SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Dulla and ors. Vs. the State

Dulla and ors. Vs. the State

SooperKanoon Citation : sooperkanoon.com/452754

Court : Allahabad

Decided On : Sep-18-1957

Reported in : AIR1958All198; 1958CriLJ316

Judge : James, J.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 32, 367, 435, 435(1), 439 and 562; Indian Penal Code (IPC), 1860 - Sections 53; Constitution of India - Article 48; Uttar Pradesh Prevention of Cow Slaughter Act, 1956 - Sections 8(1) and 9; Evidence Act, 1872 - Sections 3 and 114

Appeal No. : Criminal Revn. No. 87 of 1957

Appellant : Dulla and ors.

Respondent : The State

Advocate for Def. : Asst. Govt. Adv.

Advocate for Pet/Ap. : S. Sadiq Ali and ;Bhagwan Das Gupta, Advs.

Disposition : Revision allowed

Judgement :
ORDER

James, J.

1. This is a case under the U. P. Prevention of Cow Slaughter Act (U. P. Act No. 1 of 1956) and raises several issues of public importance. The facts as found by the Courts below are as follows. On 14th May 1950 on receipt of information that a cow was being slaughtered in the house of one Phulu oi village Saidpur, police circle Wazirganj in the district of Budaun, a party of police led by Sub-Inspector Ranvir Singh raided Phullu's house at 12 noon. In the inner courtyard Phullu, Alladin and Munshi s/o Wazir were found cutting the carcase of a cow into big pieces while Babu, Dula and Munshi s/o Karim were dividing the large pieces into small ones. Phullu was arrested on the spot but the five others made good their escape. Medical evidence established that the animal had been killed between 4.30 and 6.30 a.m. that day and that it had not been suffering from any disease. The six men were tried before a Magistrate for an offence under Section 8

(1) of the Prevention of Cow Slaughter Act on the charge that they on '14-5-56 at 1 p.m. in village Saidpur, P. S. Wazirganj, in the house of Phullu slaughtered a cow'. They pleaded not guilty. The learned Magistrate found the six accused guilty and sentenced them to eighteen months' rigorous imprisonment each, without giving a word of reason for the heavy sentences. The six took an appeal to the Sessions Judge of Budaun, and in their petition of appeal raised three points:

(1) that the order of the Magistrate was bad in law and opposed to commonsense;

(2) that the order was against the weight of the evidence; and

(3) that the sentence was 'too excessive'. The learned Judge after hearing the parties upheld the conviction and sentences and dismissed the appeal, and it should be noted that although the third ground of appeal specifically related to the amount of sen-tence he did not give any reason whatever foraffirming the sentences passed by the Magistrate.

2. Phullu submitted to the Sessions Judge's order, but the other five convicted men filed the present Revision before the High Court. The learned Application Judge admitted it only on the question of sentence. The record of the case was accordingly sent for and the Revision is before me for disposal.

3. Every criminal trial raises two issues, both important: first, is the accused person guilty; second if guilty what amount of punishment should be awarded to him? The law leaves the measures of punishment to the discretion of the Court. Nevertheless, it insists that the discretion be used judicially and not arbitrarily. This implies that it is the bounden duty of the Court to apply its mind to the question and decide it after the due consideration of all relevant circumstances.

Unfortunately, experience shows that this is seldom done by subordinate Courts. This is specially so with Sessions Judges sit-ting in appeal; in case after case this Court finds the trial Courts' sentence confirmed by the Sessions Judge without a word of reason being given, although the petition of appeal invariably contains a clause complaining of the harshness of the sentence. Indeed, when a Sessions Judge decides to uphold a conviction his duty requires him to examine the sentence passed: if excessive, he ought to reduce it; if appropriate, he should confirm it if absurdly lenient he should report it for enhancement.

