CALCUTTA HIGH COURT

Devendra Kumar Roy

Vs

Syed Yar Bakta Chaudhury

(Derbyshire, J.)

08.12.1938

JUDGMENT

Derbyshire, J.

1. This rule was issued by a Division Bench of this Court at the instance of the complainant, Devendra Kumar Roy, calling upon the opposite par. ties to show cause why the order complained of in the petition should not be set aside. Notice of the matter was given to the Legal Remembrancer of Assam. The petitioner has appeared before us by counsel as have the opposite parties. The Government of Assam is represented by Mr. S.M. Bose, Standing Counsel of the Government of Bengal. The order complained of was one made by Mr. R.R. Khaund, Magistrate, First Class, of Sylhet, on 31st March 1938 whereby he directed that the opposite par. ties herein, the accused persons then before him, should be discharged under Section 494, Criminal P.C.

2. The facts leading up to and in connexion with that order are as follows: Opposite party No. 1, Syed Yar Bakht Chaudhury, was indebted to the complainant petitioner and it was agreed some time in 1936 that that indebtedness should be discharged by a conveyance of property to the complainant by Yar Bakht Chaudhury and other persons. A conveyance in pursuance of that agreement was executed by Yar Bakht Chaudhury and other persons and on 9th June 1936 that deed was presented to the Sub-Registrar at Balaganj in Assam for registration in the Registry Office there. The Sub-Registrar is opposite party 6, A. A. Abdul Ali. The deed was sent by registered post from Balaganj Sub-Registry to Habiganj Sub-Registry Office and there acknowledged by one of the executants, Abdul Matin Chaudhury, a pleader. After execution it was sent back on 13th June to the Sub-Registrar's Office at Balaganj. In July another executant at Balaganj admitted execution before the Sub-Registrar. On 16th August, another executant, Jamirunnessa Khatun, refused to admit the execution at Balaganj. As a result of that, appropriate proceedings were taken in the District Sub-Registrar's Office at Sylhet for the purpose of having Jamirunnessa's admission of execution duly recorded, and the deed was sent to Sylhet by

registered post for that purpose arriving there on 2nd October.

3. It is alleged that on arrival there it was found that the deed had been altered and that two pages - pp. 4 and 52 - had been taken out of the deed and two others inserted in their places, the net resul of the alleged-alterations being that the complainant received under the deed fewer parcels of property than had been assured to him under the deed as originally presented for registration. As a result of that discovery, on 17th October" 1936 the complainant lodged a complaint against the six opposite parties and four others - ten in all. In that complaint were charges under Section 193, I.P.C., fabrication of false evidence, Section 467, forgery, Section 468, forging a valuable security with a view to cheating, and Section 477, fraudulently destroying or defacing a valuable security. There were charges in addition under Section 109, abetment, and Section 120-B, conspiracy to commit those offences. On 29th January 1937 the Magistrate received the sanction of the Government of Assam to prosecute opposite party 6, Abdul Ali, who was, as I have mentioned, the Sub-Registrar of Balaganj, on charges under Sections 81 and 82, Registration Act. Such charges were duly added.

4. The complaint was made before the Additional District Magistrate of Sylhet, who made an inquiry into it, and on 9th February 1937 issued summonses against all the ten opposite parties. On 10th March the case was made over to Mr. Khaund, Deputy Magistrate with First Class powers, who fixed 1st May 1937 as the date for the appearance of the accused before him. Between 10th March and 1st May, friends of the accused approached the complainant and agreed to have executed the necessary documents to convey to the complainant all the property which it had been originally agreed should be conveyed to him under the deed. On 23rd April 1937 opposite party 1, Syed Yar Bakht Chaudhury, and his cosharers in such property executed two documents, one a deed of conveyance and the other a deed of release in favour of the complainant. The effect of these documents was to transfer to the complainant in law all that was originally transferred to him in the original deed. On the same day, 23rd April 1937, the complainant filed a petition; before the Magistrate hearing the case asking permission to withdraw the complaint. On 1st May the Magistrate hearing the matter passed an order referring the matter of withdrawal to the Additional District Magistrate. On 14th May 1937 the record was received back from the Additional District Magistrate and the Government Pleader appeared for the prosecution. On 6th June 1937 the conveyance alleged to have been tempered with was sent to the Government hand, writing expert at Delhi. On 21st July there was a report from the Government handwriting expert at Delhi stating that certain signatures on pages 4 and 52 were not the same as certain other signatures on other pages purporting to have been made by the same persons. On 2nd August one of the persons who had joined in the conveyance and was included among the accused - Abdul Matin Chaudhury, a pleader whose alleged signature had

appeared on pages 4 and 52 - was discharged and he afterwards gave evidence on behalf of the prosecution. His evidence, as far as I can see, confirms the report of the Government handwriting expert at Delhi in certain particulars.

