

A.A. Mulla and Others Vs. State of Maharashtra and Another

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Court : Supreme Court of India

Decided On : Oct-28-1996

Reported in : 1996VIIAD(SC)737; AIR1997SC1441; 1997(2)ALD(Cri)386; 1997CriLJ353; 1996(4)Crimes125(SC); JT1996(9)SC551; 1996(7)SCALE840; (1996)11SCC606

Judge : G.N. Ray and; G.B. Pattanaik, JJ.

Acts : [Constitution of India](#) - Article 20(1); Indian Penal Code (IPC) - Sections 120B, 409 and 429; Gold Control Act - Sections 85

Appeal No. : Criminal Appeal No. 147 of 1986

Appellant : A.A. Mulla and Others

Respondent : State of Maharashtra and Another

Judgement :

ORDER

G.N. Ray, J.

1. This appeal is directed against judgment dated 16.1.1986 passed by the Bombay High Court in Criminal Writ Petition No. 36 of 1986. The appellants were charged under Section 409 IPC and Section 5 of the Prevention of Corruption Act for making false panchnama disclosing recovery of 90 gold biscuits on 21.9.1969

although according to prosecution case the appellants had recovered 99 gold biscuits. The appellants were tried in special case No. 8 of 1971 before the Special Judge for Greater Bombay. Two of the appellants were acquitted by the learned trial Judge and the remaining two appellants were acquitted on 6.12.1995 by the High Court inter alia on the finding that the prosecution had failed to prove misappropriation.

2. The appellants were also tried for offence under Section 120B IPC and Sections 135 and 136 of the Customs Act. Section 85 of the Gold Control Act and Section 23(1A) of Foreign Exchange Regulation Act and Section 5 of Imports and Export Control Act. The appellants filed an application before the learned Judicial Magistrate contending that on the self same facts they could not be tried for the second time in view of Section 403 of the Cr PC 1898 (corresponding to Section 300 of the Cr PC, 1973). The said application was rejected by the learned Magistrate and the appellants preferred Criminal Revision Application No. 201 of 1980 in the Bombay High Court. Such revision application was also dismissed by the High Court inter alia by holding that it would be open for the appellants to make submissions and raise contentions as to the applicability of Section 403 Cr. PC before the learned Magistrate at the time of trial of the Criminal case and the learned Magistrate could decide such contentions if raised.

3. During the trial of case No. 19/CW of 1981, the learned Magistrate recorded evidence and after hearing arguments by judgment dated 15.1.1981 convicted the appellants under Section 135(1)(i) of the Customs Act and sentenced them to 9 months rigorous imprisonment and fine of Rs. 1,000/-. The appellants were also convicted under Section 65 of the Gold Control Act. The appeal preferred by the appellants against their convictions under the Customs Act and Gold Control Act and consequential sentence passed for such convictions before the Sessions Judge, Greater Bombay in Criminal Appeal No. 521 of 1981 was also dismissed by the learned Sessions Judge. Such order was assailed before the Bombay High Court in Criminal Writ Petition No. 36 of 1986 under Article 20(2) of the [Constitution of India](#) and Sections 403 and 482 of Criminal Procedure Code. By the impugned judgment the writ petition was dismissed by the High Court.

4. For the purpose of appreciating the contention of the appellant challenging the maintainability of the Criminal Case instituted against them for the said offence under the Customs Act and the Gold Control Act, the following facts may be stated:-

5. On 10.10.1969 the appellant No. 1 who was working as Customs Inspector was contacted by some of the villagers of village Vihoor informing that the gold bars had been found in the agricultural field owned by accused No. 37. The appellants Nos. 1 and 2 who were Sub-Inspectors and appellants Nos. 3 and 4 who were Sepoys of the Customs Department recovered the said gold bars of foreign origin. But the appellants prepared a false panchnama showing recovery of 90 pieces of gold bars even though 99 pieces were recovered. The remaining 9 pieces were distributed by the appellants amongst themselves and few others.

