

Basha and ors. Vs. State of Mysore

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Court : Karnataka

Decided On : Feb-18-1969

Reported in : AIR1969Kant277; AIR1969Mys277; 1969CriLJ1144;
(1969)1MysLJ79

Judge : T.K. Tukol, J.

Acts : Code of Criminal Procedure (CrPC) , 1889 - Sections 242, 439, 535 and 537; Mysore Police Act, 1963 - Sections 78, 79 and 80; Bombay Prevention of Gambling Act - Sections 5

Appeal No. : Criminal Revn. Petn. No. 724 of 1968

Appellant : Basha and ors.

Respondent : State of Mysore

Judgement :

ORDER

1. This is an application under Section 439 of the Code of Criminal Procedure by the four accused who were convicted under Section 80 of the Mysore Police Act, and sentenced to suffer simple imprisonment for one month and to pay a fine of Rs. 200, each in default to suffer imprisonment for a further period of one month.

2. The case of the prosecution was that the four petitioners were found engaged in gambling called 'ander-bahar' with stakes; the amount found then at the time of the

raid was Rs. 35-90 Ps. They were found gambling in Room No. 49 of Eastern Lunch Home, situate at No. 20 Police Road, Bangalore City. It appears that the place was searched by the police under a search warrant issued by the Assistant Commissioner of Police. The accused were charge-sheeted for an offence under Section 80 of the Mysore Police Act, 1963 (hereinafter called the Act), before the Additional First Class Magistrate, Bangalore City.

3. All the accused pleaded guilty to the accusations, and the Magistrate accepted their plea and passed the order of conviction and sentence as stated above. The accused then appealed to the Principal Sessions Judge, Bangalore, in Criminal Appeal No. 76 of 1968. They contended that the conviction was illegal on the ground that the necessary ingredients were not explained to them and that there was nothing to indicate that all the facts had been explained to them in a language understood by them. The learned Sessions Judge, however, held that there was no irregularity in the trial Court and that the sentence inflicted by the magistrate was minimum sentence prescribed under law. He accordingly confirmed the order of conviction and sentence.

4. Being aggrieved by this order the accused have preferred this petition under Section 439 of the Code of Criminal Procedure. Mr. Nabhirajiah, learned Advocate appearing for the petitioners has submitted two points for my consideration, and, I shall deal with each of them in the order in which they were submitted at the bar.

5. The first contention advanced by the learned Advocate is that the Magistrate has committed an error in not informing the accused that they were playing 'Ander Bahar' with stakes in a common gaming house and that they were given no opportunity to explain what they had to say in regard to the different ingredients of the offence. Section 80 of the Act lays down:

'80. Gaming in common gaming house, etc.--Whoever is found in any common gaming house gaming or present for the purpose of gaming shall, on conviction, be punished with imprisonment which may extend to one year and with fine,...

Chapter VII of the Act, contains provisions for 'Prevention of Gaming'. Section 78 provides punishment for opening, keeping or using any house as a common gaming house. Section 79 provides for punishment of owners or occupiers of such houses. Section 80 makes gambling in such a common gaming house an offence punishable under the law. The learned Advocate for the petitioners naturally emphasised the fact that the provisions under the Police Act, made punishable only such acts as were committed in common gaming houses. There cannot be any doubt that playing cards like 'Ander Bahar' with stakes in a private house by some private individuals is not covered by Section 80 of the Mysore Police Act.

6. In the present case the question put to the accused does not draw their attention pointedly to the essential ingredient of the offence, namely, that they were gaming in a common gaming house. What seems to have happened at the trial is that a question uniformly worded was typed on printed forms intended for recording the examination of the accused persons. The question put to each of the accused reads thus:

'It is alleged that on 23-4-1968 at about 8-45 p.m. you are all gathered themselves engaged in gambling called 'Ander Bahar' by staking money of Rs. 35-90 Ps. at room No. 49, of Eastern Lunch Home, situated also at 20, Police Road, Bangalore City when checked by the C. W. 1 to 7 (in the charge-sheet) as per the search warrant issued by the Assistant Commissioner of Police. There by committed an offence punishable under Section 80 of M. P. Act.

