CALCUTTA HIGH COURT

Giribala Dasi

Vs

Mader Gazi

(Mallik ,J.)

15.06.1932

JUDGMENT

Mallik, J.

1. This rule was directed against an order made by the Assistant Sessions Judge of Jessore on 23rd November 1931 whereby he granted an application of the Public Prosecutor of that place under Section 494, Criminal P. C., to withdraw from the prosecution of two persons Mader Gazi and Arshad Sardar under Section 366, I. P. C., and acquitted them. What happened in the case was this : at the instance of complainant Giribala Dasi, Mader, Arshed and another man Aftab Mondal by name were summoned by the Magistrate under Section 366, I. P. C., and the Magistrate after examining a number of witnesses discharged Aftab but committed the other two men Mader and Arshad to take their trial in the Court of Session. An unsuccessful attempt was made to have the cass referred to the High Court in order that the commitment might be quashed under Section 215, Criminal P. C. Thereafter after some adjournments on 23rd November 1931 an application of the Public Prosecutor to withdraw from the prosecution was granted and the two accused persons wore acquitted without the charge being road out and explained to them and with-out their being called on to plead. It is against this order that the present rule was directed.

2. The rule in my opinion should be made absolute. Under Section 494, Criminal P. C., the Public Prosecutor can withdraw from the prosecution, (1) in cases tried by jury before the return of the verdict, and (2) in other cases before the judgment is pronounced. In the present case, the case, cannot be said to be a case "tried by jury." Indeed no trial by jury had commenced and no jury had even been empanelled in the case. The contention on behalf of the opposite party was that the word ' tried" in the expression "tried by jury" should be taken to mean "triable." This in my opinion would be a somewhat violent interpretation without any justification. Mr. Bhattacharjee for the opposite party tried to support the Judge's action by saying that if the case would not come under Clause 1 'cases tried by jury" it could come under Clause 2 "in other cases" inasmuch as the Judge could dispose of it without the help of a jury in the event of the accused pleading guilty under Section 271, Criminal P. C. But having regard to the words before judgment is pronounced" in this Clause 2, it would seem that the cases contemplated by this clause are those cases only which terminate with the pronouncement of a judgment. In the present case the Judge no doubt could dispose of the case without the aid of a jury in the event of the accused pleading guilty. But that would be no termination of the case with the

pronouncement of a judgment--a judgment as contemplated by Section 367 of the Code.
3. There is another ground on which the order of the learned Judge cannot in my opinion be maintained. To allow the Public Prosecutor to come in and withdraw from the prosecution at the stage in which the case then was would be to render the provisions of Section 215 almost nugatory. If a Public Prosecutor is allowed to intervene in a Sessions case and withdraw, from the prosecution before the commencement of the trial when there is an order of commitment it would be tantamount to give the Sessions Court powers to quash the commitment--a power which the High Court and the High Court alone has got under Section 215 of the Code. The Rule therefore in my opinion should, as stated before, be made absolute.

Remfry, J.

4. As I have the misfortune to differ from the view taken by my learned brother of Section 494, Criminal P. C., I will state my reasons shortly. The suggested difficulties are that Section 494 must be read with Section 215, and that in Section 494 the words "cases tried by jury" imply that there is a trial by jury, or that the case is being tried by a jury or that there must be a jury. In my opinion, in construing a Code the Court should not interpret its provisions as resulting in repugnancy unless compelled to do so by the intractability of the language used. The language must be strained as far as possible before it is to be assumed that the legislature in one section has enacted a rule which cannot be reconciled with the provisions of another section for that cannot have been intended. Further when the language used cannot be given its ordinary meaning without leading to] a result which there is no reason to suppose was intended, if that language is unhappy and is capable of more than one interpretation the Court should adopt the interpretation which appears to be in conformity with the intentions of the legislature as that appears from the Code read as a whole, and while straining the language to avoid one absurdity or repugnancy should as far as possible abstain from attributing to the legislature an intention to enact other absurdities, repugnancies or even anomalies. Reading Sections 215, 833 and 494, to other, in my opinion Section 215 was not directed to the same objects as Sections 333 and 494: it is not in pari materia. Under Section 215 a commitment can only be quashed on points of law and merely quashing a commitment does not necessarily end the proceedings.