5. From 3rd August to 12th August 1937, fifteen prosecution witnesses were examined including the petitioner, and the case was adjourned on 12th August to 23rd August. The evidence given by the prosecution witnesses was to the effect that pages 4 and 52 of the original conveyance had been extracted and that other pages had been put in their places, that thereby less property than had been assured in the original conveyance had been conveyed to the complainant and that the deed of conveyance not in the original form, but in its altered form, had been recorded in the book of the Sub-Registrar. There was also some evidence to the effect that the signature of opposite party No. 6, Abdul Ali, Sub-Registrar at Balaganj, appeared on each page of the altered deed. The evidence for the prosecution was not finished. Amongst other witnesses who were still to be called was the Government handwriting expert. The case ought to have been taken up again on 23rd August". But on 19th August, the Government Pleader appeared and applied for an adjournment of the case sine die giving as his reason that the record of the case was required by the Government (the Government of Assam). The Magistrate records on that application: I do not find any provision under the Criminal Procedure Code to grant an adjournment sint die on a petition like this. I have perused the letters of the Government and as directed therein I submit the record to the District Magistrate.

6. That was on 19th August 1937. The records departed and were not received again by the trying Magistrate until 22nd February 1938. It is admitted by Mr. S.M. Bose, who appears here to-day for the Assam Government, that the records went to the Secretariat in Assam. On 5th March 1938 the Government Pleader filed a petition under Section 494, Criminal P.C., asking, for the withdrawal of the case. At this time only the six opposite parties remained as accused. The Magistrate adjourned the case to 28th March for both sides to be heard. On 28th March all the parties were heard. The Government Pleader filed his petition for withdrawal of the case under Section 494, Criminal P.C., setting out the following grounds: (1) That the original complainant had withdrawn from the prosecution. (2) That on an independent examination of the records, the Provincial Government considered that the evidence was insufficient to warrant further proceeding with the case. (3) That the Provincial Government would not be justified in incurring heavy expenses in the fees and travelling allowances of the handwriting, expert and in lawyers' expenses in view of the uncertainty of successful prosecution. The Magistrate considered the grounds set out and in giving his decision allowing the; accused persons to be discharged under Section 494 he said: I am unable to come to the finding that there are not sufficient grounds for committing the accused persons in this case. In my opinion there' is

sufficient and substantial evidence amply to show that serious offences in respect of and in relation to the deed of conveyance were actually committed.

7. However, he made the order asked for and the accused were discharged. The matter then came before the District Judge who after going into the matter at some length upheld the order of discharge. The complainant then applied to this Court for a rule to show cause why the order of discharge should not be set aside and, as I stated before, the Government of Assam were notified and asked to appear. It. appears that when the Government Pleader on 28th March 1938 petitioned to withdraw the case, the complainant opposed it and offered to pay the costs of the prosecution or at any rate a part of them. The matter is a serious one and of great public importance. In the first place, the Government of Assam called for the records of a criminal case then pending before one of the Magistrates in Assam and retained those records, a matter of six months, thus holding up all proceedings during that time. In the second place, during the course of the prosecution, a considerable body of evidence was given to show that forgery and fabrication of a conveyance of property had occurred whilst that conveyance had been in the Sub-Registry for registration, and before the case for the prosecution had been completed the Government had requested that it be discontinued and the accused discharged. The matter becomes more serious in view of an allegation which is made in para. 22 of the eomplainant'3 petition before us here which is in these terms: Your petitioner begs to state that opposite party No. 6, Maulavi A.A. Abdul Ali, Sub-Registrar, is a sister's sou of Maulana Shatnsul Ulema Abu Nasar, Md. Wahid, M.L.A., who was one of the Ministers in the Assam Ministry at that time and opposite party No. 1, Syed Yar Bakht Chaudhury, besides being ah influential landholder is a relation of the said Minister and opposite party No. 5, Syed Majibal Haque Khondkar, is also a relation of the said Minister.

8. Counsel for the Government of Assam has been present to-day and he was asked whether that allegation was correct. He was not able to say one way or the other, although the allegation was in the petition and notice of the petition was given to the Assam Government. One can only conclude that the allegation is correct. The learned Magistrate sanctioned the withdrawal under Section 494, Criminal P.C., which provides that any Public Prosecutor may, with the consent of the Court, withdraw from the prosecution of any person and upon such withdrawal the accused shall be discharged in respect of such offence or offences.

