MISCELLANEOUS CRIMINAL

Before Sir Syed Wazir Hasan, Knight, Chief Judge

HAKIM ABDUL WALI (APPLICANT) *v.* KING-EMPEROR (COMPLAINANT-OPPOSITE PARTY)* 1933 *July*, 25

Criminal Procedure Code (Act V of 1898), sections 435, 439 and 561A—Interlocutory stage of criminal proceedings in subordinate court—High Court's power of interference—Absence of even suspicion of criminal liability against accused—High Court, whether should interfere.

Ordinarily the High Court will not interfere at an interlocutory stage of criminal proceedings in a subordinate court but the High Court is under an imperative obligation to interfere in order to prevent the harassment of a subject of the Crown by an illegal prosecution. It would also interfere whenever there is any exceptional and extraordinary reason for doing so. One of the tests to apply in order to determine whether any particular case is of that exceptional nature or not is to see whether a bare statement of the facts of the case should be sufficient to convince the High Court that it is a fit case for its interference at an intermediate stage. Another test to be applied is to see whether in the admitted circumstances of the case it would be a mock trial if the case is allowed to proceed. Broadly speaking the High Court will generally interfere in the interests of justice and to stop abuse of process of law.

Where, therefore, the facts float on the surface and it seems that no assistance from *deus ex machina* is required to see that there is not even a scintilla of suspicion of criminal liability as against the accused the High Court would interfere and quash the proceedings because to allow the proceedings to continue would be allowing a farce to be enacted to the great harassment of the accused. *Choa Lal Dass* v. *Anant Prasad Misser* (1), *Gokul Prasad* v. *Debi Prasad* (2), *In re: Shripad G. Chandavarkar* (3), *In re: S. Kuppuswami Aiyar* (4), *Ramanathan Chettiyar* v. *K. Sivarama Subrahmanya Ayyar* (5), *Raghunath Puri* v. *Emperor* (6), relied on. *Regina* v. *John Norman* (7), *Queen* v.

*Criminal Miscellaneous Application No. 27 of 1933, for transfer of the case from the Court of Mr. Shankar Prasad, I.C.S., Sub-Divisional Magistrate of Nawabganj, district Bara Banki.

(1) (1897) I.L.R., 25 Cal., 233. (2) (1924) 23 A.L.J., 21.
(3) (1927) I.L.R., 52 Bom., 151. (4) (1915) I.L.R., 39 Mad., 561.
(5) (1924) I.L.R., 47 Mad., 722. (6) (1932) A.I.R., Pat., 72.
(7) (1842) 174 E.R., 608

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Brinbadhur Putnaik (1), *Queen-Empress* v. *Ganpat Tapidas* (2), *Yoganand Das* v. *Emperor* (3), *Santok Chand* v. *Emperor* (4), *Krishna Lal Dhar* v. *King-Emperor* (5), *Rangi Lal* v. *King-Emperor* (6), and *Chandika Prasad* v. *King-Emperor* (7), referred to.

Messrs. *Khaliquzzaman* and *S. Akhlaque Husain*, for the applicant.

The Government Advocate (Mr. *G. H. Thomas*), for the Crown.

HASAN, C. J.:—This is an application by Hakim Abdul Wali purporting to have been made under sections 439 and 561A of the Code of Criminal Procedure, 1908.

The applicant is being tried in the Court of a Magistrate of first class at Bara Banki on a charge of criminal misappropriation under section 409 of the Indian Penal Code in respect of a sum of Rs.94-5-0 and it is stated in the charge sheet that he committed the offence "from October, 1930, onwards to the present day." He is also being tried conjointly on a second charge under section 477A of the Indian Penal Code for having "falsified the accounts of the Jubilee Bridge repairs. . . with the intention of defrauding the Municipal Board."

The applicant is a Secretary of the Municipal Board of Bara Banki on a salary of Rs.150 per mensem, but during the progress of these proceedings he has been suspended from work by the aforementioned Board.

