

In Re: Billa Masthan

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Court : Andhra Pradesh

Decided On : Sep-14-1954

Reported in : AIR1955AP33

Judge : Umamaheswaram, J.

Acts : Code of Criminal Procedure (CrPC) , 1808 - Sections 233, 234, 235, 236, 239, 403 and 494; [Indian Penal Code \(IPC\), 1860](#) - Sections 403, 408 and 477-A; [Code of Civil Procedure \(CPC\), 1908](#)

Appeal No. : Criminal Revn. Case No. 646 and Criminal Revn. Pen. No. 600 of 1954

Appellant : In Re: Billa Masthan

Advocate for Def. : Public Prosecutor

Advocate for Pet/Ap. : T.V. Sarma and ;S.V.L. Narasimhalu, Advs.

Judgement :

ORDER

(1) An interesting question of law arises for decision in this Criminal Revision Petition. In C. C. No. 143 of 1953 the petitioner herein was charged for two distinct offences under Ss. 408 and 477-A, Penal Code, respectively on 29-12-1953. On the next day, the Assistant Public Prosecutor, Gurjaal, filed a petition stating that the two offences being distinct, both the charges should not be tried together and

that the charges under S. 477-A, Penal Code, might be separated and fresh proceedings might be permitted to be started against the accused in respect of the said offence. The Additional First Class Magistrate passed the following order on that application:

'I hold that the charges under Ss. 477-A and 408, Penal Code, cannot be tried together in one trial. Hence the charge under S. 477-A, Penal Code, will be tried separately and the case against B. Masta under S. 477-A, Penal Code, will be registered as C. C. No. 308 of 1953 and proceeded with.'

(2) Another petition was filed on the same day by the Assistant Public Prosecutor stating that, in view of the separation of the charge under S. 477-A Penal Code, the charge in C. C. No. 143 of 1953 might be amended by dropping the charge under S. 477-A and the following order was passed on that application.

'The accused Billa Mastan has been charged with offences under Ss. 408 and 477-A, Penal Code, on 29-12-1953 in this case. since the two charges are distinct and are to be tried separately, the charges framed on 29-12-1953 are hereby amended by elimination of charge under S. 477-A, Penal Code.'

(3) The question that falls to be decided is, as to the effect of the order dated 30-12-1953, amending the charges framed on 29-12-1953 and eliminating the charge under S. 477-A, Penal Code. The argument addressed by Mr. Sarma, the learned Advocate for the petitioner was that the withdrawal of the charge in respect of offence under S. 477-A, Penal Code, must be regarded as made under s. 494, Criminal P. C. that under Cl. (b) it operated as an acquittal in respect of that offence, that the Additional First Class Magistrate, Narasaraopet, had not jurisdiction to try the petitioner under S. 477-A, Penal Code in C. C. No. 308 of 1953 and that the conviction and sentence passed on the petitioner to undergo rigorous imprisonment for four months, which was confirmed on appeal by the Court of Session, Guntur, in Cr. A No. 53 of 1954 was unsustainable.

In support of that contention, he mainly relied on the decision of Govinda Menon J. in -- 'In re, velayudha Mudali', AIR 1949 Mad 508 (A). The learned Public Prosecutor contended that the withdrawal of the charge was not under S. 494

Criminal P. C., that the amendment of the charge framed on 29-12-1953 did not attract the terms of S. 403, Criminal P. C., and that the decision relied on by the petitioner was distinguishable.

(4) For the purpose of appreciating the rival contentions it is necessary to examine the relevant provisions of the Code of Criminal Procedure. Section 233, Criminal P. C., enacts that there shall be a separate charge for every distinct offence of which any person is accused and every such charge shall be tried separately, except in the cases mentioned in Ss. 234, 235, 236 and 239. Section 234 provides that a person accused of more offence than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, may be charged with, and tried for not more than three such offences at one time. Under S. 235, a person who commits more than one offence in the same transaction may be charged with and tried at one trial for every such offence. Where it is doubtful which of several offences the facts which can be proved will constitute, under S. 236, Criminal P. C., the accused may be charged with having committed all or any of such offence or may be charged in the alternative with having committed one of the said offences.

