

Rasool Vs. State of Mysore

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Court : Karnataka

Decided On : Sep-02-1958

Reported in : AIR1959Kant136; AIR1959Mys136; 1959CriLJ622;
(1958)36MysLJ936

Judge : A. Narayana Pai, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 236, 237, 403, 403(5) and 494; Indian Passport Rules, 1950 - Rules 3, 4, 4(2) and 6; [Foreigners Order, 1948](#) - Rule 7; [Foreigners Act, 1946](#) - Sections 14; [General Clauses Act, 1897](#) - Sections 26; Foreigners Laws (Amendment) Ordinance, 1957; Foreigners Rules, 1948 - Rule 7

Appeal No. : Criminal Revn. Petn. No. 278 of 1958

Appellant : Rasool

Respondent : State of Mysore

Advocate for Def. : A.B. Mariappa, High Court Govt. Pleader

Advocate for Pet/Ap. : M.L. Venkatanarasimiah, Adv.

Judgement :

ORDER

1. The petitioner has been convicted by the Additional First Class Magistrate, Civil Station, Bangalore, of an offence under Section 14 of the Foreigners Act of 1946 read with Rule 7 of the Foreigners Order 1948 made under the provisions of Section 3 of the said Act, and has been sentenced to undergo simple imprisonment for a period of 2 months. The conviction and the sentence have been confirmed on appeal by the Sessions Judge, Civil Station Bangalore. Hence this revision petition.

2. Only a question of law has been argued in this revision and that is whether the conviction of the petitioner is barred under Section 403 of the Code of Criminal Procedure by reason of his having been acquitted under Section 494 (b) of the Code of Criminal Procedure in a prior case, C. C. No. 805 of 1955 on the file of the First Class Magistrate, Civil Station, Bangalore.

3. There is no dispute regarding the material facts, which may be stated briefly.

4. The petitioner is a Pakistani national. He arrived in Bangalore on 17-1-1954 on an emergency certificate issued by the Passport Officer and District Magistrate, Chittagong, which was valid up to 6-5-1954, covered by an Indian Visa of category C (that is valid for a single journey into India for a stay at a specified place not exceeding 3 months). This certificate and visa authorised the petitioner to stay at Bangalore upto 28-2-1954; this was later extended up to 27-3-1954 by the District Magistrate of Bangalore, and was further extended upto 20-4-1954 by the State Government with the express condition that he should leave India on or before that date without fail.

The order of the Government granting this extension also states that as regards the question of permanent settlement in India, the petitioner should go back to Pakistan and then apply in the prescribed form for permanent settlement to the High Commissioner for India in Pakistan. The petitioner later duly notified his intention to go back to Pakistan and actually left Bangalore by train on 20-4-1954. However, he was once again found in Bangalore on 4-4-1955 without any valid travel documents. He was thereupon prosecuted before the First Class Magistrate, Civil Station, Bangalore, in C. C. No. 805 of 1955. The charge then framed against him is in the following terms :

'Under Rule 6 Clause (a) and (b) read with Rules 3 & 4 of the Passport Rules of 1950 you are charged as follows : -- 'On 4-4-55 you were found in Bangalore Civil Station without any valid document for your stay in India after the expiry of the period of validity of the emergency certificate and Indian visa.'

5. This was on 26-8-1955. On the same day one witness for the prosecution was also examined. Thereafter there were several adjournments for reporting withdrawal or to proceed with the case. Finally on 18-1-1956 the Prosecuting Inspector made an application for permission to withdraw the prosecution, because the Government had decided to withdraw the same. The permission was granted and the accused acquitted under Section 494(b) of the Code of Criminal Procedure.

6. Thereafter nothing was done by the Government and the petitioner appears to have continued his stay in Bangalore. Early in 1957 the Central Government issued Foreigners Laws (Amendment) Ordinance 1957 (No. 1 of 1957) by virtue of which the provisions of the Foreigners Act of 1946 and the Foreigners Order of 1948 became applicable to the citizens of Pakistan by reason of a change in the definition of the term 'foreigner' which was made to extend to all persons who are not citizens of India.

On 11-4-1957 a notice was issued to the petitioner informing him that the validity of his Indian Visa had expired on 3-5-1954, that his stay in Bangalore since then was unauthorised and calling upon him to make arrangements to leave India within a period of one month from the date of the receipt of the notice and adding that on his failure to do so he would render himself liable for prosecution under the provisions of the Foreigners Act of 1946 as amended by the Foreigners Laws (Amendment) Ordinance of 1957. This notice was served on the petitioner on 13-4-1957. The petitioner did not comply with the terms thereof. Accordingly the present prosecution was launched against him in June, 1957. The charge on which he has been convicted in the present case reads as follows : --

'That you being a Pakistani National arrived in Bangalore on 17-1-1954 under an emergency certificate No. 196 dated 8-12-1953 issued by Pakistan Government and covered by Indian Visa No. 503545 dated 31-12-1953 and overstayed in India

since 20-4-1954 and thereby committed an offence punishable under Section 14 of the Foreigners Act 1946 read with. Rule 7 of the Foreigners Rule 1948.'

7. It is on these facts that it is contended that the present prosecution is either for the same offence or on the same facts for another offence for which he could have been charged or punished on the last occasion and that, therefore, Section 403 of the Code of Criminal Procedure bars the conviction. The principal, if not the only, argument on behalf of the petitioner is that in both the cases what is charged against the petitioner is 'overstay' in India beyond a particular date.

