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

Abdul Aziz Vs. Rex

Abdul Aziz Vs. Rex

SooperKanoon Citation : sooperkanoon.com/460446

Court : Allahabad

Decided On : Nov-30-1949

Reported in : AIR1950All364

Judge : Bind Basni Prasad, J.

Acts : Uttar Pradesh Opium Smoking Act, 1934 - Sections 9; Opium Act, 1878 - Sections 9; Code of Criminal Procedure (CrPC) , 1898 - Sections 239 and 537

Appeal No. : Criminal Revn. No. 1461 of 1949

Appellant : Abdul Aziz

Respondent : Rex

Advocate for Def. : J.R. Bhatt, Adv.

Advocate for Pet/Ap. : B.S. Darbari, Adv.

Disposition : Revision allowed

Judgement :
ORDER

Bind Basni Prasad, J.

1. The petitioner, Abdul Aziz, and one Asghar Ali were found in possession of one seer 4 chhataks and 1 seer 12 chhataks respectively of crude opium on 26th May

1948, at about 9 A. M. at the entrance of an opium smoking den. They were arrested on the spot and were prosecuted under Section 9, Opium Act. Learned Magistrate convicted them under Section 9, Opium Smoking Act, and sentenced them each to undergo rigorous imprisonment for three mouths. In appeal the learned Sessions Judge upheld the conviction and sentence. The conviction recorded by the Sessions Judge, however, is under Section 9, Opium Act. The trying Magistrate committed an error in recording the conviction under Section 9, Opium Smoking Act. Section 9 of that Act provides for presumption raised by presence of opium and of opium smoking apparatus. It does not provide for any offence. On the other hand, Section 9, Opium Act makes the illegal possession of opium an offence. Learned Sessions Judge was correct in applying the law.

2. Asghar Ali did not go up in appeal before the learned Sessions Judge nor has he filed any revision in this Court. He must have served out his sentence by now. The only point which has been argued on behalf of Abdul Aziz is that his trial along with Asghar Ali was illegal.

3. Section 239, Criminal P. C. provides as follows : [After quoting the section, His Lordship proceeded :] It is clear, therefore, that the applicant and Asghar Ali could be tried jointly if the offence with which they were charged was committed by them 'in the course of the same transaction.' It is true that these two persons were found selling crude opium at the same place and at the same time, but that does not necessarily mean that they were parties to the same transaction. The word 'transaction' used in the Code of Criminal Procedure is not defined. The expression 'the same transaction' suggests not necessarily proximity in time so much as continuity of action and purpose. The test in such cases is that the acts done may be so related to each other in point of purpose or as cause and effect or as principal and subsidiary acts as to constitute one continuous action. There is no evidence on the record to show that there was any such relationship between the acts of the applicant and Asghar Ali. If two persons go to a, market place quite independently to sell contraband opium and both of them are caught simultaneously it does not follow that there was any continuity of action or purpose between the two. Opium den is a place where there is a likelihood for the sale of contraband opium and persons seeking to make profit by the sale of such opium

are likely to resort to such a place. The two accused belong to different places. One accused belongs to the village of Hajipur and the other to the town of Firozabad. There being no proof of the two accused committing the offence in the course of the same transaction the trial was in contravention of the provisions of Section 239, Criminal P. C.

4. The next question is as to what is the effect of the aforesaid contravention. Learned counsel has referred to the Privy Council case of Subrahmania Ayyar v. King-Emperor, 25 Mad. 61: (28 I. A. 257 P. C.). It was held in that case that the disregard of as express provision of law as to the mode of trial was not a mere irregularity such as could be remedied by Section 537 of the Code. Such a phrase as irregularity is not appropriate to the illegality of trying the accused persons for more different offences at the same time.

