Privy Council Appeal No. 99 *of* 1946

Gokulchand Dwarkadas Morarka - - - - - - *Appellant*

v.

The King - - - - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH JANUARY, 1948

Present at the Hearing:

LORD UTHWATT
LORD DU PARCQ
LORD OAKSEY
SIR JOHN BEAUMONT

[*Delivered by* SIR JOHN BEAUMONT]

This is an appeal by special leave from the judgment and order of the High Court of Judicature at Bombay dated the 5th September 1946 setting aside the acquittal of the appellant of an offence under clause 18 (2) of the Cotton Cloth and Yarn (Control) Order 1943 by the judgment and order of the City Magistrate of Sholapur and sentencing the appellant to undergo rigorous imprisonment for one month and to pay a fine of Rs.1,550/-.

The facts giving rise to the prosecution of the appellant were stated in a written report made by Mr. Mulik Sub-Inspector of Police Food Control Sholapur to the Sub-Inspector of Police, Sholapur on the 24th January, 1945. The Report which is Exhibit No. 1 "L" was in the following terms:—

"I, Raghunath Santaji Mulik, Sub-Inspector of Police, Food Control, Sholapur, give in writing as follows:—

> Having got information that there were cloth without "Textile" mark and grain hoarded in the bungalow situate at Motibag belonging to the Old Mill at Sholapur, Mr. Yasin Ansar Bhai, the Inspector of Police took search of the said bungalow on the date the 4th August 1944; but as it drew dark, the search of the outhouse pertaining to the said bungalow remained to be taken. Therefore, the rooms of the said outhouse were sealed. On the date the 5th August 1944 the Inspector of Police ordered me to take search of the said outhouse. In pursuance thereof I took search of the said outhouse. In the same, Dhoti pairs 196 (measuring) 1,903½ yards with a name in the borders; Dhoti pairs 426 (measuring) 3,804¼ yards with no name in the borders; Patals (Sarees) 25 (measuring) 125 yards; and muslin pieces 3, (measuring) 60 yards in all, 5,892 yards of cloth without "Textile" mark were found. All that has been seized after making a Panchanama.

Mr. Gokulchand Dwarkadas Morarka is the agent of the Sholapur Old Mill. Whenever he comes to Sholapur, he puts up in the bungalow situated at Motibag. Mr. Gokulchand Dwarkadas has purchased from the said mill by oral order the aforesaid cloth between the dates the 2nd December 1942 and 15th March 1943 for his own use; and all that cloth has been taken and kept in the said bungalow on the date the 2nd August 1943.

As Mr. Gokulchand Dwarkadas Morarka has been staying at Malad, I went to Malad and took search of his house. Whatever clothes of daily wear were found in the same, were sufficient (for use) to him and the members of his family. Accordingly, a Panchanama of the clothes in his house was made.

As Mr. Gokulchand Dwarkadas Morarka has kept with him cloth in excess of what was necessary, I have a complaint against him on behalf of the Government according to clause 18 (2) of the Cotton Cloth and Yarn Control Order (of) 1943."

For the purposes of the present appeal it will be assumed that the facts stated in that report were proved and constituted an offence under section 18 (2) of the Cotton Cloth and Yarn (Control) Order 1943.

Section 23 of that Order as amended provides that " No prosecution for the contravention of any of the provisions of this Order shall be instituted without the previous sanction of the Provincial Government (or of such officer of the Provincial Government not below the rank of District Magistrate as the Provincial Government may by general or special order in writing authorise in this behalf)."

On the 5th January, 1945, sanction to the prosecution of the appellant was given by Order of the Government of Bombay in the following terms:—

SANCTION TO PROSECUTE.

(Signed) H. N. G.
Cotton Cloth and Yarn (Control)
Order, 1943.
Contravention of the Provisions
Prosecutions for—

Government of Bombay.
Finance Department (Supply).
Resolution No. 518.
Bombay Castle, 5th January 1945.

