

PATNA HIGH COURT

The King

Vs

Parmanand

(Agarwala, C.J. Das and Narayan, JJ.)

(Agarwala, C.J.)

05.11.1948

JUDGMENT

Agarwala, C.J.

1. This rule was issued by the Criminal Bench calling upon two accused persons, who were discharged by a Magistrate acting under 8. 494, Criminal P. C, and the Deputy Commissioner of Singb.bb.um, to show cause why the Magistrate's order should not be set aside and the prosecution proceeded.
2. Notice of this rule was given to the Advocate-General in order that the Provincial Government should also have an opportunity of being heard.
3. The material facts were as follows: On 18th March 1947, a first information was laid by Karuna Nair, Assistant Store-Keeper of Jugselai, alleging that 88 bags of rice had disappeared from the Tisgo Grain Store, This rice was public property and was not due to be sold as it had not been classified by the Provincial Government authorities. After investigation the police submitted a charge-sheet against six persons, of whom five, including Parmanand Marwari and his cousin Shamlal Marwari, were sent to the Sub-divisional Magistrate in custody. The sixth accused person Parbhu Marwari was alleged to be absconding. The offences mentioned in the charge sheet were offences under S3. 381, 411 and 120B, Penal Code, and an offence under the Hoarding and Profiteering Ordinance.
4. The police investigation disclosed the following facts: The rice in question was stocked in the godown of Messrs. Tatas at Garabasa for the Rationing Department. On 14th March 1947, the then store keeper, who was the accused N. K. Ghosh, proceeded on leave, making over charge to the first informant, who took charge without verification of the stock. On the 27th a clerk of the department inspected the stock and discovered that out of 200 bags of rice, 88 were missing. Of

the missing 88 bags, one was marked with the figures 2/16 and the remaining 87 with the figures 2/19. these figures representing the weight in maunds and seers. The inspecting officer ascertained that the accused N, K. Ghosh had loaded 88 bags of rice on two trucks on the 14th, and that he was assisted by the accused Chandi Charan Iche. The trucks belonged to the accused Parbhu Marwari. The house of Chandi Charan Iche was searched, and 10 empty guny bag³ with the mark 2/19 and one with the mark 2/16 were found. Iche is the proprietor of a grain shop. The investigating officer examined the coolies who had loaded the two trucks and ascertained that they were driven to the house of Parmanand and the bags stocked there in a godown. This godown was searched on 24th March, but all that was found there were bags of cement and some scattered grains of rice. In consequence of certain confidential information which he received that the stolen rice had been removed to the coal depot of accused Parmanand and Shamlal the investigating officer searched the depot and found 24 bags of rice, of which two be re the mark 2/19. After the search of the coal depot the officer went to the house of Parmanand and found him about to slip away. The officer arrested him, and he then made a statement and took the investigating officer, the Superintendent of Police and the Divisional Inspector to a brick kiln belonging to him, where he pointed out 45 bags of rice 7 of which be re the mark 2/19. The conclusion which the Superintendent of Police arrived at was that there was a conspiracy in pursuance of which N. K. Ghose and C. C. Iche stole the rice from the Jugselai godown and sold it to Parmanand through a notorious blackmarketeer known as Madan Marwari and his gomasta Parbhu Marwari. Parmanand, however, did not appear personally in the transaction, the rice being sold to one of his employees.

5. These being the facts ascertained during the police investigation which was closely supervised by the Divisional Inspector and the Superintendent of Police, the Subdivisional Magistrate quite rightly decided that they required judicial investigation. Eventually, on the application of the accused, the case was transferred for trial to the Court of Mr. E. K. Lall, a Magistrate of the first class, on 7th September 1947, and on 9th summonses were issued to all the accused, who, had in the meanwhile, been released on bail, fixing 20th for the trial. On the last mentioned date there is the following entry in the order sheet:

In accordance with the Government letter No. 218 P. P. E., Government of Bihar, Political Department (Police Branch), dated 17th September 1947, the case is adjourned to 3rd November 1947.