9. The question for us is, was the consent of the Magistrate properly given? In other words, did he exercise judicial discretion when he gave it? The three grounds upon which the Government of Assam petitioned for the withdrawal of the prosecution, I have mentioned. The first is that the original complainant had withdrawn from the prosecution. It is true that at one time he desired to withdraw from the prosecution, but it is equally true that when he withdrew the Public Prosecutor

appeared in his place. It is to be remembered that on 28th March when this application was made the complainant himself wished the prosecution to go on and offered to pay the expenses or some part of them. It does not appear to me that there was anything in ground 1 which could properly influence the Magistrate. As regards ground 2, namely that on an independent examination of the records the Provincial Government considered that the evidence was insufficient to warrant further proceedings in the case against the Sub-Registrar and the other accused, it is clear that the evidence for the prosecution was by no means finished; and it is clear, I wish to say no more than this because I do not wish to prejudice any proceedings that may follow, that a prima facie case of forgery in respect of that deed had been put before the Court, and there was more evidence to follow. As regards ground 3 that the Provincial Government would not be justified in incurring heavy expenses in the fees and travelling allowance of the handwriting expert and in lawyers' expenses in view of the uncertainty of prosecution, I can only say that as far as I can see, this prosecution would have involved no greater charge upon the finance of the Province than many other prosecutions which are habitually undertaken. As regards the handwriting expert's expenses, part of those had already been incurred. If it were desired not to incur any very heavy charges it would have been possible to obtain the services of a handwriting expert from Bengal at very much less costs. The-document itself was in Bengali.

10. There seems to me to be no substance in the grounds that have been put forward by the Government for the withdrawal of this prosecution. It is true that reparation had in some manner been made to the complainant by the execution of other deeds assuring to him the property which had been originally conveyed to him in the first deed. But there is something in this case-more than a right of private vengeance. Here is evidence, prima facie evidence, that this deed has been deposited in the Registry so that an accurate record of it could be made and perpetuated, and it had been tampered with whilst it was in the custody of a Registrar, a public servant. In the public interests it is desirable, nay more, it is necessary, that matters of that kind should be proved to the full and that if anyone has been guilty of any offence against the law in connexion with it he should be punished. That aspect of the matter does not seem to have been considered by either the Magistrate or the learned District Judge who dealt with this matter. Had they considered it and appreciated the importance of it, I cannot think that the consent which has been given would have been given. For that reason I am of the opinion that this consent was not properly given and the orders of withdrawal and discharge which followed upon it should be quashed.

11. There remains another matter to be dealt with. It has been alleged that some of the accused in this case are related to one of the Ministers and although opportunity has been given to deny this, it is not denied. A suspicion arises very strongly that here was an unusual and, as far as I can see, unwarrantable interference with the course of justice and the suspicion is that it was made

because some of the accused were related to one of the Ministers. I asked the Standing Counsel, Mr. S.M. Bose, why this unusual interference had taken place and he said that he was instructed that this interference by the Government of Assam was at the instance of the complainant himself. I enquired from Mr. Chatterji, the counsel appearing for the complainant, if that was so. He informed me that the complainant himself was in Court and that he had spoken to him and the complainant denied that he had ever approached the Government of Assam in the way suggested. One has to remember too that the complainant offered to pay part of the expenses if the prosecution went on, and one has further to remember that the complainant is here to-day asking for this rule to be made absolute. Under those circumstances, with reluctance, I feel myself unable to accept the explanation which has been offered - without doubt, bona fide, and upon instructions - by Mr. Bose. The whole affair is unsavoury.

12. There is one other matter upon which it is my duty so say something : it is the action of the Government in calling for the records of the case from the Magistrate whilst it was still proceeding, and retaining them for six months. It is obvious, if that lean be done and is done, the due course of justice is interfered with. There is no provision in the criminal law by which such interference can be made. It was quite illegal and utterly improper. The Magistrate found himself faced, I can see, with a demand such as he had not met before and he sent the papers to the District Magistrate and in course of events they found their way to the Government. That ought not to have been done and ought never to be done again. In my view this rule must be made absolute and the order of discharge set aside. The case is sent back to the Court from which it came to be heard and determined according to law by the same or some other Magistrate.

Bartley, J.

13. I agree with the view expressed by my Lord the Chief Justice, and I concur in the order which he proposes to make. The two main contentions urged on behalf of the opposite parties in this matter were, first, that this Court has no jurisdiction to interfere with the order under review and, secondly, that if it had such jurisdiction, it ought not to exercise it.

14. In my opinion both, the contentions are equally ill founded. Express jurisdiction to interfere with an order of acquittal is conferred by Section 436, Criminal P.C. If this were not sufficient, we have had cited before us in the course of argument a number of reported cases in which that jurisdiction was actually exercised by this Court. With regard to the second contention all that I need say is this : in view of the concurrent findings of the two Courts below, in view of the admissions, express or tacit, made before us in the course of this argument, and in view of the history of the case as related in the judgment which has just been delivered, I can conceive of few cases in which the duty of interference on the part of this Court could be more clearly indicated.

Henderson, J.

