Emperor Vs. Anant Narayan Kulkarni

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Court : Mumbai

Decided On : Jul-17-1944

Reported in : AIR1945Bom413; (1945)47BOMLR138

Judge : N.J. Wadia and ;Sen, JJ.

Appeal No. : Criminal Reference No. 30 of 1944

Appellant : Emperor

Respondent : Anant Narayan Kulkarni

Disposition : Appeal allowed

Judgement :

Sen, J.

1. This is a reference from the Additional Sessions Judge, Belgaum, with regard to a sessions case in his own Court to which the accused has been committed for an offence under Section 409 of the Indian Penal Code, 1860, and he has recommended that the proceedings of the case be quashed and the accused acquitted. The material facts are these. The accused was an officiating Kulkarni in the village Kongnoli in Chikodi taluka in 1941. The Mamlatdar of Chikodi taluka arrived at the said village on June 17, 1941. Before his arrival one of his clerks had reached the village and had asked the Kulkarni, the accused, to bring his account

books for inspection. The Kulkarni left but did not return. The Police Patil was then sent to find him but he also could not find the accused. The Patil then brought the account books from the Chavdi and the clerk, on inspecting them,, found that a large balance of land revenue which had been recovered had not been accounted for in the accounts. The Mamlatdar, on arriving at the village, again inspected the accounts. The next day the accused appeared before the Mamlatdar and made certain statements. The Mamlatdar found that a total amount of Rs. 655-0-6 appeared to have been misappropriated. The accused produced an amount of Rs. 642 and the balance of Rs. 13-0-6 was recovered from him by means of a warrant issued under the Land Revenue Code. On these facts two complaints were filed against the accused in the Court of the Resident Magistrate, First Class, Hukeri. In one complaint it was alleged that the accused had committed a breach of trust in respect of two sums, one of Rs. 10 and the other of Rs. 40, between March 19 and June 19, 1941, and it was further alleged in that complaint that the accused had also forged two counterfoil receipts in the village form No. 9. The other complaint, which forms the basis of the present case, was with respect to criminal breach of trust in respect of the sum of Rs. 572-15-8 committed between April 25 and June 19, 1941. The learned Resident Magistrate heard the evidence in both the cases at the same time and committed the accused to the Sessions Court in both. The accused was first tried in respect of the offence with regard to Rs. 10 and Rs. 40 in Sessions Case No. 17 of 1943. The charge in that case was that during the period from March 19, 1941, to June 19, 1941, the accused had misappropriated the two sums, Rs. 10 and Rs. 40, and forged two receipts with respect to those amounts. The offence under Section 409 was tried with a jury and that under Section 466 with the aid of, assessors. The jurors returned a unanimous verdict of not guilty and the assessors also gave a similar opinion in respect of the offence under Section 466. In the result the accused was acquitted on both the counts.

2. In the present case the trial was before another Sessions Judge. The accused was asked under Section 271 whether he was guilty of the offence charged, or claimed to be tried. He claimed to be tried and at the same time made an application contending that the present proceedings were barred under Section 403 and that he was, therefore, entitled to an acquittal. The learned Sessions Judge has come to the conclusion that the wording of Section 403 does not in

terms apply to the facts of this case as the accused is now standing his trial for an offence which is different from the offence for which he was tried in Sessions Case No. 17 of 1943, but that though it would be technically correct for him to proceed with the trial, it would be extremely undesirable that the accused, who could have been tried for all the offences committed by him, should have to undergo a second trial. For this proposition he has relied on a number of authorities. He has also held that it is open to him in a case of this nature to make a reference under Section 438 of the Criminal Procedure Code for the orders of the High; Court, with a recommendation that the proceedings may be quashed and the accused acquitted.

3. Mr. Jahagirdar on behalf of the accused has relied on most of the authorities cited by the learned Additional Sessions Judge in support of his contention that it should be held that the trial of the accused for the second time in the Sessions Court is improper in the circumstances of this case. In In re Appadurai Ayyar (1916) 17 C.L.J. 30 it was held that the intention of the Legislature in enacting Section 222 of the Criminal Procedure Code was that where there was to be a trial for misappropriation of a gross sum, there should be only one trial for such an offence committed within the period covered by the defalcation, and that, therefore, where a person was tried and convicted for misappropriating certain sums of money1 during a certain period and was again put on; trial in respect of certain other sums of money alleged to have been misappropriated during the same period the subsequent trial was barred by Section 403 of the Code. As against this decision of the Madras High Court, we have the somewhat technical view adopted by this Court in Emperor v. Kashinath : (1910)12BOMLR226 . There the accused was tried for the offence of criminal breach of trust as a public servant in respect of Rs. 12 odd, and was acquitted of the offence. He was again tried for the same offence in respect of another item of Rs. 19 odd misappropriated during the same period as that to which the Rs. 12 related, and was convicted. On appeal, the Sessions Judge acquitted the accused on the ground that his previous acquittal was a bar to the second trial. It was held by this Court that the previous acquittal did not, under the circumstances, operate as a bar to the accused's conviction at the second trial and the order of acquittal was reversed. The accused having already been convicted, all that this Court held in that case was that his