On 3rd November, the entry in the order-sheet is:

No further instruction has been received. To the 15th December 1947. Accused as before. On the same day there is a marginal note: Eeoord and case diary sent to Deputy Commissioner, Videthis office letter No. 6107 G., dated 3-12-47. There is no other entry in the order-sheet for the next six

months, when, on 13th May 1948, there is the following entry: The record had been submitted to Government in connection with the application praying to withdraw the case. The record has now been received back with a copy of letter No. 518 L. B./I.M.-25/48, dated 14th April 1948, and with D.C.'s order dated 3-6-48 to the effect that the case against Parmanand and Shamlal is ordered to be withdrawn. Issue summons to all the accused of the case to appear on 20th of May 1948, when effect of the order withdrawing the case against Babu Farmanand and Shamlal will be given and steps will be taken against the rest of the accused persons.

6. The record reveals what had been happening between the last entries in the order, sheet to which reference has been made, namely, 3rd November 1947, and 13th May 1948. On 4th September 1947, Parmanand and Shamlal had sent a petition to the Prime Minister of the Province which is here reproduced in extenso: "To The Hon'ble Prime Minister of Bihar, Patna.

Reference: Prayer for withdrawal of Police Case in Jamsbedpur against Babu Parmanand and Shamlal (before the S.D.O. under Section 411, Penal Code G. B. Case No. 227 of 1947). Sir. We have the honour to pray to you for withdrawal of a Police case against us in Jamshedpur now pending before the B. D. O. under Section 411, Penal Code (receiving stolen property) arising out of our lawful and bona fide purchase for value of rice for over 2000 labourers whom we supply to industries in and around Jamshedpur, The circumstances are as follows:

(1) We are the firm of Messrs. Ramdas and Sons of Jamshedpur who deal in labour contracts, brick manufacturing and other building contracts for about half a century and 40 years ago the first foundation of the Tata Factory was laid with our bricks.

(2) We deal with about 3000 labourers from our firm, out of which over 2000 are employed in Jamshedpur and the suburbs in almost all the Industries. Due to the fluctuating nature of the brick manufacturing concern we get a sudden influx of 500 to a 1000 labourers and we are required to supply them all with rations for their existence.

(3) Even now we are the largest labour and building contractor of Tata.

(4) We buy rice outside the rationed area and give it to our outside labourers, otherwise we cannot maintain them.

(5) On 16-3-47 we purchased a quantity of rice from Fraboo Marwari (of Hadanlal Marwari) against a Gross cheque (and a part in cash) for which we hold a receipt of full satisfaction. Our purchase was absolutely bona fide without suspicion in our mind which constitute any offence of any kind.

(6) On 18-3-47 on an F. I. B. it was discovered by Police that our rice came from a stolen stock of the Government Garabassa Godown which theft took place on 14-3-47. There is no suggestion

(as there cannot be) of our being implicated in any way in the F. I. E.

(7) We have now been run in by the Police under Section 411, Penal Code, for having been in possession of what is alleged to be stolen property 'of which we had no knowledge-of even suspicion and which we purohased for value against leoeipt in a bona fide deal).

(8) We are a very respectable Bihari family of Jamshedpur and our proprietor, Babu Parmanand is the President of the Local Bihari Association; Shamkl is hie cousin.

In the above circumstances there cannot be an; oon-viotion in any Court against us but if the case continues it will mean a great harassment, dislocation of the important industrial contracts in hand and also' labourers in these Industries, not to speak a great loss of reputation. We plead completely not guilty and pray that your honour will accept our contention. We, therefore, pray that your honour will kindly stay the proceedings in the Court (8, D. O, J.) and call for the entire record for persual. We feel certain that your honour will be convinced. We shall ba grateful if a chance is given to out counsel to explain the case to your honour when records arrive before passing final orders.

Patna, the 4th September, 1947,	We have the etc.
Local Address of our Counsel	Sd/-Illegible,
for reply:	for and on behalf of-
C/o S. N. Bhattacharyya, Esq.,	M/S Parmanand
"The Retreat". Patna,	Shamlal, Jamshedpur.