But, like all judicial orders, the order mustf be supported with reasons. Also, this Court isl getting concerned at the punishment which subordinate Courts have been thoughtlessly inflicting on persons found guilty of a breach of the Cow Slaughter Act, and has been reducing the imprisonment to the period already undergone. The instant case is an illustration of the present trend and it is worthy of note that neither the trial Magistrate nor the Sessions Judges has cared to give any reason for the obviously heavy sentences.

This is particularly to be deplored in the case of the Sessions Judge, before whom the third ground of appeal objected specifically to the excessive punishment. It would appear that many subordinate Courts are not aware of the principles which underlie the assessment of the quantum of punishment. It would therefore be rewarding to examine judicial authority on the object of punishment and the factors which have to be kept in mind in fixing its quantum.

4. Both these matters have been dealt with in Halsbury's 'The Laws of England' Third. Simonds Edition, Vol. X. I make no apology for quoting at some length from this classic. At page 487 the distinguished author observes :

"The object of punishment is the prevention of crime, and every punishment is intended to have a double effect, namely, to preventthe person who has committed a crime from repeating the act or omission and to prevent other members of the community from com-mitting similar crimes.

As regards the particular offender there are three ways of providing by punishment against the recurrence of an offence: (1) by taking from him the power of offending (in-capacitation); (2) by taking away the desire of offending (reformation); (3) by making him afraid of offending (intimidation).

*****

As regards other members of the community who are disposed to commit similar offences, the only way of providing by punishment against the commission of the offence is by the deterrent ellect which the punishment of an individual has upon others. In recent years the reformative aspect of punishment, viewed in relation to both penal treatment and the avoidance of the possibility of a new offender becoming a persistent offender, has received increasing attention, particularly with regard to young offenders'.

5. On the quantum of punishment he writes at pages 488-89 :

'The Court, in fixing the punishment for any particular crime, will take into consideration the nature of the offence and the circumstances in which it was committed, the degree of deliberation shown by the offender, the provocation which he has received, if the crime is one of violence, the antecedents of the prisoner up to the time of sentence, his age and character, and any recommendation to mercy which the jury may have made.

Moreover among the factors which may be considered are particular circumstances such as the prevalence of a particular offence, or the abuse of a position in a public service, or the need to keep secure a particular public service, or that by the nature of legislation creating the offence it is apparent that heavy pecuniary penalties may be required.

It is the practice of Criminal Courts generally to punish persistent offenders more severely than those who have not been previously convicted or have not committed other crimes, but it is not right to be guided merely by previous convictions, and it is a well-recognised principle that a severe sentence for a trifling offence cannot be justified merely on the ground that the offender has had many previous convictions. On the other hand a first offender may commit an offence of such malignity that a severe sentence is properly imposed. Previous convictions in another country may be taken into consideration in passing sentence.'

The learned author further points out that the policy of the law is, as regards most crimes, to fix a maximum penalty, which is intended only for the worst cases, and to leave to the discretion of the Judge the determination of the extent to which in a particular case the punishment awarded should approach to or recede from the maximum limit.

6. Certain principles laid down by their Lordships of the Privy Council in 1897 in a case from Upper Burma, Nga Ku v. Queen Emperor, 1897-01-1 UBR 330 (334-335) (A), are worth bearing in mind. The report of the case is not available, hence I quote from Ratan Lal's 'Law of Crimes', 18th Edition (1953), page 81:

'Both personal and public sentiments demand that the person who has made others suffer unjustly, should himself be made to suffer in return. This is quite distinct from the moral side of an act with which properly the Courts have nothing to do..... The lawindicates the gravity of the act by the maximum penalty provided for its punishment and the Courts have to judge whether the act committed falls short of the maximum degree ofgravity, and, if so, by how much.

** ** * It may generally be taken as a safe prin--ciple to follow, that punishments should be made as moderate as is consistent with the object aimed at. Punishment in excess is apt to deieat its own object, and to produce a reaction of popular feeling, as experience shows. To shut a man up in prison longer than is really necessary is not only bad for the man himself, but is a useless piece of cruelty, and economically wasteful and a source of loss to the community.'

