

State Vs. Khetaram

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Court : Rajasthan

Decided On : Mar-12-1965

Reported in : AIR1965Raj221; 1965CriLJ683

Judge : C.B. Bhargava, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 235, 235(1), 236, 237, 403(1) and 403(2); Indian Penal Code (IPC) - Sections 304A; Motor Vehicles Act - Sections 3, 89, 112 and 126

Appeal No. : Criminal Appeal No. 296 of 1963

Appellant : State

Respondent : Khetaram

Advocate for Def. : K.C. Gaur, Adv.

Advocate for Pet/Ap. : B.C. Chatterjee, Adv.

Disposition : Appeal allowed

Judgement :

C.B. Bhargava, J.

1. This is an appeal by the State against the order of acquittal D/- 18th January, 1983 passed by the Judicial Magistrate First Class, Abu Road in a case under

Section 304A of the Indian Penal Code.

2. Respondent Khetaram was prosecuted under Section 304A of the Indian Penal Code on a police report which was submitted before the Magistrate on 8th September 1961 for causing the death of one Parveen by rashly and negligently driving Truck No. RJN 237. Subsequently, on 18th October, 1981, a complaint under Section 3/112, 89 and 126 of the Motor Vehicles Act was also filed against the respondent in the court of the Sub-Divisional Magistrate, Mount Abu. In the complaint case under the Motor Vehicles Act, three police officers whose evidence was of formal character, were examined. After their evidence the P. S. I. submitted an application that as the complaint was filed directly by the Station House Officer in the court without naming the eye-witnesses, Tararam and Dudaram two eye-witnesses be summoned or he be allowed time to produce them at his own instance.

It was also pointed out that the evidence of the aforesaid witnesses had already been recorded in the case under Section 304A of the Indian Penal Code in the court of the Judicial Magistrate, Abu Road. But the learned Sub-Divisional Magistrate, Mount Abu rejected the application and acquitted the accused holding that 'there is no eye-witness of the incident and the whole case is based on hearsay.'

3. In the case under Section 304A of the Indian Penal Code charge was framed against the accused, 18 witnesses were examined on behalf of the prosecution and statement of the accused under Section 342 of the Code of Criminal Procedure was also recorded. The accused was then called upon to enter upon his defence. In the meanwhile an application was submit on behalf of the accused that in view of the acquittal of the accused in the complaint case under Sections 3/112, 89 and 126 of the Motor Vehicles Act, his trial under Section 304A of the Indian Penal Code was barred under Section 403(1) of the Code. The learned Judicial Magistrate after hearing the parties on the aforesaid application held that the accused could not be retried under Section 304A of the Indian Penal Code in view ,of his acquittal for the offences under the Motor Vehicles Act and therefore, acquitted him.

In support of his conclusion the learned Sub-Divisional Magistrate relied on a decision of the Supreme Court in *Pritamsingh v. State of Punjab*, (S) AIR 1956 S C 415 and a decision of this Court in *Prabhudayal v. Surya Narain*, 1962 Raj L W 98. The present appeal has been filed against the above order of acquittal.

4. It is contended that Section 403(1) of the Code of Criminal Procedure is not applicable in the present case because offence under Section 304A of the Indian Penal Code is quite distinct from the offences under the Motor Vehicles Act from which the accused was acquitted.

5. On the other hand learned counsel for the respondent urges that as the case under Section 304A of the Indian Penal Code is based on the same facts as were involved in the case under the Motor Vehicles Act, Section 403 (1) of the Code is applicable. In the alternative it is urged that the acquittal in the complaint case involves a finding that the respondent was not driving the truck and as such evidence to prove the same fact cannot be led in the case under Section 304A of the Indian Penal Code on the ground of issue estoppel which applies to criminal proceedings as well. In this connection learned counsel has relied on *Prabhudayal's case*, 1962 Raj L W 98, *Sunderlal Bhagaji v. State*, AIR 1954 Madh B 129 and a recent decision of the Supreme Court in *Mantpur Administration, Manipur v. Thokchom Bira Singh*, AIR 1985 SC 87.

6. Therefore the first question which requires determination is whether the trial of the respondent under Section 304A of the Indian Penal Code was barred under Section 403 (1) of the Code in view of his acquittal in the complaint case. Section 403 embodies the well known principle 'autrefois acquit' and 'autrefois convict'. To sustain a plea of 'autrefois acquit' it is necessary to show that the new trial is for the same offence or 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 238 or for which he might have been convicted under Section 237. Section 236, Cr. P. C. provides for a situation where the act or series of acts constituting an offence is of such a nature that it is doubtful which one of several offences will be made out on the basis of those facts Sub-sections 2, 3 and 4 of Section 403 lay down exceptions to Section 403 (1). Sub-section 2 says that

'a person acquitted for convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under Section 235, Sub-section (1).'