7. The last paragraph of this petition, which was apparently drafted by a lawyer, as it was requested that the reply be sent to Mr. S. N. Bhattacharya, an advocate, is significant. It requested the Prime Minister to stay the proceedings which were pending in Court and to call for the record of the ca30 for perusal, neither of which the Prima Minister or any other Minister has any authority to do, The fact that these prayers could be put in a petition drafted by a lawyer shows how widespread the belief has-become that Ministers can interfere in judicial proceedings by issuing stay order³ and calling, for judicial records. From cases which have cotne-to the notice of this Court it is unfortunately only too true that there are grounds for holding this belief. It requires, therefore, to be stated now, and most emphatically, that no executive-officer or authority has any power to issue a fiat staying proceedings in a Court of law, or to require a Court to hand over its judicial record. I shall refer to this matter later itt this judgment.

8. It will be observed that in this petition there was no denial that the sacks of rice which formed the subject-matter of the case against the accused were stolen property, or that they were recovered from the brick kiln of the petitioners, or that at the time they were removed from the

petitioners 'store-room to their brick kiln the petitioners knew that the police were searching for them in consequence of Karuna Nair's first information. The substance of the petition was not that the petitioners did not know that an offence had been committed with respect to these sacks of rice at the time, of their removal from the store-rooms to the brick kiln, but that they did not know this fact when the sacks were delivered at their store godown. The significance of this will appear later.

9. On 17th September 1947, Mr. Pillai, the then Chief Secretary to Government, issued the following letter to the Additional Deputy Commissioner of Jamshepur: I am directed to enclose a copy of a petition dated the 4th September, 1947, from Babus Parmanand and Shamlal and to request you to submit your report to Government with the least possible delay, I am also to request you to take steps to get the case adjourned until further orders. The Deputy Commissioner forwarded this letter to Mr. S. N. Singh, the Sub-divisional Officer of Dhalbhum, with the request for a report by the 23rd, and with the following endorsement on it: "The case should be adjourned until further orders." The Sub-divisional Officer sent Mr. Pillai's letter with his own endorsement on it to Mr. E. O. Prasad, the City Magistrate of Jamshepur, with a request to him to prepare a report by the 23rd. The City Magistrate was directed to examine the police papers carefully, to compare them with the contention of the petitioners and to report to Government whether the case was likely to succeed. The City Magistrate was also instructed to ask for an adjournment of the case for a month or six weeks "quoting the number of the Government letter on the ordersheet". The City Magistrate, on receipt of this letter, added his own endorsement to it, directed to the Bench Clerk of the Court in which the case was pending, viz., the Court of Mr. Lall: "Show Mr. Lall who will please adjourn the case as directed."

10. This letter and the endorsement on it explain the entry in the ordersheet of 20th September 1947, adjourning the case "until the 3rd of November in accordance with Government letter no. 213. Happily, neither the Sub-divisional Magistrate nor Mr. Lall fell into the error of adjourning the case until further orders" which they were invited to do by the Chief Secretary to Government and the Additional Deputy Commissioner.

11. Having, however, advertently or in-advertently, exercised judicial independence in this matter, on the next date fixed for hearing, namely, 3rd November 1947, Mr. Lall abandoned any attempt to maintain a judicial attitude in the case. On the 3rd of November the case was again postponed till the 18th of December, the only ground being: "No further instruction has been received." Mr. Lall apparently is under the impression that in the conduct of criminal cases his procedure is to be regulated by instructions he receives from Government. The sooner his mind is disabused of this conception of the administration of justice the better, But it is to be feared that this attitude on the part of the Magistrate in this province will persist until there is a complete and unequivocal separation of the judicial from executive functions. In the margin of the order-

sheet of this date is the entry relating to the sending of the record and the case diary to the Deputy Commissioner. This note appears to have been made by the Sub-divisional Magistrate, for it refers to a letter No, 5107G. addressed to the Deputy Commissioner. This was a letter in which the Sub-divisional Magistrate summed up the report of the City Magistrate and made his own observations. In it he enumerates what he calls the points against Parmanand and Shamlal and the points in their favour. These were as follows:

(a) Points against Parmanand and Shyاملal.