6. The appellants along with other accused were tried in Special Case No. 8 of 1971 under Section 409 IPC and Section 4(1)(c) of Prevention of Corruption Act before the Special Judge for Greater Bombay. It is not necessary to refer to the other accused in the said Special Case No. 8 of 1971. As aforesaid, two of the appellants were acquitted by the learned Special Judge and the remaining two were also acquitted on appeal by the Bombay High Court inter alia holding that there was no legal evidence to establish that there was any entrustment of gold bars and hence there was no question of misappropriation of the gold bars. In the said trial, CBI was the prosecuting agency.

7. After obtaining required sanction under Section 137 of the Customs Act, another was being case No. 19/Cus. of 1981 was filed by the Customs Authority for the offence under Section 120B IPC read with Section 135 and 136 of the Customs Act, Section 23(1A) of the Foreign Exchange Regulation Act 1947 and Section 85 of the Gold Control Act and Section 5 of the Imports and Exports (Control) Act. Such case was filed in the court of the Additional Chief Metropolitan Magistrate III Court, Esplanade Bombay against accused persons including the appellants. The complainant in this case was the Additional Collector of Central Excise, Marine and Prevention Division, Bombay.

8. The learned Additional Chief Metropolitan Magistrate, Esplanade Bombay, convicted the appellants being accused No. 11, 27, 28 and 29 under Section 135(1)(i) read with Section 135(1)(a) and (b) of Customs Act and Section 85 (ii)(iii), and (iv) of Gold (Control) Act, 1968 and sentenced them to 9 months' rigorous imprisonment and also fine of Rs. 1000/-, in default, further rigorous imprisonment for one month for each of the said offences. It was directed that substantive offences would run concurrently. It is not necessary to refer to the conviction and sentence passed against some of the other accused for the purpose of disposal of this appeal. The learned Magistrate rejected the contention that the second trial was barred under Section 403 Cr. PC. The learned Magistrate held that in the former trial against accused Nos. 11, 27, 28 and 29 before the learned Special Judge, the charge was misappropriation of gold bars and the said accused were acquitted on a finding that as there was no legal entrustment of gold bars, question of misappropriation did not arise. The question as to whether the gold bars were smuggled and are of foreign origin and on account of retention of such gold bars of foreign origin, the accused have committed offences under Gold Control Act, Customs Act and Foreign Exchange Regulation Act were not required to be decided in the earlier trial. Hence, the subsequent trial was quite distinct from the former trial and the facts leading to the former trial and present trial were also different.

9. The convicted accused preferred separate appeals before the learned Sessions Judge for Greater Bombay. The appeal preferred by the appellants herein was numbered as Criminal Appeal No. 521 of 1981. Such appeal was disposed of by a common judgment dated 17.10.1985. Criminal Appeal No. 521 of 1981 was dismissed. Further challenge of the conviction and sentence before the High Court in the said Criminal Writ Petition has also failed.

10. Mr. S.K. Jain, the learned Counsel appearing for the appellants has contended that the trial of case No. 19/Cus of 1981 before the learned Additional Chief Metropolitan Magistrate was not maintainable under the provision of Section 403 CrI. PC of 1898 corresponding to Section 300 of the Cr PC, 1973. Mr. Jain has submitted that the salutary provision of Section 403 Cr. PC is based on the principle *nemo debet bis vexari pro eadem causa* (no person should be vexed

twice for the same offence). The provision of Section 403 Cr. PC is much wider in its scope and ambit than the principle of protection against double jeopardy guaranteed under Article 20(2) of the [Constitution of India](#). The protection against double jeopardy prohibits second trial for the same offence. But bar of a second trial under Section 403 Cr. PC envisages that second trial is not permissible if for the self same facts the accused in the first trial could also have been prosecuted for the other offences arising from such facts.

11. Mr. Jain has submitted that the appellants were entrusted to ensure recovery of several gold bars kept concealed in the agricultural field in a village. It is the prosecution case that although the appellants, in fact, found out 99 gold bars of biscuits of foreign origin being kept concealed, they accounted for only 90 bars by making a false panchnama and misappropriated the remaining 9. Although in the first trial before the learned Special Judge no charge for offences under Customs Act, Gold Control Act or Foreign Exchange Regulation Act was brought against the appellants but after obtaining necessary sanction, such charges could also have been brought against the appellants in the first trial because facts constituting the first trial and the second trial are the same.

