SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Bajrang and ors. Vs. the Crown

Bajrang and ors. Vs. the Crown

SooperKanoon Citation : sooperkanoon.com/338892

Court : Mumbai

Decided On : Oct-03-1949

Reported in : 1951CriLJ1498

Judge : Mangalmurti, ;K. Kaushalendra Rao and Hemeon, JJ.

Appellant : Bajrang and ors.

Respondent : The Crown

Judgement :

Hemeon, J.

1. The applicants Bajrang and 12 others were committed by the First Class Magistrate, Wardha, to the Court of Session, Bajrang in respect of offences punishable under Section 148 and Section 307 read with Section 34, Indian Penal Code, and the other applicants in respect of offences under Section 148 and Section 807 read with Sections 84 and 149 ibid. The Additional Sessions Judge, Wardha, by his order dated 9th May 1949, held that the trial was to proceed with the aid of assessors in virtue of Rule 224 of the Rules & Orders (Criminal) and rejected the applicants' application for a jury trial, They have now come up in revision to this Court, and their main contention is that the first proviso to the aforesaid rule was ultra vires of the Provincial Government and could not override the provisions of Section 269 (8), Criminal P.C.

2. Section 269 runs as follows:

(1) The Provincial Government may, by order in the official Gazette, direct that the trial of all offences, or of any particular class of offences, before any Court of Session, shall be by jury in any district, and may, revoke or alter such order.

(2) The Provincial Government, by like order, may also declare that, in the case of any district in which the trial of any offence is to be by jury, the trial of such offences shall, if the Judge on application made to him or of his own motion so directs, be by jurors summoned from a special jury list, and may revoke or alter such order.

(3) When the accused is charged at the same trial with several offences of which some are and some are not triable by jury, he shall be tried by jury for such of those offences as are triable by jury, and by the Court of Session, with the aid of the jurors as assessors, for such of them as are not triable by jury.

3. Rule 224 of the Rules & Orders (Criminal) is based on notification No. 669-728-XIX, dated 27th April 1942, and the relevant part of it is as follows:

In exercise of the powers conferred by Sub-section (1) of Section 269 Criminal P. 0. 1898 V of 1898, and in supersession of all the previous notifications in this behalf, the Provincial Government is pleased to direct that, with effect from the 1st May 1942, the trial of all offences punishable with transportation or with imprisonment extending to a term of tan years or upwards but not punishable with death, including abetment of, and attempts to commit, any such offences alleged to have been committed within the Nagpur, Wardha, Jub-bulpore, Hosbangabad excepting Narsinghpur Sub division, Nimar, Amraoti, Aliola, Yeotmal and Buldaua revenue districts, when held before the Courts of Session shall be by jury:

Provided that any of such offences shall not be triable by jury if, at the same trial, the accused is also charge;] with another offen arising out of the same transaction which is triable by a Court of Session with the aid of assessors:

4. The relevant effect of this notification was that the trial of an offence such as attempt to murder which is punishable under Section 307, Penal Code with 10

years rigorous imprisonment or transportation for life has to be by jury. If, however, the accused is also charged with another offence arising out of the same transaction and that offence is triable by the Court of Session with the aid of assessors, the trial will lot be by jury. The other offence in the present base is under Section 148, Penal Code, and an offence of that kind is, as Schedule II of CrimiP. C. shows, triable not only by a Magistrate of the first class or Presidency Magistrate but by a Court of Session. Under the Proviso to the notification, however, trial by jury is excluded and the trial for both offences would have to be with the aid of assessors.

5. That this proviso afforded much relief to Judges is well known. The previous hybrid procedure was cumbrous and exasperating and it often placed the Judge in an embarrassing position because of the dual role he had to take i. e. vis-a-vis a jury verdict and vis-a-vis the non-binding opinion of the same gentlemen as assessors. It seems to me, however, that the proviso was ultra vires and that the proper remedy was the amendment by legislation of Section 269 (8), Criminal P.C.