(i) Parmanand's confession that he kept the rice bags in his secret godowns and he got the bags removed when he knew them to be stolen property, and also his action in pointing out the place where the bags were kept.

(ii) Parmanand's failure to inform the police (on the day of the search of his premises) as soon as he came to know that the rice was stolen property.

(iii) Shyاملal's statement before the police on 24-3-1947 that that morning the stock had been removed under the order of Parmanand from the previous godown to the Dhatlddih Coal depot of Shyاملal.

(b) Points in favour of Parmanand and Shyاملal.

(i) On 24-3-1947, when the Coal depot of Shyاملal was searched, 24 bags of rice were found out of which only 2 of the bags bore the mark 2/19. It is the prosecution case that out of the stolen 88 bags of rice, some were marked 2/16 and the rest were marked 2/19. No bag with 2/16 mark seems to have been recovered.

(ii) Out of 45 bags of rice recovered from the brick kiln pointed out by Parmanand, only 7 bags bore the mark 2/19 as Mr. E. C. Prasad reports. No bag with 2/16 mark seems to have been recovered.

(iii) Parmanand himself pointed out the brick kiln, where 45 bags of rice were kept.

(iv) Parmanand made the payment of the cost of rice through cheque No. BC/2/29G59 drawn on the Imperial Bank of India on 15-3-47 in favour of Prabhu Dayal for Ba. 2500. This cheque was cashed on 15-3-47 and Prabhu Dayal himself accepted the payment in the bank as the bank report shows.

(v) Parmanand and Shyاملal have not been named in the F. I. B.

12. This report apparently led Government to decide not to proceed with the prosecution of Parmanand and Shamlal, for the next entry in the order-sheet is that of 13th May 1948, which

records that the record had been received back with a letter from the Deputy Commissioner to the effect that the case against Parmanand and Shamlal "ia ordered to be withdrawn." 20th May was fixed for the next step in the case to be taken. The only entry is:

Issue summons to all the accused of the case to appear on 20th of May 1948, when effect of the order withdrawing the case against Babu Parmanand and Bhamlal will be given and etepa will ba taken against the rest of the accused persons.

13. Here, again, is evidence that Mr. Lall now regarded himself merely a3 an officer foe registering the orders of Government and was quite unaware that when it is intimated to the Court that Government does not propose to pro. oeed with the prosecution, the Court has to exercise its judicial discretion before deciding what to do. It is quite clear from the en trite in the order-sheet of 13th May that Mr. Lall considered that Government bad ordered the withdrawal of the prosecution, and that he bad nothing further to do but to give effect to that order. That impression is confirmed by the entry in the order-sheet of 11th June which stated:

The case agalnBt Babu Parmanand and Shamlal is withdrawn under Section 494, Criminal P. C. and I, therefore, discharge them under Section 494.

11th June was not a date which had been fixed in the case. Cri. 20th June the Magistrate being absent the case was adjourned, The next date fixed for hearing was 21st June. Why, therefore, an order was passed on the 11th is not apparent.

14. As there seems to be a misapprehension with regard to the so. called withdrawal of a case from the jurisdiction of a Court before which it is pending, I shall now refer to Section 494 of the Code. That section provides:

Any Public Prosecutor, may, with the consent of the Court, in cases tried by a jury before the return of the verdict, and in other cases before the judgment is pronounced, withdraw from the prosecution of any person, either generally or in respect of any one or more of the offences for which he is tried, and upon such withdrawal (a) if it is before a charge has been framed, the accused shall be discharged in respect of such offence or offences; (b) if it is made after a charge has been framed, or when under this Code, no charge is required, be shall be acquitted in respect of such of fence or of-fences.

