Azam Ali Vs. Rex

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Court : Allahabad

Decided On : Dec-14-1949

Reported in : AIR1950All412

Judge : Desai, J.

Acts : Indian Penal Code (IPC), 1860 - Sections 116 and 161; Code of Criminal Procedure (CrPC) , 1898 - Sections 237, 238, 423 and 439

Appeal No. : Criminal Revn. No. 895 of 1949

Appellant : Azam Ali

Respondent : Rex

Advocate for Def. : Jai Kishan Lal, Adv. ; for A.G.A.

Advocate for Pet/Ap. : Mirza Hamid Ullah Beg, Adv.

Judgement :
ORDER

Desai, J.

1. The case against the applicant, a clerk constable at police station Pilkhwa, who has been convicted Under Section. 161, Penal Code, by the Courts below, was as follows.

2. A stray camel was caught by one Jaipal and was tied up at his door. A Sub-Inspector of police of Pilkhwa police station went to the village on 23rd January 1947 and arrested Jaipal on the charge of stealing the camel. Though the villagers told him that it was not a case of theft, he did not release Jaipal on bail and took him to the police station where he was locked up. Ami Lal and Shiva Nandan offered security next morning and the Sub-Inspector demanded a bribe of Rs. 150/-. They borrowed Rs. 60/- from one Man Singh and paid the money to the Sub-Inspector and promised to pay the balance on the next day. On this promise, Jai Pal was released on bail. Jaipal, Shiva Nandan and Ami Lal then saw the Deputy Superintendent, Anti Corruption Department, and the Additional District Magistrate who set a trap to catch the Sub-Inspector in the act of receiving the balance. The three men accompanied by a First Class Magistrate went to Pilkhwa on 26th January 1947. At the gate of the police station, a constable asked Jai Pal if he had brought the money. On Jaipal's answering in the affirmative, he took him to the quarters of the Sub-Inspector. The Sub-Inspector said that he would not accept the money at night and that Jai Pal should go to him next morning. Next morning Jaipal, Shiva Nandan, Ami Lal and Man Singh went to the Sub-Inspector's quarters with unsigned notes, the numbers of which were noted down by the Magistrate. It seems that the Sub-Inspector's refusal to accept the money at night was out of fear that he might not detect markings on the notes. So the Magistrate took back the signed notes that he had given to Jai Pal on the previous day and gave him unsigned notes. When Jai Pal, etc., met the Sub-Inspector and offered him the money, he directed them to pay it to the applicant, Azam Ali. Jai Pal etc., went into the office at the police station and deliberately offered Rs. 90/-, keeping back Rs. 10/- in order to suggest that there was no trap. The applicant took Rs. 90/- and said that he would go and find out from the Sub-Inspector whether to accept Rs. 90/-. As he came out of the office, Jai Pal signalled and the Magistrate accompanied by an Inspector of the Anti-Corruption Department entered the police station premises, stopped the applicant and asked him if he had any money. The applicant point-blank denied. The Magistrate threatened to search his person and awaited the arrival of the Deputy Superintendent of Police. The applicant availed himself of the opportunity and at once ran into the Muslim Kitchen and threw the notes into fire. He was chased by the Inspector and other persons. By the time the

Inspector reached the door of the kitchen the applicant had come out and tried to stop him from going in. The Inspector forced entry and salvaged the half-burnt notes from the fire. The numbers of those notes tallied with the numbers previously noted by the Magistrate. The Sub-Inspector escaped into Pakistan and could not be prosecuted. The applicant was prosecuted and on the strength of the evidence of the persons mentioned above has been convicted.

3. The Courts below have found the above case proved from the testimony of the witnesses.

4. For a public servant to be guilty Under Section 161, it is not necessary that he should accept gratification for himself. The section itself lays down that it does not matter if he accepts gratification for 'any other person.' That other person need not be a public servant at all. The consideration for the gratification, namely, the act of 'doing or forbearing to do, etc.,' must be done by the public servant accepting the gratification and not by the 'other person.' This is clear from the language of the section. The words

'doing or forbearing to do any official act, or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render'

cannot at all go, under the rules of grammar, with the words 'any other person;' they can go only with the word 'whoever.' I am supported in this view by Emperor v. Bhagwan Das, 31 Bom. 335 : (5 Cr.. L. J. 309). Since the consideration of 'doing or forbearing, etc.', was not required from the applicant, he cannot be held guilty Under Section 161 as the principal offender. The applicant might, however, be guilty Under Section 161 read with Section 116, Penal Code as an abettor.

