
(1870) 01 CAL CK 0020
In the Calcutta High Court

**In Re: Mahesh Chandra Banerjee
 The Queen**

Date of Decision : 07-01-1870

Acts Referred:

Citation : (1870) 01 CAL CK 0020

Judgement

Norman, J.—Mr. Bourke, on behalf of the parties in these several cases, presented to this Court a petition praying the Court to quash a certain order of Mr. Grant, the Magistrate of Bancooah, whereby he directed Purna Chandra Banerjee, Mahesh Goswami, and Mahabharat Dobey to be put on their defence before him, and a certain other order whereby be directed Kali Sirkar, Hari Mookerjee, Haru Goswami, Ram Chandra Chuckerbutty, and Phal Mohan, to be tried before the Court of Session; or that, if the Court should be of opinion that there was any evidence against any of the petitioners, the Court; should transfer the case for hearing to the Magistrate of Burdwan, or some other Magistrate. On reading the petition of Purna Chandra Banerjee, verified by Mahesh Goswami, this Court on the 26th of October ordered that the Magistrate should forthwith send up the papers with all the evidence and all orders passed by the Magistrate, and submit to this Court any explanation he might have to offer with reference to the charges made against him in the petitions, and that a copy of the petition and the orders made thereon should be transmitted to the Magistrate, to enable him to submit the explanation required.

2. The following outline of the cases in their early stages is taken from the statement of the Magistrate:--

On the 8th of August a complaint was made to the Officer in charge of the Bissenpore Police Station, that one Nanda Dome had been beaten by the servants of the Banerjees of Ajudhia, and was lying in immediate danger of death. The Officer having made an investigation, and having found Nanda Dome lying insensible, with some marks of blood on a cloth covering him, but with no visible marks of violence on his body, decided to have him sent for medical inspection to the headquarters of the sub-division, viz., Gurbetta in Midnapore. The Dome was removed in a dooly to Bissenpore, and later on the same day, the

9th, sent on in charge of a constable who had orders to produce him as soon as possible before the authorities (I suppose Mr. Grant means the Deputy Magistrate) at Gurbetta.

3. The substance of the complaint, and the fact that the Dome had been sent to Gurbetta for medical inspection, were duly entered in the station diary of Bissenpore.

4. On the 13th of August the constable who had escorted the Dome to Gurbetta returned to Bissenpore, and reported that the Deputy Magistrate had declined to take up the case as a police prosecution, the case being simply one of hurt, and had dismissed the Dome, with the information that he might complain in the usual way if he pleased. On the 15th of August, as no authentic report of the result of any medical examination had been received, the Officer wrote to the Court Sub-inspector of Gurbetta for information. The Sub-inspector replied that the Deputy Magistrate had refused to take up the case as being merely one of hurt, &c., it is shown that a person, representing himself as Nanda Dome, appeared on the 11th before the Deputy Magistrate of Gurbetta, but did not desire to prosecute.

5. On the 13th, Mr. Grant received information from the District Superintendent of Police that a certain Dome had been so beaten by the servants of the Banerjees of Ajudhia, that he had lain for days in immediate danger of death, and that his Moods begged the interference of the authorities before that event which was momentarily expected, lest by removing the corpse after death the Banerjees should cause all evidence of the crime to disappear. Mr. Grant directed the District Superintendent to enquire into the matter, desiring him to employ particular officers to conduct the inquiry. On the 16th, the reports of the two police officers named by Mr. Grant to conduct the inquiry came before him. These officers conducted their inquiries separately, and made separate reports. The reports, with a letter from the officer who had been in charge of the Bissenpore Police Station, and with the man Nanda Dome, who was alleged to have been beaten, and sent to Gurbetta, were brought before Mr. Grant on the 16th August. The reports were both to the same effect, viz., that Nanda Dome had been beaten; had been taken to Gurbetta; and had been produced before the Deputy Magistrate, who had not taken up the case as a police case, but told Nanda Dome, he could himself prosecute which he was not inclined to do. The man who appeared before Mr. Grant and stated that he was Nanda Dome, in Mr. Grant's presence declined to prosecute, whereupon Mr. Grant dismissed him.

6. Finding that the police officer, who had been sent with Nanda Dome from Bissenpore to Gurbetta, had reported on his return to Bissenpore that he had been fined by the Deputy Magistrate rupees 10 for delay on the road, Mr. Grant Galled for the proceedings in which the policeman was fined. The return to Mr. Grant's requisition showed that the Deputy Magistrate had not inflicted any fine on the constable, or even noticed the fact of his having delayed on the road.

7. Mr. Grant says that the distance between Bissenpore and Gurbetta is only 16 miles, the road a public metalled road, with only one unabridged river, which is fordable. On discovering that the policeman, who had started from Bissenpore before noon on the 9th, and ought to have arrived and reported himself the same evening at Gurbetta, did not present himself before the Deputy Magistrate at that place till 10 A. M. on the 11th; that the man in the charge of that policeman, who was supposed to be in an insensible state, unable to stand or move, when he left Bissenpore, appeared before the Deputy Magistrate and spoke for himself, Mr. Grant felt convinced that some foul practice had taken place. While considering what steps he should take, he says I received privately (it elsewhere appears that this was by an anonymous petition) information which cleared up the case considerably. It was to the effect that the Banerjees, whose servants at their orders had committed the assault on the Dome "out of which the whole case originated, had taken the sick man out of the hands of the constable while on his way to Gurbetta, had privately "removed him, and had prevailed on the constable to allow a substitute to personate the sick man. At the same time I was informed that the sick man had died of his injuries."