6. The powers conferred on the Provincial Government by Section 269 (1) were exercised in the manner indicated in the substantive part of the notification. That is a particular class of offences was directed to be triable by jury in specified districts; and under the sub-section it was open to the Provincial Government to revoke or alter that order. It was not, however, in my view open to the Provincial Government so to alter the order as to demolish the effect of the mandatory provisions of Sub-section (3) of the same section. That sub-section is as much part of the section as Sub-section (1) and they must be read together in such a way that violence is not done by one to the other. The terms of Sub-section (3) are both explicit and mandatory and they clearly do not contemplate any Provisional Government order which would nullify or modify them. I would also point out that although the difficulties resulting from hybrid trials have been experienced in other Provinces, none of them has resorted to the remedy now impugned.

7. The matter is one which is not free from difficulty and one which is of importance to the Province as a whole. The proviso in question has been in force for over 7 years and a decision to the effect that it. is ultra vires would be one

which would have serious repercussions. It seems to me, therefore, that I. should accede to the application made by the learned Additional Government Pleader to refer under High Court Rule 9 (1), chapter I, the proceeding to the Honourable the Chief Justice with a recommendation that it be placed before a Bench of two Judges.

8. I direct accordingly.

Judgment of Division Bench

9. R. Kaushalendra Rao J. - This criminal revision originally came up for hearing before Hemeon J. As an important question of law was raised under Section 269, Criminal P.C. the learned Judge recommended that the case be placed before a Division Bench. The question is whether the first proviso in the notification No. 669 728 XIX, dated 27-4-1042, was ultra vires because of Sub-section (3) of Section 269, Criminal P.C. The facts giving rise to the question are to be found in the order of reference by Hemeon J and there is no need to repeat them.

10. In view of Section 268, Criminal P.C., all trials before a Court of Session are either by jury, or with the aid of assessors, The Code does not lay down what offences are triable by jury. The power to direct that the trial of all offences or of any particular class of offences, before any Court of Session, shall be by jury, is vested in the Provincial Government under sub's (1) of Section 269, Until the Provincial Government chooses to exercise the power given under sub's. (x) of Section 269, the trial of all offences before a Court of Session must necessarily be with the aid of assessors. Once, however, the Provincial Government determines that some offences are triable by jury, three types of cases can arise before a Court of Session: oases in which an accused is charged only with offences triable with the aid of assessors; cases in which an accused is charged only with offences triable by jury and finally cases in which an accused is charged with offences of which some are triable by jury and some are not triable by jury, that is to say, triable with the aid of assessors,

11. Subjection (3) of Section 269 provides:

When the accused is charged at the same trial with several offences of which some are and some are not triable by jury, ho shall be tried by jury for such of those offences as are triable by jury, and by the Court of Session, with the aid of the jurors as assessors, for such of them as are not triable by jury.

The trials held in pursuance of sub's. (3) of Section 269 have not been viewed with favour by the Courts. The mixed trial was regarded as a cumbersome device often leading to embarrassing and undetiratle results. More than one High Court pointed out the anomalies arising out of such trials: See Sakhawat v. Grown, I. L. It. 1937 Nag. 277 Emperor v. Ghanbasappa A.I.R. 1932 Bom 61 Emperor v. Maria Dhabi A.I.R. 1937 pat. 662 and Cheru Sheikh v. Emperor, 40 C.W.N. 1874 So the Provincial Government might well have thought that Such mixed trials could be averted by a notification of the kind now in question. The material portion of the notification runs:

In exercise of the powers conferred by Sub-section (1) of Section 269, Criminal P.C., 1898 V of 1898, and in super, session of all the previous notifications in this behalf, the Provincial Government is pleased to direct that, with effect from 1 5 1943, the trial of all offences punishable with transportation or with imprisonment extending to a term of ten years or upwards but not punishable with death, including abetment of, and attempts to commit, fray such offence alleged to have been committed within the Nag pur, Wardha, Jubbulpore, Hoshangabad excepting Narsingprir Sub division, Nimar, Amraoti, Akola, Ytotmal and Buldaca Revenue Districts, when held before the Court of Session shall be by jury:

Provided that any of such offences shall not be triable injury it, at the same trial, the accused is also charged with another offence arising out of the same transaction which is triable by a Court, of Session with the aid of assessors.

If the proviso in the notification was within the power of the Provincial Government under Sub-section (1) of Section 269, the undesirable mixed trial would for ever be admirably avoided.

