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Court : Andhra Pradesh

Decided On : Jan-12-1959

Reported in : AIR1960AP151; 1960CriLJ307

Judge : Basi Reddy, J.

Acts : Criminal Law (Amendment) Act, 1952 - Sections 8 and 8(3); Criminal Law (Amendment) Act, 1958; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 350; [Prevention of Corruption Act, 1947](#) - Sections 5(1) and 5(2)

Appeal No. : Criminal Appeal No. 359 of 1957, Criminal Revn. Case No. 827 of 1957 and Criminal Revn. Petn. No. 67

Appellant : K.V. Sethuraman

Respondent : Union of India (Uoi) Represented by the Hyderabad Branch of the Special Police Establishment, Hydera

Advocate for Def. : Public Prosecutor

Advocate for Pet/Ap. : G. Balaparameswari Rao, Adv.

Judgement :

ORDER

Basi Reddy, J.

1. In C. C. No. 6 of 1956 on the file of the Special Judge, Vijayawada, the accused, K. V. Sethuraman, formerly commercial clerk, Tade-palligudein Railway Station, Southern Railway, was tried on a charge under Section 5(2) read with Section 5(1)(c) of the Prevention of Corruption Act (II of 1947) for having as a public servant between 21-9-1951 and 18-9-1952, dishonestly or fraudulently misappropriated a sum of Rs. 935-6-0 collected by him by sale of season tickets and halt station tickets on various dates during that period. The learned Special Judge convicted the accused of the offence with which he was charged and, as in the Judge's view, the accused was a public servant and was not a previous convict, he took a lenient view of the offence committed by the accused and sentenced him to undergo simple imprisonment for four months. Against the said conviction and sentence the accused has preferred Criminal Appeal No. 359 of 1957.

2. The State of Andhra Pradesh has filed Criminal Revision Case No. 827 of 1957 for the enhancement of the sentence passed on the accused On the ground that the sentence is grossly inadequate, having regard to the gravity of the offence.

3. Since I have reached the conclusion that a retrial should be ordered in this case, it is not necessary to set out the evidence in support of the case for the prosecution.

4. The learned Advocate for the accused has advanced Four main arguments:

1. That the trial is illegal inasmuch as the judgment was delivered by a Judge who had not heard the whole of the evidence in the case, and the provisions of Section 350 Criminal Procedure Code were not applicable to proceedings before a Special Judge prior to the Criminal Law Amendment Act, 1958 (Act II of 1958), whereby Section 8 of the Criminal Law Amendment Act, 1952 (Act XLVI of 1952) was amended by inserting Sub-section (3-A). The new sub-section is in the following terms:

'In particular, and without prejudice to the) generality of the provisions contained in Sub-section (3), the provisions of Section 350 of the Code of Criminal Procedure, 1898, shall, so far as may be, apply to the proceedings before a Special Judge, and for the purpose of the said provisions, a Special Judge shall be deemed to be a Magistrate.' In support of this contention it is pointed out that out of the 23 witnesses examined on behalf of the prosecution, the evidence of P. Ws. 1 to 17, was recorded by Sri Y. Venkateswara Rao, who was the Special Judge at Vijayawada till 1-3-1957; that he was then succeeded by Sri Syed Firasath Hussain and the latter recorded the evidence of P. Ws. 18 to 23 and delivered the judgment under appeal.

2. That the charge as framed is bad for mis-joinder in that six independent transactions have been clubbed together in the charge. It is contended on the authority of the ruling of the Supreme Court in *Om Parkash v. State of U. P.* (S) : 1957 CriLJ575 , that the offence created under Section 5(1)(c) of the Prevention of Corruption Act is distinct and separate from the one under Section 405 I. P. C. (Criminal breach of trust), and therefore Section 222(2) of the Criminal Procedure Code cannot be invoked, and Section 234 Cr. P. C., comes into play and would be a bar to the joint trial of more than three offences of the same kind committed in the space of twelve months. It is further argued that the terms of Section 235(1) Cr. P. C. are not attracted in that the six offences with which the accused was charged, cannot be deemed to form parts of the same transaction.

3. That the sanction accorded in the case is invalid in that there is no proof that the sanctioning authority had applied his mind to the facts of the case.

4. That the oral and documentary evidence adduced in the case does not establish the guilt of the accused beyond all reasonable doubt.

5. As I am satisfied that there is force in the first of the contentions raised by the learned Advocate for the accused, I do not propose to deal with the other contentions. There is no dispute about the fact that the major part of the evidence in this case was recorded by the predecessor of the Judge who ultimately found the accused guilty and sentenced him. I am clearly of opinion that before the Criminal Law Amendment Act of 1958 came into force on 27-2-1958, the

provisions of Section 350, Cr. P. C. were not applicable to the proceedings before a Special Judge, and therefore in this case one of the fundamental rules governing criminal trials, namely, that every judgment pronounced by a Judge must be on the evidence wholly recorded before him and the entire trial should have been by him alone, has been violated, and consequently the conviction is bad.