Endorsement from the District Magistrate, Sholapur, No. XIX/4500, dated the 8th November 1944.

Resolution:—Government is pleased to accord sanction under clause 23 of the Cotton Cloth and Yarn (Control) Order, 1943 to the Prosecution of Mr. Gokulchand Dwarkadas Morarka for breach of the provisions of clause 18 (2) of the said order.

By order of the Governor of Bombay,
(Signed)
Deputy Secretary to Government, Bombay.

To
The District Magistrate, Sholapur.

It will be observed that this sanction, which is Exhibit I on the record, specifies the appellant as the person to be prosecuted and the clause of the order which he is alleged to have contravened, but does not specify the acts of the appellant alleged to constitute such contravention. The question which arises for decision on this appeal is whether this sanction, read with the evidence adduced at the trial, constituted a due compliance with the provisions of clause 23 of the said Order.

The Trial Magistrate held that the sanction was sufficient, but acquitted the accused on the merits of the case. On appeal by the Government of Bombay against this acquittal the High Court convicted the appellant as already stated.

Upon the question as to the sufficiency of the sanction the High Court noticed two previous decisions of such Court, Criminal Appeal Nos. 535 of 1945 and 548 of 1946, by which it had been held that the burden of proving that the requisite sanction had been obtained rested on the prosecution, and that such burden involved proof that the sanctioning authority had given the sanction in reference to the facts on which the proposed prosecution was to be based, facts which might appear on the face of the sanction, or might be proved by extraneous evidence. The Court accepted this view of the law, but held that in the case of the appellant it had been proved that the facts on which the prosecution was proposed to be based had been before the sanctioning authority when the sanction was given. The view of the Court upon this question appears from the following passage in the judgment of the Court:—" A Sub-Inspector who attached the cloth has sworn that on the 8th September 1944 he submitted a report to the District Superintendent of Police asking for sanction to prosecute the accused under clause 18 (2) of the Cotton Cloth and Yarn (Control) Order 1943. Subsequently the matter was forwarded to the District Magistrate and the Resolution granting sanction itself refers to the endorsement of the District Magistrate, Sholapur No. XIX/4500 dated 8th November 1944. It is true that in his cross-examination the Sub-Inspector admitted that he had not got a copy of the aforesaid endorsement made by the District Magistrate, but his evidence would show that the said endorsement was made in reference to the report which the Sub-Inspector had forwarded to the District Superintendent of Police as already stated ". This view of the facts is not supported by the evidence on record. There is no evidence to show that the report of the Sub-Inspector to the District Superintendent of Police, which was not put in evidence, was forwarded to the District Magistrate, nor is there any evidence as to the contents of the endorsement of the District Magistrate referred to in the sanction, which endorsement also was not put in evidence. The prosecution was in a position either to produce or to account for the absence of the report made to the District Superintendent of Police and the endorsement of the District Magistrate referred to in the sanction, and to call any necessary oral evidence to supplement the documents and show what were the facts on which the sanction was given. Their Lordships see no justification for drawing inferences in favour of the prosecution upon matters on which they withheld evidence under their control. Under section 114 of the Evidence Act illustration (g) the normal presumption is that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.

Upon this state of the evidence the respondent has argued that the view which has prevailed in the High Court of Bombay is wrong and that a sanction which names the person to be prosecuted and specifies the provision of the Order which he is alleged to have contravened is a sufficient compliance with clause 23 of the said Order. In their Lordships' view, in order to comply with the provisions of clause 23 it must be proved that the sanction was given in respect of the facts constituting the offence charged. It is plainly desirable that the facts should be referred to on the face of the sanction, but this is not essential, since clause 23 does not require the sanction to be in any particular form, nor even to be in writing. But if the facts constituting the offence charged are not shown on the face of the sanction, the prosecution must prove by extraneous evidence that those facts were placed before the sanctioning authority. The sanction to prosecute is an important matter; it constitutes a condition precedent to the institution of the prosecution and the Government have an absolute discretion to grant or withhold their sanction. They are not, as the High Court seem to have thought, concerned merely to see that the evidence discloses a *prima facie* case against the person sought to be prosecuted. They can refuse sanction on any ground which commends itself to them, for example, that on political or economic grounds they regard a prosecution as inexpedient.

