

The State Vs. Sohan Lal

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Court : Rajasthan

Decided On : Aug-20-1959

Reported in : AIR1960Raj44; 1960CriLJ278

Judge : I.N. Modi and; D.M. Bhandari, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 227, 228, 229, 258 and 494

Appeal No. : Criminal Appeal No. 135 of 1958

Appellant : The State

Respondent : Sohan Lal

Advocate for Def. : Balkrishna Acharya

Advocate for Pet/Ap. : Kansingh, Deputy G.A.

Judgement :

Modi, J.

1. This is an appeal by the State against the order of the Sub-Divisional Magistrate Bikaner, dated 20-1-1958. in a case under Section 408 I. P. C. by which he framed an amended charge against the accused for the certain offences of breach of trust alleged to have been committed by him during the period ranging from Kati Sudi 1

Smt. 2007, to Kati Vadi 15 Smt. 2008, and further ordered that the accused be acquitted with respect to the other breaches of criminal trust alleged to have been committed by him for the years Smt. 2007 to Smt. 2011 excluding the period last-mentioned.

2. Only a few facts need be mentioned to bring out the point which has been canvassed before us in this case. A combined charge-sheet for all the alleged offences was presented against the accused in the court of the Sub-Divisional Magistrate, Bikaner, on the allegation that he was a Munim of Naraindas Daga and had committed the various breaches of criminal trust with respect to the monies which had been entrusted to him in that capacity. The accused was challaned in the court of the Magistrate on 16-3-1955. Thereafter a single charge was framed against the accused for all the offences alleged to have been committed by him for the period ranging from Smt. 2007 to Smt. 2011], which are said to have involved a total amount of Rs. 19,887/-.

It seems to have been later realised by the prosecution that this charge was a faulty one, and that if the trial was allowed to proceed on its basis, the entire trial would be bad. Consequently, an application was moved on behalf of the State on 27-3-1957, in which it was prayed that the charge be amended so that it be confined to the defalcations committed in between the month of Kati of the Samwat year 2010 to that of 2011, and it was also submitted that separate challans were proposed to be presented against the accused for the remaining years.

The learned Magistrate by his order dated 20-1-1958, directed the amendment of the charge whereby he limited it to the defalcations committed by the accused during the Smt. year 2007-2008, which amounted to a sum of Rs. 5863-13-6 but further ordered that so far as the other defalcations alleged to have been committed by the accused during the other years were concerned, there was no other course open to him except to acquit the accused in the circumstances of the case and in this view of the matter, the accused was acquitted.

3. It is strenuously contended before us on behalf of the State that the view taken by the learned Magistrate in acquitting the accused with respect to the defalcations

committed by him during the several other years was unjust and erroneous and should be set aside. Now what the learned trial Magistrate observed was that the request for the splitting up of the charges had not been made at the very inception of the case nor had the court thought of it earlier.

He further went on to observe that if the Public Prosecutor had not made the application which he filed for the splitting up of the charges, the trial would have gone on and the accused could have only been convicted for the offences proved to have been committed by him during the course of one year and would have been acquitted so far as the other items were concerned. The learned Magistrate then went on to observe that the trial had proceeded in this case at an inordinately slow speed and that the application for the splitting up of the charges really amounted to a withdrawal from the other charges within the meaning of Section 494 Cr. P. C. In this view of the matter, the learned Magistrate ordered the amendment of the charge which had already been framed so as to be limited to the Saimwat year 2007-2008, and he came to the conclusion that the accused could not be convicted so far as the remaining offences alleged to have been committed by him were concerned.

4. We have heard learned counsel for the parties and carefully examined the contention which seems to have prevailed with the learned trial Magistrate. It was argued before us on behalf of the accused that after the charge had been framed a trial could only culminate either in a conviction or an acquittal, and that there could be no other result of the case, and that inasmuch as a charge had admittedly been framed in the present case against the accused, and a part of it was, according to the submission of learned counsel, sought to be withdrawn, that could not but result in an acquittal according to the provisions of Section 494 Cr. P. C. Learned counsel placed strong reliance for his submission on *In re, Velayudha Mudali*, AIR 1949 Mad 508 and *In re, BiUa Mas-than*, (S) AIR 1955 Andhra 33.

5. We have carefully examined these cases. Turning to (S) AIR 1955 Andhra 33 first, the facts were briefly these. The accused was charged with two distinct offences, (1) for an offence under Section 408 and (2) Section 477A of the Penal Code on 29-12-1953. On the next following day, the Assistant Public Prosecutor

filed a petition stating that the two offences were distinct and should not, therefore, be tried together and so the charge under Section 477A be separated and fresh proceedings be permitted to be started against the accused in respect of the offence under Section 408 I. P. C. The Magistrate acceded this prayer and ordered that a separate case be registered against the accused and tried under Section 477A. A further petition was filed on the same day by the Assistant Public Prosecutor praying that as the charge under Section 477A had been separated, the charge already framed be amended and this prayer was also allowed.

