The State Vs. Bhoora and ors.

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Court : Rajasthan

Decided On : Jan-09-1961

Reported in : AIR1961Raj274

Judge : C.B. Bhargava, J.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 286(2), 337(2), 339 and 339(1); Indian Penal Code (IPC) - Sections 395 and 396

Appeal No. : Criminal Revn. No. 214 of 1959

Appellant : The State

Respondent : Bhoora and ors.

Advocate for Def. : N.L. Chhangani, Adv. for Opposite Party No. 4 and; M.C. Bhandari, Adv. for Opposite Party No. 12

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

Disposition : Revision petition allowed

Judgement :
ORDER

C.B. Bhargava, J.

1. This revision application raises some points of law.

2. Bhoora and thirteen, others are standing their trial under Sections 395 and 396 I. P. C. in the court of the Additional Sessions Judge, Jalore Shri G. D. Badgel. A fresh trial became necessary because of the retirement of Shri Badri Narayan Vyas Additional Sessions Judge in whose court they were originally tried. One Bhalia was granted pardon by the District Magistrate, Jalore on 6-5-1958 and was examined as a prosecution witness before the committing Magistrate.

Since Bhalia did not comply with the terms of pardon, the learned Public Prosecutor on 27-11-1958 submitted an application before Shri Vyas to the effect that as Bhalia has forfeited the pardon he did not want to examine him at the trial. When the trial again began before Shri Badgel, the learned Public Prosecutor expressed his desire to examine Bhalia as a witness.

This was objected to on behalf of the accused on the ground that the pardon granted to Bhalia had been withdrawn and he was no longer a competent witness as after the withdrawal of the pardon his position was that of a co-accused. It was further objected that once the prosecution has given up a particular witness it is not entitled to request the court again to examine him on its behalf. These objections found favour with the learned Additional Sessions Judge who did not allow the prosecution to examine Bhalia. The State has come in revision against this order.

3. Learned Deputy Government Advocate contends that even though a certificate was issued by the Public Prosecutor that Bhalia had not complied with the terms of the pardon and had forfeited it yet in view of the provisions of Section 337(2), Cri. P. C. the prosecution was bound to examine him as a witness at the trial. In the alternative it is contended that even after the withdrawal of pardon Bhalia remains a competent witness and can be examined against the other accused as he is not being jointly tried with them. As regards the objection that he was given up as a witness on 27th November, 1958, it is urged that as a new trial is taking place it is open to the prosecution to examine him as a witness and the former application to leave him cannot be a bar.

4. Mr, M. C. Bhandari for the accused urges that the provisions of Section 337(2), Cri. P. C. do not apply when on the basis of Bhalia's statement before the

committing court his pardon was withdrawn. In such a case the prosecution is not bound to examine him as a witness in the sessions court. It is further urged that Bhalia was accused of the same offence and it was only because of the pardon granted to him that he became a competent witness.

As soon as the pardon was withdrawn that immunity disappeared and he became an accused person as before and could not be examined as a witness against the other accused. In support of their respective contentions both sides have cited cases on the point. Learned Deputy Government Advocate has referred to Mahla v. Emperor, AIR 1930 Lah 95, Chet Singh v. Emperor, AIR 1931 Lah 102, Akhoy Kumar v. Emperor, AIR 1919 Cal 1021 and Emperor v. Karamalli Gulamalli, AIR 1938 Bom 481. Shri M. C. Bhandari on the other hand has referred to In re Arusami Goundan, AIR 1959 Mad 274, Queen-Empress v. Ramasami, ILR 24 Mad 321, Nayeb Shahana v. Emperor, AIR 1934 Cal 636 and Queen-Empress v. Ganga Charan, ILR 11 All 79. In Mahla's case, AIR 1930 Lah 95 it was held that

'An approver must be examined as a witness in the Court of Committing Magistrate and at the subsequent trial of every person tried for the same offence. Failure to comply with provisions of section 337(2) is an illegality & not a mere irregularity in procedure and makes a trial void.'

This case is not directly in point. In this case one Harnamsingh was granted a pardon and he appeared as a witness against Mukhtars, Dhanna and Bakhtawar accused. But the result of that trial was that the accused persons were acquitted and the learned trial Judge held that neither the accused persons nor the approver were present at the murder. One Mahla was subsequently tried for the same offence. But the prosecution did not examine Harnamsingh as a witness either in the committing court or before the Sessions Judge. A question aiose as to whether it was necessary for the prosecution to examine Harnamsingh against Mahla also. It was held that:

'In view of the provisions of Section 337(2), Cri. P. C. as the prosecution failed to examine him as a witness, the trial was bad.'

In Chet Singh's case, AIR 1931 Lah 102 it was held that

'When a person did accept a tender of pardon once his subsequent resiling from the position that he once occupied does not make him cease to be a person accepting a pardon.'

It was pointed out that no distinction can be drawn between a person who has accepted and a person accepting a tender of pardon. In that view of the matter even though the pardon had been withdrawn in that case it was held that:

'The prosecution was bound to examine the approver as a witness in view of the provisions of Section 337(2).'