7. The views entertained on the subject by the Indian Courts are enshrined in many decisions. Some of these may be mentioned In Adamji Umar Dalai v. State of Bombay. : 1953 CriLJ542 , the Supreme Court had before them a case oi black marketing where six months' imprisonment had been combined with heavy fines, in. reducing the fines of Rs. 15000/- to only Rs. 1000/- their Lordships emphasized that the Court must always 'bear in mind the necessity of proportion between an offence and the penalty' and considered that due regard had not been paid to those considerations and that the zeal to crush the evil of black marketing had perturbed the judicial mind in the determination of the measure of punishment.'

8. Emperor v. Yar Muhammad : AIR1931 Cal448 , was a case where the accused abused and threatened some police constables who were acting in the discharge of their duty; the Magistrate found him guilty under Section 189, I. P. C. and sentenced him to fine of Rs. 50/-. The Sessions Judge made a reference to the High Courts, and among the points taken by him was that the non-appealable sentence was 'improper and open to serious objection'. Rejecting the reference a Division Bench of the Calcutta High Court ruled aa follows:

'A Court, in passing sentence, should inflict such a sentence as the gravity or otherwise of the crime with which the accused has been convicted warrants and merits, irrespec-tive of whether the sentence inflicted will involve a right of appeal or not. A Court should weigh the sentence with reference to the crime committed and the circumstances of the case and not with reference to anything which may happen subsequently.'

9. In Emperor v. Sakinabai Badruddin, AIR 1931 Bom 70 (D), a Division Bench of the Bombay High Court made some very pertinent remarks with regard to offences which, strictly speaking, were not of a criminal character. The accused had picketted a liquor shop. For this she was convicted under Section 4 of Ordinance 5 of 1930 and awarded four months' rigorous imprisonment and Rs. 100/- fine, with one month's rigorous imprisonment in default. Madgavkar, J., holding the sentence to be 'harsh and inappropriate', observed :

'A sentence of rigorous imprisonment for four months and a fine of Rs. 100/- and in default one month's rigorous imprisonment was, in my opinion excessive and

might even be criticised as vindictive. It is necessary at all times, and not least when respect for the law is being undermined, that, whatever the attitude or the politics of any party, the Courts should in all respects scrupulously hold the scales even, observe the correct procedure and that they should not by such sentences themselves still further undermine this respect for the law. Such sentences defeat their own ob-ject and usually produce an effect contrary to what perhaps they are intended to do.'

10. The Madras High Court in In re, Ramalingayya, AIR 1942 Mad 723 (E), ruled that where the law permits of a sentence of fine as an alternative, there is no need for a sentence of imprisonment at all if it is thought that the offence does not merit it.

11. Mt. Nanhi Gond v. Emperor, AIR 1927 Nag 221 (F), was a case of a previous convict who had been awarded three years' rigorous Imprisonment for theft of goods worth about Rs. 2/- only. In reducing the sentence to three months' rigorous imprisonment together with an order under Section 565, Cr. P. C. the learned Additional Judicial Commissioner of Nag-pur observed :

'The causing of merely retributive harm, Whether by the community or the individual, is itself a crime. Punishment is in itself an evil, justified only by its prevention of greater evil, that is by its effect in deterring the offender from a repetition of the offence and in deterring others, by his example, from the commission of it. In each case also it must obviously be the least that will produce both these effects.'

12. Ananda Parhi v. Emperor, AIR 1931 Pat 342 (G), was a case where a constable in execution of his duty was pushed about by the accused and his turban knocked off; for this offence the accused were sentenced to three months' rigorous imprisonment each. In Revision the learned Chief Justice of the Patna High Court held :

'In my view a breach of the peace, even if involving an assault on a public officer ofa mild character, unless there be some elements of criminality in it, should not ordinarily be punished by sentences of imprisonment.

So tar as possible the jails should be kept for the reception of person who perform criminal acts of not merely a technical but of a criminal character. I do not say that the act which these petitioners have committed is of a technical character. It is a definite offence for which they must be definitely punished, but I do not think imprisonment is the proper punishment.'

