

## LAHORE HIGH COURT

In Re: H. Daly

Vs

(Lahore)

(Tek Chand, J.)

12.07.1927

### JUDGMENT

**Tek Chand, J.**

1. On 29th April 1927, the learned Government Advocate acting under instructions from the Government of India, presented to this Court a petition under Section 561-A, Criminal P.C., praying for the expunction of certain passage from the judgment of Diwan Sita Ram, Magistrate, First Class, Jhelum, in (*Crown v. Ram Lal and Muhammad Said*<sup>1</sup>) in so far they contained remarks which reflected adversely on one N.D. Daly, Superintendent, Salt Mines, Khewra and certain "other clerks" of the Salt Department. Another application, containing a similar prayer was filed by N.D. Daly himself on 3rd May 1927. It was stated in the petitions that the remarks complained of were not supported by any materials on the record but were wholly unjustified. These petitions were laid before a Judge of this Court on 20th May 1927, who directed that copies thereof be sent to the learned Magistrate for any remarks that he might wish to make. The Magistrate has accordingly submitted an explanation dated 7th June 1927. I have examined the record in the light of this explanation and have heard the learned Government Advocate at length in support of the petitions.

2. It is necessary to briefly state here the facts, which gave rise to and resulted in the prosecution and conviction of Ram Lal and Muhammad Said. Ram Lal was a clerk employed under the Salt Department and was at the time in question posted at Khewra. Muhammad Said was a contractor who used to supply powder to the department at certain fixed rates. In 1922, Muhammad Said, on various occasions, supplied large quantities of powder to the Salt Department for which he submitted bills in due course and received payments. Subsequently when accounts were checked it was discovered that the sum of ₹ 260-8 5 had been twice paid to Muhammad Said in the month of February 1922 for a single supply of 15 maunds 13 seers of powder. An enquiry was ordered and it was discovered that Muhammad Said had received double payment in collusion with Ram Lal, Powder Clerk. Both Ram Lal and Muhammad Said were tried of offences under Sections 409, 420 and 467, I.P.C., and convicted by Diwan Sita Ram, Magistrate, First Class. On appeal

the learned Sessions Judge found that the charges under Sections 409 and 467, I.P.C., were not established and acquitted the convicts of those offences, but maintained the conviction under Section 420

<sup>1</sup> Criminal Case 20/15 of 1925

3. At the close of his judgment the trial Magistrate after holding that Ram Lal and Muhammad Said had conspired together to defraud the Salt Department, made the following remarks:

Not only that I am convinced that Mr. Daly also was a partner along with them (Ram Lal and Muhammad Said), Mr. Daly's conduct shows that he has been neglecting his duties in a reckless manner. Had he been a little prompt and careful, this defalcation would not have taken place. The report of Daulat Ram appears to be correct that Ram Lal and Mr. Daly are responsible for all this. Mr. Daly has been let off with no action having been taken against him except a formal explanation. I am also of opinion that not only Mr. Daly but other clerks who were charged with the supervision of this work must have been taking share out of the defalcations. Hence I am of opinion that the two accused deserve some consideration on that Score, as they are out of lot of parsons who were participating in the profits of these defalcations. Ram Lal is a young man with some education. It is just possible that he may be a mere tool in the hands of Mr. Daly.

4. It will be seen that in the passage, above cited the learned Magistrate finds.

- (a) that Daly was guilty of gross negligence in the discharge of his official duties;
- (b) that Daly was a partner with Ram Lal and Muhammad Said in appropriating the amount which they had received by cheating the Salt Department;
- (c) that it was possible that Ram Lal was a tool in the hands of Daly; and
- (d) that "other clerks" of the Salt Department, whose duty it was to supervise this work must have been sharing the proceeds of these defalcations.

5. The petitioner Daly objects that during his lengthy examination as a witness no questions were put to him by counsel for either party or by the Court suggesting that he was guilty of any or all of the charges in (a), (b) or (c) above, nor was any other opportunity afforded to him to explain away these allegations against him and that he should not have been condemned unheard in this manner. The Government of India support this prayer of Daly and further object that the remarks in (d) against the "other clerks" of the Salt Department whose names are not even mentioned in the judgment or the evidence, are absolutely unwarranted, and ought to be expunged. The learned Magistrate, in his explanation, adheres to his former opinion and states that the remarks made by him in his judgment in the passage complained of are fully justified.

