

State Vs. Pappachan

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Court : Kerala

Decided On : Feb-12-1959

Reported in : AIR1960Ker153; 1960CriLJ596

Judge : Sankaran, C.J. and; N. Varadaraja Iyengar, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 236, 237 and 342

Appeal No. : Criminal Appeal No. 268 of 1958

Appellant : State

Respondent : Pappachan

Advocate for Def. : T.V. Prabhakaran, Adv.

Advocate for Pet/Ap. : Public Prosecutor

Disposition : Appeal dismissed

Judgement :

Iyengar, J.

1. Tills appeal is by the State and is directed against the acquittal of the sole accused in C. C. 1530 of 1957 of the Ernakulam Second Class Magistrate's Court.

2. The accused was charged with offence under Sections 457 and 379 I. P. C. in that during the night of 28-9-1957 he broke into the house of PW. 1 with intent to commit theft by breaking a bar of the window and cut and removed gold chains worn by the three children of PW. 1 who were sleeping in a room in the house and thus committed theft. There were no eye-witnesses examined as to actual commission of the offence, the evidence let in was practically about the sale by the accused of the alleged stolen articles.

There was the evidence of PW. 6 that the accused had borrowed his scissors apparently to show that the chains were cut out while the children were asleep. But two of the chains were intact and there was snapping if at all in only one. P.W. 1's evidence revealed that he had large dealing in hay and etc. with the accused and his father and there was amount outstanding due on that account to the accused and his father at the lime of the alleged occurrence and PW. 1 had indeed paid a sum of Rs. 450 to the accused's father after the case towards purchases made before the incident.

The accused examined under Section 342 Crl. P. C. stated that when he went to PW. 1 to collect the moneys due, P.W. 1 had no cash and so gave the chains to him on the understanding that the chains may be pawned and he may take Rs. 1.00 out of the money raised and return the balance and because lie was in urgent need of money he sold them but he did not steal the chains. The learned Magistrate did not accept the evidence of the breaking of 610 bar and held that whatever may be the truth of the version of the accused as to entrustment of the chains, it was difficult to find conclusively that the accused committed theft.

He therefore gave the accused the benefit of the doubt and in the result found him not guilty and so acquitted him under Section 251-A(ii) Crl. P. C. The learned Magistrate however returned to PW. 1 the chains which had been recovered from the vendee of the accused

'Since even accepting the defence version they are in effect the subject-matter of an act possibly that amounts to criminal breach of trust and hence stolen property as defined in Section 410 I. P. C.'

3. Learned Government Pleader appearing for the State did not seek to canvass the acquittal of the accused by the court below in respect of the offences charged. But he contended that the case was one in which the accused should have been convicted on his own admission of the offence under Section 403, dishonest misappropriation or Section 406, criminal breach of trust and he relied upon Section 237 of the Criminal Procedure Code.

4. It is no doubt true that under Section 257 Crl. P. C. if 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 he may be convicted of the offence which he is shown to have committed, although he was not charged therewith. But the section is controlled by the provisions of Section 236 and it is clear from Section 236 that the actor series of acts alleged against the accused must be such as to make it doubtful as to the exact nature of the offence that may be made out on proof of such act or series of acts.

There is some controversy in the books as to whether the doubt must be about the inference from the facts (i.e. the law applicable to the facts proved) e.g. as to which of several offences has been committed on the facts which can be proved or about the facts themselves. In any event the section contemplates uncertainty at the commencement of the trial to be resolved at the end of the trial, that is, the doubt must arise at the time of the charge. As observed in *Istahar Khondkar v. Emperor*, AIR 1936 Cal 796 :

'The doubt contemplated by Sections 236 and 237 must arise at the time of the charge. In order to decide whether such a doubt exists as will attract the provisions of Sections 236 and 237 the Judge must know at that lime what facts 'can be proved.' The expression 'can be proved' means facts about which there is evidence in the hands of the prosecution.'

Referring to the Illustration to Section 237 on which learned Government Pleader relied and which is as follows:

'A is charged with theft. It appears that he committed the offence of criminal breach of trust, or that of receiving stolen goods. He may bo convicted of criminal

breach of trust or of receiving stolen goods (as the case may be) though he was not charged with such offence,' the learned Judges said:

'In interpreting the illustration of Section 237, it must be remembered that it only applies to the class of cases referred to in Section 236 and therefore it does not refer to cases in which it is merely doubtful which offence will be proved and Section 237 is no authority for holding that in such cases on a charge of one offence a man can be convicted of a different offence. Under Section 236 the doubt must arise from the nature of the facts or inferences which can be drawn from these facts.'

5. There can be no warrant therefore to avail of the answers of the accused under Section 342 Cr. P. C. for purpose of the applicability of Section 237 Cr. P. C. These answers are not strictly 'evidence' as it is understood though they 'may be taken into consideration' and as held by the Supreme Court in *Vijendrajit v. State of Bombay*, AIR 1953 SC 247, 'Conviction of the accused cannot be based merely on his statement recorded under Section 342 which cannot be regarded as evidence'.

6. We have also to observe that Sections 236 and 237 are in their very nature to be availed of by the trial court and are inherently incapable of being availed of by an appellate or revisional court. For as observed by Desai, J. in *Mangal Singh v. Rex*, AIR 1949 All 599 :

'It is the trying Court and the trying Court alone which can say whether it entertains any doubt on the question which of the offences are constituted by the facts which can be proved. It is only that Court which can avail itself of the doubt when passing the judgment. It is not for another Court, however superior it may be, to say that the trial Court had or ought to have had a doubt on the question. A superior Court, in the absence of anything on record, cannot imagine that the trial Court had a doubt and cannot proceed to resolve it on that imagination.'

Nor finally is it clear beyond doubt that the answer of the accused relied on will enable at all his conviction for offence either under Section 403 or Section 406 I. P. C. or on the other hand leave him liable merely in tort.

7. The result is that there is no merit in this appeal and it is accordingly dismissed.

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