At the hearing of this application the learned Government Advocate repeatedly laid emphasis on the consideration that it would create a bad precedent if I were to interfere at this stage of the proceedings in the trial court. It is hardly necessary for me to convey any assurance to the learned Advocate that I am fully conscious of my duties as a Judge of this Court but I

(1) (1866) 5 W.R. (Cr. ruling), p. 21. (2) (1885) I.L.R., 10 Bom., 256.
(3) (1931) A.I.R., Pat., 86. (4) (1918) I.L.R., 46 Cal., 452.
(5) (1920) 33 C.L.J., 252. (6) (1930) I.L.R., 6 Luck., 68.
(7) (1930) 7 O.W.N., 564.

cannot yield to the argument that, even in a case where it is eminently necessary in the interest of justice for the High Court to interfere whatever the stage of the proceedings in the first court, the High Court should not interfere. This is a case in which I realize that I would be abdicating my functions as a Judge of this Court if I were not to exercise my powers with which I am invested by law under the provisions of section 561A of the Code of Criminal Procedure. To my mind a gross abuse of process of law is being carried on in the trial of this case and I must stop it.

There is little doubt that the High Court has power to interfere in any case and at any stage of it but this proposition must be made subject to certain limitations. Ordinarily the High Court will not interfere at an interlocutory stage of criminal proceedings in a subordinate court but it seems to me the High Court is under an imperative obligation to interfere in order to prevent the harassment of a subject of the Crown by an illegal prosecution. It would also interfere whenever there is any exceptional and extraordinary reason for doing so. One of the tests to apply in order to determine whether any particular case is of that exceptional nature or not is to see whether a bare statement of the facts of the case should be sufficient to convince the High Court that it is a fit case for its interference at an intermediate state—*Choa Lal Dass* v. *Anant Prasad Misser* (1). Another test to be applied is to see whether in the admitted circumstances of the case it would be a mock trial if the case is allowed to proceed—*Gokul Prasad* v. *Debi Prasad* (2). Two Hon'ble Judges of the High Court of Bombay said *in re*: *Shripad G. Chandavarkar* (3) that "under section 435 of the Code of Criminal Procedure the High Court will interfere with the proceedings in the lower court at an interlocutory stage only when the accused

(1) (1897) I.L.R., 25 Cal., 233. (2) (1924) 23 A.L.J., 21.
(3) (1927) I.L.R., 52 Bom., 151.

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is not guilty on the face of the proceedings and in order to prevent his further harassment."

In re: S. Kuppuswami Aiyar (1) Mr. Justice KUMARASWAMI SASTRIYAR held that though the power of revision has to be exercised with great care the High Court has jurisdiction to interfere at any stage of the proceedings if it considers that in the interest of justice it should do so. To the same effect is the decision of another learned Judge of the same Court in *Ramanathan Chettiyar* v. *K. Sivarama Subrahmanya Ayyar* (2). In *Raghunath Puri* v. *Emperor* (3) Mr. Justice MOHAMMAD NOOR stated his opinion on the question under consideration as follows:

> "Ordinarily if the Magistrate has ordered an accused to be tried, the trial must proceed but when the High Court is satisfied that an accused is being prosecuted without there being any material before the Magistrate for his prosecution it will be abdicating its function if it did not interfere to stop patent injustice calling for a prompt redress."

The learned Judge referred in this connection to the case of *Jagat Chandra Mozumdar* v. *Queen-Empress* (4). It is obvious that the exercise of the power of interference cannot be circumscribed by any hard-and-fast rule and it must always depend on the particular circumstances of each case. Broadly speaking, however, it may be stated that the High Court will generally interfere in the interests of justice and to stop abuse of process of law. This view of law has also prevailed and consistently been acted upon in this Court. See in this connection the decision of a Bench of this Court to which I was also a party in *Sheo Saran Vaish* v. *Jitendra Nath Daw* (5).

What are the admitted and proved circumstances of this case? In the year 1930 the Municipal Board of

(1) (1915) I.L.R., 39 Mad., 561. (2) (1924) I.L.R., 47 Mad., 722.
(3) (1932) A.I.R., Pat., 72. (4) (1899) I.L.R., 26 Cal., 786.
(5) (1928) 5 O.W.N., 357.