The first thing to be observed with regard to the language of this section is that it does not authorizes the withdrawal of a case, It merely authorizes the Public Prosecutor to withdraw from the prosecution, and that only with the consent of the Court. The Court is not be und to give its consent. As the effect of the withdrawal of the Public Prosecutor with the consent of the Court is either discharge or acquittal of the accused, as the ease may be, the giving or withholding of

consent is a judicial act and the discretion conferred on the Court must be exercised judicially. There is a difference of judicial opinion in the High Courts as to whether the Magistrate is required to consider the validity of the grounds on which the Public Prosecutor asks permission to withdraw from a prosecution, I do not propose in the present case to enter into that controversy. I think it may be assumed that, when the Public Prosecutor has been instructed that there are reasons of State, or it has been discovered that evidence will not be forthcoming, or that the evidence that is forthcoming is unreliable, the Court would be justified in accepting such a statement from the Public Prosecutor and granting consent for his withdrawal from the prosecution. In the present case, the petition to the Prime Minister does not challenge the truth of the evidence on which the police relied in submitting the charge-sheet, nor is it alleged that the prosecution had been lodged out of vindictiveness. Nor, on the facts of the case, is there any reason to suppose that there was any reason of State for not allowing the prosecution to proceed. The substance of the petition was merely that, on the available material, there was no evidence that the petitioners knew the rice to be stolen property at the time they took delivery of it. That was essentially a matter of inference to be drawn by the Court from all the circumstances of the case, and the Magistrate in charge of the case was obviously the proper person to decide whether such an inference should be drawn after hearing all the evidence available. There is no justification whatsoever for the view that the Prime Minister or any other Minister or Executive Officer has the power to usurp the functions of the Court or to take the case out of the seisin of the Magistrate before whom it is pending for trial, The most that the section authorizes is that the Public Prosecutor may withdraw from the prosecution if the Court consents to his doing so. This merely means that the Public Prosecutor may, with the leave of the Court, discontinue his assistance to the Court. That this is the intention of the Legislature is made clear by comparing the language of Section 494 with the language of Section 833, which applies only to trials before High Courts. That section provides as follows:

At any stage of any trial before a High Court under this Code, before the return of the verdict, the Advocate -General may, if he thinks fit, inform the Court on behalf of His Majesty that he will not further prosecute the defendant upon the charge, and thereupon all proceedings on such charge against the defendant shall be stayed, and he shall be discharged of and from the same. But such discharge shall not amount to an acquittal unless the presiding Judge otherwise directs.

15. Here, it will be observed, the consent of the Court is not necessary. Nor has the Court any power to proceed with the hearing of the charge against the accused after the Advocate-General has stated that he will not further prosecute it. The position is entirely different under Section 491. The Public Prosecutor is only authorized to withdraw from the prosecution with the consent of the Court, and the section does not provide that the proceedings shall be stayed or terminated if the Court does not consent to the Public Prosecutor's withdrawal. There may be

cases in which the Court, on a consideration of the Public Prosecutor's application to wfcih. draw from the prosecution, considers that the prosecution should proceed. In such a case the Court will be acting within its powers, and rightly, to refuse to accede to the Public Prosecutor's request to withdraw from the prosecution. If after such refusal, the Public Prosecutor declines to assist the Court, the Court has power under Section 195 to permit the prosecution to be conducted by any other person, either personally or by a pleader. In the present instance it is quite obvious that Mr. Lall, the Magistrate in whose Court the case was pending for trial, did not attempt to exercise his discretion at all in considering the application of the Public Prosecutor, That application did not disclose any grounds for the Public Prosecutor's withdrawal from the case other than the Government's order that the case be withdrawn, and the entry in the order-sheet of 13th May 1948, discloses that Mr. Lall purported to permit the withdrawal of the prosecution merely in consequence of the Deputy Commissioner's order, with which was enclosed a copy of a letter no. 518 from the Superintendent and Remembrancer of Legal Affairs, Government of Bihar. That letter was addressed to the Deputy Commissioner and was as follows:

Sir.

I have the honour to refer to your letter No. 914 dated 12th March 1918, to the Chief Secretary to Government and to say that in the circumstances appearing from the record the chances of a successful prosecution under Section 411, Penal Code, against the above-named two persons Beera to be remote and the above-mentioned criminal case against them may accordingly be withdrawn.