8. In the 2nd, 3rd, 4th, 5th, 6th, 7th, and 8th paragraphs of the petition, it is stated, that on the 16th of August, Nanda Dome was present and withdrew the complaint, and that Mr. Grant himself found that there were no grounds for proceeding further against the petitioners; that since the 16th of August Mr. Grant had not acquired any knowledge of any offence having been committed by the petitioners of which he could legally take cognizance under section. 68 of the Code of Criminal Procedure; that on the 24th of August warrants were illegally issued for the arrest of witnesses for the prosecution, who were thereupon illegally arrested and detained in custody; that on the same day warrants were illegally issued for the arrest of the petitioners, whereupon the petitioner Mahesh Chandra Banerjee was illegally arrested and confined in jail for fourteen days, Purna Chandra Bannerjee for nine days. Kali Sirkar, Hari Mookerjee, Haru Goswami, Ramchandra Chuckerbutty and Phal Mohan for eight days, between the 24th of August and the 6th of September 1869; that during the fortnight which elapsed between the issue of the warrants and the 6th of September, several applications were made to Mr. Grant to enquire into the truth or falsehood of any complaints that might have been made, or might be made against the petitioners; that no notice was taken of their applications, though the Magistrate and the police officers who had made the inquiry were, during the whole of that time, in the sudder station, where the petitioners together with the witnesses were at that time detained in custody; and that the petitioners believe that they were arrested on charges of murder, and of grievous hurt; but Mr. Grant would not allow them to inspect the warrants, all which they believe were informal and illegal.

9. Mr. Grant's explanation is as follows:--

Kanai Goswami. Dinu Sain. Madhab Dome, Kailas Dome. Tarachand Dome.

Madhab Chuckerbutty in the margin who were Tarrak Roy, head constable, Shibu Pattra. Jainarayan Mandal. Ballai Sheikh.

Acting u/s 68 of the Code of Criminal Procedure, I issued warrants for the arrest of all whom the police reports hitherto made to me had shown to be concerned, either in the original assault or in the transport of the sick man, under the belief that the sick man had died from the effects of the beating; my warrants referred either to section 302 of the Penal Code or to that section in connection with section 109. The persons thus arrested were Mahesh Banerjee, Purna Banerjee, Madhab Dome, Dhan Krishna, the constable, and the man who had appeared before me calling himself Nanda Dome, (whom I believed to be a mere personator of the real Nanda, whom I supposed to have died of his hurts), Mahesh Goswami, and Mahabharat Nagdi. At the same time I ordered warrants of arrest to issue against six persons who had been mentioned in the police reports to me as having identified the above person as the veritable Nanda Dome; these persons, whose names I give in the margin (Kanai Goswami. Dinu Sain. Madhab Dome, Kailas Dome. Tarachand Dome. Madhab Chuckerbutty), being arrested at first as witnesses only to speak to Nanda's identity before me, and the warrants being issued u/s 188 of the Code of Criminal Procedure. Again, warrants under the same section were issued against the persons named in the margin (Tarrak Roy, head constable, Shibu Pattra. Jainarayan Mandal. Ballai Sheikh.) who were understood to be able to give evidence in the matter of taking the sick man out of the charge of the constable. At the same time I gave orders to a certain police officer to make a fresh investigation and report in the case.

The accused Mahesh Banerjee was arrested on the 24th of August, Purna Banerjee surrendered himself on the 28th, and Mahesh Goswami on the 27th, Madhab Dome, Dhan Krishna and the questionable Nanda were arrested on the 28th, and Mahabharat Nagdi on the 29th.

All those whose names appear in the first marginal list (of witnesses) above given were brought in on the 28th; the witnesses of the second marginal list on the 29th of August. Mahesh Banerjee, Purna Banerjee, Madhab Dome, the questionable Nanda Dome, and Dhankrishna were all committed to jail u/s 302, or that and section 109 combined. Mahesh Goswami and Mahabharat Nagdi, who had at first been arrested u/s 325 only, were committed to jail under the same charge as the above, viz., section 302, as I found from the reports that they were implicated in the same manner as Mahesh Banerjee and Purna Banerjee. Bail was not permitted to any of the above. The persons named in the first marginal list were, when brought up in custody, after consideration of all the circumstances which seemed to show that they had intention ally identified to the police, as Nanda Dome, a person who was not Nanda Dome, ordered to be committed to jail on a charge of giving false information, unless they could provide security to the amount of rupees 200 each.

Thus far I had acted on two specific sources of information, viz., one, the private information received by me on the 23rd of August, and second, the report of the

police in the investigation ordered by me on the 13th of August.

On the 30th of August I received still further information. I was told by a letter from the jailor that two of the prisoners, viz., Madhab and Nanda Dome, above-mentioned, wished to see me to make a statement to me. I sent for the two men and recorded the statement of each, and from information therein received, I issued warrants under sections 194 and 101 of the Penal Code, against Kali Sirkar, Hari Mookerjee, Haru Goswami, Ram Chand Chuckerbutty, and Phal Mohan Nagdi.

At the same time warrants were issued u/s 188 of the Code of Criminal Procedure against Khatu Dome, Haru Dome, and Andarmoodde a Tamali by caste, as witnesses.

Of the above accused, Kali Sirkar, Phal Mohan Nagdi, and Hari Mookerjee were brought in custody on the 1st of September, Ramchand Chuckerbutty and Haru Goswami at different times on the 6th of September.

The report made by the officer to whom I had issued orders on the 24th was dated the 29th Sunday, and on the following day, Monday, I received the fresh information which led me to issue the warrants of that date, and which were executed on the following day, viz., the 1st of September.

At that date I had in custody every one, against whom a warrant had been issued, except Ramchand Chuckerbutty and Haru Goswami.

In the meantime, the prisoners had been by my orders from the commencement so disposed in jail, as to prevent that portion of them consisting of the Banerjees and their dependants, from communicating with the Domes and others, who having been first arrested as witnesses, had been afterwards committed to jail as accused of having aided and abetted the Banerjees and their servants.

This I did because I had almost made up my mind to admit these last as witnesses after all, considering their criminality, if any, was the result of the pressure and compulsion of the Banerjees and their servants, and I wished to prevent the possibility of the latter while in jail tampering with the former. The case was taken up by me judicially on the 6th of September, and the evidence taken by me on that day consisted of that of the four Domes, relations of the assaulted Nanda, who had carried him in the dooley, and of the keeper of the chattri, where the party lodged after leaving Bissenpore.

