

he committed the offence with which he stands charged. But there are degrees of guilt. I take into consideration that for nearly fifty years the point which I have now decided has been the subject of much conflict of opinion, the law is not very clearly stated and in addition there is the conduct of Rampiari as set forth in the civil proceedings in 1932, and I am of opinion that a sentence of three days' imprisonment will meet the justice of this case. The accused may therefore be released forthwith.

TARA SINGH v. DALEL SINGH.

[Civil Jurisdiction (Maxwell Anderson, C.J.) March 15, 1935.]

Action for malicious prosecution—nolle prosequi entered to the prosecution—whether proceedings in prosecution terminated in favour of plaintiff.

In December 1933 Dalel Singh laid a charge to the effect that Tara Singh had robbed him of two one pound notes as a result of which a preliminary enquiry was held and Tara Singh committed for trial. The Attorney-General entered a *nolle prosequi* to the information and thereupon Tara Singh brought the present action claiming damages for malicious prosecution.

HELD.—A *nolle prosequi* does not have the same effect as an acquittal and does not amount to a termination of proceedings in favour of the accused so as to enable him to bring an action for malicious prosecution.

[**EDITORIAL NOTE.**—This was a reserved judgment but there is no record of a written judgment; the report is compiled entirely from the Judge's Notes. The Criminal Procedure Code s. 73 specifically provides that a *nolle prosequi* is not a bar to subsequent proceedings. At the date of the decision the relevant section (Criminal Procedure Ordinance, 1875 s. 7) contained no such provision.]

Cases referred to :—

- (1) *Gilchrist v. Gardner* [1891] 12 N.S.W.L.R. 184; 8 N.S.W.W.N. 21; 33 Dig. 481 N. (AUS).
- (2) *Goddard v. Smith* [1704] 87 E.R. 1107; 33 Dig. 481; 14 Dig. 243.
- (3) *Rich v. Forman* [1927] 29 W.A.L.R. 13. (AUS).
- (4) *R. v. Allen* [1862] 1 B. & S. 850; 31 L.J.M.C. 129; 5 L.T. 636; 26 J.P. 341; 9 Cox. C.C. 120; 121 E.R. 929; 14 Dig. 243.
- (5) *Cotterell v. Jones* [1851] 138 E.R. 655; 21 L.J.C.P. 2; 33 Dig. 507.
- (6) *Brook v. Carpenter* [1825] 3 Bing. 303; 130 E.R. 530; 33 Dig. 482.
- (7) *Metropolitan Bank v. Pooley* [1885] 10 Ap. Cas. 210; 54 L.J.Q.B. 449; 53 L.J. 163; 49 J.P. 756; 1 Dig. 67.
- (8) *Quartz Hill Gold Mining v. Eyre* [1883] 11 Q.B.D. 674; 52 L.J.Q.B. 488; 49 L.J. 249; 33 Dig. 469.
- (9) *Elworthy v. Bird* [1824] 2 Bing. 258; 9 Moo. P.C. 430; 130 E.R. 305; 14 Dig. 244.

(10) *Reed v. Hales* [1872] 11 N.S.W.G.C.R. 317; 33 Dig. 481 (AUS).

ACTION for damages for malicious prosecution.

S. B. Patel, for the Plaintiff.

P. Rice for the defendant submitted that the plaintiff's case was ill founded since it had not been shown that the criminal proceedings pleaded as the substance of the case had terminated in favour of the plaintiff (*Metropolitan Bank v. Pooley*, *Quartz Hill Gold Mining Co. v. Eyre*). A *nolle prosequi* did not amount to such a termination. (*Goddard v. Smith*, *Rich v. Forman*, *Cotterell v. Jones*, *Reed v. Hales*).

S. B. Patel, for the plaintiff submitted that it was not clear whether a *nolle prosequi* does or does not put an end to the proceedings (*R. v. Allen*) and that the plaintiff need not prove that the cause of action was at an end (*Brook v. Carpenter*).

MAXWELL ANDERSON, C.J.—As part of his case the plaintiff must show that the proceedings against him had terminated in his favour. *Gilchrist v. Gardner* is authority for the proposition that a *nolle prosequi* does not operate as a discharge or acquittal on the merits and there is some authority (*Archbold* p. 112) to the effect that fresh process may be issued on the same indictment. A *nolle prosequi* is distinct from and has not the same effect as offering no evidence and submitting to an acquittal (*Elworthy v. Bird*). I hold therefore that a *nolle prosequi* does not terminate criminal proceedings in favour of the accused so to enable him to found an action for malicious prosecution on the proceedings.

PICKERING *ats.* POLICE.

[Appellate Jurisdiction (Thacker, Acting C.J.) October 3, 1935.]

Liquor Ordinance, 1932—s. 66¹—supplying liquor to a native—evidence—corroboration of accomplice—variation between summons and conviction—material witness not called by prosecution—Appeals Ordinance, 1934—ss. 22, 24, 25²—powers of supreme court in appellate jurisdiction compared with those of courts in England hearing a stated case.

Pickering sold two glasses of home brewed beer to a Fijian constable. Beer and brewing utensils were found in Pickering's rooms on the same day.

¹ Repealed *Vide Liquor Ordinance, 1946 s. 70.*

² *R. repealed. The sections were as follows:—*

" 22. The Court may adjourn the hearing of an appeal and upon the hearing thereof may confirm reverse or vary the decision of the District Commissioner or remit the matter with the opinion of the Court thereon to the District Commissioner or may make such other order in the matter as to it may seem just and may by such order exercise any power which the District Commissioner might have exercised and such order shall have the same effect and may be enforced in the same manner as if it had been made by the District Commissioner. Provided that the Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

" 24. No judgment shall be given in favour of an appellant if the appeal is based on any objection to any information complaint summons or warrant for any alleged defect therein in matter of substance or form or for any variance between such information complaint, summons or warrant and the evidence adduced in support thereof unless it be found that such objection was raised before the District Commissioner whose decision is appealed from nor unless it be found that notwithstanding it was shown to the District Commissioner that by such variance the appellant had been deceived or misled such District Commissioner refused to adjourn the hearing of the case to a future day. Provided that if the appellant was not at the hearing before the District Commissioner represented by counsel or a solicitor the Court may allow any such objection to be raised."

" 25. Upon the hearing of any appeal the Court may hear and determine the case upon the merits notwithstanding any defect in form or otherwise in the conviction order or judgment and if the appellant is found guilty the conviction order or judgment shall be confirmed and if necessary amended."

Vide Criminal Procedure Code Cap. 4 ss. 352, 380, 382.