5. Under Sections 333 and 494 the grounds for withdrawing from prosecution are left to the discretion of the authorities concerned and the result is that the proceedings are finally terminated. No light seems to be obtainable on these sections from the procedure in England. Archibald never heard of quashing a commitment. A bill of indictment must go before a grand jury and until it has been presented to a grand jury and a true bill found, the Attorney-General cannot enter a nolli prosequi so that he only intervenes after an indictment has been found which appears to correspond with a commitment under the Code. My view is that the legislature did not intend that under the provisions of Section 215 the fact that there was a commitment affected the provisions of Sections 333 or 494. Assuming however that the wide words used in Section 215 mean that after an order of commitment only a High Court can intervene, the result must be that such a provision is repugnant to some of the provisions of not only Section 494, but of Section 333. No possible straining of the language could in such case evade the conclusion that Section 215 was repugnant to Section 333 and to Section 494, in so far as it provides for cases committed to a Court of Session where the trial is with the aid of assessors, unless Section 333 be read as a proviso to Section 215, and Section 494 be read as also involving a proviso. If not so read there is no obvious reason for giving full effect to one section and restricting the meaning of two other

sections, and where the legislature has clearly expressed two intentions mutually repugnant one to the other, in my opinion any method of reconciling them is to be preferred to what would be a mere guess as to which of the two intentions should be attributed to the legislature, and in my opinion quashing a commitment and withdrawing from a prosecution are different proceedings and that it is abundantly clear that it was not intended that the greater should include or be cut down by the less.

6. As regards the wording of Section 494, it is doubtless unfortunate. But I do not gather that without calling in aid Section 215 it is suggested that the words "cases tried by jury" could possibly mean that in a case which might eventually go before a jury, the section applied before an order of commitment, but thereafter only after a jury was empanelled. I certainly could not agree with any such interpretation of the words as legitimate, taken by themselves. And if Section 215 is to be read as overriding Section 494, Section 494 cannot apply at all to a case which is before a jury, for if to withdraw from the prosecution of such a case before the jury is tantamount to quashing a commitment, the presence of the jury cannot alter the position. Reading Section 494 by itself it is clear that cases committed to a Court of Session where trials are held with the aid of assessors, come within the words "other cases . . . before judgment," and the Public Prosecutor can withdraw from the prosecution with the consent of the Court at any stage of the proceedings before judgment. There appears to be no reason for supposing that any different rule was intended if the case happened to be triable in a district where trials are by jury. That would be an anomaly.

7. I see cogent reasons for holding that when a case must be tried by a jury it cannot have been intended that an application under Section 494 should be made in the presence of the jury.

8. There seems no reason for bringing in an actual jury at all. In my opinion a case cannot be accurately described as a case tried by jury until after a verdict has been delivered. In the context the words cannot bear that meaning for the section cannot be read as repugnant to itself if there is an alternative interpretation, even if the words must be strained in order to adopt such an interpretation. The first part of Section 494 is only concerned with fixing the stage before which it can be called in aid. That is clear, I think, because the section proceeds to refer to the stage after which there must be an acquittal. I cannot myself read "tried by jury" to mean "being tried by jury." The words might be so read by straining the language used, if that were necessary and if no more satisfactory result could be obtained by an equal amount of straining. In my opinion the words merely describe a class of case and do not imply that the trial has or has not reached any particular stage. The section means that in cases which would ordinarily result in a verdict by a jury, the Public Prosecutor may with the consent of the Court withdraw at any stage before the verdict is delivered, just as in cases which would ordinarily result in a judgment, he may do so before judgment is delivered. This interpretation has in my opinion the merit that it assumes that the section was intended to be based on one and the same principle and avoids any anomaly. I think the Legislature avoided the term cases triable by jury" because many cases are triable by jury or by a Magistrate in which latter case there would be no verdict.

9. The ratio decidendi in The Queen v. Inhabitants of Haslemere[1] in my opinion supports this method of interpretation. In that case the defendants pleaded guilty and the Judge of Assize ordered costs to be levied out of a rate. The defendants obtained a rule and the argument was that the statute under which the Judge acted only provided that "the Judge of Assize before whom the

indictment is tried" could order such costs, and as there had been no trial, the Judge had no jurisdiction. The Court held that the Judge had the power although in the ordinary sense of the term there had in effect been no trial. The reasons given were (1) that the words used were unhappy (2), that the same section gave the justices at quarter session such power and there was no reason to suppose that the Legislature meant to give the Judge more limited power, and (3) that the words quoted were merely intended to "point out" the Judge. I think the words "cases tried by jury" are merely intended to point out the class of case meant and no more. I would therefore discharge this rule.

Mukerji, J.

