

Ramkrishna Vs. State

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Court : Madhya Pradesh

Decided On : Feb-15-1956

Reported in : 1956CriLJ1073

Judge : Shinde, C.J. and ;Dixit, J.

Appellant : Ramkrishna

Respondent : State

Judgement :

Dixit, J.

1. The facts of this reference by the learned Sessions Judge of Gwalior are that three separate cases have been instituted in the Court of Additional City Magistrate, Gwalior against Ramkrishna in respect of offences under Sections 409 and 477A, I.P.C. In case No. 239 of 1952 no charge has been framed as yet but the challan mentions that the accused who was a clerk in the Telephone Department received on 23-5-1949 Rs. 771-10-0 from the Gwalior Investors Ltd., and Rs. 94-5-0 on 10-2-1950 from G. C. I. T., Company in payment of trunk telephone bills and that instead of crediting these amounts, he dishonestly misappropriated them.

In case No. 435 of 1952 the charge framed against the accused states that during the period from 22-10-1948 to 5-8-1949 he received Rs. 14,061-8-0 from J. C.

Mills Ltd., in payment of their telephone bills; that he dishonestly misappropriated this amount and made false entries of the amount in a Rokad Boob of the department and thus committed offences under Sections 409 and 477A, I.P.C.

In case No. 436 of 1952 the charge is that the accused received from J. C. Mills Ltd., Rs. 8,485-8-0 during the period from 19-9-1949 to 31-3-1950 in payment of their telephone bills; that he dishonestly misappropriated this amount and made false entries in the Rokad and thus had committed offences under Sections 409 and 477A I.P.C.

During the trial of these cases the applicant presented an application containing that in view of his previous conviction in case No. 329 of 1950, he could not be tried for the offences now alleged against him,

It must be noted that in case No. 329 of 1950 the applicant was found guilty by the City Magistrate, Lashkar under Section 409, I.P.C., on the charge that during the period from 1-4-1949 upto March 1950 he received Rs. 6,450-12-0 from the Gwalior Investors Ltd., and Rs. 1,175-12-0 from the Firm Phoolchand Deepchand in payment of their trunk call bills and dishonestly misappropriated the amounts.

The conviction and the sentence of two years' rigorous imprisonment and a fine of Rs. 500 on the applicant in that case were maintained by this Court in Criminal Revision No. 213 of 1951. The learned City Magistrate rejected the objection of the applicant founded on Section 403, Criminal Procedure Code.

The applicant then filed a revision petition before the Sessions Judge of Gwalior, who has now made this reference recommending that the proceedings in the cases referred to above pending against the accused Ramkrishna should be quash, ed.

2. The argument of Mr. Hariharnivas Dvl-vedi learned Counsel for the accused is that as the accused was tried and convicted in case No. 329 of 1950 for misappropriating certain gross sum during a certain period, he could not be tried in respect of other sums of money alleged to have been misappropriated by him during the same period.

Learned Counsel said that the trial of the accused in the pending cases was legally barred: under Section 403(1), Criminal Procedure Code and that even if the plea of autrefois convict was not technically available to the accused yet in the interest of justice he should not be tried again.

In support of his contention, learned Counsel relied on - 'Emperor v. Anant Narayan' 1945 Bom 413 (AIR V 32) (A), and the cases referred to therein. Mr. Mungre, learned Government Advocate did not dispute the proposition laid down in 1945 Bom 413 (AIR V 32) (A). He, however, urged that in case No. 329 of 1950 the accused was prosecuted not for the misappropriation of a gross sum but for misappropriation of an amount with respect to two particular items, and that there was nothing in law to prevent him from being prosecuted again in respect of other specific and distinct acts of misappropriation.

3. Now, in my opinion there can be no doubt that where a person has been prosecuted and convicted or acquitted in respect of specific acts of misappropriation, a second prosecution in respect of other specific and distinct acts of misappropriation is not barred.

There is, however, a divergence of judicial opinion on the question whether when a person has been tried and convicted or acquitted for misappropriation of a gross sum during a certain period, he can be put on trial again in respect of other sums of money alleged to have been misappropriated by him during the same period which for some reason had not been included in the gross sum for the misappropriation of which the accused was tried previously.

