

In Re: the State of Kerala and ors.

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Court : Kerala

Decided On : Jan-05-1968

Reported in : 1969CriLJ334

Judge : K. Sadasivan, J.

Appellant : In Re: the State of Kerala and ors.

Judgement :

ORDER

K. Sadasivan, J.

1. I ho question raised in this reference by the Addl. Sessions judge of Parui is whether the trial of Sessions Case No. 13 of 19fi7 is barred by 'issue estoppel' by reason of the findings already entered in C.C. No. 198 of 1966 by the Addl. First Class Magistrate, Ernakulam, which arose out of the same transaction as is the subject-matter of Sessions Case No. 13 of 1967.

2. The prosecution case is that on 19.11.1964 at 11 a.m. the complainant who was sitting in a shop in Kizhakkambalam market was beaten with iron rods by the accused, three in number, who were acting in pursuance of a common intention to murder him. As a result of the beatings, he sustained injuries all over his body including fracture of a finger bone. He got out of the shop and ran along the road to avoid further blows being sustained; but he was pursued and beaten again and as a result of the further beatings he fell down and was rendered unconscious. By

the timely intervention of a police constable his life, however, was saved. On these facts a case under Sections 323, 324 and 326 read with Section 34, I.P.C., was charged against the accused in C.C. No. 198 of 1966 and the trial was held by the Additional First Class Magistrate, Ernakulam. The learned Magistrate finding that the prosecution had not established its case beyond doubt acquitted all the accused. Exhibit D-8 is the copy of that judgment.

After that a private complaint was filed by P.W. 1 in C.C. No. 198 of 1966 (Ex. D-8 case) before the Sub-Magistrate of Perumbavoor against accused Nos. 1 to 3 in that case and two others alleging offences against them under Sections 307 and 326 read with Section 34, I.P.C. That complaint was taken on file as P.E. No. 5 of 1966 and the learned Sub-Magistrate after a preliminary enquiry has committed accused 1 to 3 to stand 'their trial before the Additional Sessions Judge. A preliminary objection was taken before the learned Judge by the accused on the ground that the trial is barred by the rule of 'issue estoppel' by reason of the findings already entered in C.C. No. 198 of 1966. The objection was taken before the Sub-Magistrate also; but that was overruled by him. The learned Additional Sessions Judge is of the view that the trial is barred by the rule of 'issue estoppel' and accordingly she has made the reference.

3. The implication of the rule of issue estoppel has been stated as follows by the Supreme Court in *Manipur Administration, Manipur v. Thokchom Bira Singh* 0065/1964 : [1964]7SCR123 :

The rule of issue estoppel in a criminal trial is that where an issue of fact has been tried by a competent Court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or *res judicata* against the prosecution, not as a bar to the trial and conviction of the accused for a different or distinct offence, but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by the terms of Section 403(2). The rule is not the same as the plea of double jeopardy or *autrefois acquit*. The rule does not introduce any variation in the Code of Criminal Procedure either in investigation, enquiry or trial. It also does not prevent the trial of any offence as does *autrefois*

acquit but only precludes evidence being led to prove a fact in issue as regards which evidence has already been led and a specific finding recorded at an earlier criminal trial before a Court of competent jurisdiction. The rule thus relates only to the admissibility of evidence which is designed to upset a finding of fact recorded by a competent Court at a previous trial.

4. As stated above, issue estoppel does, not prevent the trial of any offence as does *autrefois acquit* but only precludes evidence being led to prove a fact in issue as regards which evidence has already been led and a specific finding recorded at an earlier criminal trial. The contention of the learned Counsel is that in the previous trial no specific finding has been recorded as to whether the injuries sustained by P.W. 1 were inflicted on him by these accused and so, according to him, the bar of issue estoppel has no application in the present case. This is not correct. The finding entered by the learned Magistrate in Ex. D-8 judgment is that the case of the prosecution was not established beyond doubt and this finding has been clearly entered by the learned Magistrate in paragraph 10 of his judgment.

