approvers, and by what happened subsequently. It will be convenient to summarize briefly the relevant Sections of the Code. S.337 is

limited to certain offences, including those triable exclusively by the High Court or Court of Session, or any offence punishable with imprisonment which may extend to ten years. These latter words cover the offences with which the appellant was charged. The Section empowers certain Magistrates, at any stage of the investigation or inquiry into or the trial of the offence, with a view to obtaining the evidence of any person concerned in or privy to the offence, to tender to him a pardon on condition of his making a full and true disclosure of what he knows relative to the offence. A Magistrate who tenders a pardon under the Section is to record his reasons for so doing, and furnish a copy to the accused if required. Every person accepting a tender under the Section is to be examined in the Court of the Magistrate and in the subsequent trial if any Sub-section 2- A is the Section vital to, this case. It provides that:

(2-A) In every case where a person has accepted a tender of pardon and has been examined under sub-s. (2), the Magistrate before whom the proceedings are pending shall if he is satisfied that there are reasonable grounds for believing that the accused is guilty of an offence, commit him for trial to the Court of Session or High Court, as the case may be.

Section 338 gives power to the Court to which commitment is made to tender or order the Magistrate to tender a pardon on the similar condition. S. 339 deals with the trial of a person to whom a conditional pardon has been granted under Ss. 337 and 338, if the Public Prosecutor certifies that he has not fulfilled the condition of full and complete disclosure. S. 339-A provides that a person by whom a tender of pardon has been accepted, when tried, under S. 339, is to be asked whether he pleads that he has complied with the conditions of the pardon, and if it is found that he has, he shall be acquitted. Before considering the rival contentions in this appeal, it will be necessary to refer to S. 494, which it is said on behalf of the respondent is the Section used in the proceedings. That Section enables the Public Prosecutor with the consent of the Court to withdraw from the prosecution before the jury return a verdict or where, there is no jury, before judgment is pronounced, whereupon the accused shall be discharged if the withdrawal is made before a charge has been framed, or if it is made after a charge has, been framed or no charge is required, he shall be acquitted. The respondent claims that it was

under S. 494 that the charge was withdrawn by the Public Prosecutor, that this was done with the consent of the Court, and accordingly that the accused has no right to claim that he is entitled under S. 337 to trial by the High Court or a Sessions Court, while the approver cannot claim the benefit of the procedure for his trial provided by Ss. 339 and 339.A. Under Cl. (a) of S. 494 the approver is merely discharged, which means that he may again be put on trial for the same offence.

It is clear that in the case of each of the two approvers, Sain Dass and Vishwa Mitter, the application to withdraw was made and the consent of the Court was given as under S. 194. But, the issue to be determined here is whether the action previously taken in tendering a conditional pardon and on its being accepted, examining the approvers did not constitute action only consistent with being taken under S. 337 and therefore debarring the prosecution from claiming that they were entitled thereafter to ignore the provisions of S. 337 and proceed under S.494. Their Lordships are of opinion that the prosecution were not so entitled, and therefore it is not necessary here to discuss the precise effect of S. 494 or to consider any question which might arise in regard to S. 343, which by its express terms does not apply to S. 337, if action were not taken under that Section. In their Lordships' judgment, what was done here comes substantially within Sec. 337. The offences charged were within the Section. The tender of pardon was made by a Magistrate, within the terms of the Section. It was expressly made on condition of the person to whom it was addressed making a full and true disclosure of the whole of the facts (or circumstances) within his knowledge. It is next to be observed that the persons who accepted the tenders of pardon from the Magistrates, were severally examined before the Magistrate taking cognizance of the offence. The requirements of sub-s. 2-A the automatically came into force, which are that the accused, if there are reasonable grounds for believing that he is guilty of the offence is to be committed to the Court of Session or High Court. It is said that the Magistrate has not recorded his reasons as required by sub.s. 1-A. But that is merely an irregularity on the part of the Magistrate. The right of the accused or the approver cannot be affected because the Magistrate has failed to comply with a requirement imposed for the benefit of the accused. Nor is it material in their Lordships' judgment that the Magistrate in tendering the pardon

did so after consulting the Local Government and with its authority. That is an internal matter of administration, which cannot affect the position of the accused or the approver. The essential fact is that the pardon was tendered to the approver by the Magistrate. It is obvious that the proceedings so taken under S. 337 were different in character from the course which would have been taken under S. 494. This latter Section belongs to a different chapter of the Code S. 337 falls under Chap. 24, which deals with general provisions as to inquiries and trials. S. 494 falls under Chap. 38, which is headed "of the Public Prosecutor," that is to say, the former Section deals with the action of a judicial, the latter with that of an executive officer. S. 494 says nothing about pardons at all. It gives a general executive discretion to withdraw from the prosecution subject to the consent of the Court, which may be determined on many possible grounds, one of which no doubt is that the person in respect of whom the charge is withdrawn may be willing to give evidence. But the whole procedure and the various consequences under S. 494 differ from those under Sec. 337. No doubt, at a later stage in the present proceedings, the prosecution sought to bring themselves under S. 494, by purporting to take action under it, but it was then, in their Lordships' judgment, too late to change the position either as against the appellant or as against either of the approvers.

It is said that the Local Government did not intend to act under S. 337, but if their overt acts are such as to be only capable of being referred to that Section, their intention not to act under it cannot matter. It is not necessary to consider whether the prosecution had a desire to reap the benefits of S. 337, while also desiring to evade the consequence of having to try the case before the High Court or Court of Session, because in their Lordships' judgment it is impossible thus to make the best of both worlds. If the manner in which the tender of pardon is made, follows in substance the method prescribed in S. 337, then the Section must apply. Minor and immaterial irregularities or variations cannot be taken to affect the operation of the Section. Their Lordships do not seek in deciding as they do to throw any doubt on the general prerogative right to pardon. They are dealing here with the special statutory machinery provided under S. 337, with its peculiar feature that the pardon under that Section is tendered as a judicial act and under the special precautions, rules and consequences which the statute sets out. One

consequence, perhaps the most important, is that when a Magistrate has tendered the pardon, the trial must not be by another Magistrate even though he is rested under S. 30 of the Code, to try such an offence, but by the High Court or Sessions Court.

For these reasons their Lordships are of opinion that the trial was without jurisdiction and hence that the appeal should be allowed and the conviction and sentence set aside. In their opinion the case should be remitted to the Magistrate with direction to him to take the appropriate action under S. 337 (2-A). They will humbly so advise His Majesty.

Appeal allowed.

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