The accused was eventually convicted under Section 477A and the same was confirmed on appeal by the court of session. A revision was then taken to the High Court, and the conviction and the sentence of the accused were quashed. It was contended before the High Court that the application made to the Magistrate for the separation of trial on the two charges was, to all intents and purposes, an application under S. 494 Cr. P. C., though it was not in so many words made under that section. It was further contended that if the withdrawal was effected under Section 494 after the framing of the charge, it was bound to operate as an acquittal under Clause (b) of that section.

It was recognised that the object or the intention of the Assistant Public Prosecutor in re-requesting the Magistrate to omit the charge under Section 477A might have been with a view to empower him to initiate separate proceedings and the object of the Magistrate in allowing the petition might equally be the same. But the High Court observed that the question still remained whether such a procedure was warranted by the provisions of the Code of Criminal Procedure, and it was remarked that there was no provision in the Criminal Procedure Code corresponding to Order 23 Rule 1, Civil Procedure Code, permitting the withdrawal of a case with permission to file a fresh complaint on the same facts, and, therefore, the withdrawal; or the elimination of the charge under Section 477A though coupled with a specific direction that a separate case in relation to that offence would be registered and proceeded with was entirely ineffective and amounted to an acquittal in law. In arriving at this decision, reliance was placed on a decision of the Madras High Court in AIR 1949 Mad 508 wherein the following observations were made;

'The learned Public Prosecutor urges that the request for withdrawal was combined with the statement that the intention of the prosecution was to file separate cases against individuals or groups of accused separately and according to him, in pith and substance, the order giving permission to withdraw the case amounts also to an order empowering the institution of the present case. If the Code of Criminal Procedure contained a provision similar to Order 23 Rule 1 Civil P. C., allowing the withdrawal of a case with permission to file, on the same facts, a fresh complaint, this argument is entitled to great weight. But in the absence of any such rule of law one has to envisage the result of a withdrawal in accordance with the ideas underlying the sections of the Criminal Procedure Code. IF it is impossible to wipe off or obliterate a charge already framed without an acquittal or with the culmination of a charge in a conviction, any withdrawal with permission to file a fresh complaint cannot be understood as the keeping alive of a charge.'

We may state at once that so far as the Madras case is concerned, it is clearly distinguishable on facts inasmuch as an application there had been made avowedly under Section 494 Cr. P. C. That case, in our opinion, cannot have any real bearing on the case before us where no application for withdrawal under Section 494 Cr. P. C. was ever made or purported to be made, and all that was nought to be done was that the charge be amended so as to be confined to the defaults committed during the course of a single year, and it v. as further stated that separate challans would be presented against the accused so far as defalcations committed by him during the remaining years were concerned.

It was argued with considerable force before us that even so, if the decision in the Andhra case, (S) AIR 1955 Andhra 33, laid down the law correctly, no fault could be found with the judgment of the learned trial Magistrate in this case and the acquittal of the accused with respect to the allegations relating to the various other years than those relating to Samvat year 2007 to 2008 deserves to be upheld. (6) The crux of the case, to our mind, is whether an application of the kind which was made by the Public Prosecutor in this case properly falls within the ambit and scope of Section 494 of the Code of Criminal Procedure. On a very careful and anxious consideration of the whole matter, we have come to the conclusion that it does not. What that section lays down is that any Public Prosecutor may, with the

consent of the court, in cases tried by jury before the return of the verdict, and in other cases before the judgment is pronounced, withdraw from the prosecution of any person, either generally or in respect of any one Or more of the offences for which he is tried, and upon such withdrawal, the accused shall be discharged if the withdrawal is made before a charge has been framed and he shall be acquitted if the withdrawal happens to be made after a charge has been framed.

7. The question to consider is, what is meant by the phrase 'withdraw from the prosecution?' Now we have no hesitation in saying that there can hardly be any occasion to say that the Public Prosecutor in a particular case wanted to withdraw from the prosecution either generally or in respect of any of the offences for which the accused is being tried when he avowedly says that there is no intention whatsoever on the part of the prosecution to cease or not to continue the same but it definitely is to continue it though in a different form.

Again, there is authority for the proposition that a withdrawal from the prosecution has to be formally, or, as we may put it, consciously made, and that where a withdrawal is sought to be made, the Public Prosecutor should state that he does not want to prosecute the accused for certain alleged acts or omissions., and it has also been held that when he merely says that there is no case under a certain section or when he drops out of the case allowing the counsel of a private party to carry it on, there is no withdrawal as such. See *Gopal v. Alagirisami*. AIR 1931 Mud 770 and *Alopi Dia v. Emperor*, AIR 1935 All 366.