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On this letter the Deputy Commissioner made the following endorsement: "As ordered by Government the case against Babu Parmanand and Bhyamlal is ordered to be withdrawn."

16. Like the trying Magistrate, neither the Legal Remembrancer nor the Deputy Commissioner appears to have any conception of the scope of Section 494, Criminal P. C., or they could not have used the language they did, directing the withdrawal of the case. Furthermore, the Legal Remembrancer's letter merely states that, in his opinion, the chances of a successful prosecution under Section 411 were remote. He does not appear to have directed his mind to the possibility of a conviction either in respect of the other charges mentioned in the charge-sheet, or to the possibility of a successful prosecution of the petitioners under Section 201, Penal Code, In these circumstances, reluctant as this Court is to interfere with the judicial discretion of a Magistrate, there can be no hesitation in doing so in the present case as the trying Magistrate made no attempt to exercise his discretion at all. This Court, however, would be reluctant to direct the prosecution of persons against whom Government does not desire to proceed, unless there is

evidence which requires judicial consideration. I propose, therefore, to examine the report which, presumably, led to Government deciding not to proceed with the prosecution of Parmanand and Sbamlal as stated in the Sub-divisional Magistrate's letter No. 6107 G, addressed to the Deputy Commissioner.

17. With regard to the points said to be in favour of Parmanand and Shamlal, an analysis shows that they are not convincing. The fact that only 2 of the 24 bags found at Shamlal's depot bore the mark a/19 and none of them bore the mark 2/16 does nothing to explain how Shamlal came to be in possession of bags marked 2/19 which were public property. So also is the ease with the 4 bags recovered from the brick kiln of Parmanand, 7 of which bore the mark a/19. Nor does the fact that with these bags of stolen rice were also bags which were not stolen help the accused, for Mr. Prasad pointed out in his report that there was no doubt that offences under the Hoarding and Eating Ordinance had been committed by these persons, so that they would have to have hiding places for the stolen property which they had bought and for other stocks which offended against the Ordinance. The fact that Parmanand himself pointed out the brick kiln where the rice was concealed, so far from being a point in his favour as the Sub-divisional Magistrate seems to have thought, is a piece of evidence against him admissible under Section 27, Evidence Act. The payment of part of the purchase price by a cheque in favour of Parbhu Dayal is also not conclusive of the innocence of the petitioners, for the cheque was not for the whole amount. Part was paid in cash; so prima facie there was nothing to connect the cheque with the purchase of the stolen rice. The absence of the petitioners' names from the first information is of no consequence at all in this Case as the first informant had no knowledge of what had happened to the rice when it was discovered to be missing from the Government godown. On the other hand, the first point enumerated against Parmanand and Sbamlal discloses at least prima facie evidence of the commission of an offence under Section 201, Penal Code, for, apart from Parmanand's confession, the police papers show that it was possible to prove that the stolen rice was first kept in the petitioner's godown, and it was only when the police started searching for it that Parmanand had it removed to the brick kiln, i. e., after he had discovered it was stolen property. With regard to the charge under Section 411, even though Parmanand's confession be inadmissible as evidence as having been made to a police officer, the fact that he was found in possession of stolen property soon after its theft gives rise to a presumption under Section 114, Evidence Act, that he knew it to be stolen property, and the weight to be given to this presumption was increased by reason of the fact that he failed to inform the police on the day of the search of his premises. Then with regard to the charge of conspiracy under Section 120B, the facts are that the petitioners were hard pressed to find rice for their labourers (vide the petition to the Prime Minister). The rice was purchased by their employees for their benefit, it was stored first in their godown and then hidden in their coal depot and brick kiln. These circumstances might justify an inference that the petitioners were parties to a conspiracy to obtain

possession of rice which was public property. There is no reason to suppose that their employees would voluntarily enter into a transaction which might land them in jail, and it is not alleged that the petitioners' employees bought the rice in order to make a profit for themselves. With regard to the third point against the accused, even though Sbamlal's statement to the police is inadmissible, it was possible to prove the removal of the stock from the godown to the coal depot of Sbamlal by other evidence. In fact even in the petition to the Prime Minister the fact that it had been removed and the fact that it was known to be stolen property at the time of its removal are not denied.