But for the Magistrate's own statement it would seem hardly credible that a number of accused persons should have been detained in jail for periods of time ranging from eight to fourteen days, not only without ever having been confronted with their accuser, but without having been informed of the particulars of any charge made against them. Such a proceeding is a violation of the first principles of justice. I now proceed to show that the steps taken by the Magistrate were in direct contravention of the rules laid down by the Code of Criminal Procedure.

The Magistrate assumed to act under the 68th section, which enacts that except as therein provided the Magistrate of the district "may without any complaint take cognizance of any offence which may come to his knowledge, and may issue a summons, or in cases where a warrant may issue, a warrant of arrest against the person known or suspected to have committed such offence, in the same manner as if a complaint had been made against such person.

10. Now we have seen that according to his own statement, the Magistrate issued warrants against Mahesh Banerjee, Purna Banerjee and others on charges of murder.

11. By section 68, the Magistrate is only empowered to take cognizance of an offence which may come to his knowledge. It cannot be contended for a moment that it had come to the knowledge of the Magistrate that the offence of murder had been committed. A gratuitous suspicion or a belief founded on private and secret information contained in an anonymous petition is not knowledge.

12. Nothing can be more unfair to the prisoners than the mode in which the Magistrate has dealt with the accusation they have lain under. The Magistrate says distinctly that the orders for the arrest of Mahesh Banerjee and Purna Banerjee were founded on private information. If that information was a charge or complaint against the accused, such a charge should only be acted upon, when duly recorded by being reduced into writing and signed by the complainant and also by the Magistrate as required by section 66. It has apparently not been so recorded. The prisoners have had no access to it. To this hour they do not know who is their accuser, or what is the charge which he made against them. In forwarding the record, and in his explanation to this Court, the Magistrate only refers to it as his private information. What that information was or how obtained he has not thought fit to tell us; it is in fact from a reference in a paper in the vernacular, which we find on the record, that we are led to believe that the private information was contained in an anonymous petition.

13. The warrant which a Magistrate acting u/s 63 is empowered to issue in the case of a person suspected to have committed an offence, is a warrant of arrest as described in section 76 in Form B. This warrant simply authorises the officer to whom it is addressed to apprehend the party charged or suspected, and produce him before the Magistrate. It is not a warrant of commitment, and does not authorise the detention of the party for any longer period than is necessary for his production before the Magistrate. It is the duty of the officer executing the warrant to bring the party before the Magistrate as soon as possible after his apprehension, when, as the prisoner has been produced before the Magistrate, the warrant has been fully obeyed, and is exhausted. No one can justify any detention of the party charged under that warrant, after he has been produced before the Magistrate. If the accused is to be detained further, it must be under some fresh warrant or order snob as an order of remand u/s 224. A warrant for the further detention of an accused. person would be a warrant of commitment u/ s 222, directed to some jailor or other person having authority to receive and

keep prisoners. The 68th section does not authorise a Magistrate to make out a warrant of commitment. This warrant, which must be in Form C, must state that the prisoner is charged with some particular offence, and must show the authority of the committing officer. Before making out that warrant, the Magistrate must ascertain the existence of a charge, and as that is a matter of fact which must be proved before the Magistrate can fill up the warrant in the form prescribed, he must ascertain the fact by the evidence of a witness or witnesses who must be examined on oath or affirmation, as required by sections 43 and 193, and in the presence of the accused, as required by section 194. Before committing an accused person to jail otherwise than for mere temporary custody, as for instance until the arrival of witnesses known to be on their way or the like, the Magistrate is bound to see that upon the evidence some case is made out against the prisoner, or that there are reasonable grounds for believing that he has been guilty of the offence imputed to him.

14. If, after the Magistrate has commenced the inquiry, he thinks it necessary to defer the examination or further examination of witnesses, he is empowered by section 224 by written order to adjourn the inquiry, and to remand the accused person for such time as may be deemed reasonable, not exceeding fifteen days. In the present case there was no question of adjournment of the inquiry. The accused were not brought before the Magistrate at all, nor was the inquiry commenced until the 6th of September, which was the 14th day after the arrest of Mahesh Banerjee, the 9th day after the arrest of Purna Chandra Banerjee, the 8th day after the arrest of the others, and during the whole of that period the above mentioned accused parties were illegally detained in jail under the warrant of arrest.

15. I have spoken of the illegal detention of the accused Mahesh Banerjee and others. I now come to the warrants of arrest against witnesses. Under these warrants eleven or more persons were arrested on the 28th and the 29th of August. The warrants are in the following form:

Kailas Dome has been cited as a witness; accordingly you are "ordered to seize the said Kailas Dome and bring him before me without delay.

16. It will be seen that they do not state the object or the ground of the arrest. The Magistrate supposes that he was acting u/s 188. But section 188 only empowers a Magistrate, instead of issuing a summons, to issue a warrant in the first instance, where the Magistrate sees reason to believe, that is, after a reasonable inquiry believes, that the particular witness will not attend to give evidence without being compelled to do so. It was never intended to authorise a Magistrate, without inquiring, to issue warrants by wholesale in lieu of summons against persons who were understood by him to be able to give evidence, and to shelter himself under the pretence that they would not attend.

17. A warrant u/s 188 would be a warrant of arrest u/s 76 in Form B. I had occasion some years ago, in the case of a witness improperly arrested and put in

irons, to point out that a warrant u/s 188 to be good, and to be in accordance with the Form B must specify the special matter on which it proceeds 1 W.R. Criminal Circular Orders 7. A warrant in Form B, the only one the Magistrate has power to issue, would simply order the production of the witness before the Magistrate, whose duty it would be to examine and discharge him at once.

18. Of six of the persons so arrested as witnesses, Kanai Goswami, Deno Sen, Madbab Dome, Kailas Dome, Tarachand Dome, and Madhab Chuckerbutty, the Magistrate says, when brought up in custody, after a consideration of all the circumstances which seemed to show that they had intentionally identified to the Police as Nanda Dome a person who was not Nanda Dome, they were ordered to be committed to jail on a charge of giving false information, unless they could provide security to the amount of rupees 200 each."