Section 235 (1) covers the case of more offences than one having been committed which are distinct offences in one series of acts so connected together as to form the same transaction. It is therefore to be seen whether the two conditions necessary for the application of Section 403 (1) are satisfied in the present case or not. It is clear that offence under Section 304A of the Indian Penal Code is quite distinct from the offences under Sections 3/112, 89 and 126 of the Motor Vehicles Act. Similarly, Section 286 Cr. P. C. is inapplicable to the facts of this case because it is not doubtful which of the offence or offences were made out by the facts alleged on behalf of the prosecution. That being so Section 403 (1) cannot be said to be applicable to the present case. This is a case to which Section 235 (1) applies and as such the case would fall under Sub-section (2) of Section 405 and the trial of the respondent would not be barred.

7. In Pritamsingh's case, (3) AIR 1956 SC 415 as pointed out by their Lordships in Manipur Administration's case, AIR 1985 SC 87.

'the question raised was different and was whether 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 constitutes 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)'. Prabhudayal's case, 1962 Raj L W 98 relied upon by the learned counsel is also distinguishable. Pritamsingh's case, (S) AIR 1956 S C 415, was relied upon by this Court in Prabhudayal's case, 1962 Raj L W 98. In that case the accused was acquitted on a trial under Section 3 read with Section 112 of the Motor Vehicles Act and subsequently was being proceeded with under Section 304A and 279 of the Indian Penal Code. The Magistrate had given a finding that it was not proved that the accused was driving the bus at the time of the accident. In view of

this clear finding in the previous case the principle laid down in Pritamsingh's case, (S) AIR 1956 S C 415 was applied by this Court and it was held that : 'The case under Sections 304A and 279 cannot proceed because it is held in the other case that the accused was not driving the vehicle'.

With utmost respect I may say that the question in this case too was regarding the reception of evidence on a point on which a finding had already been given even though the subsequent trial was for a different offence which was permissible by the terms of Section 403 (2) of the Code. In Sunderlal's case, AIR 1954 Madh-B 129, the accused was prosecuted and acquitted under the Motor Vehicles Rules for driving a bus when he was fully drunk and was under influence of liquor. It was held that 'he could not subsequently be prosecuted on self-same facts under Section 338, Penal Code, because that decision was binding in all subsequent proceedings between the same parties. It was observed that :

'Subject to the exceptions contained in Sub-sections 2 to 4 of Section 403 the effect of an acquittal is conclusive and binding in all subsequent proceedings between parties to the adjudication. The principle underlying the plea of autrefois acquit is not fully stated merely by saying that an accused person should not be vexed twice by prosecution on the same set of facts. The acquittal in the previous trial by a competent Court has one further effect of making the decision binding in all subsequent proceedings between the same parties.

The conviction for rash negligent driving in the present case is not based on the speed with which the accused was running the bus nor on his want of ability or experience to control a passenger bus. The accused is found guilty because he was driving the vehicle when he was completely under the influence of liquor and unable to understand even the ordinary things. According to the appellate Court the accused had for the same reason failed to put on the lights though it had grown quite dark. Now these precisely are the facts on which the accused was charged in the previous trial and acquitted. The very basis of conviction in this case was the fact that the petitioner was heavily drunk and therefore unable to drive the vehicle properly and on this aspect the acquittal in Criminal Case No. 875 of 1951 was conclusive. In my opinion the previous decision is binding on the

prosecution and the plea of *autrefois acquit* must prevail'.

From the above observation it will be clear that the basis of conviction in the second case was on the same ground on which the accused had been previously acquitted. If the conviction of the accused had been on different facts i.e., for rash and negligent driving on account of excessive speed or his inability or experience to control the bus the rule under Section 403 (1) would not have been applicable. It is, therefore, to be seen whether in the previous case there was any finding about which evidence would not be permissible at the trial under Section 304A on the ground of issue estoppel.

In the *Queen v. Ollis*, 1900-2 Q B 758, where the prisoner was indicted for obtaining a cheque by falsely pretending that another cheque, which he then gave to the prosecutor, was a good and valid order for the payment of money the prosecutor deposed that he gave his cheque to the defendant on the faith of the defendant's statement that a cheque, which the defendant then gave to the prosecutor, was a good cheque. The cheque given by the defendant was dishonoured. The defendant stated that when he gave the cheque he expected a payment which would have enabled him to meet it. The defendant was acquitted. He was then tried on a second indictment, charging him with obtaining from other persons three sums of money on three cheques which were dishonoured. To prove guilty knowledge the prosecutor in the first case was called, and gave the same evidence as in the first case. The defendant was convicted, and the question as to the admissibility of the evidence was reserved. It was held per Wright J. that :

'The only possible ground of objection to the reception of the evidence, assuming it to be relevant seems to be that there is an estoppel of record, or 'quasi of record'. An objection in the nature of a plea of *'autrefois acquit'* cannot of course be maintained, because on either indictment the prisoner could not have been convicted of the offences, or any of them, which were alleged in the other indictment. Nor can there be an estoppel of record or quasi of record, unless it appears by record of itself, or as explained by proper evidence, that the same point was determined on the first trial which was in issue on the second trial. But in this case the record of the first trial would show no more than a general verdict of

not guilty. It would not show, nor would evidence be admissible to show, whether the jury acquitted on the ground that, in their opinion, the pretence was not false, or on the ground that though false it was not fraudulently made, or on the ground that the money was not thereby obtained from the prosecutor'.