18. It is not to be understood that the inferences indicated above are the only ones which can be drawn from the facts. When the matter has been fully investigated judicially, it may transpire that other inference should be drawn. I have analysed the alleged facts merely for the purpose of showing (i) that these are matters of a serious nature requiring investigation by an impartial judicial tribunal and (ii) that even though a Court may not, in the circumstances, infer guilty knowledge of the petitioners at the time the rice was delivered to them it would still remain to consider whether a prima facie case under Section 201 has been disclosed. It is to be clearly understood that this analysis of the Sub-divisional Magistrate's points for and against the two accused is not to be regarded as fettering the trying Magistrate's duty to draw his own inferences from the facts of the case. I would set aside the order of the Magistrate withdrawing the case and discharging the accused, and direct that he now proceed with the prosecution. The Advocate General has assured us that the Provincial Government does not propose to withdraw from the prosecution if this Court consider it should proceed. I may point out, however, that even though the Public Prosecutor should not appear in the case, the Magistrate may under Section 495, permit the prosecution to be conducted by some one else. I do not propose to leave this case without reverting to the matter to which I have already referred, namely, the impression which appears to prevail that the Prime Minister or executive officers have the power to direct the stay of criminal proceedings, or to call for the record of criminal cases, so far as the question of staying criminal proceedings is concerned, there is no power whatsoever, statutory or otherwise, authorizing any one except the presiding officer of the Court to grant an adjournment of the proceedings, and no authority except a Court superior to the trying Court which can direct a stay of criminal proceedings.

19. So far as the power to call for the record of Criminal cases is concerned, there is a distinction between calling for the record of a pending case and calling for the record of a case that has been completed. So far as the latter is concerned, a Court of appeal or revision has power to call for the record of a Court subordinate to it. The rules governing this matter are contained in Chap. V of the General Rules and Circular Orders of this Court, Paragraph 6 of these rules is explicit:

The records of decided cases shall be retained in the record rooms of the Court to which they

belong or to the superior Court of the District, and shall not be allowed to pass out of the custody of the officers of such Courts, except when called for by superior judicial authority, or required for the purposes of O. 13, B. 10, Civil P. C. by a civil Court. It is improper and inconvenient that records of the Courts of Justice should be sent to public officers or functionaries, If a reference to their contents is required the proper procedure is ordinarily to obtain copies of the requisite papers.

An exception of a limited nature has been made in favour of the Divisional Commissioner by R. 50 which provides that when he requires the record of a criminal case in order to satisfy himself whether Government should be moved to direct an appeal against an original or appellate judgment of acquittal under Section 417, Criminal P. C., the Sessions Judge should comply with the application. It is only for this limited purpose that the Commissioner may send for the record. When he does so, he may submit it to the Legal Remembrancer under E. 20 of the Practice and Procedure Manual (p. 69). In no other case is the Commissioner entitled to call for the record of a case, The only other exception is of a limited nature in favour of a commission of inquiry appointed by the Provincial Government. Rule 61 provides that when the Provincial Government appoints a commission of inquiry into misconduct on part of a police officer in consequence of strictures expressed by a Court, the Sessions Judge will forward to the commission, on requisition, the original record of the decided sessions case in question.

20. So far as pending cases are concerned, it is arguable that the High Court or the Sessions Judge or the District Magistrate or a specially empowered Sub-divisional Magistrate may call for the record for the purpose of satisfying itself as to the regularity of the proceedings of the inferior Court under Section 435. This section, however, does not authorize the District Magistrate or Sub-divisional Magistrate to call for the record of a pending case for the purpose of submitting it to the Provincial Government or anyone else, and it is absolutely wrong for the District Magistrate or Sub-divisional Magistrate to call for the record of an inferior Court for this purpose, or for the trying Court itself to part with its record in any circumstance except for the purposes sanctioned by the statute or the rules by which it is bound. It may happen that the Provincial Government or its executive officers may desire to examine the contents of the record of a case. In such an event it may, in the ordinary course, apply for certified copies of the document which it desires to consult, or an application may be made for inspection of the record. The rules in this respect are to be found in the General Rules and Circular Orders of this Court, Vol. 1. Rule:38A of ch. IIA of these rules provides that no record not deposited in the record room shall be inspected without the permission of the Sessions Judge or the Magistrate to whose file it belongs. Rule 33B, however, empowers the Sessions Judge or the Magistrate to allow inspection of a record to public officers and to pleaders and mukhtara engaged in the case. In no circumstance should a Magistrate permit the record of pending case to leave his custody. He is