Bara Banki resolved that a certain bridge within its territorial jurisdiction called Jubilee Bridge should be repaired. The estimate of the costs which the work of repairs may involve was prepared by the Sub-Overseer of the Board named Nawab Ali. This estimate is before me and is marked as exhibits 5 and 6 on the record of the case. The estimated costs were to amount to Rs.1,400. The Secretary of the Board issued cheques from time to time on the treasury of the Board in his own favour amounting to Rs.1,514-4-0 for the purposes of the expenditure relating to the repairs of the Jubilee Bridge. In due course the accounts were examined by Audit Department of the Government of the United Provinces and the report made is styled as "Audit and Inspection Note on the Accounts of the Bara Banki Municipality for the year 1930-31" (exhibit 12). Paragraphs 70 and 71 of this report deal with the accounts relating to the construction of work at the Jubilee Bridge. I propose to quote a portion of paragraph 71:

> "A detailed account of Rs.1,400 advanced to the Secretary was not prepared, but from the receipt vouchers filed in the *misl* it appears that Rs.1,305-11-0 were spent in all and Rs.94-5-0 still remain with the Secretary."

It sounds like a fiction, but it is a fact, that this report of the Audit Department was taken into consideration by the Municipal Board so late as the 25th of January, 1933. There are, however, one or two intervening circumstances which may now be stated. The Overseer, i.e. Nawab Ali who died suddenly in January, 1931, before he could submit a final and complete account of sums of money which he and the workmen engaged had received from time to time under the orders of the Secretary for expenses of the repairs of the Jubilee Bridge. The Secretary was, therefore, greatly hampered in his endeavours to explain

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and to specify with accurate particulars as to how the sum of Rs.94-5-0 had been spent. He, however, submitted a detailed explanation (exhibit 13) which covers two type-written foolscap pages. These pages do not bear any date but I am informed that they were prepared and submitted some time in October, 1931. To revert to the proceedings of the Board, it appears that a meeting was convened on the 25th of January, 1933, and the majority of the members adopted the following resolution at that meeting (exhibit A-21):

> "With reference to paragraphs 70 and 72 of Audit Notes for the year 1930-31 the Board resolves that although the Board is perfectly satisfied that the sum of Rs.1,514-4-0 entrusted to the Secretary for the construction of the Jubilee Bridge has been fully and properly spent and no part of it has been misappropriated, yet in view of the fact that there are no vouchers and detailed accounts to support the same, the Board thinks it desirable that the Secretary may be asked for the time being to deposit the sum of Rs.94-4-0, the deficit amount, and he shall be entitled to recover it on filing fuller accounts and vouchers of which the absence appears to be due to the sudden death of M. Nawab Ali who was in immediate charge of the construction."

In compliance with the directions in the resolution just now quoted the applicant deposited a sum of Rs.94-4-0 (exhibit A-20) in the treasury of the Municipal Board on the 26th of January, 1933.

Now while the Board was contemplating to adopt steps to satisfy the objections raised by the Audit Department as regards there being no materials on the file of the Board to account for the expenditure of Rs.94-5-0 and while they had before them for consideration and disposal the explanation of the applicant (exhibit 13) the learned District Magistrate of Bara

Banki deemed fit in the exercise of his magisterial powers to order an inquiry and deputed a subordinate Magistrate exercising powers of a first class Magistrate for this purpose. The result of this inquiry is embodied in a report which has curiously enough been put on the record of this case as a piece of evidence against the accused. The learned District Magistrate did not stop here. He further ordered an inquiry by the police. The result has been the initiation of the prosecution of the applicant for offences already stated in this judgment.

As I have mentioned before the applicant is a Secretary of the Municipal Board, Bara Banki. The Municipal Account Code, Chapter I, contains rules as to the steps which the "reviewing officer" shall take in cases of any embezzlement of municipal money. In this case the "reviewing officer" was the Deputy Commissioner of the district. The powers of a District Magistrate with which he is invested by law under the provisions of the Code of Criminal Procedure and the powers of a "reviewing officer" thus came to coalesce in one particular individual. In this case the learned Deputy Commissioner preferred to exercise his powers as a District Magistrate in spite of the special procedure laid down in the Municipal Account Code for cases of this nature and in spite of the Board's resolution exonerating the Secretary from all liabilities, civil and criminal. In these circumstances the conclusion to which I have reached is that I am not satisfied as to the propriety of the orders passed by the learned District Magistrate nor am I satisfied as to the regularity of these proceedings before the Court which is now seised of the case for the prosecution. Under section 435 of the Code of Criminal Procedure the High Court has power to call for and examine the record of any proceeding before any inferior criminal court for the purpose of satisfying itself as to the propriety of any order recorded or passed and as to the regularity of any proceedings of

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such inferior court; and under section 439 of the same Code the High Court may pass in its discretion such orders as it could as a court of appeal under the provisions of the Code.