6. I have carefully considered the reasons given by the Magistrate in support of his conclusion and have gone through the voluminous oral and documentary evidence on the record. Before giving my findings on the contentions raised in the petition, I think it necessary to refer to the

principles which this Court has to bear in mind in dealing with applications by witnesses and persons other than the parties to a litigation for expunction of remarks made against them in judgments of Subordinate Courts. The power of this Court to expunge passages from judgments delivered by itself or by Subordinate Court, is undoubted. The Chief Court of the Punjab exercised this power in various cases, see for example *Nur Din v. Emperor*<sup>2</sup> *Gopal Singh v. Emperor*<sup>3</sup> *Modi Shah v. Emperor*<sup>4</sup> *In re Malik Umar Hayat Khan*<sup>5</sup> and *Naha v. Emperor*<sup>6</sup> Similarly in other provinces Courts in the exercise of their revisional jurisdiction directed the expunction of remarks from judgments in appropriate cases *Ma Kya v. Kin Lat Gyi*<sup>7</sup> *Emperor v. Thomas Pellako*<sup>8</sup> *Baroda Nath v. Karait Sheikh*<sup>9</sup> notes and *Lachchu v. Emperor*<sup>10</sup> A discordant note was, however, struck by the Allahabad Court in *Emperor v. C. Dun*<sup>11</sup> where a Division Bench held that the powers of a High Court were restricted to making an amendment of an effective order of the Court below and not of expunging passages which did not commend themselves to it. The matter has, however, been now put beyond controversy by the legislature by the enactment of Section 561-A, Criminal P.C., wherein it is provided:

Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under the Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

7. Since this amendment was made in the Code of 1923, the Allahabad Court also has entertained and granted applications for expunction of remarks. In AIR 1927 All 193, it was held that; the High Court has inherent power to order deletion of passages, which are either irrelevant or inadmissible and which adversely affect the character of persons before the Court. Similarly the Lahore High Court in *Amar Nath v. Emperor*<sup>12</sup> and *Benarsi Das v. Emperor*<sup>13</sup> expunged remarks made in judgments of lower Courts.

8. This jurisdiction, which undoubtedly exists in this Court is, however, of an extraordinary nature and has to be exercised with great care and caution. As pointed out by the learned Chief Justice in A.I.R. 1926 Lah. 382.

The power to expunge a portion of a judgment delivered by a competent Court, is intended for cases of exceptional circumstances and should be exercised sparingly.

9. On the one hand it has to be borne in mind that in weighing evidence and arriving at conclusions on questions of fact, lower Courts have to review the conduct of witnesses with reference to particular indicants and at times have to adjudge generally on the veracity or otherwise of such persons and in doing so they have often to make remarks which reflect adversely on their character. It is of the utmost importance to the administration of justice that Courts should be allowed to perform their functions freely and fearlessly and without undue interference by this Court. At the same time it is, as remarked by Clark, C.J., in *Nur Din v. Emperor*<sup>14</sup> Cr., equally necessary that the right of Magistrates to make disparaging remarks on

persons who appear, or are named, in the course of a trial, is one that should be exercised with great reserve and moderation, especially where the person disparaged has had little or no opportunity of explaining or defending himself.

<sup>2</sup>[1903] 27 P.R. 1903 Cr

<sup>4</sup>[1904] 80 P.L.R. 1904

<sup>6</sup>[1911] 133 P.L.R. 1911

<sup>3</sup>[1901] 164 P.L.R. 1901

<sup>5</sup>[1910] 2 P.W.R. Cr. 1910

<sup>7</sup>[1911] 4 Bur. L.T. 173

<sup>8</sup>[1912] 5 Bur. L.T. 20

<sup>10</sup>[1914] 1 O.L.J. 141

<sup>12</sup> A.I.R. 1925 Lah. 187

<sup>92</sup> C.W.N. 256

<sup>11</sup> A.I.R. 1922 All. 107

<sup>13</sup> A.I.R. 1925 Lah. 392

<sup>14</sup>[1903] 27 P.R. 1903

10. If the conduct of the witness appears to the Judge to be suspicious or otherwise not above-board, he has the right and the duty to test his evidence by putting questions to him. But before he is justified in commenting adversely upon a witness' evidence he must establish the particular fact warranting such criticism by proper evidence in Court and not on conjectures or by reference to materials which are not properly on the record: *Amar Nath v. Emperor*<sup>15</sup>. Again it is well settled that a Magistrate should not in his judgment make observations prejudicial to the character of a person, who is neither a witness nor a party to the proceedings and who has no opportunity of being heard: *Benarsi Das v. Emperor*<sup>16</sup>

11. Bearing in mind these principles, I have to see if the petitioners have made out a case for the expunction of the passages complained of. Now as to the remarks in the Magistrate's judgment against the "other clerks" of the Salt Department, I must say at once that there was absolutely no justification to suggest that they were taking any share out of the defalcations of which Ram Lal, Muhammad Said or both were guilty. There is no indication in the judgment as to who these "other clerks" are, nor is there anything on the record to establish what their duties were. These clerks were not examined at the trial and had no opportunity of explaining any suspicions that might have existed against them. I have carefully examined the record and fail to find any warrant for this wholesale condemnation of a section of the clerical establishment of the Salt Department of Khewra. I would, therefore, direct that the passage in the learned Magistrate's judgment relating to the "other clerks" be expunged.

