

State of U.P. Vs. Prabhat Kumar Trivedi

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Court : Allahabad

Decided On : Aug-17-1965

Reported in : AIR1966All349; 1966CriLJ737

Judge : J. Sahai, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 235(1), 236, 237, 403, 403(1), 403(2), 403(5) and 494; Arms Act - Sections 25; Indian Penal Code (IPC) - Sections 411; General Clauses Act - Sections 26; [Constitution of India](#) - Article 20(2)

Appeal No. : Criminal Appeal No. 675 of 1964

Appellant : State of U.P.

Respondent : Prabhat Kumar Trivedi

Advocate for Def. : H.K. Ghose, ;S.C. Das, ;S.D. Misra, ;Shailendra Misra, ;Brijesh Kumar and ;S.S. Rathore, Advs.

Advocate for Pet/Ap. : R.B. Bisaria, Adv.

Disposition : Appeal dismissed

Judgement :

J. Sahai, J.

1. This appeal has been filed by the State of Uttar Pradesh under Section 417, Cri. P. C. and is directed against: the order of Sri M. P. Srivastava, Magistrate 1st Class, Sitapur, dated 6-6-1964, acquitting the respondent, Prabhat Kumar Trivedi.

2. The Station Officer Incharge police station Kotwali, Sitapur, submitted a charge-sheet against the respondent for his prosecution under Sections 380 and 411, I. P. C. The Magistrate did not frame charge under Section 380, I. P. C. but framed one under Section 411, I. P. C. The relevant portion of the charge-sheet framed by him reads:

'That you on or about the 9th day of April 1963 at about 7-30 p.m. at Changalia Bus Stand, Qasba Naraini District Banda were found in possession of stolen revolver No. 2745 Webley Scott which you retained in your possession knowing or having reasons to believe it to be a stolen property and thereby committed an offence punishable under Section 411 of the Indian Penal Code, and within my cognizance,'

Before the charge-sheet giving rise to this appeal was filed by the Police in the court of the Sitapur Magistrate, the respondent was put up for trial at Banda for being in possession of the same revolver at the same time and place as is the subject-matter of the charge in the instant case. After a charge-sheet had been framed by the Banda Magistrate against the respondent under Section 25 of the Indian Arms Act, the State Government decided to withdraw the prosecution and issued G. O. No. U. P. 4509/VII-B-279P/63, dated July 5, 1963 to that effect. Consequently the trial Magistrate at Banda, Dr. P. Mishra Anand Raja acquitted the respondent of the charge under Section 25 of the Indian Arms Act by his order dated the 20th of July, 1963. The charge-sheet in the instant case was submitted by the police on the 31st of July 1963 i.e. after the Banda Magistrate had acquitted the respondent. Sri M. P. Srivastava, the trial Magistrate at Sitapur acquitted the respondent after noticing certain judicial decisions and after recording the finding that in view of the acquittal of the respondent at Banda in the case under Section 25 of the Indian Arms Act against him, the trial before him was barred. He relied upon the provisions of Section 403(1), Cri. P. C.

3. Dissatisfied with the order of acquittal recorded by the Magistrate, Sri M. P. Srivastava, the State has filed the instant appeal. No evidence was recorded either by the Banda Court or by the Sitapur Court and the only question that requires consideration is whether the learned Magistrate, Sri Srivastava, was justified in ordering the acquittal of the respondent only because he was acquitted of the charge under Section 25 of the Indian Arms Act at Banda.

4. It is admitted, and the charge-sheet framed in the case fully bears out the admission that the respondent was tried at Sitapur on the same facts on which he was charged and acquitted by the Banda Magistrate.

