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SooperKanoon Citation : sooperkanoon.com/455913

Court : Allahabad

Decided On : Jan-01-1949

Reported in : 1949CriLJ923

Judge : Desai, J.

Appellant : Mangal Singh and ors.

Respondent : Rex.

Judgement :

ORDER

Desai, J.

1. The applicant Raja Ram Pandey has been convicted by the Sessions Judge of Jhansi under 8. 411, Penal Code, and the other applicants, Mangal Singh and others, under 8. 411 read with 8. 109, Penal Code. They were tried along with Khitta, who was acquitted by the trial Court, for the theft of two bullocks belonging to Ram Prasad Patwari. The case for the prosecution was as follows:

2. Ram Prasad was Patwari in village Patha up to December 1946. He used to do cultivation in the village jointly with Khitta. He owned three bullocks which used to be kept with Khitta. Khitta himself owned one bullock. In December 1946, the Patwari left Patha circle or was transferred from it. He sent his three bullocks to P. W. Sultan Singh and D. W. Narayanju, who are brothers living jointly in village

Ourha Buzurg. In January he sent them to village Midarwara which adjoins village Patha. On 14th January 1947 they strayed from Midarwara to Ehitta's house in Patha. Raja Ram applicant belongs to village Mebroni, which is about 7 miles from Patha, and has been associated with the Congress for many years. In January 1947, he was the president of the Congress Mandal Committee. On 16th January 1947 he went to Patha and held a Congress meeting in the evening. At night, after holding the meeting, he went with the other applicants to the house of Damru Mukhia. There he asked the people who had collected there what was the news of the Patwari. The applicants in reply to this simple question told him that he had gone away from the village, that his three bullocks had strayed into the village and were in Ehitta's possession, that he was at liberty to take them with him and that if he desired to do so they would help him. Thereupon, he sent Nathwa to call Ehitta with his bullocks. Ehitta went with the three bullocks of the Patwari and his own bullock to the house of Damru. Raja Ram then called Mangal Singh applicant, who is the Moharrir at the cattle pound of Patha, and asked him to make false entries in the pound register to the effect that the four bullocks had been impounded into the pound by Eamta a p. plicant and had been released by Ehitta. After some hesitation, Mangal Singh was persuaded to make entries in the register to the effect that on 15th January 1947 Eamta had impounded the bullocks at 7 P. M. and that on 16th January 1947 at 8 A. M. they had been released by Kbitta. Then Damru wrote out a receipt purporting to be for Es. 78 received by Ehitta for sale of two bullocks belonging to him to Baja Ram. Baja Ram asked Ehitta to sign the receipt, but he refused. The applicants threatened that if he refused to sign it he would be ruined in the same manner in which the Patwari was. Ehitta asked what the document was about and Baja Ram told him that he would take two of the Patwari's bullocks and the other bullock would be left with him (Kbitta). Whether under the influence of the threat or on account of greed, Khitta signed the receipt. The applicants, Jagannath, Puran, Kamta and Wamdin attested it. Thereupon Raja Ram took away two of the bullocks and tied them at the door of the Mukhia, while Ebitta took away his own bullock and the third bullock of the Patwari. On 17th January 1947 the Patwari heard that his bullocks had strayed to Patha, went there and learnt that two of them had been taken away by Baja Ram and after verifying the fact made a report at police station Mehroni.

3. the police started investigation. It was at first done by the second officer who was then acting as the station officer. Fie submitted a final report on 22nd January 1947. But before it reached the Magistrate, the Deputy Superintendent of Police ordered further investigation by the permanent station officer who bad by then returned from leave and taken over charge. The further investigation resulted in thp submission of a charge sheet by the Station Officer against Khitta under 8. 37U4, Penal Code against Raja Ram under Section 417 Penal Code, and against the remaining applicants and Damru under Section 411, read with Section 109, Penal Code. Damru has been absconding and the other persons were put on trial.

