

Maimai Shah Vs. State

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Court : Allahabad

Decided On : Nov-21-1957

Reported in : AIR1958All422; 1958CriLJ708

Judge : H.P. Asthana and ;S.N. Sahai, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 236, 237, 423 and 537; Indian Penal Code (IPC) - Sections 411 and 457

Appeal No. : Criminal Revn. No. 143 of 1955

Appellant : Maimai Shah

Respondent : State

Advocate for Def. : Deputy Govt. Adv.

Advocate for Pet/Ap. : S.N. Dwivedi, Adv.

Disposition : Revision dismissed

Judgement :

H.P. Asthana, J.

1. This case has come before us on a reference by a learned Single Judge of this Court who originally heard the revision and who was of the opinion that in view of the Single Judge decision reported in the case of Mula v. Emperor : AIR1926 All33

, it was desirable that it should be referred to a Bench for decision, and accordingly it has been so referred.

2. The applicant Maime Shah was charged by the trial court for committing house-breaking on the night between the 26th and 27th of April, 1952 into the house of one Sheo Shanker Lal Tewari in order to commit the offence of theft, The learned Magistrate, on a consideration of the evidence produced before him, was of the opinion that the charge under Section 457 I. P. C. had been satisfactorily established and accordingly he convicted the applicant on that charge.

3. The lower appellate Court did not agree with the finding of the trial court that the charge under Section 457 I. P. C. had been established. It was, however, of the opinion that some of the stolen property was recovered from the possession of the applicant which he knew to be stolen property and relying on that evidence he convicted the applicant under Section 411 I. P. C. and maintained the sentence of imprisonment and fine awarded by the trial court.

4. The applicant filed a revision against this order of the lower appellate court and his main contention was that as there was no charge under Section 411 I. P. C. he could not be convicted of this offence when he had been acquitted of the offence under Section 457 I. P. C. in respect of which he was charged by the trial court. In support of his contention learned counsel for the applicant cited the case of : AIR1926 All33 , before Hon'ble V. D. Bhargava, J. who originally heard the revision.

It was held in this case that a charge could not be so altered by an appellate court as to make it necessary for an accused to meet an absolutely different case from that with which he was charged in the court of the trying Magistrate. In this case the accused was charged under Section 457 I. P. C. The trial court convicted him of this offence. The learned Sessions Judge did not agree with the trial court and was of opinion that the charge under Section 457 I. P. C. had not been made out.

He, however, found him guilty under Section 411 I. P. C. as there was evidence on the record that he was found in possession of the stolen property. A revision was filed against this order and therein it was held that the conviction under Section

411 I. P. C. was not justified. After hearing learned counsel for the parties we regret to say that we are unable to agree with the above decision of the learned Single Judge.

5. The main question for consideration before us is whether an accused person can be convicted of an offence with which he is not charged if there is evidence on the record that he committed that offence and not the particular offence with which he was charged. In order to decide this question it is necessary to refer to the various provisions of the Criminal Procedure Code.

6. Section 236 Cr. P. C. provides that if a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once or he may be charged in the alternative with having committed some one of the said offences.

Illustration.

(a) A is accused of an act which may amount to theft, or receiving stolen property, or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft, or receiving stolen property, or criminal breach of trust or cheating.

(b) A states on oath before the Magistrate that he saw B hit C with a club. Before the Sessions Court A states on oath that B never hit C. A may be charged in the alternative and convicted of intentionally giving false evidence, although it cannot be proved which of these contradictory statements was false.

7. Section 237 provides that if, in the case mentioned in Section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

Illustration.

A is charged with theft. It appears that he committed the offence of criminal breach of trust, or that of receiving stolen goods. He may be convicted of criminal breach of trust or of receiving stolen goods (as the case may be) though he was not charged with it.

8. Section 238 (1) provides that when a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

9. Sub-section (2) of this section lays down that when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

10. Sub-section (2-A) provides that when a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.

11. Sub-section (3) lays down that nothing in this section shall be deemed to authorise a conviction of any offence referred to in Section 198 or Section 199 when no complaint has been made as required by that section.

Illustration.