5. That being the factual position, the Sitapur Magistrate was of the opinion that the trial of the respondent at Sitapur was 'against the spirit of Article 22 of the Constitution'. He also held that having been 'held to be not guilty of being in possession of an unlicensed gun' the 'evidence relating to that charge would not be again admitted (against?) the accused in respect of a prosecution against him on a different charge'. The Magistrate further held that 'this is also the true meaning of Section 403(1), Cr. P. C.'. when the learned Magistrate mentioned Article 22 he in all likelihood meant Article 20(2) of the Constitution. It is well settled that a court of law has to gather the Spirit of the Constitution from the language of the Constitution. See *Keshavan v. State of Bombay* : 1951 CriLJ680 . If the provisions of Article 20(2) of the Constitution support the view of the Sitapur Magistrate that the trial of the respondent at Sitapur was barred, his conclusion would be correct, but if the language of Article 20(2) of the Constitution does not warrant such an inference, the decision of the Magistrate cannot be sustained on the basis of the supposed spirit of Article 20(2) of the Constitution. Article 20(2) reads:

'No person shall be prosecuted and punished for the same offence more than once.'

The respondent was prosecuted at Banda for an offence punishable under Section 25 of the Indian Arms Act and not under Section 411, 1. P. C, He was, therefore, prosecuted for a different offence. In my opinion there is no application of Article 20(2) of the [Constitution of India](#). The Sitapur Magistrate placing reliance upon a Single Judge decision of this Court in *Sarnam Singh v. State* : AIR1961 All196

held that the prosecution at Sitapur was barred by the spirit of Article 22 of the [Constitution of India](#). In Sarnam Singh's case : AIR1961 All196 , Uniyal J, observed as follows:

'I am astonished at the finding recorded by the learned Additional Civil and Sessions Judge on this point. The appellant having been tried for the offence of being in possession of an unlicensed gun and it having been found by a competent court that the charge laid against him had not been satisfactorily established, the accused was entitled to rely on that finding, and it was not open to any court subsequently to ignore the order of acquittal and to proceed to hold that the finding of acquittal in favour of the appellant was not correct. This in my opinion would be against the spirit of Article 22 of the Constitution which enjoins that no person shall be prosecuted and punished for the same offence more than once.'

Probably Uniyal J. was considering the provisions of Article 20(2) and not Article 22 of the Constitution and inadvertently Article 22 got into the judgment. In view of the Supreme Court decision that the Constitution being a written words and not the spirit, I do not think written instrument, what matters are the I would be justified in sustaining the judgment of the Sitapur Magistrate on the ground that the respondent's trial at Sitapur was against the spirit of Article 20(2) of the Constitution. In view of the observations of Uniyal J. in Sarnam Singh's case I might have referred this case to a larger bench but have not considered it necessary to do so because Uniyal J. rested his decision primarily on the principle of res judicala which I am also going to do in this case and also because I too am reaching to the same conclusion as he did except for some difference in reasons.

6. I will now proceed to examine whether the respondent's prosecution at Sitapur was barred by the provisions of Section 403(1), Cri. P. C. Section 403, so far as relevant for my purposes, reads:

'403(1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts (for any other offence for which a different charge from the

one made against him might have been made under Section 236, or for which he might have been convicted under Section 237.)

(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under Section 235, Sub-section (I).

(3)

(4)

(5) Nothing in this section shall affect the provisions of Section 26 of the General Clauses Act, 1897, or of Section 188 of this Code.'

(Bracketed by me).

It is admitted that no appeal or revision was filed against the order of acquittal passed by the Banda Magistrate. That order of acquittal, therefore, remains in force.

7. Section 403(1) only bars another trial for the same offence and also on the same facts for any other offence for which a different charge from the one made against the accused person might have been made under Section 236 or for which he might have been convicted under Section 237, Cri. P. C. Section 236 reads:

'236. 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.'

On the facts before me it cannot be said that it is doubtful whether the respondent has committed the offence punishable under Section 25 of the Indian Arms Act or Section 411, 1 P. C. If the facts alleged in this case were accepted as correct, the respondent would have been guilty under both the provisions, that is, Section 25 of the Indian Arms Act and Section 411, I. P. C. Consequently the case before me is not one of those cases in which a charge under Section 238, Cri. P. C. could have

been framed. It is also not a case where a person could be convicted under Section 237, Cri. P. C. That provision reads:

'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.'