4. Khitta was acquitted by the trial Court, while Raja Ram was convicted under Section 411, Penal Code and the other applicants under S. Ill read with B. 109, Penal Code. On appeal, their convictions under Sections 411 and 411/109 were converted to those under 8a. 384 and 384/114, Penal Code by the learned Sessions Judge.

5. The prosecution examined a number of witnesses including the Patwari. Phundi Lai, another Raja Ram, Chhotey Lai, Gbanshiam and Ram Das are the eye witnesses of the occurrence and stated that the two bullocks are of the Patwari and that Raja Ram applicant took them from the possession of Ehitta after threatening him and getting false entries made in the pound register and a fiotitious receipt written out by Damru and Bigned by Ehitta and the four applicants. The Patwari deposed that the bullocks are his. The proseoution also examined Nathwa who deposed that he bad gone to call Ehitta at the instance of the applicants.

6. All the applicants pleaded not guilty. Their defence is that the bullocks belonged to Ehitta and not the Patwari, that they had ;been impounded by Kamta because they-had damaged his crops and had been released by Khitta, that they had been sold by Ebitta in open market in the morning of 16th January 1947 to Raja Ram applioant for R8. 78, that the receipt is a genuine document and that Ehitta himself had taken the bullocks to Raja Barn's house in Mehroni. They examined a number of witnesses to prove their version.

7. The applicants challenged their convictions on several grounds. The first ground is that once the previous investigating officer had submitted a final report the investigation could not be re-opened and that in any case the result of the earlier investigation could not be materially altered by the resumption. No authority was quoted in support of this contention. There is nothing in the Code of Criminal Procedure to support it. The law about the result of investigation is contained in Section 173 of the Code which requires that the officer, after finishing the investigation, must forward to the Magistrate concerned a report in the prescribed form through the superior officer. The superior officer has been expressly empowered to direct the officer in charge of the police station to make further investigation while forwarding the report to the Magistrate for his orders. So when the previous investigating officer's final report reached the Deputy Superintendent of Police he had the power to direct the Station Officer to make further investigation. And if as the result of the further investigation the Station Officer found that the applicants were guilty, he had to submit a charge sheet for their prosecution. It could not be the intention of the Legislature that there can be further investigation, but that its result cannot be given effect to. I, therefore, do not see anything illegal in the further investigation and in the submission of the charge sheet as the result thereof.

8. The next ground was that the applicants were prejudiced in their trial on account of being jointly tried with Ebitta. Whether the joint trial was legal or not depends upon the allegations made in the complaint or report for prosecution and not upon the result of the trial or the findings of the trial Court. According to the charge sheet submitted by the police, Ebitta had committed an offence of theft by stealing the bullocks of the Patwari and the applicants had committed the offences of receiving those bullocks knowing them to be stolen and abetting the receipt of them. On these allegations they could have been jointly tried. The evidence at the trial made out that Ebitta himself was the victim of threat or compulsion and this is the finding of the learned Sessions Judge. But this, happened after Ebitta had validly commenced as a joint trial. When the evidence was led, it was open to the trying Court to separate the trial of Ebitta, but it was not bound to do so, in any case not bound to do so when there was no objection from the side of the applicants that they would be prejudiced in defence if their trial continued to be joint with Ebitta's. I do

not see any force in the argument of the learned Counsel for the applicants that they had been deprived of the opportunity of cross-examining Ehitta. It is by no means certain that, even if they had been tried separately from Ebitta, they would have had an opportunity of cross-examining him. They could have had this opportunity only if he had been examined as a prosecution witness, but the prosecution was by no means bound to tender him as a witness. He could depose about the transaction, to prove 'which the prosecution has five witnesses who have been examined in this case. So it is conceivable that, even if the applicants had been tried separately, the prosecution might not have produced Ehitta as a witness against them, but might have relied upon the evidence of Phundi Lai, etc. The applicants themselves could not summon Khitt as their own witness and then Cross-examine him. Moreover, if they wanted to rely upon any statement of Ehitta. they could do this even in the joint trial. If they wanted any questions to be put to Ehitta, they could have suggested them to the trying Magistrate to be put to Ehitta while he' was examined as an accused.