15. I agree. Mr. Bose contended strongly that we have no jurisdiction to interfere in this matter because the order of discharge in question was passed upon an application made by the Public Prosecutor under the provision of Section 494, Criminal P.C. There is a long current of authority in this Court to the effect that we have such jurisdiction. It is true that the dictum of Teunon J. that a Magistrate is bound to record his reasons has been doubted. But none of those decisions suggests that there is no jurisdiction in this Court. The decision of the Patna High Court in Gulli Bhagat v. Narain Singh (1924) 11 A.I.R. Pat. 283 is really to the same effect. The learned Judges assumed that; they had jurisdiction, but merely emphasized the reluctance of a High Court to interfere with an order of acquittal On the application of a private party.

16. Furthermore, it is clearly necessary to distinguish between an order of acquittal and an order of discharge. Under the very terms of Sections 436 and 437 we have power to order a further enquiry in a case in which an accused person has been discharged. In my opinion, the learned Sessions Judge was quite correct when he held that he himself had jurisdiction to order a further enquiry, should he see fit to do so.

17. Mr. Basu further contended that if we were not prepared to go so far as Teunon J. and hold that the Court is bound to record reasons we must also hold that we have no jurisdiction to interfere because no mate, rials would be available for our interference. Now it seems to me, to say that it is difficult to interfere cannot possibly be an argument with regard to the existence or not of a jurisdiction to do so. There is certainly nothing in law which prevents a Magistrate from recording his reasons and in practice he generally does so. I take it that it would always be open to the Crown to explain in any case what the actual reasons were; but at any rate I propose to defer considerations of any difficulty there may be until an appropriate occasion arises. This contention with regard to jurisdiction is really a matter of form and not a matter of substance. It cannot be doubted that it is open to the petitioner, if we discharge this rule, to file another complaint to-morrow and in the event of its dismissal, he could come up here in revision. My Lord has set out in full the reasons which were given by the learned Magistrate for his order. We have therefore no difficulty in dealing with the present case.

18. The first reason is highly disingenuous. It is perfectly true that the complainant was willing to compound the case. But the action of the District Magistrate in refusing his permission made this impossible. The Assam Government had really no reason to suppose that at the time the application was made the complainant was unwilling to prosecute and, as soon as he objected, this ground should not have been pressed. The second ground has nothing in it. The learned Standing Counsel was unable to tell us what exactly is meant by the expression 'independent

examination'. But the result of this examination was that the Assam Government reached a conclusion that the evidence was insufficient to warrant further proceedings although the prosecution case had not even been closed. Such an opinion is so obviously groundless that it did not require any serious consideration. The third ground relates to the expenses likely to be incurred in the prosecution of the case. I myself very much doubt whether financial consideration had anything to do with the final determination of the matter. The case was not a particularly heavy one. It could go on without the evidence of the expert witness. The complainant was perfectly willing to pay the expenses incurred in obtaining that evidence. I have seen several cases equally heavy from the district of Sylhet while sitting as a member of the Criminal Bench and not a single one of them has been withdrawn on the ground of expense. An examination of the reasons given for withdrawal of this prosecution will not therefore bear a moment's exmination.

19. Mr. Bose however contended that apart from the merits, we ought not to interfere at the instance of the complainant in order to help him to carry on a vendetta. There is nothing to show that the complainant had any previous grudge against any of the accused persons and the question of a vendetta does not arise. The most that can be said against the complainant is that, like many other complainants, he was quite willing to compound a non-compoundable case. It is also necessary in this aspect of the matter to consider the position of the accused. Here we have been placed in a difficulty by the contradictory instructions which were given to the learned Standing Counsel and to Mr. Chatterji. While the former was instructed to say that it was the complainant who first approached the Assam Government, the latter informed us that the complainant had nothing to do with it. In my opinion it is a question of no practical importance. It is abundantly clear from the conduct of the parties that, even if the complainant was primarily responsible for the manoeuvre by which the record was transferred to the Secretariat in Assam, he entirely failed to get what he wanted. There is nothing to lead us to suppose that he was ever willing to withdraw the case as long as he was not given his quid pro quo. The accused, on the other hand, were perfectly satisfied with the proceeding of the Assam Government and have done their best to support them not only here, but in both the Courts below. We then find out that the Sub-Registrar, for whom a conviction would be an unusually serious matter, is a nephew of one of the Assam Ministers, while the principal accused and one of the other accused are also related to him. In these circumstances I feel strongly that we ought not to accept this contention of Mr. Basu merely because the complainant would rather get his land than see the accused persons punished.

20. To sum up, in my judgment, this order of discharge has resulted in a failure of justice which is so serious as to amount to a scandal. When that is the result of the discretion exercised by the

learned Magistrate, I have no difficulty in reaching the conclusion that that discretion has not been properly exercised.