ALLAHABAD HIGH COURT

Lal Behari

Vs.

State (Allahabad)

Criminal Revn. No. 12 of 1961. , against order of S.J. Sitapur

(B.N. Nigam and R.A. Mlsra, JJ.)

06.12.1960. 27.10.1961

JUDGMENT

B.N. Nigam, J.

1. The police of Mahmudabad, district Sitapur, submitted a charge sheet against Khunnoo Khan and thirteen others. One of the accused Puttoo was acquitted by the judicial Officer, Sidhauli and the remaining twelve accused persons were acquitted on appeal by the learned Civil and Sessions Judge by judgment dated 6-2-1960. During the trial Lal Behari, the present applicant before us, was examined as a prosecution witness and he stated that Sheo Ram was not his cousin and that Sheo Ram's father Ram Bilas and Lal Behari's father Ram Prasad were not real brothers. It was submitted in an application under Section 476, Criminal Procedure Code by Khunnoo Khan that Lal Behari had intentionally given false evidence in the course of judicial proceedings to impress his independent character as a witness. The first application under Section 476, Criminal Procedure Code was preferred on 16-2-1960. Arguments were heard and the case was reserved for judgment. Then the learned Magistrate wanted to hear further arguments. These further arguments were also heard and a date was given for final orders. Then the learned counsel for Khunnoo Khan gave an application that he wanted time to place before the Court certain other rulings. 3rd of June 1960, was fixed in this application. On that date Khunnoo Khan was not present and no one argued the case on his behalf. The learned Magistrate dismissed the petition in default of prosecution. Khunruoo Khan filed a fresh application on 17-6-1960 submitting that he had fallen ill and had recovered only just in lime to present this next application.

2. In the meantime, there had been a change in the presiding officer and the successor started proceedings under Section 476, Criminal Procedure Code. Finally a complaint was sent to the Additional District Magistrate (Judicial) Sitapur on 10-10-1960. Against that order an appeal was preferred under Section 476-B of the Code of Criminal Procedure. The appeal was dismissed by the learned Sessions Judge Sitapur by judgment dated 6-12-1960 and now Lal Bchari has come

up in revision before this Court. The revision application came up for hearing before my brother Misra J. and he considered it desirable to refer the case to a Bench. We have heard the learned counsel for the petitioner as well as the learned counsel opposite.

3. The first contention of the learned counsel for the applicant is that the complaint under Section 476 is barred by the provisions of Section 479-A of the Code of Criminal Procedure. The argument as I understand it, is that Section 479-A of the Code of Criminal Procedure refers to all casts of perjury in judicial proceedings and Section 476 of the Code must be held to have been implidly repealed when the Parliament enacted Section 479-A of the Code of Criminal Procedure. We have been referred to two cases of this Court and two cases of the other High Courts. The arguments of the learned counsel cannot be better put than in the words of our learned brother Sahai, J. who gave the decision in the case of *Jai Bir Singh v. Malkhan Singh*[1], It is not necessary for me to quote at length. The learned Judge however held:

> "These words are not meant to classify cases of perjury into two classes, one those where the perjury or the fabrication of false evidence has been detected by the court when the judgment is pronounced and the other where the perjury or fabrication of false evidence does not come to light till after the judgment has been pronounced."

This reasoning appealed to the Punjab High Court and in the Division Bench case of *Paishottam Lal v. Madan Lal Bashambar Das*[2], the learned Judges held:

> "Section 479-A was enacted for the more expeditious and effective manner of dealing with perjurors. It was meant to be fair to both sides, i.e. to bring a criminal to book promptly and not to harass him after long delays."

The view taken by Sahai, J., however came up for consideration in the case of *Durga Prasad Khosla v. State of Uttar Pradesh*[3] and then the view expressed in the case of AIR 1958 Allahabad 364, (supra) was dissented from. It was then laid down:

> "Section 479-A was enacted to give additional power to the Court authorizing it to deal speedily with the more flagrant or serious cases of intentionally giving false evidence or intentionally fabricating evidence in judicial proceedings. The Court could, however, act under the new provision only if it was of opinion not merely that it was expedient in the interests of justice to launch such a prosecution but that it was so necessary to do so for the eradication of the evils of perjury and fabrication of false evidence. The use of these words in Section 479-A shows clearly that the intention with which the section was enacted was to deal with the offences of perjury of a more serious type....."