(a) A is charged, under Section 407 of the Indian Penal Code, with criminal breach of trust in respect of property entrusted to him as a carrier. It appears, that he did commit criminal breach of trust under Section 406 in respect of the property, but that it was not entrusted to him as a carrier. He may be convicted of criminal breach of trust under Section 406.

12. Section 537 (b) provides that subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account of

any error, omission or irregularity in the charge, including many mis-joinder of charges, unless such error, omission, irregularity, or misdirection has, in fact, occasioned a failure of justice. There is an Explanation appended to this section which provides that in determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

13. It will appear from an examination of the various provisions referred to above that for a conviction of a particular offence it is not always necessary that there should have been a charge in respect of that offence. It will further appear from the above provisions that if there is evidence on the record that a certain offence has been committed but in respect of which there was no specific charge, the accused can be convicted of that offence unless his conviction on that charge would occasion a failure of justice.

In the case before us there can be no doubt that the specific charge against the applicant was under Section 457 I. P. C. There is definite evidence on the record in support of the charge that some stolen property was recovered from the possession of the applicant shortly after the alleged burglary at the house of Sheo Shanker Tewari. The applicant was specifically questioned on this part of the evidence and he denied. In the circumstances it cannot be said that he was not aware of the evidence regarding the recovery of the stolen property from his possession.

He could certainly meet that evidence and in his defence produce evidence that no such recovery was made from his possession or that the property which was alleged to have been recovered from his possession was not stolen property. In the circumstances, we do not think that his conviction under Section 411 I. P. C. is bad in law or has, in any way, occasioned a failure of justice.

14. In *Begu v. Emperor*, it was held that where the accused were charged under Section 302, and on evidence they were found to be guilty of an offence under Section 201 (causing the evidence of crime to disappear) and so were convicted under the latter section their conviction was proper and was not vitiated simply

because there was no charge under Section 201 I. P. C.

15. In *Deorao v. Emperor*, AIR 1932 Nag. 173 (C), it was held that where it was doubtful whether an accused person had committed theft or had only received stolen property, it was better to charge him in the alternative under the provisions of Section 236, but where there had been an omission to make such an alternative charge, the accused person could still under Section 237 be found guilty of the offence with which he was not charged but with which he could have been charged, under the provisions of Section 236 even by the appellate court.

It was further held in this case that where a man had been charged under Section 457 of house-breaking with intent to commit theft, he could be found guilty of receiving the property stolen at that house-breaking. This case followed the decision in , which has already been referred to above.

16. In *re Valli Ammal*, AIR 1947 Mad 114 (D), it was held by a Division Bench of that Court that an accused person charged under Sections 302 and 380 I. P. C. could be convicted of an offence under Section 411 I. P. C. even though he was not charged under it.

17. In *Bejoy Chand v. State of West Bengal* : 1952 CriLJ644 , it was held that where the accused is charged under Section 307 Penal Code he could be convicted under Section 326 even in the absence of a charge in respect of it, if on the facts of the case he could be charged alternatively under Sections 307 and 326, I. P. C. It was further held in this case that it was not sufficient for the accused merely to show that he had not been fully examined as required by Section 342, but he must also show that such examination has materially prejudiced him.

18. In *Kashmira Singh v. State of Madhya Pradesh* : 1952 CriLJ839 , it was held that where a person was acquitted of the charge of murder and other cognate charges with which he was charged his conviction under Section 201 I. P. C. without any charge under this section was not illegal.

19. It will appear from a review of the above authorities that it was not always necessary that the accused should be charged with the specific offence of which

he had been convicted before he could be convicted of it, and if there was evidence on the record that he did commit that particular offence, though not the specific offence with which he was charged, and if he could have been charged of that particular offence, his conviction of that offence in the absence of a specific charge would not be considered illegal.

We are, therefore, of opinion that there is no illegality in the order of the lower appellate Court convicting the applicant of the offence under Section 411 I. P. C. merely because there was no specific charge about it. So far as the question of fact is concerned, we agree with the finding of the court below that the applicant was found in possession of the stolen property and had knowledge that it was stolen property.

20. This revision is, therefore, rejected and the conviction and the sentence of the applicant under Section 411/75 I. P. C. are maintained. The applicant, who is on bail, shall surrender at once and serve out the rest of his sentence.

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