12. Mr. Jain has submitted that in *Mohammad Safi v. the State of West Bengal* 1963 (3) SCC 467, this Court has held that Section 403(1) Cr. P.C. can be successfully pleaded as a bar to subsequent trial for the same offences as for an offence based on the same facts where an accused had been tried (a) by a court of (b) competent jurisdiction and (c) acquitted.

13. In the instant case, the appellants were tried before a competent court for certain offences arising out of self same facts and in such trial, they were acquitted. Hence, the immunity against another trial for offences arising out of the self same facts is squarely attracted in the facts of the case. But the courts below failed to appreciate the scope and ambit of Section 403 Cr. PC and rejected the contention of appellants that the subsequent trial was not maintainable at all.

14. Mr. Jain has also submitted that even if the contention of the appellants about the maintainability of the second trial is not accepted, the criminal trial is also liable to be quashed in the special facts of the case. The alleged incident had happened

in 1969 and the appellants had suffered immensely because of the protracted criminal trials for unduly long period for no fault on the part of the appellants. The appellants did not put any hindrance in completing investigation regarding offences under Customs Act or Gold Control Act or Foreign Exchange Regulation Act. The prosecuting agency could easily complete the investigation required for bringing such charges against the appellants long back. The necessary sanction for prosecution of the appellants in the second trial could have been taken long back. It was only in 1981 the second trial was initiated. There is no manner of doubt that if the criminal trial is delayed unreasonably, the accused is bound to suffer serious prejudice. The appellants have lost their jobs. Because of pendency of two separate trials in the different forum over an unusual long period the appellants have also suffered serious financial difficulties. Accordingly, the High court should have quashed the second trial by holding that such trial had resulted in serious prejudice against the appellants and had also resulted in abuse of the process of law. Mr. Jain has submitted that considering the said facts, the criminal trial should be quashed by setting aside conviction and sentence passed against the appellants. The appellants are in advanced age and they are settled in family life.

15. Mr. S.M. Jadhav, the learned Counsel appearing for respondent No. 1 State of Maharashtra has disputed the contention of Mr. Jain, Mr. Jadhav has submitted that the criminal writ petition was filed by the appellants in the Bombay High Court under Section 20(2) of the [Constitution of India](#) and Section 403 and 482 Cr. PC. Mr. Jadhav has submitted that the issue that arises for consideration is whether the view of provisions of Article 20(2) of the Constitution and Section 403 Cr.PC, the subsequent trial for offence under Customs Act and Gold Control Act was barred on the ground that in an earlier trial for offence under Section 409 IPC and Section 5(1)(f) of Prevention of Corruption Act, the appellants were acquitted.

16. Mr. Jadhav has submitted that the present case is governed by old Section 403 Cr. PC of 1898. It is quite evident that the subsequent trial is for an offence which is distinct from the offence in earlier trial. Hence, such subsequent trial is not barred on a plain reading of Section 403(2) Cr. PC. What is barred under Section 403 Cr. PC and Article 20(2) of the Constitution is the subsequent trial for the

same offence and not for distinct offence under different enactments. For such a bar, the second trial must be for the same offence i.e. an offence whose ingredients are the same.

17. Mr. Jadhav has submitted that if the second prosecution is not for the same offence and the offences in the first and second prosecution are distinct, there is no question of application of the rule of double jeopardy. For such contention, Mr. Jadhav has referred to the decision of this Court in *State of Bombay v. S.A. Apte and Anr.* : 1961 CriLJ725 and *Harjinder Singh v. State of Punjab* : 1986 CriLJ831 . In this connection Mr. Jadhav has also referred to another decision of this Court in *State of Bihar v. Murad Ali Khan* : 1989 CriLJ1005 . In the said decision, it has been held that in case of killing an elephant, the fact that the police officer had filed a final report that no offence was made out under Section 429 IPC would not bar the initiation of another proceeding under Section 51(1) read with 51 of Wild Life Protection Act.

