Tiny and ors. Vs. State

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Court : Allahabad

Decided On : Jul-27-1951

Reported in : AIR1952All92

Judge : Brij Mohan Lall, J.

Acts : Indian Penal Code (IPC), 1860 - Sections 71, 147, 149 and 323

Appeal No. : Criminal Revn. No. 1290 of 1950

Appellant : Tiny and ors.

Respondent : State

Advocate for Def. : Assit. Government Adv.

Advocate for Pet/Ap. : B.C. Saxena and ;V.K.S. Chaudhory, Advs. for No. 1

Disposition : Revision application dismissed

Judgement :

Brij Mohan Lall, J.

1. This is an application in revision by twenty-four persons who have been convicted by a learned Magistrate, first class, of Azamgarh of offences punishable under Sections 147 and 323/149 I.P.C. Every one of them has been sentenced to pay a fine of Rs. 30/- under the former section and a further fine of Rs. 20/- under

the latter section.

2. The applicants filed a revision in the Court of the learned Sessions Judge of Azamgarh. But that revision was summarily dismissed. They have now come up to this Court in revision.

3. The charge which the trial Court found proved against the applicants is that they formed an unlawful assembly on the 31st of January 1950 in the evening in village Muzaffarpur, police station Kandharpur in the district of Azamgarh, of which the common object was to give a beating to Ali Ahmad and his companions and that in prosecution of the said common object they committed rioting and caused hurt to Ali Ahmad and five other persons. The trial Court held that the first two applicants, viz., Tiny and Gul Mohammad, actually caused injuries. It is not proved that the remaining 22 applicants or any one or more of them actually caused any injury. What is proved is that the unlawful assembly of which the remaining 22 applicants were also members did cause injuries to Ali Ahmad and his companions and that these injuries were caused in prosecution of the common object. These findings of fact cannot be challenged in these proceedings.

4. So far as the first two applicants, viz., Tiny and Gul Mohammad, are concerned, there is no doubt about the correctness of their convictions and sentences. A person who actually causes hurt and is also a member of an unlawful assembly can be convicted of' committing riot under Section 147, I.P.C., and of causing hurt under Section 323, I.P.C. It has not been contended before me that their convictions are illegal. The Full Bench case of 'Queen Empress v. Ram Sarup', 7 All. 757, is an authority for the proposition that persons who commit individual apts of violence with their own hands can be convicted of rioting as well as of hurt. Therefore, the revision has no force so far as these two applicants are concerned.

5. The learned counsel for the applicants contended that the remaining 22 applicants cannot be awarded sentences both under Section 147 and under Section 323/149. He does not contend that these 22 persons could not be convicted of the aforesaid offences. His contention is that, although they could be convicted of the said offences, separate sentences could not be passed under both Sections. For this contention he places reliance on Section 71 of the Indian

Penal Code.

6. Before discussing the provisions of Section 71 it is necessary to make a reference to two other allied provisions contained in Sections 235 and 35 of the Code of Criminal Procedure. Section 235 permits the joining of charges under Sections 147 and 323/149 when the acts are so connected together as to form the same transaction. Illustration (g) of the said section makes it clear that persons so charged can be convicted in the same trial of the afroesaid offences, Section 235 does not deal with punishment. Therefore, neither the main section nor the aforesaid Illustration is an authority for the proposition that separate punishments can also be awarded for the abovementioned two offences. On the contrary, one finds that subsection (4) of Section 235 says that:

'Nothing contained in this section shall affect the Indian Penal Code, Section 71.'

Thus, there is an express provision to the effect that the provisions of Section 235 Cr. P. C., are subject to the provisions of Section 71, I.P.C. This means that, although a person may be tried at one trial of offences punishable under Sections 147 and 323/149 and although he may be convicted of the said offences in the same trial, he cannot be given separate sentences unless the same is warranted by Section 71, I.P.C. Therefore, Section 235 cannot override Section 71 and the last-mentioned section is to be interpreted irrespective of what is contained in Section 235, Cr. P. C.

7. Section 35 says that:

'Where a person is convicted at one trial of two or more offences the Court may, subject to the provisions of Section 71 of the Indian Penal Code, sentence him for such offences to several punishments prescribed therefor which such Court is competent to inflict.....'

The very language of this section makes it clear that this section also is subject to the provisions of Section 71, I.P.C. Consequently, the provisions of this sectioife-also do not control Section 71, I.P.C. ,

8. It may De pointed out at this stage that before the amendment of the Code of Criminal Procedure in 1923, the language of this section was materially different from the present language. At that time the word 'distinct' found place before the word 'offences' where it occurs for the first time. Moreover, the words 'subject to the provisions of Section 71 of the Indian Penal Code' did not exist. Moreover there was an explanation appended to the section which has since been omitted. In the circumstances, the rulings which interpret Section 35, as it stood prior to the year1923, are not very helpful and need not be considered.

9. This brings me to Section 71, I.P.C. This section runs as follows:

'Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such offences, unless it be so expressly provided. Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.'

10. A perusal of the language of the section leads to the conclusion that if the case is governed by the first paragraph of the section, sentence can be awarded in respect of one offence only. But if the case falls under paragraph 2 or 3 of the section, the limitation is that 'the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.' In other words, sentences may be awarded in respect of both offences, but the aggregate of such sentences should not be more than what could be awarded under any one of the two offences. This interpretation was adopted in the case of 'Dharamdeo Singh v. Emperor', 14 A.L.J. 738. With this interpretation I respectfully agree.

11. What is proved against applicants Nos. 3 to 24 is that they were members of an unlawful assembly of which the common object was to give a beating to Ali Ahmad and his companions. It is not proved that they themselves caused hurt to

any one. Their act constitutes two separate offences, viz., those punishable under Sections 147 and 323/149. Therefore, their case falls under paragarph 2 of Section 71. There should consequently be no objection to sentences being awarded to them under both sections provided the aggregate sentence does not exceed the limit which is prescribed in respect of one of them. Since the aggregate sentence amounts to a fine of Rs. 50/-, which could be awarded under either of the two sections, there is no illegality in the sentence.

12. I am alive to the fact that in the case of 'Nilmony Poddar v. Queen Empress', 16 Cal. 442, the majority view of the Full Bench was that a case like the present fell under paragraph 1 of Section 71. But with utmost respect I am unable to agree with this interpretation. Paragraph 1 contemplates a case like the one given in illustration (a) of Section 71. It is pointed out there that, if a person gives fifty strokes with a stick to another, he cannot be convicted' of fifty different offences. It is a case like that which is contemplated by paragraph 1 of Section 71.

13. For the reasons given above, I am of the opinion that there is no illegality in the sentences awarded to the applicants 3 to 24.

14. The revision fails in its entirety. It is hereby dismissed.