In the case of *In re 'Appadurai Ayyar* 1917 Mad 524 (AIR V 4) (B)', the Madras High Court took the view that when the prosecution has recourse to Section 222(2), Criminal Procedure Code it must be assumed that the amount in respect of which the prisoner was charged was the whole amount misappropriated by him within the period mentioned in the charge and that, therefore, a second prosecution in respect of other sums of money alleged to have been misappropriated during the same period but not included in the previous charge would be barred by reason of the provisions of Section 403(1), Criminal Procedure Code.

The learned Judge of the Madras High Court pointed out that the legislature did not intend that under Section 222, Criminal Procedure Code

the prosecutor should be at liberty to prosecute for a gross sum misappropriated during a particular period consisting of certain items more than three in number and obtain a conviction for the same and then choose another gross sum consisting of different items alleged to have been misappropriated during the same period and have a separate trial for the second group of items. What, the legislature apparently intended was that where there is to be a trial for misappropriation of a gross sum, there should be only one trial for such an offence committed within the period covered by defalcation.

A contrary view has been taken in - 'Emperor v. Kashinath' 12 Bom LR 226 (C); - 'Nagendra Nath Bose v. Emperor' 1923 Cal 654 (AIR V 10) (D), and in 'Brijwan Das v. Emperor' 1931 All 209 (AIR V 18) (E). The reasoning adopted in these cases is that Section 222(2), Criminal Procedure Code dispenses with the particulars which otherwise would be required, but that it does not say that the gross sum is to include every act of misappropriation committed within the dates specified in the charge and that the essence of the offence is the misappropriation and not the time within which it took place.

The third view represented by cases 1945 Bom 413 (AIR V 32) (A) and - 'Sidhnath v. Emperor' 1929 Cal 457 (AIR V 16) (F), where it has been held that though a second trial is not barred where the prosecution has recourse to Section 222(2), Criminal Procedure Code and even though the benefit of Section 403, Cr. P.C. is not technically available to the accused, yet when the interests of justice require, the principle of Section 403 should be extended to the accused and he should not be tried again for a sum which was not included in the gross sum for the misappropriation of which the accused was tried previously.

As at present advised, I am disposed to agree with the reasoning of Chandawarkar J. in 12 Bom LR 226 (C), which was followed in 1923 Cal 654 (AIR V 10) (D). The provision in Section 222(2) Criminal Procedure Code that a charge may be framed for the gross sum of which the different items are composed and that such a charge constitutes only a charge for a single offence within the

meaning of Section 234 is only to remove the difficulty often felt in specifying the particular items of misappropriation when there is a running account between the parties and to enable the prosecution to charge the accused at one trial for more than three acts of criminal breach of trust or dishonest misappropriation committed in the course of one year.

It is noteworthy that a charge framed in accordance with Section 222(2) is deemed to be a charge of one offence within the meaning of Section 234. There would, therefore, appear to be no bar to an accused person being legally tried at one trial for three separate charges of criminal misappropriation in respect of three gross sums each made up of separate items. See 'Madhusudan Mukerjee v. Emperor' 44 Cal WN 175 (G).

If, therefore, reading Sections 222 and 234 three separate charges of criminal misappropriation in respect of three gross sums each made of separate items can be legally tried together provided the offences in respect of the three gross sums are alleged to have been committed within a period of twelve months, then an accused can equally be tried separately in respect of different gross sums each made up of separate items.

That being so, if for some reason it was impossible for the accused to have been tried at the previous trial for a gross amount made up of all the sums misappropriated by, him during a particular period, I am unable to see how the acquittal or conviction in the previous trial can, under Section 403, Criminal Procedure Code, be a bar, to this being tried subsequently for item or items which were not included in the gross sum at the previous trial.

As to the question of giving the accused the benefit of the principle of Section 403 where the section does not in terms apply it is entirely one depending on the facts and circumstances of each case. It cannot be laid down as a rigid rule that in every case even though Section 403, Criminal Procedure Code cannot be technically applied, yet the accused must be given the benefit of that principle.