4. The Bench was, therefore, clearly of opinion that the offence of perjury could be divided into two classes, one more serious which had to be dealt with not only because it was expedient in the

interests of justice to launch a prosecution but also because it was necessary to do so for the eradication of the evils of perjury and fabrication of false evidence. The other less serious cases which had to be dealt with

[1] AIR 1958 All 364 [3] AIR 1959 All 744

[2] AIR 1959 Pun 145

only because it was in the interest of justice to launch a prosecution could be dealt with under the pre-existing law contained in Section 476 of the Code of Criminal Procedure.

5. We are bound by this Division Bench view and I may further submit that I respectfully agree. The purpose in enacting Section 479-A of the Code appears to be to further arm the Court with a weapon to deal with mere flagrant cases and not to take away the weapon already in its possession. This view has also been accepted by the Bombay High Court in the case of *State of Bombay v. Premdas Sukritdas*[4] dissenting from the view taken in AIR 1958 Allahabad 364, (supra) and the Punjab case referred above was clearly dissented from. In *Kasi Thevar v. Chinniah Konar*[5], it was held that where material came to the notice of the Court subsequently Section 479-A of the Code of Criminal Procedure did not bar action under Section 476 of the Code. I do not think it necessary to elaborate on this point. It appears to me that the law has been correctly laid down in the Division Bench case of our own High Court and I see no reason to differ from that view. This contention of the learned counsel must, therefore, be rejected.

6. The second contention of the learned counsel is that there can be no revival of the proceedings but that the remedy lies by way of an appeal or a revision. The facts in brief are that the Magistrate after the close of arguments and the reservation of the case for judgment asked the parties to reargue the matter and then fixed 3-6-1960 for orders. On an application for time for further arguments 3-6-1960, was not fixed for the hearing of the arguments. The learned Magistrate should in all reasonableness have only rejected the application for time. The arguments had already been heard and the learned Magistrate should have proceeded to consider the matter on merits. Proceedings under Section 476 of the Code of Criminal Procedure are in my opinion proceedings taken by a Court whether suo motu or on an application, to consider whether it is expedient in the interest of justice that a prosecution should be launched. It is admitted on all hands that properly speaking there can be no dismissal in default. The words of Section 476, Code of Criminal Procedure are clear. I am further of opinion that there can be no appeal against an order of such dismissal, for that order cannot, in my opinion, be interpreted as an order rejecting the application or refusing to file a complaint. The order in my opinion, is one not envisaged by the Code of Criminal Procedure and not competent to the Court. It must be deemed to be a nullity. The words of Section 476-B are clear. There can be an appeal only when the Court has refused to make a complaint under Section 476 or Section 476A of the Code of Criminal procedure or it may be filed by a person against whom such a complaint has been made. I do not see any warrant for any stretching of the words used in Section 476B. It does not appear to me that there is any right of appeal against such an order. To me it appears that there is no substance in the contention that as the right of appeal is allowed by Section 476B of the Code of Criminal Procedure there could be no revival of the proceedings in the Court of the

Magistrate.

7. I would now refer the rulings that have been placed before us. In the case of *Harekrishna Parida v. Emperor*[6], a Bench of the Patna High Court held as follows:-

[4] AIR 1960 Bom 483 [6] AIR 1929 Pat 242

[5] AIR 1960 Mad 77

> "If it is expedient in the interest of justice that an enquiry should be made into a particular offence and if there is a prima facie case there is no reason why a matter once dropped should not be reopened and a complaint can be made even if an order was previously passed dismissing for non-prosecution the application of a particular party under Section 476."

8. The Nagpur High Court in the case of *Bhagwandas v. Mathura*[7], took a similar view and held that a second application could be moved after the Magistrate had passed an order refusing to start proceedings for perjury.

9. In the case of *Jahan Khan v. Emperor*[8], Coldstream, J. held that the term 'rejection' in Section 470-A includes rejection on the ground that the applicant did not appear to prosecute the application as he ought to have done. This wag a case in which an application asking the Court to make a complaint under Section 476 of the Code of Criminal Procedure had been dismissed in default and the applicant had taken no steps to get the order of dismissal set aside or even ask the court to restore his application.

10. Again in the case of *Jawala Prasad v. Ram Prasad*[9], Blacker J. held that a second application under Section 476 of the Code of Criminal Procedure could be made where the first application had been dismissed for non-appearance of the applicant, and that the principle of 'nemo debet' is not applicable where there has been no inquiry on the merits it was further held that Section 476-B of the Code of Criminal Procedure did not give a right of appeal against a dismissal in default and that such an order was wholly improper.