10. This case has come up before me under Section 429, Criminal P.C., on a difference of opinion between my learned brothers Mallik, J. and Remfry, J, (The Judge after stating facts proceeded.) Section 494 of the Code authorizes the withdrawal by a Public Prosecutor with the consent of the Court in circumstances which are expressed in the following two clauses: (1) In cases tried by jury before the return of the verdict; and (2) in other cases before the judgment is pronounced.

11. Mallik, J., was of opinion that the present case cannot be said to be a case "tried by jury"; no trial by jury had commenced and no jury had even been empanelled, and so it is not a case within Clause (1) and in his opinion, it is also not within Clause (2) because it could not terminate with the pronouncement of a judgment as contemplated by Section 367 of the Code, even though it could be disposed of without a jury in the event of the accused pleading guilty. He was also of opinion that to allow the Public Prosecutor to come in and withdraw the prosecution at the stage in which the case then was, would be tantamount to give the Sessions Court a power to quash a commitment, a power which the High Court and the High Court alone has got under Section 215 of the Code, He was therefore of opinion that the present case did not come either under Clause (1) or under Clause (2) set forth above.

12. Remfry, J., was of opinion that the words of Clause (1) merely describe a class of case and do not imply that the trial has reached any particular stage; that the section means that in case which would ordinarily result in a verdict by a jury the withdrawal may take place at any stage before the verdict is delivered, just as in cases which ordinarily result in a judgment it may take place at any time before judgment is delivered. He was of opinion that the Legislature avoided the term "cases triable by jury" and used the words "cases tried by jury" because many cases are triable by jury or by a Magistrate, in which latter case there would be no verdict. He was also of opinion that Section 215 was not directed to the same objects as and is not pari materia with Section 494 or Section 333. Apparently, he was of opinion that the present case came within Clause (1) above set forth.

13. I am of opinion that whatever difficulty may at first sight appear as regards the interpretation of the words "cases tried by jury," it disappears largely when one finds in a latter part of the same paragraph the words "either generally or in respect of any one or more of the offences for which he is tried." The expression cannot but mean a state of things when it can be said that there is, in fact, a trial by a jury. In my opinion Clause (1) and (2) do not necessarily indicate distinct classes of cases from the point of view of their being triable by the Court of Session or by a Magistrate. In my opinion, Clauses (1) and (2) together exhaust the whole range of cases conceivable :

Clause (1) putting into one category only those cases in which a jury trial is, in fact, being held, and all other oases being put into a different category, namely, Clause (2). And I think that the legislature has put these into two different categories, only for the purpose of providing for the extreme limit or the ultimate point of time till when the withdrawal can be made: in Clause (1) before the return of the verdict; and in Clause (2), before the judgment is pronounced. When the accused has been committed to the Court but a jury trial has not begun, the case is not within Clause (1), and so is within Clause (2). In such a case the withdrawal may be permitted until the judgment is pronounced. I do not see why an order of conviction on a plea of guilty or an order finally terminating the case at that stage cannot be regarded as a judgment: the Code does not define a judgment, but Section 866 only speaks of a judgment on trial and Section 367 only says what every such judgment," that is to say, every judgment on trial should contain. Of course, if the trial before a jury has actually begun, the case would at once come within Clause (1) and that clause would then apply to it. It follows therefore that, in my judgment, there was no want of jurisdiction or illegality in the withdrawal that was permitted.

14. Neither Section 215 nor Section 333, in my judgment, can be resorted to for construing Section 494. I agree with Remfry, J., that they are not pari materia The power which an Advocate-General, entering a nolli prosequi in a trial before a High Court, exercises under Section 333, does not depend on the consent of the Court, which a Public Prosecutor has to obtain when acting under Section 494, and are indeed rights and privileges of a very different character which the Advocate General owns by virtue of his appointment. The contention that Section 494 is controlled by Section 215, in my judgment, is not well founded. At the same time, I entirely agree with Mallik, J., in thinking that the legislature never intended that under the garb of Section 494 and merely because the Public Prosecutor has applied for a withdrawal, the Sessions Judge would be competent to do what in effect is the quashing of a commitment for which purpose power is given under Section 215 to the High Court only and on a question of law. The. next matter to be considered is the propriety of the order which is complained of. On this question, as apart from the question of jurisdiction or legality, the differing Judges have expressed no opinion. This omission does not relieve-me of the necessity to go into the question, because the rule covers it and it has been pressed before me. The Public Prosecutor in his application for withdrawal gave the following reasons:1...That the complicity of the accused in the alleged offence has not been proved beyond reasonable doubt, inasmuch as the complainant alone, having regard to her history, is not a reliable witness.
2....That her statement in the complaint on serious points has not been corroborated by the P. W.'s deposing on the point.