If this Court considers that in any particular case the interest of justice requires that a person who has been convicted already should not be prosecuted again, it

can exercise its power to Stop the trial on the ground that to prosecute the accused again would be a distinct hardship. In the present case having regard to the facts and circumstances of the acts of misappropriation alleged against the accused, there do not appear to me any consideration of property for quashing the proceedings against the accused Ramkrishna.

4. There was some controversy at the bar whether the accused was tried in case No. 329 of 1950 for a gross sum or in respect of separate and specific heads of misappropriation.

Prom the challan filed in that case the charge framed and the judgments of the trial Magistrate, the Sessions Judge in appeal and of this Court in revision, it is plain to me that in case No. 329 of 1950 the prosecution had recourse to Section 222(2) Criminal Procedure Code and the accused was convicted for a gross sum of Rs. 6,415-12-0 received by him from the Gwalior Investors Ltd., during the period from April 1949 to March 1950 and for another gross sum of Rs. 1,175-12-0 received by him during the same period from the firm Phoolchand Deepchand. These gross sums did not, however, represent the entire amount said to have been misappropriated by him during that period.

They were 'gross' sums made up only of the amounts received by him during that period from the Gwalior Investors Ltd., and the firms Phoolchand Deepchand.

5. The question whether in the circumstances stated above the accused Ramkrishna can and should be tried again for sums said to have been misappropriated by him during April 1949 to March 1950 which are not included in the amount for the misappropriation of which he was charged and convicted at a previous trial, is not free from difficulty. It is also one of considerable importance and of frequent occurrence.

In my opinion it should be decided by a larger Bench rather than by me sitting singly. Let the papers be, therefore, laid before my Lord the Chief Justice for the constitution of a larger Bench for the hearing and disposal of this reference.

ORDER

Shinde, C.J.

6. The facts out of which this reference arises are briefly as follows: Three separate cases Nos. 239 of 1952, 435 of 1952 and 436 of 1952 have been instituted in the Court of Additional City Magistrate, Gwalior against Ramkrishna in respect of offences under Section 409 and 477A, I. p. C. Case No. 259 of 1952 is in respect of misappropriation of Rs. 771-10-0 received from Gwalior Investors Limited on 23-5-1949 and Rs. 94-5-0 received from G. C. I. T, on 10-2-1950.

In case No. 435 of 1952 the charge framed against the accused states that during the period from 22-10-1948 to 5-8-1949 the accused received Rs. 14,061-8-0 from J. C. Mills Limited in payment of their telephone bills which he misappropriated. In case No. 436 of 1952 the charge is that the accused received from J. C. Mills Limited Rs. 8,485-8-0 during the period from 19-9-1949 to 31-3-1950 in payment of their telephone bills and that this amount was dishonestly misappropriated by the accused.

It appears from the record that the accused was a clerk in the Telephone Department and as such received various sums in payment of telephone bills which he dishonestly misappropriated. During the trial of these cases the accused presented an application that in view of his previous conviction in case No. 329 of 1950 he should not be tried for the present offences.

In case No. 329 of 1950 the accused was found guilty by the City Magistrate, Lashkar under Section 409, I.P.C. on the charge that during the period from 1st April 1949 upto March 1950 he received Rs. 6,450-12-0 from the Gwalior Investors Limited and Rs. 1,175-12-0 from the firm Fhoolchand Deep-chand in payment of their trunk-call bills which he dishonestly misappropriated.

The conviction and sentence of two years' Rigorous Imprisonment and a fine of Rs. 500 were maintained by this Court in Criminal Revn. No. 213 of 1951 (Madh-B.) (H). The contention of the accused is that Section 403, Criminal Procedure Code is a bar to the institution of any further prosecution in respect of any fresh item covering the same period.

This contention was rejected by the City Magistrate; but on a revision being filed the Sessions Judge made a reference under Section 438, Criminal Procedure Code. That reference was heard by my brother Dixit J. in a Single Bench. But as the case involved an important point of law he referred the matter to a larger Bench under Section 29 of the High Court of Judicature Act. Consequently this case came up for hearing before us.

7. In case No. 329 of 1950 the misappropriation was of various items made during the period beginning from 1st April 1949 to 31st March 1950. In case No. 239 of 1952 the misappropriation is alleged to have been made between 23-5-1949 and 10-2-1950.

