

## APPELLATE CRIMINAL

Before Mr. Justice Bhagwati and Mr. Justice Dixit.

GULAM MAHOMED v. STATE.\*

1952  
July, 8

*Criminal Procedure Code (Act V. of 1898) s. 561 A—Expunging of remarks from judgment of the lower Court—Powers of High Court—Principles governing the exercise of such powers.*

Magistrates and Judges are entitled to pass remarks in their judgments on the conduct of a party or of a witness to proceedings provided the remarks are justified by findings.

*In re Public Prosecutor,*<sup>(1)</sup> *Panchanan Banerji v. Upendranath Battacharjee,*<sup>(2)</sup> *In re Advocate General Punjab,*<sup>(3)</sup> *Karamat Ullah v. Emperor,*<sup>(4)</sup> *Hardless v. Hardless,*<sup>(5)</sup> *In re Advocate General,*<sup>(6)</sup> and *In the matter of Daly and others,*<sup>(7)</sup> relied upon.

CRIMINAL APPLICATION for expunging remarks from the judgment of S. B. Awar, Presidency Magistrate, 15th Court, Bombay.

One Gulam Mohomed (accused No. 1) and his mother Khatijabai (accused No. 2) were prosecuted under s. 5 of the Bombay Prevention of Prostitution Act, 1923, read with s. 114 of the Indian Penal Code for living on the earnings of prostitution. The petitioner, Essa Noor Mahomed, had given information to the Police against the accused and acted as the bogus customer in the trap that was laid by the Police. The petitioner was examined as a witness for the prosecution. The trial Magistrate disbelieved the evidence for the prosecution and acquitted both the accused.

In the course of his judgment the trial Magistrate passed certain remarks against the petitioner observing, *inter alia*, that "he was not only an unscrupulous and treacherous person but also was a most dangerous man".

The State preferred an appeal to the High Court against the acquittal of the accused. The petitioner also filed an application to the High Court under s. 561A of the Criminal Procedure, Code, 1898, that the remarks passed against him by the trial Magistrate in his judgment be expunged on the ground that they had caused great prejudice and harm to him and also affected his reputation and business.

\* Criminal Application No. 499 of 1952 in Criminal Appeal No. 203 of 1952.

<sup>(1)</sup> [1944] A. I. R. Mad. 320.

<sup>(2)</sup> (1927) 49 All. 254.

<sup>(3)</sup> (1938) 20 Lah. 327.

<sup>(4)</sup> [1940] A. I. R. Lah. 42.

<sup>(5)</sup> (1940) A. I. R. Lah. 82.

<sup>(6)</sup> (1939) 40 Cr. L. J. 655.

<sup>(7)</sup> (1927) 9 Lah. 269.

The application was heard.

K. A. Somjee, with Messrs. Captain and Vaidya, for the petitioner.

M. G. Chitale, for the Government Pleader, for the State.

BHAGWATI J.—[After stating the facts and disposing of the appeal His Lordship proceeded.]

In regard to criminal application No. 499 of 1952 which is an application for expunging certain remarks which were made by the learned Presidency Magistrate against Essa Noor Mohamed, it will be apposite to refer to the principles which govern the applications for expunging such remarks as laid down in the authorities. The first case to which our attention was drawn by Mr. K. A. Somjee in this connection was *In re Public Prosecutor*.<sup>(1)</sup> It was a decision of Leach C. J. and Lakshmana Rao J. of the Madras High Court. In the case before the learned Judges of the Madras High Court a sort of a homily was preached by the learned Sessions Judge to the Government in regard to the desirability of not enforcing too strictly certain punitive measures which were enacted by the Government. The Government had made an application for an order expunging these remarks from the judgment of the learned Sessions Judge. The learned Chief Justice in the course of the judgment observed (p. 320):—

“ . . . We have no doubt that in a proper case the Court has power to expunge a part of a judgment of a Court subordinate to it; but it will only take such action when the words objected to are not relevant to the case and are of a scandalous or very improper nature.”

He then quoted the observations of Sulaiman J. (as he then was) in *Panchnan Banerji v. Upendranath Battacharjee*<sup>(2)</sup> that (p. 320):

“ . . . he (Sulaiman J.) saw no reason why the inherent power of the Court should not comprise a power to order a deletion of passages which are either irrelevant or inadmissible and which adversely affect the character of persons before the Court.”

He further quoted the observations of Mr. Justice Din Mohammad J. in *In re Advocate-General, Punjab*<sup>(3)</sup> that (p. 320):—

“Courts are not expected to play to the gallery, nor to invoke the press in a manner which is liable to be misunderstood and may land the administration in general in an awkward situation.”