In *R. v. Connelly*, (1963-3 W. L. R. 839), on March 12, 1963, C. and three other men were convicted of murder in the course of theft. C's defence at the trial 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 whereon, relating to C's presence at the scene of the crime was satisfactory. The Court of Criminal Appeal did not expressly reach any finding that C had not been present; but his conviction was quashed, the court acting under Section 4 of the Criminal Appeal Act, 1907. 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 C. 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, C. was remanded in custody. Subsequently he was tried and convicted. On appeal, it was held that (1) no finding that C. had not been proved to have been present at the scene of the crime was involved in the decision of the Court of Criminal Appeal to quash his conviction of non-capital murder, even though the only issue ventilated before the court was as to his presence at the scene of the crime, for the court had also, under Section 4 of the Criminal Appeal Act, 1907, to consider whether a substantial miscarriage of justice had occurred, and acquittal of the whole of an offence was not an acquittal of every part of it; accordingly the statutory acquittal by the Court of Criminal Appeal of the murder charge did not entitle C. to plead *autrefois acquit* in bar of the indictment for robbery, nor was there inconsistency between the quashing of the murder conviction and the subsequent conviction of C, for robbery.

It was also held that (11) assuming, without deciding, that a plea of issue of estoppel ('res judicata pro veritate accipitur') might validly be raised in a Criminal Court in England, the conditions for applying the plea were not fulfilled in the present case, as the same issue (as to the presence of C. at the scene of the crime) had not been inevitably decided on the appeal to the Court of Criminal Appeal. In the above case reference was made to the following observations of Dixon, C. J., in *Mraz v. The Queen*, ((1956) 98 C L R 62) :--

'The law which gives effect to issue estoppel is not concerned with the correctness or incorrectness, of the finding which amounts to an estoppel, still less with the processes of reasoning by which the finding was reached in fact. ... It is enough that an issue or issues have been directly raised and found. Once that is done, then, so long as the finding stands if there be any subsequent litigation between the same parties, no allegations legally inconsistent with the finding may be made by one of them against the other. Res judicata pro veritate accipitur . . . And . . . this applies in plea of the Crown'.

The following observations made by Herron and Maguire, JJ. in *Brown v. Robinson*, (1960 S R(N S W) 297) were also quoted : --

'Before issue estoppel can succeed in a case such as this, there must be a prior proceeding determined against the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner ... It depends upon an issue or issues having been distinctly raised and found in the former proceeding.'

Their Lordships further quoted with approval the observations of Herron, J. in *R. v. Clift*, ((1952) 52 S R (N S W) 213).

'The doctrine (of estoppel) cannot be made to extend to presumptions or probabilities as to issues in a second action which may be, and yet cannot be, asserted beyond all possible doubts to be, identical with those raised in the previous action.'

It will thus appear that in order to exclude evidence in the second trial on the ground of issue estoppel it must be shown that in the previous trial an issue was distinctly raised and decided.

8. In the light of the above it is to be seen whether in the previous case the Sub Divisional Magistrate, Mount Abu recorded any finding on which evidence was sought to be given in the case under Section 304A of the Indian Penal Code. I have already quoted the order of the Sub Divisional Magistrate in the previous case. It would be noted that no eye witness was examined in that case and three police officers whose evidence was of formal character were only examined. No issue was raised whether the respondent was driving the truck at the time of accident or not. Nor did the court give any finding on that point. From the order of acquittal therefore, it cannot necessarily be implied that the court held that the respondent was not driving the truck at the time of the accident.

Therefore, the prosecution was not debarred from adducing evidence to prove that it was on 'account of the respondent's rash and negligent driving that the accident took place. The order of acquittal in the previous case also cannot operate as a bar under Section 403 (1) for the trial of the respondent in the present case under Section 304A of the Indian Penal Code. As already pointed out the cases relied upon on behalf of the respondent are all distinguishable. The learned Judicial Magistrate was therefore not right in acquitting the respondent and the said order deserves to be set aside.

9. This appeal is therefore, accepted, order of acquittal dated 18th January, 1963, of the respondent is set aside and the case is sent back to the same court for proceeding further with the trial in accordance with law.