The learned Magistrate has further held that it is probable that the injuries were sustained by P.W. 1 in a prolonged fight. From this the learned Counsel would build up an argument that the finding is vague and that the learned Magistrate has not found as to how and at whose hands the injuries were sustained. It is unnecessary for the purpose of the case to indulge in such speculations. When once it is found that the prosecution has not succeeded in proving the guilt of the accused, the matter ends there. The real question is whether the evidence once considered and rejected could be permitted to be let in, in the second trial.

The learned Counsel relying on certain observations of the Privy Council in *Sambasivam v. Public Prosecutor, Federation of Malaya* 1950 AC 458, stated that the second trial is not barred. In that case it was held that-

the appellant's counsel at the second trial was entitled to cross-examine the witness as to what he had said at the first trial so as to demonstrate to the Court the fact and extent of the discrepancy.

There, the appellant's counsel at the second trial was estopped from referring to the previous trial, and thereby prevented from effectively cross-examining one of the witnesses. The main evidence at both trials consisted of the evidence of three Malays, and as appeared from the record from the notes of the second trial, when counsel for the appellant tried to put to one of those Malays that he had given different evidence in the first trial from that which he was giving in the second, the Judge said that he must not do that must not refer to the fact that there had been a previous trial. That prevented the witness from being cross-examined and very seriously deprived the appellant of the right of testing the case that was put against him. It was in those circumstances that the objection was overruled and the witness was allowed to be cross-examined with reference to his statement made at the first trial.

5. In the present case the position is different. The facts which constituted the charge on the first occasion are sought to be put again on trial now on the allegation that the offence disclosed is one of attempt to murder which the Magistrate is not competent to try and so the second trial should be permitted overlooking the one that has already ended in acquittal. My attention was invited by the learned Counsel to *R. v. Connelly* (1963) 3 All ELR 510, where murder was committed in the course of the commission of theft. The first trial was for murder and the accused were convicted. Subsequently they were put on trial again on a charge of robbery on the same occasion. The defence put forward at the trial for murder was twofold: (a) an alibi or (b) no murderous intent. The trial Judge ordered that a second indictment for robbery with aggravation should not be proceeded with without leave.

On appeal against the conviction the only issue ventilated was whether the evidence, and the Judge's direction thereon relating to the accused's presence at the scene of crime was satisfactory. The Court of Criminal Appeal did not expressly reach any finding that the accused had not been present; but his conviction was quashed. On application by the Crown, the Court granted leave that the prosecution should proceed on the second indictment. At the trial on the indictment for robbery the accused pleaded *autrefois acquit*, but the trial Judge directed the Jury that the plea had not been proved. He then indicated his view

that the prosecution ought not to proceed on the indictment for robbery, but the Crown not being prepared to abstain from proceeding with the trial, the accused was remanded to custody. Subsequently, he was tried and convicted. On appeal it was held that there was no finding that the accused had not been proved to have been present at the scene of the crime in the first trial.

6. That decision also, in my view, is inapplicable to the facts of the present case. The point to be noted is that where an issue of fact has been tried by a competent Court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or res judicata against the prosecution, not as a bar to the trial and conviction of the accused for a different or distinct offence; but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence. Applying the above principle, it has to be held that the second trial is incompetent. Even though the offence alleged against the accused in the proposed second trial is attempt to murder, the transaction which is the background of the offence is the same and the facts sought to be proved to bring home the accused's guilt are also the same. These self-same facts were put on trial on the first occasion and a decision arrived at by the learned Magistrate.

The only additional factor sought to be established by the second trial is the intention to kill, so that the offence may amount to attempt to murder. The intention is something to be inferred from the facts which were already there. It cannot, therefore, be said that the second trial has been necessitated by the fact that the Magistrate failed to enter a definite finding on the first occasion. The question is whether the evidence sought to be let in now is the self-same evidence produced and considered on the first occasion. No other item of evidence than those considered on the first occasion is sought to be let in now. In the circumstances, I am of the view that the present trial is hit by the bar of issue estoppel.

7. The reference is hence accepted and the committal order is Quashed.