The imprisonment was substituted with a fine of Rs. 100/- on each accused.

13. A Division Bench of the same Court in Jai Narain Sah v. Emperor, AIR 1944 Pat 16 (H), enjoined the Courts to be more cautious in making the sentence proportionate to the nature of the offence committed and warned them against sentences which might seem to be of a vindictive nature.

14. All these decisions favour the passing of lenient sentences and the observance of moderation.

15. The provisions of the U. P. First Offenders' Probation Act (Act No. 6 of 1938), show that the legislature desire extremely mild treatment of first and or youthful offenders, even where the offence is of a serious nature (so long as it is not punishable with death or life imprisonment).

16. There are also decisions encouraging the passing of heavy or deterrent sentences. But it would be instructive to see the principles on which they proceed. Mahomed Hanif v. Emperor, AIR 1942 Bom 215 (I), was a case where the two accused had committed house-breaking and were caught red-handed; both had many previous convictions to their discredit and had displayed a deliberate intention to live by crime. The Presidency Magistrate sentenced them under Section 454, I. P. C. to nine months' rigorous imprisonment each. A Bench of the Bombay High Court enhanced the sentence to two years' rigorous imprisonment, the maximum which the Magistrate could have passed. In doing so Beaumont C. J., stated in his judgment:

'The determination of the sentences, within certain limits, is in the discretion of the trial Court, and it is in many cases one of the most delicate matters with which criminal Courts have to deal.... Magistrates do, I think appreciate the desirability of

avoiding sending a first offender to prison for an offence which is not of a serious charcter, and thereby running the risk of turning him into a regular criminal.

In applying the provision of Section 562, Criminal P. C., it is better to err (if any one must) on the side of liberality. But where a man has shown from his past actions that he intends to adopt a criminal career, three things should be remembered. In the first place, it is necessary to pass a sentence upon him which will make him realise that a life of crime becomes increasingly hard, and does not pay.

In the second place, the sentence should serve as a warning to others who may be think-ing of adopting a criminal career. In the third place, tne public must be protected against people wao show that they are going to ignore the ruies framed lor the protection of society. One cannot, of course, determine sentences on old offenders by any rule of thumb. One cannot say tnat so many past convictions justify such and such a sentence.

In each case the circumstances have to be considered. The number of past convictions is one matter to be looked at; the interval of time which has elapsed between one conviction and another, and, particularly since the last conviction, is important; and, so of course, is the nature of offences previously proved.'

17. Attention should be drawn to the clear distinction made by the learned Chief Justice between a first offender on the one side (in whose case Section 562, Cr. P. C. would be wholly appropriate) and a confirmed criminal (who must be awarded deterrent punishment).

18. Emperor v. Maiku : AIR1930 All279 , was a case where the accused was caught in the act of distilling liquor in his house in Sadar Bazar, Agra city; a large quantity of illicit liquor and a complete paraphernalia of instruments for manufacture of liquor was discovered. The trial Magistrate sentenced him to a fine of Rs. 50 only. A notice for enhancement was issued, and in his explanation the learned Magistrate submitted that he had pass1-ed such a sentence in a hundred similar or more serious cases without any objection being taken. A Division Bench of this Court severely criticised him and remarked:--

'Does the Magitrate claim a right to inflict a sentence of fine in all cases because he has done so in hundred other cases -- some of which more serious -- without any regard to the nature of facts, upon which each and every case had to be decided? The Magistrate would have been well advised not to bring in the aid of prescription in his favour. It is an elementary proposition in criminal jurisprudence that sentence in each case should be proportionate to the nature and gravity of the crime.'

In enhancing the sentence to six months' rigorous imprisonment and Rs. 50 fine, their Lordships pointed out that Excise cases are not easy to detect and are difficult to prove; the distiller not unoften prepares liquor for purposes of traffic; the game is a profitable one; illicit distillation of liquor does not only mean a loss of revenue to the Government but is a serious menace to the health and moral well being of the community; the crime is widely prevalent.