Section 239 provides as to who may be charged and tried together. What emerges from an examination of these provisions is that distinct charges, ought not to be tried together. This position was realised by the Assistant Public Prosecutor, Gurjala, on 30-12-1953, after the Magistrate framed the charges on 29-12-1953. The petition filed by the Assistant Public Prosecutor on 30-12-1953, does not, in specific terms, refer to S. 494, Criminal P. C., but, in my opinion it must be regarded as having been made under that section, as the learned Public Prosecutor has not been able to invite my attention to any other section of the Criminal Procedure Code under which the charge framed under S. 477-A could have been eliminated and the trial confined to the charge under S. 408, Penal Code. There can be no doubt, that if the withdrawal was effected under S. 494, after the framing of a charge, it would operate as an acquittal under Cl. (b).

The Public Prosecutor was therefore, constrained to contend that the withdrawal under S. 494 referred only to the withdrawal of charges which might be clubbed together under Ss. 234, 235, 236 and 239, Criminal P. C., and was not applicable to the withdrawal of charges framed in respect to distinct offences and which could not be tried together under the mandatory terms of S. 233 Criminal P. C. The contention is, in my opinion, unsustainable as is clear from the language of that section. Section 494, Criminal P. C., enacts that any Public Prosecutor may withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried. Clause (a) provides that, if the withdrawal is made before a charge has been framed, the accused shall be discharge in respect of such offence or offences. Before the framing of a charge no question of misjoinder arises. The words 'one or more of the offences for which he is tried' are general in character and they may be distinct offences or offences of the same kind or offences arising out of the same transaction. Those words in the earlier part of section cannot therefore be construed differently in judging the effect of the withdrawal under Cls. (a) and (b).

(5) the decision in -- In re, Velayudha Mudali (A)' directly governs the case. As some of the charges framed in that case were exclusively triable by a Court of Session, the Public Prosecutor applied under S. 494, Criminal P. C., for permission to withdraw the case stating that his intention was to file separate prosecutions, against the accused for those offences and the Court granted the permission for the withdrawal and discharged the accused under S. 494(a), Criminal P. C. Govinda Menon J. held that the withdrawal of the case, after the framing of a charge, amounted to an acquittal of the accused. The observations of that learned Judge are not only apt but are entitled to great weight and are directly applicable to the facts of this case.

They are as follows:

'The learned Public Prosecutor urges that the request for withdrawal was combined with the statement that the intention of the prosecution was to file separate cases against individuals or groups of accused separately and according to him, in pith and substance, the order giving permission to withdraw the case

amounts also to an order empowering the institution of the present case. If the Code of Criminal Procedure contained a provision similar to O.23, R. 1, Civil P. C., allowing the withdrawal of a case with permission to file, on the same facts, a fresh complaint, this argument is entitled to great weight. But in the absence of any such rule of law one has to envisage the result of a withdrawal in accordance with the ideas underlying the sections of the Criminal Procedure Code. If it is impossible to wipe off or obliterate a charge already framed without an acquittal or with the culmination of a charge in a conviction, any withdrawal with permission to file a fresh complaint cannot be understood as the keeping alive of a charge.'

(6) The object of intentions of the Assistant Public Prosecutor in requesting the Magistrate to omit the charge under S. 477-A might be to empower him to initiate separate proceedings in C. C. No. 308 of 1953 and the object of the Magistrate in allowing the petition might equally be the same.

(7) But the question is whether such a procedure is warranted by the provisions of the Code of Criminal Procedure. Unfortunately, as there is no provision in the Criminal Procedure Code, corresponding to O. 23, R. 1, Civil P. c., permitting the withdrawal of a case with permission to file a fresh complaint, on the same facts, the withdrawal or the elimination of the charge under S. 477-A, Penal Code, though coupled with a specific direction 'that the case against B. Mastan under S. 477-A, Penal Code, will be registered as C.C. No. 308/53 and proceeded with' would only amount, in law, to an acquittal. The result of such a construction may be regrettable, but the law must be given effect to. In spite of the fact that this anomaly was pointed out by a learned Judge of the Madras High Court with vast criminal experience, in 1948, the Criminal Procedure Code has not been duly amended.