11. I now come to the case of our own High Court. In the case of *Ram Prasad v. Emperor*[10], Ashworth J. doubted whether a Court can review its order refusing to make a complaint under Section 476 of the Code. He was inclined to the view that as an appeal was allowed by Section 476-B a review would appear undesirable.

12. The matter came up before the Court in the case of *Jagat Ram v. Emperor*[11], and Bennet J., held:

> "It is clear that a complaint cannot be a judgment even when the complaint is made by a Court under Section 476, Criminal Procedure Code. Therefore Section 369 cannot apply to a complaint and does not therefore amount to a bar against a Court altering or reviewing the complaint under Section 476, Criminal Procedure Code.....Therefore it

appears to me that the Code does not bar a Court from altering or reviewing its complaint under Section 476 Criminal Procedure Code"

In *Niranjan Lal Mittal v. Emperor*[12], Plowden J., pointed out:

"If the original Court records a finding and makes a complaint or refuses to make a complaint under Section 476, Criminal Procedure Code, an appeal lies

[7]37 Cri LJ 977: (AIR 1936 Nag 156) [9] AIR 1940 Lah 526 [11] AIR 1987 All 76
[8] AIR 1938 Lah 429 [10] AIR 1927 All 571 (1) [12] AIR 1944 All 40

under Section 476-B; a dismissal in default does not amount to a refusal. If there is such a dismissal, the Court concerned under Section 476-A on application or on its own motion may make a complaint or refuse to make, in which case an appeal lies to the High Court.....A dismissal in default under Section 476-A does not amount to a refusal and in the event of such dismissal by a Sessions Court, an application in revision lies to the High Court. An appeal under Section 476-B can only be filed, therefore from an order containing a complaint or from an order refusing to make a complaint giving reasons i.e., from an order equivalent to a judgment."

13. I may conveniently quote from the case of AIR 1929 Patna 242 (supra) as the argument is put in very suitable words:

"It (S.476, Criminal Procedure Code) provides that in the matter of certain offences committed in or in relation to a proceeding in a Court such Court may make a complaint thereof in writing and shall forward the same to a Magistrate of the First Class who shall thereupon proceed according to law.....Thus the proceeding under Section 476, Criminal Procedure Code terminates in a mere complaint which can be taken cognisance of.....A person can change his mind as to whether he will file a complaint or not; on the same principle it may quite properly be stated that the complaining Court may also alter its mind and decide, on proper materials being placed that it would make a complaint. The crucial point to be remembered always is whether it is expedient in the interest of justice that an enquiry should be made into any particular offence. It is not a case of any final order and therefore, no question of the absence of any provision for review in the Code of Criminal Procedure would arise.

.....The application of a particular party was merely dropped. This cannot, in my opinion take away the jurisdiction of the Court to make a complaint if satisfied on proper materials being placed that it is expedient in the interest of justice that the matter should be enquired into.....I fail to see why a Judge acting under Section 476 Criminal Procedure Code would be debarred from making a complaint if satisfied that there is a prima facie case merely because an order was previously passed dismissing for non-prosecution the application of a particular party under Section 476. In my opinion, the first contention is not well-founded."

14. On a consideration, I am of opinion that the order passed by the Magistrate on the first application was a wholly improper order, that no appeal is allowed under the Code of Criminal Procedure against such an order that this not being an order in a trial but only a determination of the question whether a complaint is or is not to be filed, there is no question of any review. Besides, the provisions of Chapter XXXI of the Code of Criminal Procedure are not applicable to these proceedings. It was therefore quite competent for the Magistrate to prefer a complaint subsequently. I am even prepared to go further and to hold that even on consideration of the matter placed before it the Court decided on merits not to prefer a complaint it would not be debarred from reconsidering the matter if additional materials are placed before it and then it would be competent for it to decide to prefer a complaint.

15. The contention of the learned counsel that as no order of dismissal in default is provided for in the Code such an order should be deemed to be an order refusing to prefer a complaint liable to be set aside under Section 476-B of the Code of Criminal Procedure and therefore, it was not open to the Court to revive proceedings is, in my opinion, not well founded. It first of all seeks to make an improper order into the nearest proper order permissible under the Code and then stretches the provisions of Section 476-B of the Criminal Procedure Code which do not allow an appeal against an order of dismissal in default. Further this argument seeks to equate an order of refusal to prefer a complaint with an order of acquittal which is essentially an order passed after a trial, that is, which could be passed only by a Magistrate taking cognizance of the matter on complaint being preferred and the proceedings of enquiry under Section 476, Criminal Procedure Code can in no manner be equated with the proceedings in a regular trial. I would like to point out that proceedings under Section 476 of the Code may legally be taken even without giving the opposite party an opportunity of being heard. The preliminary enquiry directed under Section 476 is wholly discretionary and therefore, the question of harassment also cannot be properly urged as an argument.