18. Mr. Jadhav has also referred to the decision of this Court in *V.K. Agarwal, Assistant Collector of Customs versus Vasantaraj* : 1988 CriLJ1106 . In that case, the incidences of Section 403 Cr. PC and Article 20(2) of the Constitution were taken into consideration. It has been held that Section 403(1) Cr. PC bars trial again for the same offence. In order to ascertain whether the two offences are the same, it is necessary to analyse the ingredients of two offences and not the allegations made in the two complaints. The ingredients required to be established for offences under Section 111 read with Section 135 Customs Act are altogether different from these required to be established for offence under Gold Control Act.

19. Mr. Jadhav has submitted that the appellants were employees of the Customs Department. They have been found guilty for serious offences under Customs Act and Gold Control Act. Simply because they were not convicted for their improper acts as legal incidence of entrustment was not established for conviction under Section 409 IPC in previous trial, the second trial should not be quashed. The appellants do not deserve any sympathy or compassion. Hence, even on merits, no case for quashing under Section 482 Cr. PC has been made out.

20. Mr. P.A. Choudhry, learned senior counsel appearing for respondent No. 2 Assistant Collector. D.R.I. Bombay has also disputed the contentions of Mr. Jain. Mr. Choudhary has contended that the plea of bar of the second trial cannot be accepted either in principle or on authority of judicial decisions.

21. Mr. Choudhary has submitted that a criminal act that falls under Section 135 of Customs Act and Section 85 of Gold Control Act is different and distinct from a criminal act that falls under Section 409 IPC and Section 5 of the Prevention of Corruption Act. The violation of these sections of penal laws constitute distinct and separate offences within the meaning of 'offence' as (sic) deferred in Section 4(1) of the Cr. PC They are incapable of attracting the principle of autrefois convict. Mr. Choudhry has also relied on the decision of this Court in V.K Agarwal's case (supra). Mr. Choudhary has also relied on the decision of this Court in P.V. Mohammad V. Director : 1993 CriLJ197 where similar view has been expressed. In Mohammad's case, two prosecutions were under Customs Act and Foreign Exchange Regulation Act but ingredients of two offences are found to be different.

22. Mr. Choudhry has also submitted that the plea of the appellants that there was a long delay in lodging the second criminal prosecution is similar to the plea which was raised in V.K. Agarwal's case (supra). Such plea has been rejected by this Court in the following words:-

That 20 years have elapsed since the date of seizure of gold under Section 111 read with Section 135 Customs Act is no ground for not proceeding further with the matter in as much as the offence in question is a serious economic offence which undermines the entire economy of the nation.

Mr. Choudhry has submitted that the case for quashing the criminal case is devoid of any substance and should not be entertained by this Court. This appeal, therefore, should be dismissed.

23. After giving our careful consideration to the facts and circumstances of the case and the submissions made by the learned Counsel for the respective parties, it appears to us that the ingredients of the offences for which appellants were charged in the first trial are entirely different. The second trial with which we are

concerned in this appeal, envisages a different fact situation and the enquiry for finding out facts constituting offences under the Customs Act and the Gold Control Act in the second trial is of a different nature. It may be indicated here that the second trial has been initiated after obtaining necessary sanction for prosecuting the appellants. The principle of double jeopardy and bar of second trial as enunciated by this Court in V.K. Agarwal's case (supra) and P.V. Mohammad's case (supra) is applicable in the facts of this case. Not only the ingredients of offences in the previous and second trial are different, the factual foundation of first trial and such foundation for the second trial is also not indented, Accordingly, the second trial was not barred under Section 403 Cr. PC of 1898 as alleged by the appellant.

24. In the facts of the case, we also do not find any justification for quashing the criminal trial simply on the ground of delay and consequential suffering of the appellant. The offences committed by the appellants are serious economic offences and normally in such offences, a strict view is to be taken. We, therefore, find no reason to interfere with the impugned decision. This appeal, therefore, fails and is dismissed.