12. The argument in favour of the proviso-proceeded on Thee lines. Offences become triable by jury only on the Provincial Government directing that they shall

be so triable under subs. (1) of Section 269. The Provincial Government is given the power to direct that either all offences or only a particular class of offences shall be triable by jury. The class of offences may be determined by the Provincial Government in their own discretion, according to the persons who commit the offences, or according to the particular occasion on which they are committed. Reliance was placed on Queen-Empress v Ganpathi Vannianar, 23 Mad. 632. The Provincial Government might well have said that certain offences if only they were committed in the course of a transaction giving rife to no other offence shall be triable by jury, It is no violation of a provision to keep outside it. If the notification is read as a whole, the Provincial Government did no more than this. We are not prepared to say that there was no force in the contention about what the Provincial Government might have done. If that was all that the Provincial Government intended to do, the phrasing of the notification was singularly unfortunate. But we cannot accede to the further contention of the learned Counsel for the Grown that what the Provincial Government actually did was no more than what the Provincial Government might have done.

13. When the Court comes to examine the exercise of a power given by a statute, the Court must be satisfied that the power given covers the purported exercise of it and that no other provision in the statute! is being infringed. The power of the Provincial Government to direct that certain offences shall be triable by jury cannot legitimately be extended so as to include the power to regulate the trial of the accused charged with offences of which some are and some are not triable by jury Once a person is charged with offences the provisions of the Code come into play and regulate the trial. The Provincial Government has no power at that stage to directs anything contrary to what is laid down by the legislature.

14. A close analysis of the notification will show how the Provincial Government infringed Sub-section (3) of Section 269. The main part of the notification, to be brief, says that the trial of all offences punishable with transportation or with imprisonment extending to a term of ten years or upwards but not punishable with death, including abetments of, and attempts to commit, any such I offences shall in certain areas be by jury. So far, there is no diffloulfcy. The proviso, however, says that any of such offences shall not be triable by jury if, at the same trial, the

accused is also charged with another offence triable with the aid of assessors The words 'any of such offences' must necessarily mean the offences which, the Provincial Government in the main part of the notification directed, shall be triable by jury. That being so, there was no power left to the Provincial Government to say that if the accused is also charged at the same trial with other offences, he shall not be tried by jury for the offences which were directed to be so triable in the main part of the notification. These words are in glaring conflict with the words in Sub-section (a). The power given to the Provincial Government under subs. (1) cannot sustain what is said in the proviso. Sub-Section (1) has reference to a stage prior to the accused being charged with offences and not subsequent to it. The conflict is not capable of reconciliation without doing violence to the language used. When there is an irreconcilable repugnance between what the legislature has enacted and what an authority purporting to act under the powers given by the legislature has done, the latter must give way. The rule governing such a case is clear and the conclusion is inescapable.

15. The learned Counsel for the Crown invoked the canon of construction that where there is a proviso, the former part which is described as the -enacting part must be construed along with the proviso and not apart from it. Reference was made to the decision of the House of Lords in Jennings v. Kelly. 1940 A.C. 206 It was further submitted that the Court could not dissect the notification. The question before us is not about the meaning of the notification which is fairly obvious but about the vires of the proviso. Where the words employed in the main part are capable of two meanings the proviso may have repercussions on the construction of the preceding words but not otherwise. Whether the main part of the notification and the proviso are read separately or together the words used do not admit of different meanings Where there is no doubt or obscurity about the meaning of words used, the tack of interpretation can hardly be said to arise. If the words of a provision are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such a case, best deal are the intention of the law giver: Wear River Commissioners v Adam-son, 1877 2 A 743 We can gather the intention of the Provincial Government only from the words employed in the notification. The meaning of the words used in the proviso leave no room for

the argument that the proviso did not trespass into the field cohered by sub Section (3) of Section 269.

16. The view that the proviso was ultra vires will not have any repercussions on previous trials because of Sub-section (2) of Section 536, Criminal P. C: sea Sakhawat Crown I.L.R. 1937 Nag. 277

17.We hold that the impugned proviso was ultra vires. The application for revision is allowed. The order dated 9.5-1949 by the Additional Sessions Judge is set aside and he is directed to proceed in accordance with law.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com