Show cause as to why you should not be convicted?'

Such mechanical repetition of the question ought to be discouraged as the result in a criminal trial is likely to be tainted with errors, if not with unjust consequences to the accused. Section 242 of the Code of Criminal Procedure which prescribes the procedure to be followed in summons cases requires the Magistrate to explain to the accused the substance of the accusation without framing a formal charge. What it lays down is, that 'when the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him and he shall be asked if he has any cause to show why he should not be convicted....' So the first duty of the Magistrate is to state to the accused

particulars of the offence of which he is accused. He shall then ask the accused as to why he should not be convicted. Where the offence consists of numerous ingredients it would be always advisable to state the particulars with such clarity as would make the accused understood all the ingredients of the offence. If an omnibus question is put to the accused, as has been done in this case, and he pleads guilty, complications are likely to arise as have arisen in this case. If the particulars put to the accused suffer from omissions of material particulars, the plea in such cases would not be a plea of guilty; it would be a plea of guilty only to the particulars explained to him.

7. Mr. Rego, learned counsel appearing for the State, submitted that even though there was no specific reference to the 'common gaming house' in the particulars explained to the accused yet, the reference to the search warrant issued by the Assistant Commissioner of Police was sufficient to indicate, that the accused were charged with the offence of gaming in a common gaming house. I do not think, that the legal presumption that arises under the issue of a proper warrant by the Assistant Commissioner could be called in aid to fill up the lacuna in the particulars explained to the accused. The warrant issued by the Assistant Commissioner is a piece of evidence which will lighten the burden of the prosecution when leading evidence as to the nature of the place where gambling was found to have been indulged in. From the mere fact that the question mentioned something about the search warrant, it would not be correct to infer that the accused were expressly told that they were gaming in a common gaming house. It is necessary to mention that two of the accused are illiterate. Under these circumstances it is difficult to infer that the necessary particulars had been explained to the accused.

8. The learned Advocate appearing for the State drew my attention to Sections 535 and 537 of the Code of Criminal Procedure. The former refers to the effect of omission to prepare charge, while the latter provides that no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered in appeal or revision on account of any error, omission or irregularity in the charge, summons, warrant, proclamation order etc., Both these sections are subject to one important clause and that is if the irregularity or omission is such as has evidently occasioned a failure of justice, then such irregularity or omission ought to be

regarded as of material consequence in law.

9. So the question that has to be determined is whether the omissions to explain to the accused that they were found gaming in a common gaming house is such as could be said to have resulted in clear failure of justice or prejudice to the accused. In my opinion, if the particulars explained to the accused do not refer to the common gaming house, but merely refer to gaming with stakes in some house, their act would not be one punishable under Section 80 of the Mysore Police Act. There cannot therefore be any doubt in such circumstances in holding that the trial has resulted in miscarriage or failure of justice.

10. Mr. Nabhirajaiah, for the petitioners has drawn my attention to a decision of the Bombay High Court in *State of Maharashtra v. Sharad Keshav*, : AIR1967 Bom52 . That was a case under the Bombay Prevention of Gambling Act. There also the accused were convicted on their own admission to the charge that they were found in a common gaming house. No particulars were put to them as to whether they were actually gaming or present for gaming. The accused in that case also had been convicted; when they appealed to the Sessions Judge, he came to the conclusion that unless there was a finding that the accused were gaming in a common gaming house, it was not open to the Magistrate to convict them on admission. The Sessions Judge, made a reference to the High Court. In accepting the reference, it was emphasized that the different ingredients of the offence ought to have been put to the accused and their explanation ought to have been asked on each such particular.

It was further observed that if the presumption under Section 5 of the Act were to be raised, the accused had to be asked whether the place where they were found was a common gaming house. As already observed, there would be no occasion for cases like the present, if the Magistrates are careful enough to explain to the accused each of the material particulars constituting the offence and get their say on those particulars instead of putting an omnibus question and asking them to show cause why they should not be convicted.

11. In the result, I allow this petition, set aside the order of conviction and sentence and remand the case to the Court of the Magistrate for a fresh trial according to

law. The fine if paid by the accused shall be refunded.

12. Petition allowed.

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