It is for the Legislature to step in and remedy such defect and not for me to strain and construe the provisions of S. 494, Criminal P. C., in such a way as to avoid the result of acquittal and sustain the conviction, as contended for by the learned Public Prosecutor. I do not agree with the learned Public Prosecutor that as the two charges framed under Ss. 408 and 477-A were in respect of distinct offences and could not be tried together according to S. 233, Criminal P. C., it was open to

the Magistrate to proceed with the trial of the charge under S. 408, Penal Code, in C. C. No. 143 of 1953 and to separately proceed with the trial of the other charges under s. 477-A in C. C. No. 308 of 1953. This argument overlooks the fact that after charges are framed by the Magistrate, the enquiry is transformed into a trial and that it is impossible in the words of Govinda Menon J. in -- 'In re Velayudha Mudali (A)':

'to wipe off or obliterate a charge already framed without an acquittal or with the culmination of the charge in a conviction.'

There is no distinction in principle between the decision in -- 'In re Velayudha Mudali (A)' and the present case. In -- 'In re, Velayudha Mudali (A)', the Magistrate was not competent to try some of the offence as they were cognizable by a Court of Session, while in the present case, the Magistrate was not competent to try them as they related to two distinct and separate offences. If according to the learned Public Prosecutor there was no withdrawal within the meaning of S. 494, Criminal P. C., what happened to the charge under Section 477-A, Penal Code? Even if the charge was eliminated or omitted under s. 277, Criminal P. C., it would, in law, amount to an acquittal and he cannot be tried over again for the same offence having regard to the clear terms of S. 403(a), Criminal P. C.

Clause (2) of s. 403 has no application to a case of this description. The decision of Walsh J. in -- 'Thangappa Nadar v. Neethimanicka Ndar'. 1943 Mad WN 1094 (B) has no bearing as charges under ss. 477-A and 409, Penal Code, were not framed together as in this case. Proceedings under S. 477-A were started at first and the learned Judge held that it did not bar proceedings being taken under S. 409 after conviction under S. 477-A, Penal Code, as the facts constituting the two offences were different and distinct.

(8) The learned Advocate for the petitioner raised several other legal contentions, but it is unnecessary for me to discuss them as the conviction has to be set aside on the first point itself.

(9) In the result, the Criminal Revision Petition is allowed and the conviction and sentence imposed by the Addl. Ist Class Magistrate, Narasaraopet, and confirmed

on appeal by the Sessions Judge, Guntur, are set aside.

(10) Before concluding the judgment, I only wish to point out that it is regrettable that both the Courts below erred in not referring to and following the direct decision of Govinda Menon J., referred to 'supra', even though I understand from the learned Advocate for the petitioner who appeared in the Courts below that this decision was cited before them. It may be, as pointed out by me in -- 'Venkayya v. Seshayya', Alr 1954 Andhra 29 (C) and the unreported decision in -- 'Subba Reddi v. Govinda Reddi', Second Appeal, No. 574 of 1950, d/- 10-9-1954 (Andhra) (D) that this High Court which was inaugurated in July 1954, is not bound to blindly follow all the decisions of the Madras High Court and is entitled to examine the soundness or the correctness of those decisions in proper and appropriate cases.

(11) I also pointed out therein that those decision are entitled to the greatest respect and weight. But those observations ought not to be understood as implying that the Subordinate Courts in the State are entitled to ignore the direct decisions of the Madras High Court or to capriciously prefer the decisions of the other High Courts to the decisions of the Madras High Court. the Subordinate Courts in the State are primarily bound to follow the decisions of this Court. If there are no decisions of this Court directly governing the case, they ought to follow the decisions of the Madras High Court as they have been previously doing in preference to the decisions of other High Courts. It is only when there are no decisions of this Court or the Madras High Court dealing with the point, they are free to follow the decision of other High Courts. The petitioner is set at liberty and bail bonds cancelled. Revision allowed.

Revision allowed.

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