9. The next contention of the applicants is that it was not legally open to the learned Sessions Judge to record conviction under Section 331, Penal Code in place of their conviction under Section 411, Penal Code when they had absolutely no notice that they would have to meet such a case, It would be better first to find out what offences were, prima facie, made out by the evidence produced by the prosecution. There is evidence that the bullocks belonged to the Patwari and that they strayed from the possession of his bailees to the house of Khitta because they used to be tethered there and so succeeded in finding their way from the adjoining village Midarvara to Khitta's house, Khitta kept them at his house for only one or two days. We are not concerned with what intention he kept them with him. He might have kept them honestly with the intention of returning them to the Patwari, or he might have kept them dishonestly with the intention of misappropriating them. But, in either case the fact is that they came to be in his possession. Raja Ram applicant took them from his possession without his consent dishonestly in order to make wrongful gain and to cause wrongful loss to the Patwari. He had been told that they belonged to the Patwari and had strayed away from his possession. He had absolutely no right to convert them into his property or to deprive Ehitta of his possession over them. Ehitta might have had

no better title to them than Baja Ram, but still he had the possession and he (the latter) had no right to deprive him of his possession. So there is no doubt that, whatever might have been the offence committed by Khitta in retaining possession over the bullocks, Baja Ram committed an offence at least of Section 379, Penal Code. This is on the assumption that the facts stated by the prosecution witnesses are correct. I am not giving any finding about their truth because in view of the final order that I am going to pass it is not necessary to do so. The learned Sessions Judge thought that because Khitta had not been threatened with ruin if he did not sign the receipt, the theft became extortion. I do not agree with him. The theft consisted in taking possession of the bullocks and no force or threat was used for taking possession of them. The threat was uttered only in order to make Khitta sign the receipt. The possession of the bullocks was taken quite peacefully without the use of any force or threat. Khitta did not give his consent to Baja Ram's taking possession of the bullocks, but at the same time he did not resist him and did not object to his taking possession of them. There can be no extortion unless a person is by threat of injury induced to deliver any property to the culprit. I, therefore, find that Baja Ram committed no offence of extortion by taking possession of the bullocks, even though he made Khitta sign the receipt by threatening him. It may be said that he committed an offence of extortion by taking possession of the receipt from him after getting his signature by threatening him, but this is not the finding of the learned Sessions Judge. He has not found Baja Ram guilty of extortion because he by threat induced him to deliver the receipt after affixing his signature on it. If there is no offence of extortion committed by Baja Ram, there is no offence of abetment also committed by the other applicants. The learned Sessions Judge was, therefore, wrong in finding the applicants guilty under Section 334 and 8. 384/114, Penal Code.

10. It is to be seen whether the convictions under 8. 379 and 8. 379/114, Penal Code can now be substituted in place of the convictions recorded by the Courts below. The applicants were never charged under these sections. They were charged under S. 411 and 411/109, Penal Code. The only section under which conviction under 8. 379 can be recorded by an appellate Court or by a Court of revision in place of conviction under 8. 411 is Section 237, Criminal P. O., if at all. Section 237 applies only in a case which is governed by B. 286, Criminal P. C.

It is to the effect that:

If a charge of offence is of such a nature that it is doubtful which of several offences the facts which have been proved will constitute, the accused may be charged with having committed all or any of such offences.