<sup>(1)</sup> [1944] A. I. R. Mad. 320.

<sup>(2)</sup> (1927) 49 All. 254 at p. 256.

<sup>(3)</sup> (1938) 20 Lah. 327 at p. 329.

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After quoting these observations, the learned Chief Justice observed that (p. 320):—

“ . . . It would have been far better if the learned Sessions Judge had confined himself to the case before him and had omitted the observations complained of, but it is a different matter to say that they are of such a nature that the Court should expunge them from the record. The Court must carefully guard against doing anything which might tend to restrict the free expression of judicial opinion on a matter before the Court.”

And, therefore, even though the Court considered that the homily should not have been indulged in and the Court did not agree with all the Sessions Judge had said, that was not a case which called for expunction. It cannot be gainsaid that Magistrates and Judges are entitled to pass remarks in their judgments on the conduct of a party or of a witness to proceedings provided the remarks are justified by findings, and it was observed by Mr. Justice Dalip Singh in *Karamat Ullah v. Emperor*,<sup>(1)</sup> that a Magistrate was not bound to confine himself merely to a finding that the accused was not proved guilty. Such a verdict often leaves the accused with a stain on his character in the public estimation though not in law and it was the duty of a Magistrate if he considered that the prosecution case was not only not proved but was deliberately false and concocted, to give such a finding in favour of the accused so that the accused should leave the Court without a stain on his character. Care should, however, be taken to base the remarks and the comments which the learned Magistrate or the Judge makes in regard to the character or conduct of witnesses who appear to support the case on findings arrived at in that behalf, and the remarks and the comments should not be lightly made or be the result of any sentiment or prejudice on the part of the Magistrate or the Judge. Our attention was next drawn by Mr. K. A. Somjee to a decision of a Special Bench of the Lahore High Court reported in *Hardless v. Hardless*,<sup>(2)</sup> where it was laid down that

“Judges, when commenting on the conduct of parties and others, should be very careful to use sober restrained language. A passage which is not necessary to the conclusion of the Judge nor even necessary to his argument and is likely to militate seriously against party's earning a living in his profession should be expunged from the judgment.”

We may in this connection also refer to the passage which has been quoted in Mitra's Criminal Procedure Code, Vol. II, p. 1691:—

<sup>(1)</sup> [1940] A. I. R. Lah. 42.

<sup>(2)</sup> [1940] A. I. R. Lah. 82 F. B.

"While on the one hand Courts are at liberty to discuss the conduct of the persons before them, either as parties or as witnesses untrammelled by any considerations, on the other they are not permitted to travel beyond the record and are bound to exercise due restraint on the language employed by them. In other words, they should neither make any such sweeping assertions as are not borne out by the evidence produced before them nor should they use language which is unduly harsh (*Vide In re Advocate-General.*"<sup>(1)</sup>)

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These principles have been very clearly and forcefully expounded in *In the matter of Daly*<sup>(2)</sup> at p. 275:—

"...the High Court has power to expunge passages from judgments delivered by itself or by Subordinate Court but this jurisdiction is of an extraordinary nature and has to be exercised with great care and caution. On the one hand, it has to be borne in mind that in weighing evidence and arriving at conclusions on questions of fact, lower Courts have to review the conduct of witnesses with reference to particular incidents and at times have to adjudge generally on the veracity or otherwise of such persons and in doing so they have often to make remarks which reflect adversely on their character. It is of the utmost importance to the administration of justice that Courts should be allowed to perform their functions freely and fearlessly and without undue interference by the High Court. At the same time it is equally necessary that the right of Magistrates to make disparaging remarks on persons who appear, or are named, in the course of a trial, is one that should be exercised with great reserve and moderation, especially where the person disparaged has had little or no opportunity of explaining or defending himself. If the conduct of the witness appears to the Judge to be suspicious or otherwise not above-board, he has the right and the duty to test his evidence by putting questions to him. But before he is justified in commenting adversely upon his evidence he must establish the particular fact warranting such criticism by proper evidence in Court and not on conjectures or by reference to materials which are not properly on the record. Again, a Magistrate should not in his judgment make observations prejudicial to the character of a person, who is neither a witness nor a party to the proceedings and who has no opportunity of being heard."

[Their Lordships ordered the following words to be deleted from the Magistrate's judgment:

"After going through the evidence, I have no doubt that the complainant is not only an unscrupulous and treacherous person but he is also a most dangerous man."]

*Order accordingly.*

K. B. S.

<sup>(1)</sup> (1939) 40 Cr. L. J. 655.

<sup>(2)</sup> (1927) 9 Lah. 269.