19. On the principles which I have already stated, the committal appears to have been wholly illegal, as it was made by the Magistrate without taking any evidence whatever against the accused. The Magistrate had nothing before him except the Police reports and the private information or anonymous letter to which he continually refers.

20. On the 30th of August Madhab Dome and Nanda Dome being sent for by the Magistrate gave him certain information. The Magistrate took down their statements. But those statements are not made on oath or in the presence of any of the accused parties. Mr. Grant says he took down these statements in his executive capacity and not in his judicial capacity. However that may be, he acted upon that information as Magistrate, and forthwith issued warrants for the arrest of Kali Sirkar, Hari Mookerjee, Haru Goswami, Ram Chand Chuckerbutty, and Phal Mohan Nagdi, and at the same time he issued warrants for the arrest of three persons as witnesses, Khatu Dome, Haru Dome, and a moodee whose name the Magistrate did not know. He describes him as a Tamali who keeps a chattri at Baukadoho. On the 1st of September all the persons suspected of having committed offences, except Ram Chand Chuckerbutty and Haru Goswami, and nineteen witnesses had been arrested and were in custody. These witnesses were actually detained in custody, under what authority I am wholly unable to understand, from the several dates of their arrest until the 6th of September, and many of them till much later date. Khatu Dome, for instance, was examined on the 29th of September. The Magistrate thinks that he treated the witnesses with some tenderness. He says I might have confined all these witnesses in jail, but I did not do so. I left them in comparative liberty in the "Police lines, where there is excellent accommodation for the purpose, subject only to the surveillance of the Police. Only three witnesses whom I had not yet quite determined were criminally implicated in the offences, Madhab Dome, Nanda's brother, about whose identity I had still some doubt, Tara Chand and Kailas No. 1, were sent to jail."

21. I have already pointed out that section 188 does not empower a Magistrate to commit a witness in Form C.

22. Purna Chandra Banerjee and others in the 6th paragraph of their petition complain that while they were detained in custody prior to the 6th of September, several petitions were made to the Magistrate to admit them to bail without effect, and that the order of the 6th of September, allowing them to be admitted to bail, was so framed as to preclude the possibility of the petitioners availing themselves of it.

23. Mr. Grant says, I have no doubt that some verbal motions for admittance to bail were made by the petitioner's mookhtears, but no written petitions on this subject were ever presented, and bail was only refused by me on the verbal motions, because there was reasonable grounds for believing that the crimes imputed to the petitioners were such as are not bailable by law. Thus when Mahesh Banerjee and Purna Banerjee, Mahesh Goswami and Mahabharat Nagdi were arrested, my "information made me reasonably believe that Nanda Dome had died of the effects of the beating which they had given him, wherefore there were reasonable grounds for believing that they were guilty of murder or culpable homicide not amounting to murder, which offences are not bailable. Again when Kali Sirkar, Hari Mookerjee, Ram Chand Chuckerbutty, and Phal Mohan Nagdi were arrested, there were reasonable "grounds for believing that they had been guilty of abducting Nanda with "intent secretly and wrongfully to confine him, and this is not a bailable offence."

24. I have already pointed out that the Magistrate had no right to cause the detention of the prisoners except under a warrant in Form C; and that before he could legally issue such warrant, it was necessary for him to cause the prisoners to be brought before him, and take evidence.

25. Had the Magistrate proceeded in regular course, the prisoners would have had an opportunity of applying to be admitted to bail, and the Magistrate if he did not find it necessary to adjourn the inquiry u/s 224, must then have decided upon the evidence, in accordance with the provisions of section 212, whether the accused should be admitted to bail or not.

26. The petitioners allege that on the 6th of September the Magistrate made an order that they should be admitted to bail. The petitioners complain that the amount of bail required, which aggregated rupees 96,000 or rupees 65,000 besides their personal recognizances, was excessive, and that the order was accompanied by conditions which rendered it impossible that they should give the required bail.

27. The conditions were as follows:--"The sureties in each case must be zemindars of the district whose names as such are written in the towji of the Collector, and no one zemindar will be accepted as surety for more than one of the accused, i.e., there must be twice as many zemindar sureties as there are accused."--This would make it necessary that the accused should find sixteen zemindars to give bail for them. The Judge, upon an application u/s 436, reduced the security required for the appearance of the accused from rupees 96,000 to

rupees 6,000.

28. We may observe that the conditions that the sureties should be zemindars and that no one zemindar should be accepted as surety for more than one of the accused, throwing unnecessary difficulties in the way of the defendants procuring bail were illegal, and such as the Magistrate had no right to impose.

29. Paragraph 9 complains that the evidence of the witnesses taken on the 6th was not legally recorded, as it was not read over or interpreted to them as required by sections 198 and 199.

30. The note at the foot of each deposition is as follows:--"The above deposition was not taken down with my own hand, because I was physically unable to do so owing to the great pain I was suffering from acute inflammation of the parotid gland, but it was taken down from my declaration under my personal direction and superintendence and hearing."

31. The Magistrate says, Unfortunately, there requirements of sections 198 and 199, whereby the deposition must be read over to the witness to be corrected if necessary, and a certificate of its having been so read over, explained, and admitted to be correct by the witness, was omitted. This occurred by pure inadvertence, caused by the unusual mode of procedure, and by the bodily state I was in. I had purposely refrained from reading over the first witness' depositions, meaning to recall all the witnesses at the end of the sitting and read over the depositions, " with the hope of saving time, but at the end of the sitting, which was a very late one, I overlooked the matter, and thus the omission occurred."

32. I am not called on to decide whether the omission to read over the evidence to each witness is one by which the accused were so materially prejudiced, that a commitment on evidence be taken must necessarily be" set aside, notwithstanding the provisions of section 426. I may say, however, that I should require to consider the case further before I could fully assent to the ruling on this subject in *The Queen v. Issur Raut* 8 W.R. Cr. Rul. 63. In the present case, if the evidence to which this objection applies, be treated as inadmissible, there is other evidence regularly taken on which a commitment might be rested.