3....That the testimony of the complainant is contradicted on some points.

15. The Judge in a somewhat lengthy order in effect agreed with the grounds taken by the Public Prosecutor, as stated above, and concluded by saying: Furthermore, the complainant herself appears to be a woman of easy virtue, and normally it would be moat unsafe to rely 'Upon her uncorroborated testimony for a conviction. Regard being had to all the above circumstances and particularly to the paucity of evidence as to the complicity of the accused in the offence of abduction, if there was any, I do not think any useful purpose would be served in refusing permission to the withdrawal of the prosecution.

16. It is necessary also to quote two passages from the explanation which the District Magistrate

has submitted in answer to the rule. He has observed:Weakness in the evidence is a good ground especially in a case like this where the only witness about the identification of the accused on trial is the complainant alone who bears a shady character. Absence of evidence is a ground for quashing the commitment, where weakness is a good, ground for permitting withdrawal.

17. And: The Public Prosecutor and the Judge agree on a probable issue of fast. If both of them agree that the evidence is weak and not likely to-lead to conviction there is no legal bar to the withdrawal of prosecution and the jury has nothing to do in the matter.

18. The legislature not having defined the circumstances under which a withdrawal is permissible, it would not be right to attempt to lay down any hard and fast rule, circumscribing the limits within which a withdrawal may be made. It seems that the Sessions Judge when he recommended the question of withdrawal to the District Magistrate, the Public Prosecutor when he made the application for withdrawal and the District Magistrate in the explanation that he has submitted, have all been of the view that after a commitment to the Court of Session a concurrence of opinion between the Judge and the Public Prosecutor that the prosecution case is a weak one and is not likely to end in a conviction is, by itself, sufficient to justify the Public Prosecutor in making an application for withdrawal and the Judge in according his consent thereto. This however is not the correct view to take of the law. Section 494 has b8en expressed in very general words no doubt, but that is so only because it does not intend to limit the materials on which action may by taken to matters appearing on the record only. My attention has been drawn to the observations of Mitter, J., in the case of C. V. Raman v. Emperor , where he has said:In the case of withdrawal by Public Prosecutor, the consent of the Court is necessary under the Criminal Procedure Code. The result of the authorities is that whore the Court is considering whether the Chief Presidency Magistrate has rightly made the order of discharge under Section 491 or not, one test and a very important test is whether in coming to a decision it has taken into consideration extraneous circumstances which ought not properly to have been taken into account.

19. I have perused the cases to which he has referred, and if in some of them the necessity on the part of the Judge to examine the record for himself has been insisted on, it was only because in those cases the ground for the withdrawal was said to arise upon the record itself. On the other hand Section 494, in my opinion, contemplates action to be taken more often than not upon circumstances extraneous to the record of the case, inexpediency of a prosecution for reasons of State, necessity to drop the case on grounds of public policy, credible information having reached the Government as to the falsity of the evidence by which the prosecution is supported and other matters of that description. The commitment order in the present case is a well-reasoned document showing a good deal of commendable care and fairness on the part of the Magistrate who made it. The Public Prosecutor must have been misled into thinking by the remarks of the Sessions Judge to which reference has already been made, that he would be justified in withdrawing the case upon such grounds as are to be found in his petition, grounds which would not justify even the High Court in setting aside the commitment. And the Judge who has made the order was clearly wrong in supposing that the position that "no useful purpose would be served in refusing" the permission, sufficiently justified the consent that he gave.

20. This Court undoubtedly has got the power to revise the consent which the Judge has given, and I think it should be revised in the present case. As I am ordering a trial of the case I

purposely refrain from saying anything on the merits. I desire however to say that I have carefully examined the materials on the record, but can see no justification for stopping the trial or withholding it from the jury, the questions arising in the case being matters entirely within their province to adjudicate upon. It is unfortunate that the case has taken such a career and that it is now eleven months since the commitment order was made, a delay which is bound to reflect upon the trial to some extent. The trial should now be held by the Sessions Judge with the aid of a jury and with as little further delay as possible. As the Public Prosecutor will naturally desire to be relieved of the case, a special Public Prosecutor for the purposes of the case should be appointed by the authorities concerned. Steps must be taken at once to arrest the accused persons and then to let them out on suitable bail pending the trial to be held. The Rule is made absolute, the order complained of is set aside and a trial as indicated above is ordered. (The Court after referring to another case against the accused deleted the words ordering bail).

Cases Referred.

1[1863] 3 B. & Section 313