This alleged misappropriation, therefore, is during the same period in which sums were misappropriated in Case No. 329 of 1950. In Case No. 435 of 1952 the misappropriation is alleged to have taken place between 22-10-1948 and 5-8-1949. Some items of this case fall in the same period in which misappropriation took place in Case No. 329 of 1950.

In case. No. 436 of 1952 the entire misappropriation is alleged to have taken place between 19-9-1949 and 31-3-1950. This period falls within the same period in which misappropriation took place in Case No. 329 of 1950. The argument advanced by the learned Counsel for the accused is that Section 403, Criminal Procedure Code, is a bar to the fresh trial of the accused in the present case. Section 403 reads as follows:

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.

Relying upon this section the learned Counsel for the accused contends that fresh trials are barred against the accused. The argument apparently is that as fresh trials for the same period for which conviction has already taken place, it is the

same offence. Reliance is placed on the wording of Section 222, Clause 2, Criminal Procedure Code. Section 222, Clause 2 is as follows:

When the accused is charged with criminal breach of trust or dishonest misappropriation of money it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be charge of one offence within the meaning of Section 234: Provided that the time included between the first and last of such dates shall not exceed one year.

The contention is that the gross sum misappropriated during the period of one year is to be mentioned in the charge: therefore, it should be presumed that all the sums misappropriated during that period must be included in the charge.

8. We have to examine how far this contention is tenable in law. Section 403 incorporates the common law principle of the well-known pleas of *autrefois acquit* and *autrefois convict* which means that no one shall be punished or put in peril twice for the same matter.

If, therefore, Section 222 Sub-section (2) directs that all the sums during the period of twelve months must be included in the charge, Section 403 will no doubt be a bar to a fresh trial for any misappropriation alleged to have been committed during the same period.

If, however, that is not the intention of Section 222 Sub-section (2), Section 403 will not operate as a bar for the present trials. Section 233, Criminal Procedure Code, states that for every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately. Section 234 is an exception to this general rule. That section reads as follows:

When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with, and tried at one trial for, any number of them not exceeding three.

This section permits three offences of the same kind to be combined at the same trial provided they are committed within the space of 12 months. Section 222, Cr. P.C. really refers to the particulars to be mentioned in the charge. Sub-section (2) makes an exception in respect of criminal breach of trust and dishonest misappropriation of money.

It lays down that it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed and the dates between which the offence is alleged to have been committed without specifying particular items or exact dates and the charge so framed shall be deemed to be a charge of one offence within the meaning of Section 234, provided the acts are committed within the space of one year.

By this provision Sections 233 and 234 stand further amended. Section 233 says that for every offence there shall be a separate charge and a separate trial. Section 234 says that three offences of the same kind committed within the space of twelve months can be combined at the same trial.

Section 222, Sub-section (2) says that if it is an offence of criminal breach of trust or dishonest misappropriation whatever may be the number of items misappropriated, it is sufficient to specify the gross sum without specifying particular items, provided the misappropriation is committed within the space of twelve months.

The same sub-section further states that the charge for the gross sum shall be deemed to be a charge of one offence within the meaning of Section 234. The expression 'gross sum' is explained by the words 'without specifying particular item' used in the section.

All that the section directs is that all items of misappropriation included in the gross sum need not be specified but that they can be grouped together into one lump sum and that that can be shown as the sum misappropriated. There is nothing in the sub-section to show that all items misappropriated within the space of one year must be included in the gross sum.

Besides, under Section 233 every item misappropriated must have a separate charge and a separate trial. Under Section 234 three offences of the same kind can be combined at one trial provided they are committed within the space of twelve months. This implies that three items misappropriated during the course of one year can be combined at one trial.

Section 222, Sub-section (2) enjoins on the other hand that items, whatever be their number, can be grouped into one lump sum provided the misappropriation is committed within the space of one year. But the sub-section goes further and states that this lump sum is to constitute one offence within the meaning of Section 234.

This clearly indicates that the intention of the Legislature was to allow three lump sums to be combined at one trial under Section 234 Criminal P.C. If that be the intention of the Legislature, it is not correct to say that the gross sum must include all the items of misappropriation made during the course of one year.

