

BOMBAY HIGH COURT

Hansabai Sayaji Payagude

Vs.

Ananda Ganuji Payagude

Criminal Ref. No. 188 of 1948

(Rajadhyaksha and Chainani, JJ.)

03.03.1949

JUDGMENT

Chainani, J.

1. The facts of this case briefly are that on 8th September 1946, the complainant Hansabai filed a criminal complaint against the accused under Sections 447 and 504, Penal Code, and Section 24, Cattle Trespass Act, before the First Class Magistrate, Haveli. This was dismissed as she was absent on the date of the hearing. Thereafter she brought a fresh complaint in the same Court. After recording the evidence adduced by her, the Magistrate discharged the accused on 5th March 1947. A fortnight later, on 18th March 1947, the complainant filed a third complaint on the same facts against the accused. This was transferred to the Third Class Magistrate, Haveli. The Magistrate decided to inquire into the case again and issued summonses to the accused. After the evidence, which the complainant produced, had been taken, the accused applied to the Magistrate that no charge should be framed, as he had previously been discharged on the same evidence. The Magistrate did not accept this argument and on 15th November 1947, framed a charge against the accused and passed an order that the case should proceed. On 9th December 1947, the accused made a revision application to the Sessions Judge, Poona, in which he requested that the order passed by the Magistrate on 15th November 1947, should be set aside. The Sessions Judge has made a reference to this Court, recommending that the proceedings pending before the Magistrate should be quashed.

2. It is now well settled that the discharge of an accused person does not operate as a bar to the institution of fresh criminal proceedings against him for the same offence, and that it is competent for a Magistrate to entertain another complaint on the same facts and to enquire again into the case against the accused. (See *In re Mahadeo Laxman*, 27 Bom LR 352 : (AIR 1925 Bombay 258 : 26 Cr LJ 991), *Emperor v. Amanat Kadar*¹, and *Alimahomed v. Kasturchand*², The Third Class Magistrate, Haveli, was, therefore, competent to entertain the third complaint brought by the complainant against the accused. Section 203, Criminal Procedure Code, provides

that the Magistrate before whom a complaint is made may dismiss the complaint, if after considering the statement of the complainant and the result of the investigation or inquiry under Section 202, if any, there is, in his judgment, no sufficient ground for proceeding. In coming to a decision

¹³¹ Bom LR 146 : (AIR 1929 Bom 134 : 30 Cr LJ 594)

²⁴¹ Bom LR 90 : (AIR 1939 Bom 89 : 40 Cr LJ 346)

whether there is sufficient ground for proceeding with the complaint the Magistrate must take into consideration previous proceedings, if any. Where an accused person has been discharged after consideration of all the evidence produced by the complainant, and a fresh prosecution is instituted thereafter on the same facts, the Magistrate cannot be said to have sufficient ground for proceeding with the complaint unless he is satisfied that some additional evidence is forthcoming, of which the complainant was not previously aware or which it was not within his power to produce in the previous trial, or that there has been manifest error apparent on the face of the record or manifest miscarriage of justice. It cannot be said to be in the interests of justice that a party who has obtained a decision from a Court after a full consideration of his case should be given an opportunity to seek from the same Court or another Court of co-ordinate jurisdiction a different decision on the same facts and on the same evidence. The proper remedy for the complainant, who is dissatisfied with an order of discharge passed under Section 253 (1), is to move the superior Court to set it aside and order further enquiry in the case under Section 436, Criminal Procedure Code. For, otherwise it would be open to a complainant to file a series of complaints on the same facts, a new complaint being brought as soon as or shortly after the accused has been discharged in the previous case, and thus continue indefinitely the harassment of the accused.