5. Reliance has been placed also upon the case of Sewak v. Emperor : AIR1928 All417 . That was a case in which two persons were tried together under Section 216, Penal Code. One was charged with harbouring two absconding offenders and the other for harbouring two different absconding offenders. No connection between the two accused could be shown. Relying upon Subrah Maniayyer's case, (25 Mad. 61: 28 I. A. 257 P. C.) the conviction was set aside but as the sentence was a short one and the applicants had spent a considerable amount of money in carrying their cases upto this Court no fresh and separate trial was ordered. The same principle was enunciated by the Calcutta High Court in Emperor v. Fazal Shaikh, 41 I. C. 667: (A. I. R. (5) 1918 Cal. 471 : 18 Cr. L. J. 833). In Tilak Dhari Das v. Emperor, 6 Cr. L. J. 442: (6 C. L. J. 757), the Calcutta High Court held that a joinder in one charge of two offences committed on one and the same is an illegality which vitiates the trial and is not governed by Section 537, Criminal P.C.

6. Learned counsel holding the brief of the Government Advocate has relied upon the Full Bench case of Kapoor Chand v. Suraj Prasad : AIR1988 All264 . Referring to Subrahmania Ayyer's case, (25 Mad. 61 : 28 I. A. 257 P. C.), it was observed in the Full Bench case that the sole criterion given by Section 537 is whether the accused person has been prejudiced or not and that no distinction should be made

between illegality and irregularity. The facts of that case were quite different. It was a revision arising out of a case under Section 145, Criminal P. C. No question of joinder of charges was involved in it.

7. I have been referred also to the case of Emperor v. Rafiuzzaman Khan : AIR1926 All334 . This is also distinguishable. In that case at a criminal trial arising out of a communal riot three witnesses gave almost identical and false account as to the manner in which a certain Mohammadan met his death at the hands of Hindus. Subsequently they were jointly tried for perjury. It was held that whether or not there was continuity of purpose in the sense of conspiracy amongst the accused there was identity of purpose and the acts were committed during the course of the same transaction and so their joint trial was not illegal having regard to the provisions of Section 239 of the Code. Referring to the point of the sameness of transaction their Lordships observed:

'The only question then that remains is whether these offences were committed in the course of the same transaction. Here again the circumstances in different cases may vary to an infinite degree. In the present case we find three accused persons, witnesses on the same side in a case of communal riot, all giving evidence on the same point and to the same effect, to prove the same fact viz. the manner in which a certain man met his death. We have no hesitation in holding that this evidence in the case of three witnesses was given in the course of the game transaction. There was the most obvious identity of purpose and that alone, in the circumstances of this case, is, to our mind, sufficient.'

8. In the present case the two accused were found selling the contraband opium at the same time but as already stated it is not proved that there was any connection between them or their acts.

9. Lastly I have been referred to Emperor v. Bhajja : AIR1939 All238 . The facts of that case are also distinguishable. It was not a case of joint trial of accused persons. The only question was as to the right of the accused to cross examine prosecution witnesses under Section 266 of the Code. Referring to this point it was observed in that case that no distinction could be made between illegality and irregularity. Subrahmania Ayyar's case, (25 Mad. 61 : 28 I. A. 257 P. C.) was

interpreted in the following manner :

'I think what they meant was that where the irregularities were so gross (they described such an irregularity as illegality) that it may be presumed from the existence of the irregularity itself that there must have been a failure of justice which would justify a Court in setting aside the sentence, finding or order.'

10. It is true that in the present case learned counsel for the applicant has not been able to point out to me as to in what manner the applicant has been prejudiced by reason of the fact that he was tried along with Asghar Ali, but having regard to the weight of the authorities discussed above I am of opinion that the trial I was illegal being opposed to Section 239, Criminal P. C. Following the case of Sewak v. Emperor : AIR1928 All417 , I would set aside the conviction and the sentence. The accused has already been in jail for about a month and has suffered costs both in the Court of Session and in this Court. I think he has sufficiently been penalized and the ends of justice do not require a fresh trial.

11. The revision is allowed, the convictions and sentence are set aside. The applicant need not surrender to the bail.

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