If the Legislature had intended that all sums misappropriated during the course of one year should be included in one gross sum, the amendment should have been not to Section 234 but to Section 233 which states that for every offence there shall be a separate charge and a separate trial.

The very fact that the gross sum is to be deemed as a charge of one offence under Section 234 clearly points to the intention of the Legislature that three lump sums can be combined at one trial. Mention of Section 234 in Sub-section (2) of Section 222 completely counters the argument that the gross sum must include all items of misappropriation made during the course of one year.

9. It would be advisable at this stage to examine case law on the subject. In '1917 Mad 524 (AIR V 4) (B) a Division Bench of the Madras High Court observed as follows:

Section 234 permits the trial of a person in one and the same trials for three offences committed within the space of twelve months. The question is whether Section 403 which bars a second trial for the same offence of a person who has

once been tried and convicted, applies.

Here the accused has already been tried and convicted for misappropriating a gross sum of money during the same period and the charge in the previous case should be taken to include all the items misappropriated by him in the course of the same transaction during that period.

I think that ought to be the interpretation of the section, because otherwise it seems difficult to conceive that the legislature should have intended that under Section 222 the prosecutor should be at liberty to prosecute for a gross sum misappropriated during a particular period consisting of certain items more than three in number and obtain a conviction for the same and then choose another gross sum consisting of different items alleged to have been misappropriated during the same period and have a separate trial for the second group of items.

What the Legislature apparently intended was that where there is to be a trial for misappropriation of a gross sum, there should be only one trial for such an offence committed within the period covered by the defalcation.

This decision proceeds on the ground that under Section 222 Sub-section (2) the gross sum should be taken to include all the items of misappropriation. In 12 Bom LR 226 (C), a Division Bench of the Bombay High Court took the opposite view. Chandavarkar, J., observed as follows:

Then Section 222 comes in which engrafts another exception upon the rule, but it is not an exception of the same kind as Section 234. It is an exception rather to another general rule, viz., that at a trial for an offence certain particulars must be given in the charge. Section 222, Clause 2 modifies that rule as to charges of criminal breach of trust, & c. but does not restrict in any way the scope and object of Section 234.

In '1923 Cal 654 (AIR V 10) (D) the majority decision followed the view taken by the Bombay High Court. They held that Section 222 Sub-section (2) only dispenses with the particulars which otherwise would be required, but it does not say that the gross sum is to include every act of misappropriation committed within

the dates specified in

The essence of the offence is the misappropriation and not the time within which it took place. In 1931 All 209 (AIR V 18) (E) Dalai J. also followed the Bombay view. In '44 Cal WN 175 (G) it was argued on behalf of the petitioner that the procedure adopted by the Magistrate in dividing the total amount with regard to which the petitioner was charged into gross sum made up of separate items and tried the petitioner on three such charges is contrary to the provisions of Criminal Procedure Code. The Division Bench of the Calcutta High Court repelled this contention and held as follows:

Under Section 222, Criminal P.C. it is legal to specify, in the case of a charge of criminal breach of trust, the gross sum in respect of which the offence is alleged to have been committed and the dates between which the offence is said to have been committed, without specifying particular items or exact date, provided of course that the time included between the first and last of such dates does not exceed twelve months.

It is further laid down in Section 222 that the charge so framed shall be deemed to be a charge of one offence within the meaning of Section 234. It follows that each of the three charges, which we are now considering, must be deemed to be a charge of one offence within the meaning of Section 234 of the Code of Criminal Procedure.

This decision also followed the view taken by the Bombay High Court.

10. To me it appears that the view taken by the Bombay and Calcutta High Courts is based on sound reasoning. Consequently with respect I agree with the view taken by Bombay and Calcutta High Courts.

11. For the reasons given above I am clearly of the opinion that the conviction of the accused in case No. 329 of 1950 is no bar to the present trials although the alleged misappropriation is committed during the same period. Consequently the reference is disallowed.

Dixit, J.

12. While expressing my concurrence with what my Lord the Chief Justice has said, I have nothing to add to what I said in the order of reference. I agree that this reference should be rejected.

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