Looked at as a matter of substance it is plain that the Government cannot adequately discharge the obligation of deciding whether to give or withhold a sanction without a knowledge of the facts of the case. Nor, in their Lordships' view, is a sanction given without reference to the facts constituting the offence a compliance with the actual terms of clause 23. Under that clause sanction has to be given to a prosecution for the contravention of any of the provisions of the Order. A person could not be charged merely with the breach of a particular provision of the Order; he must be charged with the commission of certain acts which constitute a breach, and it is to that prosecution—that is, for having done acts which constitute a breach of the Order—that the sanction is required. In the present case there is nothing on the face of the sanction, and no extraneous evidence, to show that the sanctioning authority knew the facts alleged to constitute a breach of the Order, and the sanction is invalid.

Mr. Megaw for the respondent has suggested that this view of the law would involve in every case that the Court would be bound to see that the case proved corresponded exactly with the case for which sanction had been given. But this is not so. The giving of sanction confers jurisdiction on the Court to try the case and the Judge or Magistrate having jurisdiction must try the case in the ordinary way under the Code of Criminal Procedure. The charge need not follow the exact terms of the sanction, though it must not relate to an offence essentially different from that to which the sanction relates.

Their Lordships were referred to certain decisions upon the group of sections in the Code of Criminal Procedure, 195 to 199, relating to sanctions. These cases do not appear to lay down any principle inconsistent with the views expressed above, and as the sections of the Code are expressed in language different from that used in clause 23 of the Cotton Cloth and Yarn (Control) Order 1943, and are directed to different objects, no useful purpose would be served by an examination of the cases. It may be observed that section 230 of the Code provides that if the offence stated in a new or altered charge is one for the prosecution of which previous sanction is necessary the case shall not be proceeded with until such sanction is obtained " unless sanction has been already obtained for a prosecution on the same facts as those on which the new or altered charge is founded." The latter words indicate that the legislature contemplated that sanctions under the Code would be given in respect of the facts constituting the offence charged.

It was argued by Mr. Megaw, though not very strenuously, that even if the sanction was defective the defect could be cured under the provisions of section 537 of the Code of Criminal Procedure which provides, so far as material, that no finding, sentence or order passed by a Court of competent jurisdiction shall be altered or reversed on account of any error, omission or irregularity in any proceedings before or during the trial, unless such error, omission or irregularity has, in fact, occasioned a failure of justice. It was not disputed that if the sanction was invalid the Trial Court was not a Court of competent jurisdiction, but Mr. Megaw contends that there was in this case a sanction, and that the failure of the Crown to prove the facts on which the sanction was granted amounted to no more than an irregularity. Their Lordships are unable to accept this view. For thereasons above expressed the sanction given was not such a sanction as was required by clause 23 of the Cotton Cloth and Yarn (Control) Order 1943 and was, therefore, not a valid sanction. A defect in the jurisdiction of the Court can never be cured under section 537.

For these reasons their Lordships will humbly advise His Majesty that this appeal be allowed, that the Order of the High Court of Judicature at Bombay dated 5th September 1946 be set aside and the Order dated 21st August 1945 of the City Magistrate of Sholapur acquitting the accused and ordering the property before the Court to be returned to the person concerned from whom it was attached, be restored.

(59276) Wt. 8013—20 180 1/48 D.L. G. 338

In the Privy Council

GOKULCHAND DWARKADAS MORARKA

v.

THE KING

[DELIVERED BY SIR JOHN BEAUMONT]

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