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When one enters into even a cursory examination of the documentary evidence on which the case for the prosecution rests it will at once be seen that though there are no written receipts or vouchers to support the expenditure of Rs.94-5-0, yet there are several pieces of repairs done at the bridge besides the work for which vouchers and receipts exist and these repairs would more than cover the expenditure of Rs.94-5-0. This view is borne out by the report of one Jamil Ahmad, Overseer of the Public Works Department, who was deputed by the Deputy Magistrate in charge of the inquiry to inspect the work of the repairs at the bridge. The report is on the file and is proved by the evidence of the learned Deputy Magistrate who was examined as a prosecution witness (P. W. 3). Again in the stock book (exhibit 17) we find entries as regards the purchase of several articles for the purpose of the work at the bridge the prices of which are also outside the existing receipts and vouchers. These facts float on the surface and it seems to me that no assistance from *deus ex machina* is required to see that there is not even a scintilla of suspicion of criminal liability as against the accused.

There is also evidence both oral and documentary furnished on behalf of the prosecution which shews that the Secretary nominally drew money from the treasury under the cheques which he issued in his own favour but as a matter of fact the actual custody of the money covered by these cheques was always with the treasurer of the Board and on requisition made by the overseer, contractor or a workman for sanction of expenditure the Secretary used to grant the requisite sanction. But the payments thereunder were always

made by the treasurer directly to the person who had obtained the sanction. A mere glance at the receipts as explained by the evidence of Baijnath, municipal clerk (P. W. 1), will unmistakably show that this was the condition of accounts on the expenditure side.

On these facts how does the case stand? Here is a public servant responsible in law for the proper expenditure of a certain sum of money but in respect of which he has had no dominion other than passing orders for payment in writing and into whose hands money never actually came. He also showed from the evidence produced by the prosecution that there are pieces of work on the bridge and materials in the stock which more than cover the sum of Rs.94-5-0 with the embezzlement of which he is charged. Further the owner of the money, that is the Municipal Board of Bara Banki, is satisfied with the payment of Rs.94-5-0 made by the accused and has exonerated him from every liability civil or criminal. There is one other circumstance which should not be lost sight of and that is the sudden death of the Sub-Overseer Nawab Ali before he could prepare and file the final and complete accounts of the expenditure incurred over the repairs of the Jubilee Bridge. Lastly a delay of nearly three years has occurred between the alleged embezzlement and the initiation of these proceedings. Thus in my opinion there is no case of criminal misappropriation against the accused whatsoever. I go further and say that there is no reasonable ground for even a suspicion of such an offence as against the accused. There is one more fact which must be stated. The petitioner has filed a receipt executed by one Parmeshur Din (exhibit A-30). This receipt covers the expenditure of Rs.94-5-0 also. It has been proved by P. W. 7. The accused obtained this receipt while the matter was under consideration of the Municipal Board. Obviously the object of the accused in obtaining and filing this receipt was to establish his innocence.