16. The third contention of the learned counsel is that there was no finding by the Magistrate that it was expedient in the interest of justice that an enquiry should be made into the offence. No copy of that order has been filed before us. I however, find that such a finding is mentioned in the complaint preferred by the Magistrate in paragraph 5 it is stated that he thought it expedient in the interest of justice that an enquiry should be made in this matter.

17. Numerous rulings have been cited before us. In the case of *Munuswami Naidu v. Emperor*[13], it was held that the failure to record such a finding was not curable under Section 537 of the Criminal Procedure Code. Again in *Ramayya v. Emperor*[14], it was held that such a finding was necessary and *In re Pakkiriswami Pillai*[15], it was held that in the absence of a finding that the prosecution is expedient in the interest of justice an order under Section 476 Criminal Procedure Code could not stand as the defect was incurable. The Andhra Pradesh High Court has, however, hold *in re K. Narahari Pillai*[16], that such an objection could not be urged for the first time in revision and that such a defect could be rectified by fresh proceedings under Section 476

Criminal Procedure Code and a fresh complaint if objection is taken before the lower courts.

18. In the three Calcutta casts *Rajani Kanta Kayal v. Bistoo Moni Dassi*[17], *Keramat Ali v. Emperor*[18], and ***Satis*** *Chandra Malik v. Emperor*[19], it has been held that such a finding as regards the expediency of the prosecution is necessary. In the Patna case of *Nawalal Jha v. Emperor*[20], Rowland J., held that in the case of an order for prosecution under Section 476, Criminal Procedure. Code, the absence of a finding by the lower Court that an enquiry should be mode not in itself fatal to the proceedings. The Nagpur High Court in the two cases of *Dwarka Prasad*

[13] AIR 1928 Mad 783 [15] AIR 1948 Mad 297 [17] AIR 1927 Cal 718 19 AIR 1930 Cal 705
[14] AIR 1933 Mad 67 (1) [16] AIR 1959 And Pra 51 [18] AIR 1928 Cal 862
[20]37 Cri LJ 193 : (AIR 1936 Pat 162)

Pyarelal v. Emperor[21], and *Thunnudeo Raghvi v. Baladeo Raghudeo Raghvi*[22]. has held that such a finding is necessary and should be recorded. The same view was accepted by the Oudh Chief Court in *Suraj Lal v. Sheo Shankar Lal*[23], but in *Ibn Ali v. Emperor*[24], Kendall J., held that where after making an enquiry the Court ordered that a complaint should be made against the applicant but the Court did not in so many words express the opinion that it was expedient that a prosecution should follow, this did not render the order illegal.

19. A Division Bench of this Court in the case of *Liaqat Husain v. Vinay Prakash*[25], held that there must be a finding by the Court that the prosecution is expedient in the interest of justice.

20. After considering the contentions of the learned counsel I am of opinion that the formation of an opinion that the prosecution is expedient in the interest of justice is a condition precedent to the preference of the complaint. The law also requires that such a finding should be recorded but the jurisdiction of the Court to prefer a complaint does not in my opinion depend upon the recording of the opinion though it is consequent on the formation of such an opinion. In the circumstances I am of the view that omission to record such an opinion is only an irregularity and does not affect the legality of the complaint. In that case the Courts record will not be available to prove that such an opinion was in fact formed but that would mean that it would be incumbent on the prosecution to prove by other evidence such as examining the Presiding Officer of the Court concerned, that such an opinion was in fact formed. Normally the fact that a complaint is preferred is itself evidence of the fact that such an opinion had been formed and in proper cases a presumption may even be raised under Section 114 of the Indian Evidence Act. In the particular case I find that the complaining Court has itself made a reference to the formation of such an opinion in paragraph 5 of the complaint preferred by it. In the circumstances I am unable to attach any weight to this contention of the learned Counsel.

21. This disposes of all the contentions urged before us. It was not argued before us, nor was such an argument raised before the Court of Session that the statement made by the present applicant was not material to the decision of the original case and it has also not been urged before us that the accused has been sufficiently harassed and therefore the proceedings may be

dropped.

22. On a consideration I am, therefore, of opinion that this revision application has no force and it should be rejected.

Revision dismissed.

[21] AIR 1940 Nag 227 [23] AIR 1934 Oudh 272 [25] AIR 1946 All156

[22] AIR 1944 Nag 359 [24] AIR 1935 All 608