3. As long ago as 1887, it was held by this Court in *Queen-Empress v. Bapuda, Rat*³. that while there is nothing to prevent a Magistrate, after he has once discharged an accused under Section 253, from inquiring again into the case against him, as the discharge not operating as an acquittal leaves the matter at large for all purposes of judicial inquiry, the Magistrate is bound to exercise due discretion and to take that discharge into account and avoid oppressive proceedings. In *Reg. v. Divama and Somshekhar*⁴, at p. 66, it was observed that while a Magistrate has discretion to entertain a fresh complaint against a person who had been discharged by another Magistrate, he should not normally exercise such discretion unless it should appear to him that justice requires him to adopt that course. In *In re Mahadev Laxman*, 27 Bom LR 352 : (AIR 1925 Bombay 258 : 26 Cr LJ 991), it has been held that the complainant is bound to disclose to the Magistrate before whom he makes a fresh complaint that his previous complaint was dismissed. In *Queen-Empress v. Dolegobind Dass*⁵, *Maclean, C. J.*, at p. 217 expressed the view that no Magistrate ought to rehear a case previously dealt with by another Magistrate of co-ordinate jurisdiction upon the same evidence only, unless he is plainly satisfied that there has been some manifest error or manifest miscarriage of justice. In *Dwarka Nath Mondul v. Beni Hadhqb Banerji*⁶, Prinsep, J., has stated that while according to the decisions of the Calcutta High Court a fresh complaint could be brought against a person who had been discharged, that Court had "thought it proper to restrict the exercise of this power to cases in which fresh evidence was forthcoming." Similar

view has been taken by the Madras High Court in *In re Koyassan Kutty*, AIR 1918 Madras 494 : (18 Cr LJ 329). In his judgment in that case Sadashiv Aiyar, J., observed that while there is nothing in law against the entertainment of a second complaint on the same facts on which a person has already been discharged, inasmuch as a discharge is not equivalent to an acquittal, a person who has been charged once and discharged ought not to be harassed again on the same charge, unless very strong grounds are shown, e.g. new facts are discovered, which were not within the knowledge of prosecution when the first charge was brought.

³Un. Cr. C. 350

⁵28 Cal 211 : (5 CWN 169)

⁴1 Bom. 64

⁶28 Cal 652 at p. 659: (5 CWN 457 FB)

4. *In Biso Ram v. Emperor*⁷, the Patna High Court has held that an order of discharge should not be set aside and prosecution started afresh, unless there are new materials before the Magistrate which were not before him previously. The Allahabad High Court is of the same opinion. In *Ramanand v. Sheri*⁸, Iqbal Ahmad, J., has observed (p. 426) :

"It is clear, therefore, that an order of discharge cannot be a bar to the trial of the person discharged for the same offence of which he was discharged, but it is also equally clear that it would be highly inconvenient to allow successive trials of complaints, based on the same allegations, by different Magistrates and different Courts, after a previous complaint on the same facts by the same complainant and against the same accused has been dismissed by a Magistrate of competent jurisdiction."

5. The Sind Judicial Commissioner's Court and the Lahore High Court have taken the same view. In *Parsram Bhagwandas v. Emperor*⁹, (Sind)) and *Emperor v. Alias*¹⁰, the Sind Judicial Commissioner's Court held that it is a well-recognized and salutary principle of law that a fresh complaint in respect of the same offence should not be entertained when it is based on same facts and same evidence as were available at the previous trial. In *Mohammad Din v. Mahtab Din*¹¹, and *Allah Ditta v. Karam Bakhsh*¹², the Lahore High Court has held that a second complaint should be entertained only in exceptional circumstances, for example where the previous order was passed on incomplete record or was manifestly perverse or foolish. In *Allah Ditta v. Karam Bakhsh*¹³, it was urged that in the second case brought against the accused, the complainant was a different person. Referring to this argument, Bhide, J., at p. 12 stated :

"But when it is admitted that the facts are identical and there are no good grounds for reconsideration of the case, the mere fact that the complainant is not the same person would, in my opinion, make no difference. If this were not so, it would be easy enough for a complainant to harass an accused person with complaints on the same facts by his friends and relations as often as he likes. It is, in my opinion, nothing short of an abuse of the process of the Court to entertain a fresh complaint in such circumstances."