19. In the recent case of Om Prakash v. State : AIR1956 All163 , a Division Bench, of which I was a member, declared that unless there was satisfactory proof of the existence of mitigating circumstances the sentence for the offence of dacoity should invariably be heavy and deterrent.

In ruling this the Bench held that dacoity should be treated as one of the most serious offences noticed in our Penal Coae, the reasons inter alia being that it is invariably the work of a well-knit organisation; it involved deliberation and pre-planning; its victims are law-abiding citizens; it is accompanied by physical violence on defenceless people; recent years have seen a marked increase in the use of lire-arms; a dacoit is actuated by the contemptible motive of appropriating property o others; the crime is difficult to trace; only a small proportion of the criminals get arrested; it is often difficult to secure the conviction of more than a fraction of them. It is thus the character of the crime that should dictate the measure of punishment for it.

20. To these principles I should like to add that the criminal Court must draw a distinction between acts which are universally acknowledged as 'crimes' and those which were previously lawful but have been made unlawful by virtue of recent legislation of a social or economic character designed to further the country's

advance towards its goal of a welfare State.

The Court should also bear in mind how long ago the previously lawful act was made an offence, and whether or not such an act is an offence in other parts of the country. An illustration will perhaps help to bring these ideas into proper focus. Until recently it was perfectly lawful for a person in Kanpur to have possession of alcoholic liquor on which full duty had been paid.

But recent legislation, ostensibly intended to improve the physical and moral health of the community, has made Kanpur a 'dry' district, thereby making it illegal for a person to possess liquor without a permit. But the law in the neighbouring districts of Luck-now and Allahabad remains the same as before. If therefore a person in Kanpur is found to have a bottle of liquor in his possession without a permit, should the Court award him a heavy sentence? Surely not; a sentence of fine would be sufficient, unless of course the person was found to be a persistent offender.

On the other hand, illicit distillation of liquor has always been an offence throughout the State. Consequently a person found distilling liquor, whether in Kanpur or in Luck-now or in Allahabad, does not deserve leniency. These aspects of punishment assume special significance because of the large amount of fresh legislation, frequently embodying penal clauses, which these days is being introduced in the Union and the various States.

21. The principles deducible from the above may now be summarised. The twin objects of punishment are to prevent a person who has committed a crime from repeating it and to prevent others from committing similar crimes. The sentence passed on the offender must be the least that will achieve both these objects. In deciding the measure of punishment the Court ought to take into consideration the nature of the offence, the circumstances inwhich it was committed, the degree of deliberation shown by the offender, and his age, cha-racter and antecedents.

The prevalence of a particular crime in a particular area or during a particular period should also be taken into account. One's political, sentimental or religious pre-conceptions should be strictly disregarded. The Court must bear in mind the

necessity of proportion between an offence and the penalty. The maximum penalty provided for any offence is meant for only the worst cases.

No sentence should ever appear to be vindictive. An excessive sentence defeats its own object and tends to further undermine the respect for law. The jails should be reserved for the reception of those who perform criminal acts of not merely a technical but of a criminal character. If the law permits a sentence of fine as an alternative, there is no need of the sentence of imprisonment, unless of course the gravity of the offence or the antecedents of the offender demand it.

First and/or youthful offenders should invariably be treated leniently, and in applying provisions of law like the First Offenders' Probation Act or Section 562, Cr. P. C., it would be better for the Court to err on the side of liberality. On the other hand, a person who has taken to a life of crime or who has refused to take a lesson from his previous convictions should be meted out severe punishment.

A deterrent sentence is wholly justifiable when the offence is the result of deliberation and pre-planning, is committed for the sake of personal gain at the expense of the innocent, is a menace to the safety, health or moral well-being of the community, or is difficult to detect or trace. Unlike those acts which are universally acknowledged to be of a criminal nature, an act which has only recently been made an offence or which is not unlawful in other parts of the country or State or which is not essentially criminal in character, deserves leniency, except in the case of persistent offenders.