If the evidence makes out that he had committed a different offence for which he might have been charged under Section 236, he can be convicted) of that offence even though not charged with it; this is the gist of Section 237. It was argued that the doubt referred to in s. 236 must be a doubt about the law applicable to the facts and not about the facts themselves. Though there are some authorities in support of the argument, I am inclined to the view that the doubt may be not only about the law applicable to the facts but also about the facts themselves. There are some authorities to support this view also. There is also Illustration (b) to Section 236 which clearly refers to a doubt about the facts and not about the law. However, it is not necessary to state definitely whether the doubt can be about the facts or not because there are two reasons on account of which I hold that Sections 236 and 237 cannot be applied in the present case. One reason is that these sections are in their very nature to be availed of by the trial Court and are inherently incapable of being availed of by an appellate or revisional Court. It is the trying Court and the, trying Court alone which can say whether it entertains any doubt on the question which of the offences are constituted by the facts which can be proved. It is only that Court which can avail itself of the doubt when passing the judgment. It is not for another Court, however, superior it may be, to say that the trial Court had or ought to have had a doubt on the question. A superior Court, in the absence of anything on record, cannot imagine that the trial Court had a doubt or ought to have had a doubt and cannot proceed to resolve it on that imagination. In the present case there is nothing to indicate that the learned Magistrate had any doubt as to the offence constituted by the facts. He charged the applicants under ss. 411 and 411/109 and he convicted them under those very sections. I do not understand how the learned Sessions Judge could say that the learned Magistrate ought to have had a doubt and ought to have resolved it at the time of pronouncing judgment by recording convictions under ss. 334 and 334/114. The same objection would apply to this Court. The other reason is that the charge of which

an accused can be found guilty under Section 237, must be a charge which could have been framed against him under Section 236, Criminal P. O. If it would be illegal to frame that charge against him, he cannot be found guilty of that offence by resorting to Section 237. The applicants, were tried jointly with Khitta, who was himself charged under 8, 414. The applicants could not have been jointly tried for an offence of extortion and abetment thereof, with Khitta, who was charged under Section 414, A joint trial of Khitta, under 8. 414 and of the applicants for extortion and abetment / thereof would have been quite illegal, as being against the provisions of 8. 289. The offences of Section 414 and of extortion could not possibly have been held to be of one transaction. If one man dishonestly disposed of property and another man extorted it, there must be two different transactions. In one transaction there cannot possibly be dishonest disposal of property by one and extortion of it by the other. Therefore in the joint trial with Khitta the applicants could not possibly have been charged with extortion and abetment thereof, and consequently the learned Sessions Judge had no power, by resorting to Section 237, to convert the convictions to those under Section 384 and Section 334/114.

11. The powers of this Court, acting in revision, are the same as those of an appellate Court, and what I have stated above prevents me from recording convictions against the applicants under Section 379 and S3. 379/114 in place of those recorded by the Courts below The learned Counsel appearing for the Crown agrees with me and concedes that a remand is necessary.

12. Now I have to decide whether I should remand the case for retrial or not. The learned Counsel for the applicants stated that the evidence is doubtful and that it would not be proper to order retrial. I have gone through the evidence. I do not wish to say anything about it lest there should be any prejudice. It is sufficient to state that I am not satisfied that a retrial would be improper, Further, a retrial is obligatory under Section 232 of the Code. The applicants contended that they were misled in their defence by the absence of a charge under Sections 334 ' and 334/114 and would contend similarly if they were found guilty under 8s. 379 and 879/114. The charges framed by the learned Magistrate against the applicants as well as Khitta were erroneous. Khitta has been acquitted and his case is now out of consideration. Now only the applicants will be retried and they can all be

tried in one trial under 8s. 379 and 879/114, Penal Code. There will be no illegality in this trial.

13. I, therefore, set aside the convictions and sentences of the applicants and order them to be retried, Raja Ram on the charge of 8, 379, Penal Code of stealing two bullocks belonging to Ram. Prasad from the possession of Khitta without Khitta's consent and with a dishonest intention, and the other applicants on the charge of 8b. 879/ 114 by abetment of the above mentioned offence by Raja Ram while being present at the time of its commission. The case should go back to another Magistrate, The applicants will remain on bail during the trial.

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