33. Paragraph 10 complains that the Magistrate, without notice to the accused, proceeded with the inquiry on the 6th, though requested by the accused to wait until the arrival of their advocate, who was on his way, but had been detained.

34. Paragraph 11 contains a very serious charge against the Magistrate. The petitioners say, that the Magistrate considered it desirable that Mahesh Goswami should be particularly identified by a witness named Nodair Chand Dutt, and on the 6th of September 1869, when taking the evidence of the said witness, and immediately after that part of the evidence of that witness, as recorded, in which the witness said " I do not recognize the Nagdis, I do not recognize the Domes, I recognize the Gomasta," the Magistrate rose from his seat and left the dais on

which his seat is placed, and went; to the end of the Court room, where the petitioners were in the dock, and brought the said witness with him to the dock, and then asked the witness, " Do you recognize the prisoners," and in reply, the witness said " No. " The Magistrate then took hold of the witness by the neck and pointed out the petitioner, Mahesh Chandra Banerjee, to the witness, and said to the witness, " Is this Mahesh Baboo"? and in reply the witness said " I do not know." The Magistrate then pointed out the petitioner, Purna Chandra Banerjee, to the witness, and said to the witness, " Is this Purna?" and in reply the witness said, " I do not know." Then the Magistrate struck the petitioner, Mahesh Goswami, in the face, and said to the witness, " Is this the man," and in reply the witness said, " I do not know." The blow was given with considerable force by the Magistrate, apparently with the intention of inducing the witness to identify the petitioner, Mahesh Goswami." The petitioner says that the assault was witnessed by Dr. Richards, the civil surgeon, Kartick Banerjee, Gowar Mandal, Nudiar Chand Chuckerbutty and others.

35. The Magistrate repudiates, with the utmost indignation, the charge "that he struck the prisoner while in the dock. We are not trying the Magistrate on the charge. But I may say that, for present purposes, I have no hesitation in accepting the explanation of the Magistrate. He says, " I will not here make any appeal to my known character and "disposition, in disproof of such a monstrous accusation, for I am convinced that those who know me know I could never be guilty of such an offence as that described in the petition, but I will show plainly that this accusation has arisen from a most wickedly coloured and distorted version of facts that I admit did occur, and thus. The witness under examination was a boy apparently under 20 years of age, evidently in a state of great nervousness, and I knew that attempts had been made by the accused to tamper with him. He gave his evidence in a frightened, nervous manner, and when asked if he could recognize any of the persons who had come to his shop, he looked at the occupants of the dock and said he recognized only the Gomasta. He was then taken down to the dock in order that he might point out clearly the person whom he recognized. On being taken to the dock he stood in front of it trembling and irresolute, not attempting to look any of the accused in the face. Seeing this, I went down to him and encouraged him, and took him from end to end of the dock, and exhibited each of the accused to him in turn, asking if this man was one of those who visited his shop. What I did was this--I went down the dock from left to right. Mahesh Banerjee was the first man, I put my arm through the railing of the dock, which is nearly six feet high, touched him (I believe I laid my hand on his shoulder) in order that the witness might be certain of whom he spoke, and asked him, was this one of the men who visited your shop?" I did the same to the next man, Purna, and so on. But when I got to Hari Mookerjee, just as I was going to bring him forward in the same manner as I did the others, Mahesh Goswami, who was beside or rather behind him, thrust himself forward in a swaggering and impudent manner, and hustled Hari Mookerjee out of my reach. I did not at the moment suspect any motive for this except insolence, but

I did not choose that he should come forward till I wanted him. I pushed him aside or rather back, and brought forward Hari Mookerjee, whom the witness at once identified as one of the visitors, &c. I did not strike Mahesh Goswami in the face, I did not strike him at all. But as he thrust himself forward just as I was about to bring forward Hari Mookerjee, I thrust "him back, placing my hand on his shoulder and with very little more force than I had used while bringing forward the other accused to the witness."

36. The Magistrate appeals confidently to Dr. Richards who was in medical attendance on him, and the numerous other persons present during the sitting as to the correctness of his version of the facts; impugns the motive of Mahesh Goswami in bringing such a charge against him, and says it was an afterthought, and concocted during his absence in Calcutta.

37. It certainly is a remarkable fact that on the first application to this Court on the 5th of October, not a word was said as to the assault.

38. But accepting the Magistrate's account of the matter, we cannot but lament that he should have so far forgotten his position as to lay hands on prisoners standing in the dock. This act of imprudence appears to have involved him in a species of personal contest with one of those prisoners. He has no right to be surprised if the most unfavourable construction is put on his proceedings by a prisoner subjected to violence at his hands. Taking his own account of the matter, we think his conduct in laying his hands on prisoners in the dock, most censurable.

39. The 12th paragraph complains that on the 6th of September, the Magistrate improperly adjourned the hearing without fixing a day for taking up the case again, as required by the 224th section.

40. The 15th paragraph of the petition says that during the inquiry on the 23rd of September, the Magistrate himself declared to the prosecutor, that although directions of the High Court were shown to the Magistrate, directing that a Magistrate should not regard himself as a prosecutor, the Magistrate refused to recognize such directions of the High Court as binding him. The Magistrate admits this. He says, "I did say I was the prosecutor, and that it was impossible I should not be such. I was the chief executive authority in the district; the prosecution had been instituted by my own action in a very special manner u/s 68," The Magistrate refers to a case in re Hossein Manjee 9 W.R. Cr. Rul. 70 as one in which the High Court have declared that no Magistrate except the initiating Magistrate has any jurisdiction in cases commenced u/s 68. There was no government or public prosecutor, and therefore it was an abuse of words to say I was not prosecutor. With regard to the High Court precedent shown me, I pointed out first that it was an obiter dictum, and secondly, that I doubted the authority of the High Court to adjudicate on a point of purely executive function.