22. Subordinate Courts should take the aid of these principles in deciding the quantum of punishment for all persons found guilty by them.

23. I turn now to the question of what would be the proper punishment in a rase like the present where a cow has been slaughtered. The question must be examined with judicial detachment, eschewing all sentimentality. Since neither the trial Magistrate nor the Sessions Judge has given a single word by way of reason, it is impossible to know what were the causes that led them to impose the obviously heavy sentences that they have done.

The record does not even remotely suggest that the applicants are previous convicts or persistent killers of cows. The only inference possible is that the Courts below look upon the offence as very heinous. It is accordingly necessary to see how far this view is justified. This must depend strictly upon the terms of the Prevention of Cow Slaughter Act, for onlyby their examination can the Court perform itsduty of interpreting the will of the Legislature. What did the U. P. Legislature will by passing this Act? Article 48 of the Constitution, which falls under the Chapter 'Directive Principles of State Policy', enjoins:--

'The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaugnter, of cows and calves and other milch and draught cattle.'

The Cow Slaughter Act stems from this injunction, as the following passage from its 'Objects and Reasons' discloses:--

'Article 48 of the Constitution of India enjoins on the State Government to organise agriculture and animal husbandry on modern and scientific lines and in particular to take steps for preserving and improving the breeds and prohibiting the slaughter of the cow and its progeny..... In view of this experienceand the consideration that the cow and its progeny must be saved with a view to provide milk, bullock power as well as manure, it becomes imperative to impose a complete ban on cow slaughter.'

This Court is aware that large sections of the community deify the cow or surround it with a halo of religious veneration. But it is clear from a reading of the Act that it sedulously ignores as is inevitable in a secular State --the religious or sentimental aspect of the subject; it views it exclusively as an economic proposition, a weighty consideration in an agricultural economy as ours. It aims solely at economic progress by improving the breeds of the cow and preserving it for milk, bullock-power and manure.

A perusal of the various provisions of the Act shows that it only bans the slaughter of-the cow and its progeny and the sale and transport of beef; it does not penalise

the possession or eating of beef. Indeed, Section 5 allows beef or beef-products to be served for consumption by a bona fide passenger in an aircraft or railway train, while no prohibition is placed on the sale of beef in imported sealed containers.

Besides, realising that in certain circumstances a cow ought to be killed, due provision has been made for this in Section 4. Also, though the sale of beef is forbidden, a gift of it is not. The sentence prescribed by Section 8(1) for offences under the Act is revealing : the maximum punishment is two years' rigorous imprisonment together with a fine of Rs. 1.000, while the permissible minimum is the smallest coin of the realm. Quite obviously, the Legislature did not intend to view offences under the Act with a high degree of severity. It has been suggested that since Section 9 makes the offence non-bailable it should be deemed to be a heinous one.

But offences under Sections 326, 356, 379, 380, 406, 411, 414, 452, 457 and 505 of the Penal Code are all non-bailable offences. Yet every day these offences are tried by Magistrates, who in ordinary circumstances give bail inthem and would not dream of awarding for them tne sentence that has been done in the present case, while first of lenders are treated with considerable leniency. The argument based on the non-bailable nature of an oilence under Section 8(1) of the Prevention of Cow Slaughter Act is thus bound to be untenable.

24. There are other relevant considerations besides. Beef is the staple food of most of the countries of the world. In India for many classes it has always been the poor man's meat. For agriculture, transport and milk-products the buffalo has almost the same value as the cow, yet there is no ban on the slaughter of a buffalo or on the sale or transport of its meat. The Prevention of Cow Slaughter Act is a very recent piece of legislation, having been brought into force only as recently as the 6th January 1956.

The offence of the applicants was committed only four months later, viz., on the 4th May 1956. I note with interest that in Criminal Revns. Nos. 1675 and 1717 of 1956 (All) (L), decided on the 14th February of this year, Mr. Justice Oak reduced the imprisonment of the convicted persons to the period already undergone purely on this ground. Most of the other States in the country, so far as I am aware, have

not imposed any ban on cow slaughter. Such slaughter does not involve moral turpitude.