The present case cannot come under Section 236, Cri. P. C. Consequently it cannot also fall under Section 387, Cri. P. C. Section 403(1) bars second trial only in the following two cases:

(1) When the second trial is for the same offence for which in an earlier trial a person has either been convicted or acquitted;

(2) When a charge under Section 236 could be framed or a conviction with the aid of Section 237, Cri. P. C. recorded,

It is trite that an offence punishable under Section 25 of the Indian Arms Act is not the same offence as one punishable under Section 411, I. P. C. Consequently the first bar created by Section 403(1), Cri. P. C. is not applicable to the facts before me. I have already said earlier that neither the provisions of Section 236 nor that of Section 237, Cri. P. C. are applicable to the facts of the instant case with the result that the other bar created by Section 403(1), Cri. P. C. is also not attracted. I am, therefore, of the opinion that the respondent's trial at Sitapur was not barred by the provisions of Section 403(1), Cri. P. C.

8. Besides, under the provisions of Subsection (2) of Section 403, Cri. P. C. the respondent could be tried for an offence distinct from Section 25 of the Indian Arms Act. An offence under Section 411, I. P. C. is certainly distinct from an offence under Section 25 of the Indian Arms Act. The first one is an offence under the general law of crimes codified in the Indian Penal Code and the latter one is an offence under a special Act, the Indian Arms Act. There is no manner of doubt that by virtue of the provisions of Section 235(1) a separate charge could have been

framed under Section 411, I. P. C. even during the trial of the respondent at Banda for an offence punishable under Section 25 of the Indian Arms Act. Section 235(1) reads:

'235(1) If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.

In my judgment in view of the provisions of Sub-section (2) of Section 403 read with Section 235(1), Cri. P. C., the trial of the respondent at Sitapur was not barred by the provisions of Section 403, Cri. P. C.

9. Again it would be noticed that Sub-section (5) of Section 403, Cri. P. C. provides that nothing in Section 403, Cri. P. C. shall affect the provisions of Section 26 of the General Clauses Act, 1897, or of Section 188, Cri. P. C. Section 20 of the General Clauses Act reads:

'26. Provision as to offences punishable under two or more enactments. Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.'

The trial at Sitapur was, therefore, saved by virtue of the provisions of Section 26 of the General Clauses Act and for that reason by Subsection (5) of Section 403, Cri. P. C. I am not concerned with Section 188, Cri, P. C. in the instant case because the offences are not alleged to have been committed outside India.

10. Most of the ingredients of an offence punishable under Section 411, I. P. C. and one under Section 25 of the Indian Arms Act are common, but not all. Being in possession is a necessary Ingredient of both the offences with the difference that under Section 25 of the Indian Arms Act, it is only the possession of an arm or ammunition and not of the other articles which is punishable. Possession of any stolen article, an arm or ammunition included is an offence under Section 411, I. P. C. However, for conviction under Section 411, I. P. C., it is necessary that the article must be stolen or the person in its possession must have knowledge that it

was stolen. Under Section 25 of the Indian Arms Act theft or the knowledge that the arm or ammunition is stolen is not necessary. All that is required is that an unlicensed arm or the ammunition must be in the possession or the control of the accused person. Consequently, even though some of the important ingredients of both the offences are common, it cannot be said that all the ingredients of the offence punishable under Section 411 I .P .C. are common with the one punishable under Section 25 of the Indian Arms Act, That is another reason why the trial of the respondent at Sitapur was not barred by the provisions of Section 403, Cri. P. C. I am, therefore, not prepared to sustain the order of the learned Magistrate acquitting the respondent on the basis of the provisions of Section 403, Cri. P. C.

11. However, it is settled law that the principle of res judicata applies to criminal cases also (See Pritam Singh v. State of Punjab : 1956 CriLJ805 . In that case Pritam Singh Lohara and others were tried for an offence punishable under Section 302, I. P. C. and sentenced to death. The evidence against them also consisted of an alleged recovery of a revolver from the possession of Pritam Singh Lohara. Pritam Singh Lohara was earlier tried under Section 19-F of the Arms Act for being in possession of that revolver and was acquitted. The Supreme Court held as follows:-

'The acquittal of Pritam Singh Lohai a of that charge was tantamount to a finding that the prosecution had failed to establish the possession of the revolver Ex. P-56 by him. The possession of that revolver was a fact in issue which had to be established by the Prosecution before he could be convicted of the offence with which he had been charged.