41. The petitioners further charge that the Magistrate refused to disclose any of the facts connected with the origin of the case, or of the manner in which it came

to his cognizance. The Magistrate says, It is true that I refused to disclose any of the facts connected with the origin of the case, and of the manner in which it came to my cognizance. In so refusing I only stood on my right. Government would soon become powerless if the secret information and mode of the inquiry adopted in unearthing crime were liable to be proclaimed in open Court. A "prosecutor, whether he be a private individual or a Government acting through its police, puts before a Court of Justice its case in the form which seems best to it, and if in that form, it is not sufficient to vindicate justice, the fault is with the prosecutor. It is not for the Court to command the introduction of matter which the prosecutor does not think fit to present to it, much less is it for the Court to command or allow the production of matter which is by law expressly disqualified from being put before a Court of Justice.

42. The whole of this argument of the Magistrate appears to me to proceed on a series of misconceptions.

43. Mr. Grant would have done well to bear in mind, and I hope he will never again disregard the observation of Mr. Justice Trevor commenting on the case of Somiruddi Sheikh 1 W.R.Cr.L. 12, that Magistrates are not prosecutors, that it is their duty to investigate every case thoroughly, examining both sides of every case." It is a most dangerous thing for a Magistrate to assume the character of a prosecutor. It is most difficult for a judicial officer placed in such a position to preserve an attitude of perfect impartiality and to avoid prejudging accused or suspected persons. In following up the traces of crime or supposed crime, the acuteness of the person in hunting down a criminal is taxed to the uttermost; no matter how faint the scent, he must follow the movement of the parties supposed to be guilty. The slightest circumstances tending to bring home the charge of guilt to the accused are full of meaning for him. To bring the accused parties to conviction is a cause of triumph, perhaps involuntary triumph, but it is success. To (sic)ail, to allow them to escape, is to be thwarted and beaten. How different is this spirit from the calm impartiality with which it is the duty of a Magistrate to conduct his investigation. But it is in the spirit of a prosecutor zealous to secure a conviction that Mr. Grant has conducted this case. He has taken it up and pursued it as a detective policeman might have done. I shall endeavour to show elsewhere, that Mr. Grant is mistaken in supposing that he alone could proceed with this case.

44. Mr. Grant's notion that he was at liberty to keep back the knowledge of the contents of the anonymous petition, or whatever else his private information consisted of, is most extraordinary. It may be true that witnesses cannot be examined as to information given by them to the Government for the discovery of the offenders. But the rule is apparently founded on reasons of state policy, and is one of very limited application. I am not aware that it has ever been held to extend to ordinary prosecutions--to any case in fact in which the Government is not directly concerned, as it is in offences against the state, or prosecutions for breach of the revenue laws. It is wholly inapplicable where the information--not

merely information privately communicated to the Government to be used or acted upon as the Government or the prosecutor may think fit, which they may perhaps never bring forward in a Court of Justice, but information which has been communicated to a Magistrate and acted upon by him in his capacity as Magistrate--has formed the ground of orders and warrants under which the party asking the question has been deprived of his liberty, where the questions are these: With what am I charged? Who is my accuser. What does he say against me? Why have you imprisoned me?

45. The Magistrate writes for the satisfaction of the High Court, I do "not mind informing them, though I am in no way bound to do so, that my statement had reference to a petition to the Government of Bengal in which the Banerjee family of Ajudhia were accused of more than one specific crime, amongst them being those the subject of this prosecution, viz., the assault on Nanda Dome, and his subsequent abduction from the custody of the Police. This petition was forwarded to me for disposal through the Commissioner of the division."

46. The Magistrate is greatly mistaken if he thinks that he is at liberty to issue a warrant of arrest, detain the party arrested for a considerable time under the warrant, and then keep back from the High Court, whose duty it is to superintend the proceedings of all inferior Courts, the materials which formed the ground of such arrest and detention.

47. We think that in justice to the petitioners, we are bound to call for this petition, and to direct that it be placed with the record, so that the accused may have free access to it for the purposes of their defence, or otherwise : and we therefore order the Magistrate forthwith to send up the petition referred to by him, with any other materials on which the warrants of arrest or any of them were based, or on which the Magistrate acted in refusing verbal or other applications for bail.

48. In the 18th paragraph, the petitioners complain that persons arrested as accomplices, were examined as witnesses without a pardon having been tendered to them. But we see no reason to think that the Magistrate was wrong in so examining the witnesses. In the 20th, they state that the Magistrate refused to allow a witness, Sriram Bagchi, a Police constable, to be cross-examined as to the contents of a report made by him on the 9th of August.

49. The Magistrate refers to section 155, and says, nothing is more clear than that the report of a policeman is not evidence except against the writer." The reports of policemen may not be evidence of the facts stated therein, but they may be evidence, and very strong evidence, to contradict or explain the policeman's evidence as given before the Magistrate, and an accused party has therefore a clear right to cross-examine the policeman as to the contents of such report, and to call for its production if he thinks it necessary to put it in for the purpose of contradicting or discrediting the evidence given by the policeman in Court. We mention this particularly, because the Magistrate says, he did the

same in many instances."

50. The 22nd paragraph alleges that on the 2nd of October the Magistrate asked Kali Sirkar, Hari Mookerjee, Haru Goswami, Ramchand Chuckerbutty and Phal Mohan Nagdi, whether they wished to examine any witnesses for their defence before him, to which they replied that they did not. Upon this the Magistrate, in pursuance of the provisions of sections 233 and 239 of the Code of Criminal Procedure, prepared charges against the accused under the 143rd, 146th, 186th, 201st, 341st and 365th sections of the Indian Penal Code, the charges were read over, and a copy furnished to the prisoners. The copy so furnished contained the usual order that the prisoners should be tried by the Court of Session on the said charges. In pursuance of the provisions of section 227 of the Criminal Procedure Code, the last mentioned parties were required at once to give a list of witnesses whom they might wish to be summoned to give evidence on their trial before the Court of Session. The parties gave in a list of witnesses in writing.