6. The same view has been taken by the Rangoon High Court in *Ma The Kin v. Nga E Tha*¹⁴, *U Shwe v. Ma Sein Bwin*¹⁵, and *Dhana Reddy v. Emperor*¹⁶, In *U Shwe v. Ma Sein Bwin*¹⁷, Brown,

J., observed (p. 114).

"It may, therefore, be taken as settled law in this Province that the Magistrate was competent to take cognisance of the present case; but it does not necessarily follow from the mere fact that he is competent to take cognisance that he should have done so. If an accused person, after enquiry and after an order of discharge has been passed, is liable to further prosecution on the same evidence, as a matter of course, it is quite clear that the way is open to grave injustice and oppression. and although

⁷ AIR 1922 Patna 372

⁹30 Cr LJ 444 : (115 IC 309

¹¹33 Cr LJ 493 : (137 IC 520 (Lah)

⁸56 All 425 : (AIR 1934 All 87 : 35 Cr LJ 1062)

¹⁰ AIR 1929 Sind 242 : (31 Cr LJ 687)

¹² 12 Lah 9 : (AIR 1930 Lah 879 : 31 Cr LJ 1180)

¹⁴1 UBR 19

¹³(12 Lah 9 : AIR 1930 Lah 879 : 31 Cr LJ 1180)

¹⁵ AIR 1925 Ran 114 : (26 Cr LJ 284)

¹⁶31 Cr LJ 824 : (AIR 1930 Ran 156)

¹⁷(AIR 1925 Ran 114 : 26 Cr LJ 284)

the Magistrate in the present case was competent to take cognizance of a further complaint, it seems to me clear to have been his duty to have considered whether the circumstances were such as to justify him in doing so, or whether he should not have dismissed the complaint under the provisions of Section 203, Criminal Procedure Code

As pointed out in *Ma The Kin's* case. (1 U. B. Rule 19),

"It is the duty of a Magistrate, therefore, who receives a complaint in a case where there has been a previous order of dismissal or discharge, not to issue process, unless he is plainly satisfied that there has been some manifest error or manifest miscarriage of justice, or unless new facts are adduced which the complainant had not knowledge of or could not with reasonable diligence have brought forward in the previous proceedings.' "

With respect, we agree with these observations of Brown, J.

7. In this case, as I have mentioned, before the present prosecution was commenced, two complaints had been filed on the same facts and for the same offences. The first of these was dismissed on account of the absence of the complainant, and in the second one the accused was discharged after the complainant had adduced all her evidence and after the Magistrate had considered this evidence in order to determine whether it established prima facie the guilt of the accused. The complainant has admitted in her deposition that she has no additional evidence to lead beyond that which was already produced by her in the previous case before the First Class Magistrate, Haveli. If she was dissatisfied with the order of discharge in that case, she should have applied to the Sessions Court for revision of that order under Section 436, Criminal Procedure Code. Instead of following that course, she took the unusual step of filing a fresh complaint within 15 days after the order of discharge had been passed. This conduct on her part amounts to taking undue advantage of the process of the Court. This should not have been permitted by the learned Magistrate. In our opinion, the Magistrate exercised his discretion

wrongly in issuing process and in deciding to inquire into the case again, after the present complaint had been brought. He should have ascertained from the complainant whether she was in a position to place any new materials before the Court and should have dismissed the complaint when he found that no additional evidence was forth coming.

8. We, therefore, accept the reference made by the Sessions Judge and direct that the proceedings pending before the Third Class Magistrate, Haveli, against the accused should be quashed.

9. We find from the record that there has been considerable delay in dealing with the revision application made by the accused to the Sessions Court. We hope such delays will be avoided in future.

Reference accepted.