

**Emperor Vs. Abla Isak**

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**Court :** Mumbai

**Decided On :** Jan-21-1931

**Reported in :** (1931)33BOMLR349

**Judge :** Mirza, J.

**Appeal No. :** First Criminal Sessions of 1931, Case No. 4

**Appellant :** Emperor

**Respondent :** Abla Isak

**Judgement :**

**Mirza, J.**

1. [After setting out the facts of the case his Lordship proceeded:] An objection is taken on behalf of the accused to the second and fourth counts in the charge-sheet and it is urged that a trial on those points is not now competent. Reliance is placed upon Section 403 of the Criminal Procedure Code which provides:--

A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under Section 236, or for which he might

have been convicted under Section 237.

2. Section 236 of the Criminal Procedure Code provides:--

If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

3. Section 237 provides :--

If, in the case mentioned in Section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

4. It is clear that although there was no separate charge at the original trial of culpable homicide not amounting to murder against accused No. 1 and of aiding and abetting the commission of culpable homicide not amounting to murder against accused No. 2, it would have been competent to the jury, if satisfied by the evidence before them, to have found the accused guilty of those offences respectively and not of the major offences of murder and abetment of murder with which they were respectively charged. Mr. Gomes on behalf of the prosecution has contended that the lesser charges in respect of culpable homicide not amounting to murder and abetment of that offence must be regarded as being implied in the major charges of murder and abetment of murder and there would be no need to set them out separately as charges at the original trial to entitle the Crown to have a re-trial on the lesser charges in case the verdict of the jury at the original trial in respect of the lesser offences cannot be accepted. He relies on the case of *Emperor v. Nirmal Kanta Roy* ILR (1914) Cal. 1072, where the facts were that the prisoner had been originally tried at the Criminal Sessions of the High Court for the murder and abetment of murder of a police-officer under Section 302 read with Section 34 and Section 302 read with Section 114 and Section 302 read

with Section 109, Indian Penal Code, and also for the murder and culpable homicide of another person under Sections 302 and 304, Indian Penal Code. The jury returned a unanimous verdict of acquittal under Section 302 read with Section 34, Indian Penal Code, in the first case, and unanimously acquitted the accused under Section 302 in the second case, but differed as to the remaining charges by five to four and were discharged. The prisoner was put up for re-trial at a subsequent Criminal Sessions of the High Court on a charge of culpable homicide not amounting to murder in respect of the second case. An objection was taken on behalf of the prisoner that such a re-trial was not competent and that the provisions of Section 403 of the Criminal Procedure Code were a bar to it. The Court negated this contention and held that the prisoner was not being 'tried again' within the meaning of Section 403 but that his re-trial was on the original indictment and plea and that the Court was continuing the trial before another jury and the process could continue till a verdict was passed on all the counts. The learned Judge in the course of his judgment observes (page 1083):--

In this case the evidence discloses only one illegal act, as far as Ananta is concerned, and the accused has been charged in the alternative with having committed murder or culpable homicide of Ananta, a procedure the correctness of which has not been disputed. Section 403, however, protects him only against a trial for murder and 'any other offence for which a different charge from the one made against him might have been made'. But the offence of culpable homicide, for which it is now proposed to try him, is the same charge that was made against him, and on the terms of the section therefore this defense must fail.

5. The facts in the present case are materially different from those in *Emperor v. Nirmal Kanta Roy*. In this case there were no specific charges before the jury of culpable homicide not amounting to murder and abetment of culpable homicide not amounting to murder. The jury were not bound to return a verdict in respect of these offences unless they were of opinion that the accused could be held guilty of these offences instead of murder and abetment of murder. Had these specific charges been framed in the original trial, the jury would be bound to return a verdict on them. The position at the present trial seems to be this, that two charges are preferred against the two accused respectively which charges were not

specifically framed against them in the original trial. The case, in my opinion, is covered by the provisions of Section 408 of the Criminal Procedure Code and a fresh trial on the second and fourth counts is not competent. The trial should proceed under the first and third counts only.

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