51. Mr. Grant says, I then asked the counsel for the accused whether he wished those witnesses to be summoned and examined before me. He said "no"; that he only required their attendance to give evidence before the Sessions Court."

52. Mr. Grant adds, "I then exercised my discretion u/s 207 of the Code to summon these witnesses to appear and give evidence before me. I did this in order that I might prevent the concoction of a false defence. This order was passed designedly u/s 207, but it might also have been referred to sections 201 and 367 as extended by section 380A of Act VIII of 1869, both of which sections allow a Magistrate in any stage of a judicial proceeding to summon and examine any witness whose evidence he shall consider essential to the case."

53. On the 4th of October, the petitioners or their counsel applied to the Sessions Judge to send up the case to the High Court u/s 434. Mr. Grant attended before the Judge, and explained that he had passed no final order; the Judge says:--"the Court is of opinion that if any commitment has been made, the Magistrate has passed a final order which u/s 434, may be referred to the High Court. It is very desirable that where a party has been illegally committed, he should not unnecessarily be brought to trial." The Judge, however, refused to interfere on the ground that no final order for commitment) had been made. Now we desire to observe that after making an order that the accused person shall be tried by the Court of Session, and after the accused person has given in the list of witnesses whom he may wish to be summoned to give evidence on his trial before the Court of Session, the Magistrate subject to the provisions of section 228, is bound to summon the witnesses to appear before the Court before which the accused person is to be tried, that is, the Court of Session. The language of the 227th section is imperative. There is nothing in that section which leaves it open to a Magistrate to prevent a prisoner from reserving his defence for the Court of Session. It is evident that in many instances it might be a great hardship on prisoners to compel them to disclose their defence, perhaps before they have had time to ascertain by what evidence they may be able to support it.

The 207th section is. relied on by the Magistrate. It has no application to the case before us, The marginal abstract shows very clearly what it means, viz., that it gives a discretion to the Magistrate to take evidence for the defence-- the evidence of witnesses offered on behalf of the accused party. Here no witnesses were offered to the Magistrate on behalf of the accused. Sections 201 and 367, as extended by section 380A of Act VIII of 1869, are equally inapplicable. The Magistrate does not pretend to say that he considered the evidence of the witnesses named for the defence. or that of any one of such witnesses, essential to the enquiry, as spoken of in section 201, or to the just decision of the case as mentioned in section 367. Mr. Grant says, I asked the advocate for the accused whether the accused wish to have their witnesses heard in defence before me; he re-plied that he reserved his defence for the Court of Session. I then immediately passed the order for their examination u/s 207;" and elsewhere he says, I did this in order to prevent the concoction of a false defence Elsewhere again the Magistrate says, "I recorded an order u/s 207, requiring these witnesses to appear on the 6th of October, my object being, by requiring their immediate presence, to prevent what was otherwise certain to happen--the concoction of a story for the defence."

54. The fact is that the Magistrate had made up his mind of the guilt of the accused, and his object was simply to disable the defendants in any attempt to put forward a defence before the Court of Session, which he chose to assume would be a false defence. That is shown clearly by the manner in which he dealt with the witnesses when brought before him in obedience to the summons.

55. On the 9th of October, the mookhtears of the accused, alleging as a reason the absence of counsel for the accused, declined to examine the witnesses.

56. The Magistrate then professing to exercise the power given to him by the 367th section, seems to have asked the two first witnesses if they knew why they were summoned as witnesses. The question is not recorded, but the answer of the first witness, Mr. Cornish is, I do not know why the accused have mentioned me as a witness in their defence I am not personally cognizant of any assault, &c., committed by the accused."

57. Mr. Weatherall's deposition commences by a similar statement. No questions were put by the Magistrate to any of the other witnesses summoned.

58. There are two circumstances which, to some extent, explain Mr. Grant's, delay in taking up the case. He says, "from the 19th of August I was suffering from inflammation of the parotid gland, ending in an abscess causing me excruciating pain such as made it quite impossible for me to attend to any but the most routine work, and that at my own house. The disease continued with such virulence that on Sunday, the 5th of September, I was advised to go to Calcutta, to "undergo an operation. Accordingly I arranged my departure for the night of the next day, Monday, expressly that I might attend Court that day, and hear and dismiss all the chief witnesses in the case, who had then been nearly a

week in attendance. During the whole period from the 20th of August to the 5th September, I had been able to attend office only on four days, and then with the greatest difficulty, and only to dispose of the most urgent business. The 6th of September was the most critical day of the disease, the 12th day of the abscess, and nothing but the absolute necessity of hearing the case made me attend " Court. * * It was necessary for me, if the daring crime committed by the accused was not to be permitted to go unpunished, to take up the case on the 6th September, although my state of pain was such as almost to unfit me for work. * * For the previous three weeks I had only on an average three hours" sleep in the twenty-four, though I had, especially latterly, taken largely of opiates and such like anodynes. During the judicial sitting in open Court on the 6th, I had about a dozen successive poultices applied. The abscess burst about two hours after my leaving Court. It was operated upon the next day in Calcutta by Dr. *** and I remained in Calcutta a week in Dr. * * * hands."

59. Next the Magistrate supposes that having originally taken up the case, he could not make it over for trial to any other judicial officer. No doubt he could not do so under the provisions of section 36. But it seems to me clear that though a Magistrate has originated proceedings so far as to issue a warrant of arrest, he may decline to proceed further with the case, and direct the party injured, or a police officer to proceed, or may himself proceed, in the usual way by complaint u/s 66 before any other Magistrate having jurisdiction to receive such complaint. Suppose, instead of inflammation of the parotid gland, the Magistrate after the issue of a warrant u/s 68 had a paralytic stroke which incapacitated him altogether for work, could it be said that the prisoner must go free because no other Magistrate could take up the case. Again suppose a Magistrate were to issue a warrant u/s 03 to apprehend a person for receiving stolen goods, and it should turn out that the goods were the property of the Magistrate himself; or suppose the warrant was to apprehend a person for robbery or murder, and it should turn out that the person robbed or murdered was the wife or son of the Magistrate. There is no ground for contending that u/s 68 the Magistrate must act in a case in which he finds himself to be an interested party. Nor do I think he is bound to proceed in any case in which he finds it necessary to take upon himself the office of an active prosecutor. The Magistrate considered that there was a ruling of the High Court in support of his view.