6. In re, Vaidyanatha Iyer, : AIR1954 Mad350 , a Division Bench of the Madras High Court had held that the Court of a Special Judge was not a Court of Session, and by reason of Section 8(1) of the Criminal Law Amendment Act 1952 (Act XLVI of 1952), the procedure prescribed by the Criminal Procedure Code for the trial of warrant cases by Magistrates, which procedure comprehended Section 350 Cr. P. C. as well, was applicable to the trials before a Special Judge. This decision was, however, overruled by a Full Bench of the Madras High Court in Re, Fernandez, 1958-2 Mad LJ 294: (AIR 1958 Mad 571), and the Full Bench held that the principle of law laid down in : AIR1954 Mad350 was not correct. The question formulated for the decision of the Full Bench was: 'Is Section 330 Cr. P. C. part of the procedural law applicable to the trial of an accused person by a Special Judge appointed under the provisions of (Central) Act XLVI of 1952?' Balakrishna Ayyar, J., who delivered the judgment of the Full Bench, stated his reasoning and conclusions thus:

(a) The ordinary rule in the Criminal Procedure Code is that judgment in any case should be delivered only by the Judge who has heard the whole of the evidence in the case. The only exception to this rule is that created by Section 350 Cr. P. C., which empowers the Magistrate to dispose of a case on evidence heard in part by himself and in part by his predecessor or predecessors. But even this exception is not applicable to a Court of Session,

(b) An analysis of the four sub-sections of Section 8 of the Criminal Law Amendment Act of 1952, shows that a special Judge officiating under that Act, is neither a Magistrate nor a Sessions Judge. He is deemed to be a Magistrate for certain purposes and he has got the powers of a Sessions Judge for certain other purposes. He occupies an anomalous position and will be a court 'constituted under any other law', as contemplated by the classification of Criminal Courts

under Section 6 of the Criminal Procedure Code.

(c) Having regard to the cardinal rule of procedure in criminal matters and having regard to the pattern of legislation creating Special Courts and investing them with specific powers on procedural matters, in the absence of express provision in any statute, it cannot be presumed that the Legislature intended to depart from the normal procedure applicable to trial of criminal cases when they are tried by Special Courts. The Criminal Law Amendment Act of 1952 (before its recent amendment by Act II of 1958), did not contain an express provision, as many similar legislations of the time did, similar to the one contained in Section 350 of the Code of Criminal Procedure, dispensing with 'de novo' trial in case of change in the personnel of the Special Court trying the case under the Act. Hence the right of an accused to demand a 'de novo' trial in such cases could not be negated as Section 350 of the Code of Criminal Procedure was not made applicable to the Special Courts.

7. I respectfully agree with the reasoning and the conclusion of the learned Judges of the Full Bench in the above case. That what the Full Bench laid down was the true position in law, has since been recognised by the Legislature itself by inserting the new Sub-section 3-A in Section 8 of Act XLVI of 1952. This sub-section enacts that the provisions of Section 350 of the Code of Criminal Procedure, shall, so far as may be, apply to the proceedings before a Special Judge, and for the purposes of the said provisions a Special Judge shall be deemed to be a Magistrate. It is, therefore, manifest that but for this provision, Section 350 Cr. P. C., would not have been applicable to proceedings before a Special Judge since the sub-section says in so many words that for the purposes of Section 350 Cr. P. C., a Special Judge shall be deemed to be a Magistrate. The word 'deemed' is commonly used for the purpose of creating a statutory fiction. In *Reg. v. Norfolk County Council*, (1891) 60 LJ QB 379 at a 380, Cave J., gives the following meaning to the phrase 'deemed to be':

'Generally speaking, when you talk of a thing being deemed to be something, you do not mean to say that which it is deemed to be. It is rather an admission that it is not what it is to be deemed to be, and that, notwithstanding it is not that particular

thing, nevertheless it is to deemed to be that thing'.

8. It follows that as the law stood at the time the present case was tried by the Special Judge, the provisions of Section 350 Cr. P. C., were not applicable to proceedings before a Special Judge, and therefore the procedure followed in this case is illegal, the trial is invalid and the resulting conviction is void.

9. I am also of the view that, in the circumstances of this case, it would have been in the best interests of justice that the Judge who had to adjudicate upon the guilt of the accused, had seen and heard all the material witnesses and watched their demeanour whilst giving evidence. In this case the plea of the accused was that, he had handed over the moneys collected by him by the sale of tickets to the Station Master as and when they were collected. It would have been fairer to the accused if the Judge, who ultimately decided the case, had seen the Station Master (P. W. 5) in the witness-box and noted his reaction to the suggestions made by the defence. Similarly it would have been much more satisfactory if Lakshmana-swami (P. W. 14), who was one of the most important witnesses for the prosecution and who is said to have bought three half tickets on three different occasions from the accused and paid the money to him, had been examined by the Judge who found the accused guilty of the three heads of charge. The same considerations apply to P. Ws. 10 and 11, two of the three persons who are alleged to have bought season tickets from the accused, which allegation forms the subject-matter of items 1 and 3 of the charge.

10. In the result Criminal Appeal No. 359 of 1957 is allowed. The conviction and sentence are set aside and the case is directed to be retried by the Special Judge, Chittoor, according to law.

11. Criminal Revision Case No. 827 of 1957 is dismissed.

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