entirely responsible for the safe keeping; of the record, and no opportunity should be created which might permit a party to entertain even the slightest suspicion that the record might be tampered with. When a record has improperly left the custody of the Court it might create an impression in the minds of litigants that the record has been tampered with, and should any part of the record be after, wards found to be damaged or missing, a very difficult situation would arise.

21. I have considered it necessary to invite attention to these rules and to legal position regarding the custody of judicial records because in more than one case recently it has come to my notice that District Magistrates have called for records and submitted them to the Provincial Government. The District Magistrate is not entitled to call for a record for this purpose, or to part with the record of a case which he has properly called for, and it is to be hoped that the . Provincial Government itself will not only refrain from issuing orders to District Magistrates to call for records they are not entitled to call for, or to call for them for purposes for which they are not entitled to call for them, but also to impress on all executive officers that they must conform to the rules in this respect.

Das, J.

22. I agree.

Narayan, J.

23. I agree. But as from the arguments advanced by the learned Advocate General and from the letter addressed to the Deputy Commissioner by the Superintendent and Remembrancer of Legal Affairs, it appears that the legal advisers of Government were under the impression that the Government could order a summary or full-dress enquiry for the purpose of satisfying themselves whether the prosecution was likely to end in conviction or not, it must be pointed out that any enquiry with regard to a matter which is sub judice is be und to interfere with the even and ordinary course of justice. It is a cardinal principle that when a matter is pending for decision before a Court of justice nothing should be done which might disturb the free course of justice and this Court will discountenance any attempt on the part of any executive official, however high he may be, to prejudge the merits of a case and to usurp the functions of the Court which has got seisin of the case. Such a practice is fraught with immense danger, and I was surprised to hear the learned advocate contending that a parallel enquiry could be started by the Government. If we accede to the argument of the learned Advocate General that a parallel enquiry can be started, we will be opening the door for contempt and impediment in the course of justice. Once the principle is accepted that the Government are free to hold a separate enquiry, it would be impossible to impose any limit as to the nature and the scope of such an enquiry. This case is the

best instance to indicate the futility of an enquiry like this. The Superintendent and Remembrancer of Legal Affairs, whom the Advocate General called the expert legal adviser of Government, ordered after the enquiry had been completed that the prosecution should be withdrawn and the letter, which he has written to the Deputy Commissioner, does not even show that it was written under the directions of the Government. It must be presumed that he went through all the papers before ordering the withdrawal of the prosecution and it is evident that as a result of the enquiry he was satisfied that the chances of conviction in this case were remote. He practically left no discretion to the Magistrate and said that the chances of a successful prosecution seemed to be remote, though at that stage the only thing to be seen was whether a prima facie case had been made out or not. The Deputy Commissioner took his direction as the final order of the Government and wrote to the Sub-divisional Magistrate that "as ordered by Government the case against Babu Parmanand and Shyamlal is ordered to be withdrawn," The directions and the expert legal advice were all wrong and the result now is that the prosecution has to proceed from the stage at which it was closed, and the accused would be put to unnecessary harassment. It should now, therefore, be realised that an enquiry like this has got no utility and is not warranted by law, and that a lot of mischief can come out of it. It is bound to lead to comments on a pending case, and all comments on a cause written and published, spoken or threatened, while it is pending are contemptuous and likely to prejudice one party or the other. In short, according to the accepted principle, nothing whatsoever should be done which can disturb the free course of justice.