60. The Magistrate has allowed himself to be carried away by misdirected zeal in his efforts to secure the conviction of parties whom he most firmly believed to be guilty, and his judgment may no doubt for the time have been impaired by the great bodily suffering which he was undergoing while the case was pending before him.

61. There is no doubt that in the condition in which the Magistrate was after taking some formal evidence in each case, he might have remanded the several prisoners u/s 224, till he was in a condition to proceed with the case. But for his illness and the misconception under which the Magistrate appears to have

laboured as to his duties, after having instituted a prosecution u/s 63, I should have thought it necessary to remark still more severely on the proceedings of the Magistrate.

62. The order for the commitment of Kali Sirkar, Hari Mookerjee, Haru Goswami, Ram Chand Chuckerbutty and Phal Mohan Nagdi appears to be regular and formal; having made, that order the Magistrate had no power to recall it. I have gone through the depositions, and though I do not express any opinion as to the guilt or innocence of the parties charged, I cannot say that there is no evidence on the record to justify the commitment. If that commitment had been complete, and the case had been transmitted to the Court of Session, I should have felt great difficulty in saying that it should be quashed. But as I am by no means certain that the Magistrate would have proceeded to commit the accused on the evidence as it stands, if his mind had not been influenced, and his judgment warped, by impressions derived from his private information, as there are questions which in the interest of justice ought to have been put to witnesses examined for the prosecution before the accused were committed on the principal charge, particularly a question to the Deputy Magistrate of Gurbetta, as to whether or not he could recognize Nanda Dome as the man who appeared before him, and as Mr. Grant himself treated the inquiry as not concluded by summoning and issuing warrants for the attendance of witnesses after drawing up the charges, at the foot of which is the order for commitment, I think the Court is not bound to do any thing to carry out that order. I do not feel myself bound to send back the case to Mr. Grant, in order that he may complete the commitment, issue the summons to the witnesses, and transmit the record to the Court of Session.

63. From the manner in which the investigation has been conducted, and the state of antagonism in which Mr. Grant has placed himself as regards some of the accused, I think that it would not be satisfactory that the case should proceed further before him. I think that the Government of Bengal should be requested to depute a Magistrate from Burdwan or some other adjoining district to take up the case. Should the Government think fit to depute a Magistrate for this purpose, an order will issue that the case be transferred for trial before such officer. Should there be a difficulty as to the deputation of a Magistrate for this purpose, the case will be transferred to the Court of the Magistrate of Burdwan. In either case the Magistrate will, of course, take up the case afresh from the commencement. If any of the prisoners are committed for trial to the Court of Session, the Magistrate will, of course, commit them for trial before the Judge of "West Burdwan.

Kemp, J.

64. The four prayers of this application as stated by the learned counsel for the petitioners are:--

1st.--That this Court will see fit to quash the order of the Magistrate of

Bancoorah, directing the accused Purna Chandra, Mahesh Goswami, and others to be put upon their trial before the said Magistrate.

2nd.--That this Court will see fit to quash the order of the said Magistrate directing the commitment to the Sessions Court of Kali Sirkar and others.

3rd.--That the whole case, supposing there be any evidence upon which to go to trial, be transferred to another Magistrate.

4th.--That the Court will see fit to refer the whole case to His Honor the Lieutenant-Governor of Bengal, with the view to the removal of Mr. J.P. Grant from the office of Magistrate of Bancoorah.

65. I concur generally in the remarks made in the elaborate judgment of Mr. Justice Norman. It is to me clear that the Deputy Magistrate before whom the case first came saw no ground for proceeding against the accused.

66. The Magistrate admittedly acted upon private information. He has not been candid enough to disclose the source of his information, but on reading over the vernacular papers, I accidentally came upon a perwanna addressed by Mr. Grant to a subordinate officer, from which it appears that Mr. Grant acted upon information conveyed by an anonymous petition.

67. The accused were not even informed, as they most certainly ought to have been, of the nature of the charge made against them, nor of the source of the "knowledge" upon which the Magistrate professed to act. Some of the accused, highly respectable men, were kept for many days in confinement upon a charge originating in an anonymous petition. Their applications to be admitted to bail were met by a demand for bail to such an extent and under such extraordinary conditions as to amount to a positive denial of justice.

68. The grave illegalities and irregularities in the proceedings of the Magistrate have been pointed out by Mr. Justice Norman. I am of opinion that the ends of justice require that the order of the Magistrate directing the accused to be put upon their trial before him be quashed : and further, that the order of commitment, for the reasons given by Mr. Justice Norman, must also be set aside.

69. The whole case has not been tried in a fair and proper manner. There may be evidence, if credible (and of this I give no opinion) warranting a commitment, but I am clearly satisfied that this evidence must be taken de novo by another officer, and for this purpose I would direct the transfer of the case to the file of the Magistrate of East Burdwan. This officer ought, in my opinion, to be instructed to take up the case as a fresh case, and to try it, and if necessary to commit the accused to the Sessions Judge of the same district. I understood the learned counsel during the argument to say that he would not press for a reference to His Honor the Lieutenant-Governor of Bengal, if this Court passed orders for the transfer of this case from the file of the Magistrate of Bancoorah. But for this, I should have considered it my duty to refer the whole proceedings

of the Magistrate of Bancoorah, which I consider to have been illegal, arbitrary, and unjust, for the orders of His Honor. I concur with Mr. Justice Norman in thinking that the Government of Bengal should be addressed with the view of obtaining orders for the deputation of the Magistrate of East Burdwan, or other competent officer to try this case. It would be very harassing to the witnesses in the case who reside in West Burdwan to direct them to appear before the Magistrate of East Burdwan.