12. The aspersions against the petitioner are of a twofold nature: firstly it is stated that he was grossly negligent in the discharge of his duties; and secondly, that he was a partner with Ram Lal in appropriating the amount which had been received from the treasury by double payment and that Ram Lal convict was in all probability a mere tool in his hands I have examined the evidence of Daly, of P.W. 1 Pitt who was the Assistant General Manager and of other witnesses produced by the prosecution and the defence and have failed to find anything to indicate that Daly was a partner with Ram Lal or Muhammad Said in these defalcations or that he was taking a share from them out of "their ill-gotten gains. Daly was in the witness box for a number of days and was cross-examined at great length. No questions were put to him by either counsel or by the Court from which it could be inferred that he was privy to Muhammad Said receiving the double payment or to Ram Lal allowing Muhammad Said to do so. There is, again, nothing to indicate that Ram Lal was a mere tool in the hands of Daly. In these circumstances I am of opinion that

there was no justification for holding Daly to be guilty of the charge of receiving a portion of the amount in question or of Ram Lal being a mere tool in his hands. The remarks relating to these two matters must, therefore, be expunged from the judgment.

13. As to the charge of gross negligence on the part of Daly, however, I am of opining that there was sufficient material on the record, from which the Magistrate could infer that Daly was neglecting his duties. In the first place there is the evidence of Daulat Ram (P.W. 3), a clerk in the Salt Department, who seems to have first discovered the

<sup>15</sup>[1903] 27 P.R. 1903 Cr

<sup>16</sup> A.I.R. 1925 Lah. 392

double payment and who after auditing the accounts, made a report on which an enquiry was started resulting in the prosecution of Ram Lal and Muhammad Said. This report was put in by the prosecution and formally proved at the trial. In this report Daulat Ram had stated that the defalcations were due to the negligence of Ram Lal and Daly. Secondly, we have the documentary evidence in Exs. P. A/1 P.B., the voucher P.C. and the receipt P.J./1, all of which are duly attested by Daly and should have satisfied himself that double payment was not being made for a single supply. The learned Government Advocate has argued that it was really the duty of P.W. 1, Pitt; who was at that time the Assistant General Manager of the Salt Mines at Khewra, to check the bills and to see-that double payments were not made and that the blame, if any, attaches to Pitt rather than to Daly. I see, however, no force in this contention and am not prepared to endorse the view that the real person to blame was P.W. 1, Pitt. Ex. P.J., the voucher for ₹ 1,639-3-7, which includes the double payment in question seems to me to put the matter beyond all doubt. The case for the prosecution was that this quantity of 96 maunds, 17 seers included the 15 maunds 13 seers which had already been paid for and which ought not to have been included again in this voucher. Daly admittedly was in charge of the powder that was actually received, and I can find no justification for his signing this bill without satisfying himself that the whole of this quantity had been actually received and had not yet been paid for. In his statement as a witness Daly admitted his signatures on this voucher. This payment of the sum of ₹ 1,008-1-7, after it had been passed was made in the presence of Daly and the receipt (Ex. P.J.) was also taken by him. From the materials on the record I cannot see that the inference drawn by the Magistrate that Daly was grossly negligent in the discharge of his duties could not possibly have been drawn. I can only order the expunction of these remarks, if I come to the conclusion that they were wholly unwarranted by the materials on the record and this I am unable to do. I cannot, therefore, accept the prayer for holding that the passage imputing negligence to Daly should be expunged.

14. The result is that I direct that from the judgment delivered by Lala Sita Ram in the aforesaid case the following passages be expunged:

Not only that I am convinced that Mr. Daly also was a partner along with them.

Mr. Daly has been let off with no action having been taken against him except a formal

explanation. I am also of opinion that not only Mr. Daly but other clerks who are charged with the supervision of this work must have been taking share out of the defalcation. Hence I am of opinion that the two accused deserve some consideration on that score, as they are out of a lot of persons who were participating in the profits of these defalcations. Ram Lal is a young man with some education. It is just possible that he may be a mere tool in the hands of Mr. Daly.

15. The rest of the judgment will stand.