5. Any one who engages with one or more other person in conspiracy for the doing of a thing, is said to abet the doing of that thing if an act takes place in pursuance of that conspiracy. Here, the conspiracy is said to be between the applicant and Jai Pal. etc, It is not necessary that the conspiracy should be with the person to be abetted; Expl. 5 to Section 108, Penal Code, makes it clear that a conspiracy to abet an offence need not be with the person to be abetted. The conspiracy is said

to be that Jai Pal, etc., should pay the money as a bribe to the Sub-Inspector and that the applicant should receive it on behalf of the Sub-Inspector. He is also said to have intentionally aided the receipt of a bribe by the Sub-Inspector by receiving the money from Jai Pal, etc. with the intention of paying it to the Sub-Inspector. Doing anything to facilitate the commission of the act of receiving a bribe, is intentionally aiding that act.

6. I shall not discuss the merits and the evidence because I would first see whether I can alter the conviction to one for abetment. If I cannot do so, a retrial may be necessary and I must avoid the applicants's being prejudiced in the retrial. The learned counsel for the applicant contended that it is not open to me to convict the applicant as an abettor. He thought that the applicant had no notice during the trial that he was in danger of being convicted as an abettor and had not full opportunity of meeting the charge of abetment. He was charged with the principal offence and in his defence he met only that charge. If he is to be convicted as an abettor, he must be given an opportunity of meeting that charge. In a number of cases it has been held that an appellate or revisional Court can substitute conviction for abetment. Among them are Inder Chand v. Emperor, 42 Cal. 1094 : (A. I. R. (3) 1915 Cal. 431 : 17 Cr. L. J. 113 S. B.); Jnanada Charan v. Emperor : AIR1929 Cal807 , Khuman v. Emperor, 7 Luck. 102 : (A.I.R. (18) 1931 Oudh 274:88 Cr. L. J. 905), Provincial Govt. V. Saidu, A.I.R. (34) 1947 Nag. 113 : (47 Cr. L. J. 968), Hira Sah v. Emperor, A. I. R. (34) 1947 Pat. 350: (25 Pat. 562), and Emperor v. Jayanti Lal, A. I. R. (34) 1947 Sind 130:(48 Cr. L. J. 419). On the other hand, there are cases in which it has been held that conviction for abetment cannot be substituted for conviction for the principal offence see Emperor v. Mahabir Prasad : AIR1927 All35 and Chotey v. Emperor : AIR1948 All168 . In Padmanabha Payikannish v. Emperor, 33 Mad. 264 : (5 I. C. 145), it was stated that conviction for abetment when the charge was for the principal offence was not justified by Sections 237 and 238 of the Code.

7. Section 423 of the Code does not impose any fetters on the power of an appellate Court (a High Court acting in revision has the same powers as an appellate Court) to alter the finding of the trial Court, But it has never been ruled by any High Court that an appellate Court has unlimited power to alter a finding.

There are many authorities laying down that an appellate Court must exercise this power in accordance with the provisions in Sections 236 to 238. In Padrnanabha's case, (33 Mad. 264 : 5 I. C. 145) the High Court observed that the power is not to be exercised arbitrarily. Section 238 permits conviction for a minor offence when the charge was for a major offence. The offence of abetment, though in some cases it may be punishable with one-half or even one quarter of the sentence provided for the principal offence, is not a minor offence in relation to the principal offence. There are some ingredients in the offence of abetment, such as those of engaging in conspiracy or intentionally aiding, which are not to be found in the principal offence. If all the ingredients of one offence are not included in the ingredients of another offence, the former cannot be said to be a minor offence in relation to the latter. Section 237 is dependent upon Section 236. Section 236 deals with a case in which the Magistrate, at the time of framing a charge, entertains a doubt about the offence which can be established against the accused. Obviously the doubt must be in the mind of the trial Court. Unless there was a doubt in its mind, it could not proceed Under Section 236, and unless it proceeded Under Section 236, It could not proceed Under Section 237. It is not for an appellate Court, unless it has some evidence to show that the trial Court had a doubt in its mind, to avail itself of the provisions of Section 237, if the trial Court failed to avail itself of them. The provisions of Section 237 appear to me to be inherently incapable of being availed of by an appellate Court. In the present case, there is nothing to indicate that the learned Magistrate entertained any doubt about the nature of the offence committed by the applicant and charged him with the principal offence of accepting a bribe by availing itself of the provisions of Section 236. It convicted him of the very offence of which. he was charged; thus it did not act Under Section 237 while convicting him. I cannot now say that it ought to have entertained a doubt about the nature of the offence committed by the applicant, that it charged him with the principal offence by availing itself of the provisions of Section 236, and that it ought to have convicted him of the offence of abetment by availing itself of the provisions of Section 237, Alteration of applicant's conviction to one for abetment would thus not be justified by either Section 238 or Section 237.