conviction in a second trial was not illegal. That is the view that has been also taken by the learned Additional Sessions Judge; and Mr. Jahagirdar also has not urged that the second trial of the accused in the present case would be barred under Section 403 of the Criminal Procedure Code. In Nagendra Nath Bose v. Emperor I.L.R (1923) Cal. 632 the accused was first tried under Section 409 of a charge of criminal breach of trust in respect of Rs. 18,024-4-0, committed during the period between October 1, 1921 and March 1, 1922. The charge was withdrawn by the public prosecutor, with the result that in law it amounted to an acquittal of the accused. Thereafter the accused was prosecuted for criminal breach of trust in respect of Rs. 100 which had not been included in the sum of Rs. 18,924-4-0, alleged to have been misappropriated within the period covered by the charge in the first trial. There was a difference of opinion between the two Judges of the High Court who heard the matter as to whether the provisions of Section 403 of the Criminal Procedure Code were a bar to the second trial. The third Judge to whom the case was referred held, following Emperor v. Kashinath, that the essence of the offence being the misappropriation, and not the time within which it took place, and the subject-matter of the present charge not having been included in the gross sum in respect of which the accused had been charged in the earlier trial,, the second trial was competent. In Sidh Nath Awasthi v. Emperor I.L.R (1929) Cal. 17 the facts were somewhat different. The accused was charged in the Police charge sheet with criminal breach of trust in respect of a gross sum of Rs. 3,651-5-3, but he was tried with respect to three particular items out of the said sum and was convicted. Thereafter there was a second trial in respect of three other items also included in the gross sum mentioned above, and he was again convicted. The High Court noticed the divergence of judicial opinion as shown in In re Appadurai Ayyar on one hand and Emperor v. Kashinath Bagaji and Nagendra Nath Bose v. Emperor on the other. In that case the prosecution from the beginning knew perfectly well what was the gross sum in respect of which the accused had committed the criminal breach of trust. Mukerji J. said : 'Though Section 403 of the Criminal Procedure Code may not strictly apply in its terms to a case like the present, still there is abundant authority for the view that a second trial, in circumstances such as these, ought to have been allowed to be held'; and he cited several decisions in support of this view, viz., Inam-ullah v. King-Emperor

(1905) 2 A.L. 673 Emperor v, Jhabbar Mull Lakkar I.L.R (1922) Cal. 924 Bishun Das Ghosh v. The King-Emperor (1902) 7 C.W.N. 493 and Jaliram Alom Ganburah v. Rajkumar Umar Singh (1900) 5 C.W.N. 72. He was of opinion that if the accused had moved the High Court at an early stage for stopping his second trial, he would have found no difficulty in getting an order in his favour. As, however, the second trial had also terminated, the order made was that the conviction should be upheld but that the sentence should be reduced to a day's rigorous imprisonment. In the present case also, the prosecution knew from the very beginning what was the gross sum in respect of which the accused was alleged to have committed the offence. Government's sanction was obtained for the prosecution of the accused in October 1941. It was in respect of the whole amount of Rs. 655-0-6; and in the committing Magistrate's Court, as I have already stated, the evidence in both the cases was recorded side by side. The accused has moved the Sessions Court as soon as possible after he was brought to that Court for trial. Mr. Jahagirdar has, therefore, contended that the principle of Sidh Nath Awasthi v. Emperor should apply and that the proceedings should be quashed and the accused acquitted. One other case he has relied on is Jagadish Prosad v. Emperor A.I.R [1938] Mad. 126. In that case there were two accused persons charged with conspiracy to commit criminal breach of trust and also criminal breach of trust with regard to specific sums of money. When the case came on for trial the prosecution split up the case to be tried into four separate trials. In the first case both the accused were found guilty under Section 409 and in the second trial also the two accused were convicted under the said section. It was held that though on a technical ground the two conspiracies of which the accused were found guilty were not the same, yet it was really impossible to distinguish them and that further the method of splitting up the charges as adopted by the prosecution was improper. Henderson J. remarked (p. 698):

We cannot imagine a more harassing method of proceeding with the prosecution than that adopted in this case. Three items might have been selected as the subject-matter of separate charges. Then it would have been possible upon a verdict of guilty to impose a sentence that would be sufficient. There would then have been no necessity for proceeding with the trial of any more charges. We entirely disapprove of this method of proceeding with an indefinite number of trials and imposing sentences to take effect one after the other.

