

Calcutta High Court

Santiram Mandal vs Emperor on 7 January, 1929

Equivalent citations: AIR 1929 Cal 229, 118 Ind Cas 572

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JUDGMENT Mukerji, J.

1. This Rule has been issued to show cause why a commitment to the Court of Sessions should not be quashed on two of the grounds set forth in the petitioner's petition of motion. The commitment has been made for the trial of the petitioner on a charge under Sections 211, 193 and 194, I.P.C. The two grounds on which the Rule has been issued are:

First for that in view of the fact that the judicial enquiry in respect of which the petitioner is alleged to have committed the offence with which he has been charged was in regard to a prosecution which was not legally instituted, no judicial notice could be taken of the complaint made or of the evidence given by the petitioner both of which are nonest in the eye of law, and the commitment made on the basis thereof is not sustainable in law.

2. Second : For that the order of commitment is vitiated by the fact that the complainant was not examined at the enquiry before the Magistrate.

3. Now the relevant facts are these : The petitioner lodged a complaint in the Court of the Magistrate at Howrah against five persons including one Mr. Mould. It was stated in the complaint that on 7th March 1928 a lock out was declared by the authorities of the East Indian Railway against 14,000 men, working in their Lillooah Workshop who had gone on strike, that on 28th March 1928, when some of the strikers were proceeding homewards they were held up by some Police Officers, some Goorkha guards of the Watch and Ward Department of the Railway and some men of the Railway Volunteer Rifles. It was stated that offences punishable under various sections of the Penal Code were committed by the accused persons. The specific allegation made against Mr. Mould was in these words:

While all this was going on Mr. Mould came running from the direction of the Loco quarters and snatching off a gun from a Goorkha guard, fired it without any previous warning on the strikers. One man was hit and fell down by the side of the road.

4. On being examined on oath on the said complaint the petitioner said:

Then Mr. Mould came running from the Loco quarters, snatched up a gun from a Goorkha and shot a man who was standing under a banian tree on the side of the road and the man dropped down and did not move again.

5. On this complaint a judicial enquiry was held by Mr. G.S. Dutt, the District Magistrate, in which a number of witnesses were examined, and the complaint was dismissed under Section 203, Criminal P.O. Mr. Mould then moved the District Magistrate for proceeding against the petitioner under Section 476, Criminal P.C. The petitioner showed cause but eventually the District Magistrate

preferred a complaint against the petitioner for having committed offences under Sections 193 and 211, I.P.C. On the basis of this complaint an enquiry preliminary to commitment was held by Mr. H. C. Bose, Deputy Magistrate, who eventually made the order of commitment against which this Rule is directed.

6. The second of the two grounds set forth above may be disposed of quite soon. It rests upon the words of Section 208, Sub-section (1) which says:

The Magistrate shall, when the accused appears or is brought before him, proceed to hear the complainant (if any) and take...evidence etc.

7. It is said that the Sub-section means that if there is a complainant his evidence must be taken, and that in this respect the provision contained in this Sub-section is very different from the provisions contained in Section 200 Proviso (aa) which dispenses with the examination of the complainant in any case in which the complaint has been made by a Court or a public servant acting or purporting to act in the discharge of his official duties, and in Section 244(1), proviso and Section 252(1), proviso which say that in the case of a complaint by a Court the Magistrate shall not be bound to hear any person as complainant. It is said that the omission in Section 208 of a proviso of this character to be found in Sections 244 and 252 and on the other hand the deliberate use of the words referred to above in Section 208 is significant, and that this difference has been made in view of the importance and seriousness of the offences to which the procedure in Chap. 17 is applicable. I am of opinion' that the argument though specious is not sound. In the first place there is a palpable difference between hearing the complainant and examining him, so that what Section 200, Proviso (aa), means is that; the complainant need not be examined on the complaint while Section 244(1), proviso and Section 252(1), proviso mean that he need not be heard, but on the other hand Section 208(1), enjoins that the complainant (if any) shall be heard. It is not the examination of the complainant that is necessary under Section 208(1), but only that he shall be heard. In this case it is not suggested that the complainant was not heard. What reason there is for making this distinction in this respect between the procedure in trials before Magistrate on the one hand and enquiries by them preliminary to commitment on the other need not be speculated upon ; probably it was a case of pure oversight so far as the enactment of Section 208 is concerned, or it may be, though it is hardly likely that the distinction was deliberate. Be that as it may, it is clear beyond doubt that the examination of the complainant was not obligatory.

8. The first of the grounds is based upon the view that the complaint was not sustainable because of the bar imposed by Section 132 of the Code. It is said that if the Court could not entertain the complaint by reason of the bar, no offence was committed by the petitioner under Section 211 or Section 193 or Section 194, I.P.C. In the present case I do not desire to express any opinion on the question whether the offences could be held to have been committed by the petitioner if his contention that Section 132 of the Code barred the complaint was well-founded ; because in the view I take of the applicability of Section 132 it is not necessary for me to go into that question. Section 132 is worded very differently from Section 195. The words in Section 132 are:

No prosecution against any person for any act purporting to be done under this chapter shall be instituted in any criminal Court,

9. while the words in Section 195 are:

No Court shall take cognizance of any offence punishable under section etc.

10. In connexion with Section 132, therefore, two matters have to be considered : first whether the filing of a complaint against Mr. Mould amounted to an institution of a prosecution against him ; and second whether the complaint was in respect of any act of his purporting to be done under Ch. 9. There is authority for the proposition that the prosecution of a person does not commence till he is summoned to answer a complaint : *Golap Jan v. Bholanath Khettry* [1911] 38 Cal. 880. Whether the institution of a prosecution as contemplated by Section 132 is synonymous with the commencement of a prosecution for the purpose of a suit for malicious prosecution is a matter on which I have my doubts but it does not call for any decision here. I would rather rest my judgment on the second matter which I have already referred to, namely the question whether the acts alleged against Mr. Mould fall within Ch. 9 of the Code; in other words to quote the words of Section 127 whether a Magistrate or an officer in charge of a Police Station had required the assistance of Mr. Mould, and Mr. Mould had done the acts attributed to him on such requisition. There is a passage in the order of the District Magistrate on which a good deal of reliance has been placed on behalf of the petitioner, so far as this question is concerned. The passage runs thus:

It appeared from Mr. Sturgis' evidence that he considered the assembly of strikers to be an unlawful one and that he purported to act under the provisions of Ch. 9, Criminal P.C., in dispersing the assembly. He admitted that he had directed the police under him as well as other accused persons named in the complaint to assist him in dispersing the assembly which he considered unlawful and that, in so dispersing the assembly, these persons had, under his order used force.

11. The passage seems not to be entirely borne out by the evidence of Mr. Sturgis and is evidently loosely worded in so far as it refers to all the other accused persons. It is not the complainant's case anywhere that the assistance of Mr. Mould was requisitioned by Mr. Sturgis and it cannot also be the case of Mr. Mould. I am of opinion, therefore, that the acts attributed to Mr. Mould can by no means be regarded as falling within Ch. 9 and consequently Section 132 has no application to this case. The rule must therefore, be discharged. Let the record, be sent down as early as possible.

Graham, J.

12. In my opinion the rule should be discharged on two grounds : 1. Firstly, because the case instituted by the petitioner Santiram Mandal had not reached the stage at which it became a prosecution, there being merely an inquiry which resulted in the dismissal of the complaint (1) (I.L.R. 38 Cal. 880), and 2. Secondly, because, even if Section 132, Criminal P.C., be held to apply, it seems to be clear that it can have no application so far at all events as Mr. Mould is concerned. I agree that the rule should be discharged.