There is no suggestion that the applicants did anything to hurt the religious feelings of their fellow-citizens, for instance, taking the cow in procession through the streets or slaughtering it in public or exposing its flesh or blood to public gaze; on the contrary, the prosecution themselves acknowledge that whatever they did was in the privacy of the house of Phullu. Further, the killing was purely for the sake of food, presumably because mutton or white-meat is much more expensive, whereas they are villagers of ordinary status. Moreover, there is no suggestion that the cow belonged to anyone but themselves, or that it was killed in a cruel or unusual manner. Nor does anyone say whether it was of economic utility or not. Finally, this was their first offence.

25. In these circumstances a sentence of eighteen months' rigorous imprisonment bore no relation to the nature or gravity of the of-fence committed by the applicants; it seems that the mere fact that a cow had been killed so 'perturbed the judicial mind' -- to use the words of the Supreme Court in the Courts below that all sense of proportion was lost. A fine of Rs. 50 or so on each man would have better fitted the offence.

26. But Mr. B. D. Gupta, learned counsel for the applicants, was not satisfied with a mere reduction in the sentences; contending that there was no evidence on the record which could justify the conviction of his clients he sought permission to argue the case on merits also, and submitted that, despite the order ofthe learned Application Judge admitting the Revision on the question of sentence only. Iwas not bound by that order and that I hadan unrestricted right to hear and decide the Revision on any point that I chose to take up.

27. The next question before me therefore is: in the face of the learned Application Judge's order am I empowered to hear this case on merits? This issue embraces the entire held of the Revisioaal powers of the High Court as prescribed by the Code of Criminal Procedure. Section 435(1) of the Code empowers the High Couit to call for and examine the record of any proceeding before any inferior criminal Court for the purpose of satisfying itself 'as to the correctness, legality or propriety

of any finding, sentence or order recorded or passed.....'

It is by virtue of this provision of the Code that the learned Application Judge admitted the applicants' Revision petition and summoned the record, although, according to the order that he passed, this was ostensibly for the purpose of satisfying himself only as to the propriety of the sentence. But since the record has been received, Section 439 comes into operation, and it is under this section that the High Court acts.

To put it differently, Section 435(1) provides the machinery for calling for the record while Section 439 furnishes the power by which it can be disposed of. Now, Clause (1) of Section 439 confers very wide powers on the High Court. For example, it vests it with all the powers of a Court of appeal. Under Section 423 these powers, in the case of a conviction, include the authority to interfere with both the conviction and the sentence, Nothing contained in Section 435 can abridge this authority.

In other words, once the record of the case is before the High Court, it, by virtue of Section 439, any order passed previously notwithstanding, can interfere with both the conviction and the sentence. Accordingly, I am firmly of opinion that I am not bound by the learned Application Judge's order to confine the hearing of this Revision exclusively to the question of sentence, and that I am entitled to hear it on merits also.

28. Judicial authority supports this view. In Rajbansi v. Emperor, AIR 1920 All 268 (M), which was a Revision before this High Court, Walsh, J., agreed that the parties could be heard on grounds other than those upon which the original order issuing notice had been made, though he considered it a desirable practice that they should be confined to those grounds.

Mangi Lal v. Emperor : AIR1945 All98 , was a Revision which had been admitted only on the question of sentence, but Mulla, J., held that in spite of this he did not think he was prevented from considering the case as a whole and holding that there was an illegality in the trial and in the sentence imposed upon the accused person.

In Bejoy Singh Hazari v. Mathuriya Debya : AIR1925 Cal1182 , a case under Section 476. Cr. P. C., a Division Bench of the Calcutta High Court declared that though the Rule issued by the Court was to show cause why the appeal should not be re-heard by the District Judge,it was within the competence of the High Court to make any such order as it might think fit. It should however be mentioned that in none of these cases did the learned Judge give any reasons for their opinion.