The facts of the present case on which Mr. Jahagirdar has relied, are :- (1) that the prosecution knew all the facts of the case from the beginning; (2) that the accused could have been tried in one trial under Section 222 of the Criminal Procedure Code; (3) that the Assistant Public Prosecutor has admitted that there is no evidence to be produced at the second trial which has already been produced at the earlier trial; and (4) that the jury have unanimously found the accused not guilty, the Judge also being of the same opinion, in the earlier trial. Finally, Mr. Jahagirdar has relied on a dictum of Subrahmania Ayyar J. in Emperor v. Chinna Kalliappa Gounden I.L.R (1905) Mad. 126 (p. 138):

Nor is authority wanting for the view that even where the plea of autrefois acquit is not technically available, the principle of it is available for the accused when the interests of justice require its extension in his favour.

4. The learned Government Pleader has argued, in the first place, that the Additional Sessions Judge was not entitled to make this reference, for under Section 272 of the Criminal Procedure Code, after the accused had claimed to be tried, there was no option to the Judge but to proceed to choose jurors and to try the case. Section 272 is no doubt applicable, but it must, in our opinion, be read subject to the provisions of Section 438 under which the Sessions Judge may, if he thinks fit, on examination of the record of any proceedings, report for the orders of the High Court the result of such examination; and the High Court has wide powers of revision under Section 439 and would be in a position to quash the commitment of the accused under Section 215 of the Criminal Procedure Code. Secondly, the Government Header has argued that the stage at which the accused made his application was too late and that, therefore, such application could not avail the accused. He has relied on Weir's Criminal Procedure, Vol. II, p. 262, where a case is reported (Criminal Miscellaneous Petition No. 127 of 1902) in which the High Court refused to make an order under Section 215 as the reference before them had not been made before the commencement of the trial in the Sessions Court. Their Lordships said:

We find from the record that the accused was put on a trial, that he pleaded not guilty and that he was tried with the aid of assessors. Under these circumstances, it is now too late to quash the proceedings.

The facts in that case were obviously not similar to those in the present case. As the accused in the present case has not actually been tried in the Court of Session, we do not think that the application made before the Additional Sessions Judge was too late. The learned Government Header has also relied on Kasem Molla v. King-Emperor : AIR1926 Cal410 where it was alleged that the trial before the Sessions Court had been vitiated by an irregularity in the committal proceedings and the High Court was invited to quash the committal proceedings. The trial in the Sessions Court had proceeded to its conclusion and the accused had been convicted. It was held that the application was made too late and that even if the provisions of Section 208 of the Criminal Procedure Code had not been strictly followed in the Committing Magistrate's Court as alleged, that would not be a sufficient ground for setting aside the conviction. The facts of that case, again, cannot be said to be similar to those of the present case. The learned Government Pleader has next contended that the prosecution split up the case into two trials because otherwise there would have been a misjoinder, the first trial being under Sections 409 and 466 in respect of two items and the second case being in respect of an offence under Section 409 alone, with no offence under Section 466. Reliance has been placed on certain dicta by Wassoodew J. in Emperor v. Ramchandra Rango (1938) 41 L.R. 98 and on Shapurji Sorabji v. Emperor I.L.R (1935) Bom. 148: 38 Bom. L.R. 106 and it has been contended that in view of these authorities it was at least arguable that there should be two trials, that this was accordingly done and that the object of the prosecution in the present case was not, therefore, to harass or to oppress the accused. It is contended, therefore, that the holding of the two separate trials of the accused should not be held to be improper. It may be that some such ground as is advanced by the Government Pleader prevailed with the authorities in splitting up the prosecution into two, trials. But the material considerations in this case are : That the jury have unanimously held the accused not guilty in the earlier trial and the accused has once been acquitted; that the accused has in fact paid the whole amount involved in the two trials ; that he has already suffered one lengthy trial; and that it is undesirable that in the second trial there should be any risk of the jury's taking a view different from that taken by the jury in the first trial. In these circumstances we think the principle enunciated by Subrahmania J. in Emperor v. Chinna Kallappa Goundan applies to the facts of this case and that the second trial of the accused should be prevented.

5. We, therefore, accept the reference and quash the committal order as well as the proceedings in the Court of the Additional Sessions Judge and direct that the accused be acquitted and discharged.