The fact was found against the prosecution and having regard to the observations of Lord MacDermott quoted above, could not be proved against Pritam Singh Lohara in any further proceedings between the Crown and him, We are of the opinion that the High Court was right in rejecting the evidence regarding the recovery of Ex. P-56 against Pritam Singh Lohara and the evidence against him would have to be considered regardless of the alleged recovery of Ex. P-56 at his instance.'

12. In the trial before the Magistrate at Sitapur the same fact was in issue as was the one before the Magistrate at Banda; the fact being whether or not the respondent was in possession of Revolver No. 2745 Webley Scott at 7.30 P. M. on 9th day of April 1963 at Changajia Bus Stand in Qasba Naraini, District Banda. In view of the Banda Magistrate having acquitted the respondent, the prosecution could not produce any evidence before the Sitapur Magistrate to show that the respondent was in possession of Revolver No. 2745 Webley Scott at 7.30 P. M. at Changalia Bus Stand. Qasba Naraini District Banda on 9th day of April 1963. If the prosecution was barred from producing evidence to prove the facts mentioned above, it is obvious that a charge under Section 411 I. P. C. could not be established against the respondent and for that reason the learned Magistrate was right in acquitting the respondent.

13. An argument was advanced on behalf of the State that inasmuch as no evidence was recorded at Banda, there was no trial held by the Banda Magistrate. It is admitted that a charge-sheet was framed by the Banda Magistrate against the respondent under Section 25 of the Indian Arms Act, Section 494 provides that a Public Prosecutor may withdraw from the prosecution of any person and if the withdrawal 'is made after charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences'. Consequently the State cannot escape the consequences of this provision and plead that since no evidence was recorded the proceedings before the Banda Magistrate did not amount to a trial and consequently the order passed by him was not an order of acquittal. Section 494(b) is general in terms and applies to cases not only where evidence has been recorded, but also to those in which no evidence has been recorded, but a charge-sheet has been framed. Besides, it is well settled that the trial begins no sooner the cognizance is taken of the offence by a court and process issued. (See *Indra Devi v. Oil Sukh*, 1961 All LJ 85: (1961 Cri LJ 589)). Mr. Bisaria, who has appeared for the State., has placed reliance upon *Reoti Emperor* : AIR 1933 All 461 and *Emperor v. Munnoo*, AIR 1933 Oudh 470. The first case is clearly distinguishable. The question of res judicata or estoppel or finality of proceedings was never canvassed before the learned Judge who decided that case. The second case, in my view, does not support the State at all. In fact, certain observations made in that case lend support to the

submissions made on behalf of the respondent.

14. For the reasons mentioned above I am satisfied that the learned Magistrate at Sitapur was right in acquitting the respondent.

15. Before I part with this case I would also like to point out that the instant appeal was filed by the State of Uttar Pradesh under a complete misconception of the factual position. Ground No. I, which is the main ground in the memorandum of appeal filed by the State of U. P., reads:

'Because the trial court has erred in holding that the respondent's acquittal under Section 25 Anns Act for possession of a revolver for which he had no licence would be a bar to his being prosecuted for being found in possession of stolen revolver at Sitapur knowing it to be stolen etc.'

At Sitapur the respondent was not prosecuted for being found in possession of the revolver at Sitapur but at Naraini in the District of Banda. I have already pointed out earlier and it is also admitted by Mr. Bisaria, who has appeared for the State, that the respondent was prosecuted at Sitapur on the same facts and for being found in possession of the same revolver at the same time and place as he was prosecuted for at Banda. It is, therefore, obvious that the State of U. P. was under a misconception that the prosecution of the respondent at Sitapur was on a different set of facts and not on the same facts on which he was prosecuted and acquitted at Banda. Mr. Bisaria, who has appeared for the State, while admitting that there was a misconception in the filing of the appeal, sought permission to argue it on the basis that the respondent was tried on the same facts at Sitapur as he had been tried at Banda. He was permitted to do so and he argued the appeal on that basis.

16. For the reasons mentioned above I am satisfied that there are no merits in this Government Appeal. It is accordingly dismissed. The bail bonds of the respondent are cancelled.

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