8. There is a certain amount of fallacy in the reason given in some of the authorities which permit an appellate Court to substitute conviction for abetment. It is argued that if the evidence produced in the trial makes out a case of abetment, an appellate Court can convict the accused of abetment even though he was charged with the principal offence. The question of substituting conviction for abetment would arise only when there is evidence to sustain the conviction for abetment. If there is no evidence to prove abetment, there cannot possibly arise any question of the appellate Court's substituting conviction for abetment. The question is whether an appellate Court can substitute conviction for abetment in a case where the evidence makes out a case of abetment and not of the principal offence, and it would be somewhat illogical to reply that if the evidence makes out a case of abetment, the conviction can be altered to one for abetment. The case for an appellate Court's substituting conviction for abetment becomes unanswerable where the facts mentioned in the charge itself make out a case of abetment. But in ordinary practice charges are so defectively framed by Magistrates and they lack details to such a lamentable extent, that there would rarely be a case in which the facts stated in the charge itself would make out a case of the principal offence as well as its abetment. In the present case the facts stated in the charge cannot make out a case of abetment.

9. I doubt if it is quite proper to emphasise the fact that all the evidence was disclosed during the trial and that the accused can be convicted of any offence that may be made out from the evidence even though he was charged with another offence. The charge is framed on the basis of the evidence heard by the trial Court and it is the charge which gives real notice to the accused of what the case against him is and what case he has to meet. Giving this notice is one of the primary functions of a charge. If an accused can be convicted of any offence regardless of what he was charged with, it would nullify the utility of a charge. An accused is given the valuable right of cross-examining prosecution witnesses after a charge is framed against him. He also enters into defence after the charge. The line of cross examination of the prosecution witnesses and the defence depend upon the charge. If he is convicted of another offence and complains that ho was prejudiced by the wrong charge, his complaint must be heard by the appellate or revisional Court. It is undoubtedly an irregularity to convict an accused of one

offence when he was charged with another. If this is done by the trial Court itself, an appellate Court, on being informed by the accused that he was prejudiced by the wrong charge, would be obliged to set aside the conviction. If the trial Court (erroneously) convicts the accused of the offence with which he was charged, the appellate Court cannot, after being informed by the accused that he did not try to meet any case other than that stated in the charge, set aside the conviction and substitute another. The position of an appellate Court is weaker than that of the trial Court in this respect; it cannot do what it would have undone, if done by the trial Court. Section 537 of the Code only allows an appellate or revisonal Court to condone an irregularity or illegality committed by the subordinate Court; it does not authorise the appellate or revisional Court to commit an irregularity or illegality.

10. I accept the contention of the applicant's counsel that I cannot substitute conviction for abetment. As there is reason to believe that the applicant is guilty of abetment, he must be retried. A retrial is obligatory Under Section 232 of I the Code.

11. I set aside the applicant's conviction and sentence and direct a new trial to be had upon the following charge:

'You, Azim Ali, being a public servant, namely, a police constable, on 26th January 1947, in the morning at police station Pilkhwa engaged with Jaipal, Ami Lal, Shiva Nandan, etc. in a conspiracy for the receipt of an illegal gratification by Sub-Inspector Muqutada Ali, who was a public servant, as a reward for doing the official act of releasing Jaipal and his brother on bail and for showing favour to them; and you also intentionally aided the act of the said Sub-Inspector's receiving illegal gratification, by the act of receiving Rs. 90/- from Jaipal, etc. for the purpose of paying the amount to the said Sub-Inspector as illegal gratification, and thereby committed an offence punishable Under Section 161 read with Section 116(2), Penal Code.'

12. The applicant may be retried by the District Magistrate himself or by any Magistrate other than Shri Abdul Qayyum, to whom he may make over the case for retrial. The retrial will be from the stage of framing the charge; the Court should frame the charge as directed and then proceed. The applicant will remain on bail,

The record should be sent to the District Magistrate, Meerut, as early as possible.