It seems to me that the only difficulty, or mere accurately confusion, in this case has been created by over-emphasis on this word 'overstay'. That word is used in the charge in the present case. I do not find it used in the previous charge. The previous charge says that when on 4-4-1955 he was found in Bangalore, the petitioner was not in possession of any valid documents for his stay in India. If care had been taken by the Courts to read the relevant rules and sections before framing charges, this argument would not have been available at all.

On the former occasion the accused was said to have contravened Clauses (a) and (b) of Rule 3 of the Indian Passport Rules of 1950, read with Rules 3 and 4 of the same Rules. Rule 3 prohibits entry into India without possession of a valid passport issued under the Rules. Rule 4 exempts certain persons from the necessity of having a passport. Rule 6 provides that whoever contravenes or abets the contravention of Rule 3 or Rule 4 (2) shall be punished. A charge under these rules should have charged the accused with having entered India without being in possession of a valid passport and not that he had been found somewhere In India without having any travel documents in his possession.

However nothing mere need be said about that charge because the accused had been acquitted on that charge. The present charge is for a contravention of Rule 7 of the Foreigners Order of 1948, which is made punishable by Section 14 of the Foreigners Act. Rule 7 imposes certain restrictions on a foreigner's sojourn in India and requires him to depart from India before the expiry of the period during which he is permitted to stay in India. The notice issued to the petitioner in the present case on 11-4-1957 drew his attention to this Rule when it asked him to depart from

India within a month from the date of the service of the Notice.

The substance of the offence this time is failure to depart from India although the permitted period of stay had expired. The charge, therefore, should have said that he had failed or omitted to depart from India and thereby committed an offence and not stated that he had overstayed since a particular date and thereby committed an offence.

8. Because the accused in both the courts below has laid great emphasis on this term 'overstay' the argument on behalf of the prosecution has also laid great emphasis on what is described as the recurring nature of this offence. The answer in my opinion, is as illogical as the original argument itself. 'To recur' simply means 'to occur again' or to repeat; the word connotes distinct and different repetitions of the same act.

It is impossible to understand how a man who has overstayed repeats himself every day or every moment in that act of overstay. Overstaying is a continuous idea, because stay itself is a continuous idea. In the context 'stay' means 'dwell', which again is a continuous act and not a repetition of several acts. For a correct appreciation of the case, therefore, it is necessary to reject both the original argument and the suggested reply thereto.

9. Discarding all the confusion caused by the wording of the charges and the argument and counter-argument based on such wording, the simple question in the case is whether the petitioner, who has once been tried for an offence and acquitted of such offence, has now been tried again for the same offence or on the same facts for any other offence for which different charges might have been made against him under Section 236 or for which he might have been convicted under Section 237 of the Code of Criminal Procedure.

That the offence is not the same is perfectly clear because the offence with which the petitioner was charged on the last occasion is contravention of the Passport Rules, that is entering India without a valid passport, and the offence with which he is now charged is contravention of Rule 7 of the Foreigners Order, that is, failure to depart from India after the expiry of his permitted period of stay.

To answer the question whether the facts are the same, it is necessary to ask the further question what are the relevant facts? For the offence of illegal entry, the relevant facts would be that accused had entered India and that the accused was not in possession of a valid passport. For the offence of failure to depart, the relevant facts would be that the accused has entered India under authority of a visa held under the Passport Act, that the period of validity of the visa has expired and that the accused has failed to depart before the expiry of that period.

Viewed in this light the relevant facts would also appear to be clearly different. The argument regarding identity of facts is also made possible by reason of the wording of the charges. On the last occasion it was said that the petitioner was found in India on a particular date without valid documents. On the present occasion it is said that the petitioner is overstaying in India since a particular date.

Both the charges give point to the fact of the accused being here instead of stating, as they should have, that the accused entered India or that the accused has not departed from India as the case may be. If, therefore, irrelevancies are ignored and attention paid only to relevant facts, the facts, in my opinion, on which the present conviction is based are different from the facts on which the last prosecution was sought to be founded.

It is because of the apparent identity of the facts or the illusion of the identity caused by wrong wording of charges that the Courts below have been obliged to strain themselves to show that the present offence, though based on same facts, is distinct from the last offence and for that purpose to devote much of their time to discover and state what they call the gist of the offence.

10. For the reasons stated by me it seems to me that this is not a case in which Section 403 of the Code of Criminal Procedure could at all be invoked. I may also add that according to Sub-section (5) of Section 403 of the Code of Criminal Procedure the said entire Section does not affect the provisions of Section 26 of the General Clauses Act. The latter section provides that where an act or omission constitutes an offence under two or more enactments the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.

In other words, there is no bar to a second trial but the only bar is against two punishments. If, therefore, on the former occasion the accused has been acquitted, the courts are not prohibited from convicting him at the second trial. Only if for the same act or omission the accused has been punished under one statute, he cannot be punished again for the same act under another statute. This view of the effect of Section 26 of the General Clauses Act is supported by a ruling of the Madras High Court In the matter of K. B. Prabhu : AIR1944 Mad369 .

Even assuming, therefore, for purposes of argument that the facts in the two cases may be said to be the same and those facts constituted an offence under the Passport Act and also an offence under the Foreigners Act, the accused having been acquitted and not convicted under the former Act he cannot plead the previous acquittal as a bar against his present trial and conviction.

11. In the result the revision petition is dismissed. The petitioner will surrender to his bail.

12. Revision dismissed.

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