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CRESSWELL, J., in *Regina* v. *John Norman* (1) said:

> "Embezzlement necessarily involves secrecy: the concealment, for instance, by the defendant of his having appropriated the money. If, instead of denying his appropriation, a defendant immediately owns it, alleging a right, or an excuse for retaining the sum detained, no matter how frivolous the allegation, and although the fact itself on which the allegation rests were a mere falsification"

In *Queen* v. *Brinbadhur Putnaik* (2) KEMP and GLOVER, JJ., held "that a mere fact of there being a large deficit of salt, without distinct proof of a criminal misappropriation, is not sufficient to convict the salt Darogha in charge of the golahs of criminal breach of trust under section 409 of the Indian Penal Code." BIRDWOOD and JARDINE, JJ., held in the case of *Queen-Empress* v. *Ganpat Tapidas* (3) that, where the accused in his capacity of revenue Patel received from the Government Treasury small sums of money on account of certain temple allowances and did not at once pay over the sum to the persons entitled to receive them, as he was bound to do, but it appeared that such persons were willing to trust him, and had actually passed receipts which the accused fulfilled the trust reposed in him by the Government and that his mere retention of the money for a time, in the absence of any evidence of dishonesty, does not amount to criminal breach of trust within the meaning of section 409 of the Indian Penal Code. In the case of *Yoganand Das* v. *Emperor* (4) ADAMI, J., held that the charge of criminal breach of trust should not be maintained against the petitioner in that case except with the sanction of the Court of Wards through the Collector who had appointed him manager of the estate under the Court of Wards. This

(1) (1842) 174 E.R., 608.

(2) (1866) 5 W.R., (Criminal Ruling) p. 21.

(3) (1885) I.L.R., 10 Bom., 256.

(4) (1931) A.I.R., Pat., 86.

statement of law was made not because of any particular rule of procedure requiring sanction of the Court of Wards in cases of prosecution for a criminal breach of trust of any of its employee but for the reason that the absence of such a sanction is almost a conclusive evidence that there was no dishonest intention on the part of the accused to misappropriate any money belonging to the Court of Wards. See in the same connection *Santok Chand* v. *Emperor* (1) and *Krishna Lal Dhar* v. *The King-Emperor* (2). In the case of *Rangi Lall* v. *King-Emperor* (3) my learned brother RAZA, J., expressed his opinion on a similar question as follows:

> "Ordinarily the High Courts do not enter into the merits of criminal cases in revision and refuse to consider question of fact but such questions ought to be considered where the lower courts have approached the case from a wrong point of view and the evidence produced has not received due consideration.
>
> Mere retention of money or failure to return it does not necessarily raise a presumption of dishonest misappropriation. The mere fact that payment was delayed is no ground for imputing a criminal intention. Though the ingredients of the offence of criminal breach of trust under section 408 of the Indian Penal Code are somewhat broadly stated, the section was intended to punish an offence of which dishonesty is the essence. Any breach of trust is no offence. It may be intentional without being dishonest or it may appear dishonest without being really so. In such cases the Magistrate should be slow to move. This caution is all the more necessary since there is a natural desire to secure speedy justice by having recourse to criminal law.

(1) (1918) I.L.R., 46 Cal., 432. (2) (1920) 33 C.L.J., 252.
(3) (1930) I.L.R., 6 Luck., 68.

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> Although transactions which involve civil liabilities may amount to criminal offence, and often do, so that the dividing line between the two is almost indistinguishable, the use of the criminal law, not for the purpose of punishing an offender or in the public interest but as a means of exerting pressure to extract money from an agent, is to be discouraged—*ibid.*"

See also the decision of my brother NANAVUTTY, J., in the case of *Chandika Prasad* v. *King-Emperor* (1).

The second charge entered in the charge sheet as framed by the learned Magistrate, who is trying this case, is not without an element of ridicule. The learned Government Advocate, the learned Advocate for the applicant and myself tried to find any account in respect of which the applicant is charged under this head but our joint efforts proved of no avail whatsoever. It was suggested (but the suggestion is so ridiculous that it is impossible to treat it with any seriousness) that the charge relates to the typed explanation which the applicant furnished in answer to the Audit's objection and to which I have already made a reference. To my mind, therefore, it is quite clear that if I were to allow these proceedings to continue I would be allowing a farce to be enacted to the great harassment of the applicant. To use the language of Mr. Justice MUKERJI in *Gokul Prasad* v. *Debi Das* (2) "to allow the case to proceed would be to allow a mock trial to proceed, with no purpose." I therefore quash the entire proceedings taken against the petitioner, cancel the charge sheet framed and direct that he be discharged.

Application allowed.

(1) (1930) 7 O.W.N., 564

(2) (1924) 23 A.L.J., 21 (23).