So far as the case before us is concerned, an application for withdrawal had never been made therein by the Public Prosecutor, and, therefore, with all respect for the decision in (S) AIR 1955 Andhra 33, we are not prepared to go so far as to hold that the application made for splitting up the charges which had all been unlawfully joined together and for separate trials was really tantamount to an application for withdrawal from the prosecution within the meaning of Section 494 Cr. P. C. As we look at the matter, this was really an application for the amendment of the charge under Section 227 Cr. P. C.

It is true that with this application a prayer (was also made that separate challans would be presented against the accused so far as the other alleged offences were

concerned. Even so, we are unable to hold this prayer amounted to a request for withdrawal from the prosecution for the remaining offences within the four walls of Section 494 Cr. P. C.

8. We may refer here to the submission that after a charge is framed, a criminal case can only result either in conviction or in acquittal. We have no doubt that in one sense that is so. But if this statement is intended to suggest that before the final result of a case ending in conviction or acquittal the Court cannot pass any other suitable order during the trial of a case, as for example, for a retrial thereof by amendment of a charge and/or for a separate trial with respect to some of the charges, we are clearly of the opinion that the aforesaid proposition of law is an over statement of the correct legal position. We would invite particular reference to Sections 228 and 229 of the Code of Criminal Procedure in this connection.

It may very well be that before a case eventually results in acquittal or conviction, a re-trial may be properly called for where a case so falls within the ambit of the two sections mentioned above. We wish to illustrate what we mean by a simple example, which, to our mind, clearly brings out the fallacy in the argument on which learned counsel for the accused relies. Let us suppose that the accused has had a trial in a case wherein a number of charges have been, clubbed together, and they could not have been so clubbed according to law, and eventually the accused is convicted by the trial court. The matter is taken in appeal.

Now, can it be said that when the appellate court is satisfied that the trial has been illegal on, account of a misjoinder of the charges, the only course open before it, if it cannot convict the accused as undoubtedly it cannot, is to acquit the accused; or can an appellate court not order a retrial of the accused with a direction that the various charges be tried separately according to law? For ourselves, we have no doubt, that this can be done, and there is nothing in the Criminal Procedure Code which bars such a course from being adopted.

If that is the correct position in law, which it is open to the appellate court to adopt in a case of this character, we fail to see why a mistake of law which can be corrected by a superior court at the time of appeal cannot be corrected by the trial court itself during the course of trial when such an irregularity is brought to its

notice or it takes notice thereof itself, and why separate trials cannot be ordered while there is yet opportunity for doing so.

We are disposed to hold the view that the trial court has such power and should exercise it whenever a legitimate occasion for doing so arises. With respect, we desire to point out in this connection that the view which seems to have weighed with certain Courts that no procedure can be adopted howsoever reasonable and proper it may be unless there is an express provision sanctioning it in the procedural Code governing the case is hardly correct. So far as we understand, the correct principle is that in matters of procedure, a particular procedure should be considered to be permitted if it is not prohibited and not that every procedure should be taken as prohibited, unless it is provided for; and there cannot possibly be any valid objection to the adoption of this general rule in cases where no prejudice thereby can ever be caused to any party, and on the other hand, the object of the kind of procedure sought to be adopted is to avoid such prejudice.

There is ample authority for the proposition that where there may be no specific provision, a criminal court, no less than a civil court may mould the procedure to enable it to pass such orders as the ends of justice may require. See *Rahim Sheikh v. Emperor*, AIR 1923 C:il 724 and *Hansraj Harjiwan v. Emperor*, AIR 1940 Nag 390. Reference may also be made in this connection to *Akhil Bandhu Ray v. Emperor*, AIR 1938 Cal 258, where an analogous question arose, though we recognise that the facts there were slightly different. In that case certain persons were charged for conspiracy to commit criminal breach of trust and cheating.

After the prosecution evidence was over, the Magistrate found at the stage of the framing of the charges that all the accused could not be tried together and the case should be split up in order to avoid misjoinder. Thereupon the Magistrate formed two groups of the accused persons and ordered a de novo trial of one of them. It was held by a bench of the Calcutta High Court that the Magistrate had acted rightly in ordering a de novo trial of one of the groups,

This case establishes that criminal courts have extensive powers to order the splitting up of the charges where such a course is called for in the interests of justice. In other words, it is not necessary that before such power can be or should

have been exercised, there must have been an express provision in the Act to enable this power to be exercised. In fact, we think that this power can be properly deduced from the provision contained in Section 227 itself read with Ss. 22S and 229 of the Code.

9. For the reasons mentioned above, we set aside the order of the learned Magistrate insofar as it amounts to the acquittal of the accused in relation to the offences alleged to have been committed by him during the Surnwat years 2008 to 2011, and hereby send the case back to him with a direction that he shall split up the various allegations made against the accused for each year separately and proceed to frame fresh charges against him and try him in accordance with law. We need hardly add that the prosecution will furnish all the requisite material in each case separately in the court of the Magistrate for the trial to be commenced in accordance with law.

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