29. In view of the foregoing I have no doubt that, now that the record is before me, along with the question of sentence I have the power to also examine the question of the legality or correctness of the conviction of the applicants. I would however add that in my opinion an order admitting a Revision only on the question of sentence should as a rule be respected, and that it is only in exceptional cases where compelling reasons are placed before the High Court that the power to examine the correctness or legality of the conviction should be utilised.

30. Since Mr. B. D. Gupta succeeded in placing before rne compelling reasons I turn to the merits of the instant case. What exactly is the evidence on which the prosecution ask for the conviction of the applicants of the offence they were charged with, viz., that they slaughtered the cow in question? (Incidentally, there was a deplorable lack of care by the Magistrate in framing of the charge: the time of the offence should have been, not 1 p.m. as recited in his charge, but between 4-30 and 6-30 a.m., which was the time proved from the medical evidence.)

Neither the Magistrate nor the Sessions Judge appears to have noticed that there was not an iota of evidence to indicate that the slaughtering had been done by any of the ap-plicants; all that the evidence showed was that at about 12 noon they were found cutting pieces from the body of a cow which had been killed between 4-30 and 6-30 a.m. earlier that day. Evidently realising the difficulty the Sessions Judge thought that he had got over it by relying solely on Section 114 of the Evidence Act, for we find him observing in his judgment:--

'Under these circumstances the slaughtering of the cow being a concluded phase, the subsequent participation in the cutting phase of the flesh of the cow would give rise to an inference under Section 114, Indian Evidence Act, that the persons discharging that subsequent part of the cow slaughter were also the miscreants in

the slaughtering of the cow and all those persons were guilty of cow slaughter read with Section 34, I. P. C.'

However much one may stretch and strain the phraseology of Section 114 and the Illustrations appended to it one cannot possibly draw the inference the learned Judge has done. There may be a presumption -- though even that is doubtful -- that Phullu, in whose house the slaughtered cow was found, had participated in its killing. But there can be no possible presumption that if a man is found at mid-day cutting a piece of meat from an animal which had been killed six hours earlier that he must have been the person who killed it.

31. It would be well to remember that the charge against the applicants was of slau-ghter simpliciter. There was not a single witness who said that he saw any of them doing the killing; the evidence relied on by the prosecution was purely of a circumstantial nature, and the sole circumstance was that at 12 noon they were found cutting pieces from the carcass of a cow which according to the medical evidence had been slaughtered that day between 4-30 and 6-30 a.m.

It passes one's understanding how on this solitary circumstance the Courts below found the applicants guilty of the charge of slaughter. Their Lordships of the Supreme Court in Hanumant v. State of Madhya Pradesh : 1953 CriLJ129 , have laid down the principles applicable to cases resting on circumstantial evidence. They observe:--

"In cases where the evidence is of a circumstantial nature, the circumstances from which, the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused.

Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused, and it must be such as to show that within all human probability the act must have been done by the accused.'

The facts of the instant case do not exclude hypothesis other than that the applicants slau-ghtered the cow. An elementary consideration which both the Courts below completely missed was that they could very well have arrived on the scene after receiving information that a cow had been slaughtered in Phullu's house and its meat available, in which case they would be innocent of the slaughter: they would only be deemed to be in possession of the beef, which is indisputably not an offence.

It is also possible that after killing the cow Phullu decided to make a gift of the spare beef to his friends, in which event too the applicants would not be guilty of any offence. Unless the prosecution can eliminate these con-tingencies the applicants cannot be held guilty of any offence under the Cow Slaughter Act.

32. There being not a scrap of other evidence, it is clear that, whatever view one might hold about Phullu -- and he is not before this Court -- the conviction of the applicants is bas-ed on no evidence at all. Hence it must be reversed.

33. Were I to uphold the applicants' conviction, I would have considered a fine of Rs.50 on each of them sufficient. But since onthe merits I hold that there is no evidence onwhich they can be held guilty, I allow this Revision, set aside their conviction and sentencesand acquit them. Their bail and surety bondsare hereby discharged.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com