A similar view was expressed in Emperor v. Shah-dino Dhaniparto, AIR 1940 Sind 114 where it was held that:

'When an accused after accepting pardon denies all knowledge of facts before the committing Magistrate and the case is committed to Sessions Court the pardon cannot be forfeited before the accused is examined in the Sessions Court. Once a pardon is tendered and accepted, Section 337(2) renders it obligatory for the prosecution to examine the approver both in the committing Magistrate's court and in the Sessions Court should the case be committed. Failure of the prosecution to examihe the approver in the Sessions Court vitiates the trial.'

5. A contrary view was taken in re Arusami Goundan's case, AIR 1959 Mad 274 and it was held that:

'If at any stage he (approver) either wilfully .... conceals material particulars or gives false evidence he would have failed to comply with the conditions on which the pardon was tendered to him and thereby incurred its forfeiture. Neither as a matter of reason or logic, nor as a matter of statutory interpretation can it be said that Section 339(1) is dependent on or connected with Section 337(2) in the sense that the approver must be examined both in the committing court and the sessions court before it can be held that he has forfeited his pardon. It is sufficient if he fails to conform to the conditions to which the pardon has been granted to him at either stage.'

Similarly in Nayeb Shahana's case, AIR 1934 Cal 636 it was held that:

'It is not obligatory upon the prosecution to examine an accomplice as a witness after he has forfeited his pardon.'

6. In my view Section 339, Cri. P. C. does not require that the person who has accepted the pardon must be examined both before the committing court and the Sessions Court before the Public Prosecutor can certify that he has not complied with the condition of pardon and proceedings should be taken against him. This can even be done after the statement of the approver before the committing Magistrate is recorded.

It is nowhere laid down in Section 339 that the approver should be examined both before the committing Magistrate and the Sessions Judge before the Public Prosecutor can issue such a certificate. Once the approver is examined before the committing court and Public Prosecutor is satisfied that he has not made a true disclosure of the facts and has forfeited the pardon. I do not see why the prosecution should be asked to examine him over again in the sessions court.

I agree with great respect with the view expressed in re Arusami Goundan's case, AIR 1959 Mad 274 that the provisions of section 337(2) and Section 339(1) are not dependent or connected with each other and neither as a matter of reason or logic it can be said that approver must be examined both in the committing court and the sessions court before it can be held that he has forfeited his pardon.

But the question here is not that the prosecution is withholding Bhalia from being examined as a witness but on the contrary is insisting for his examination in the sessions court despite the fact that he has forfeited his pardon. Whether after the withdrawal of the pardon Bhalia can be said to be a competent witness against the other accused is next to be considered. Under Section 118 of the Evidence Act,

'All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.' The only bar against a person to be examined as a witness is when he is placed on trial jointly with other persons. In that case he cannot be examined as a witness against the other

accused persons. But here there is a specific bar for the joint trial of the approver against whom the pardon has been withdrawn with the other accused. Section 339 clearly provides that:'Such person (approver) whose pardon has been Withdrawn shall not be tried jointly with any of the other accused and that he shall be entitled to' plead at such trial that he has complied with the conditions upon which such tender was made in which case it shall be for the prosecution to prove that such conditions have not been complied with.'

Sub-section (2) provides that:

'statement made by a person who has accepted a tender of pardon may be given in evidence at such a trial.'

These are special provisions and have to be complied with when the approver is tried for the original offence. Therefore, when such a person cannot be tried jointly with the other accused there appears to be no reason why he cannot be a competent witness against the other accused persons. In this case pardon was granted to Bhalia on 6th May, 1958 and the challan was submitted against other accused on 14th May, 1958. Simply because Bhalia was accused of having committed the same offence but was not being jointly tried it cannot be held that he is not a competent witness because the pardon granted to him had been withdrawn. Reference may be made to Akhoy Kumar's case, AIR 1919 Cal 1021 where it was held that:

'An accused person actually under trial cannot be sworn as a witness, and if two or more persons are being jointly tried none of them is competent witness for or against the others. But this exception to the general rule goes no further and has no application to an accused person who is not at the time under trial. Accordingly, when two persons, though they may be accused of complicity in the same offence, am tried separately each is a competent witness at the trial of the other and the deposition of each may be used against him in his own trial.'

The same view of law was taken in Karamalli Gulamalli's case, AIR 1938 Bom 481 where it was held that:

'Accused' in Section 342 means the accused then under trial and under examination by the Court and cannot include an accused over whom the Court is exercising jurisdiction in another trial.' That being so Bhalia has not ceased to be a competent witness against the accused persons simply because his pardon was withdrawn on 27th November, 1958.

7. A fresh trial is taking place in the court of Mr. Badgel and the previous refusal o the prosecution to examine Bhalis would not debar it from examining him now at this trial. The learned Additional Sessions Judge was not right in rejecting the Public Prosecutor's prayer for examining Bhalia as a witness at the trial.

8. This revision application is therefore, allowed, the order of the learned Additional Sessions Judge dated 2nd May, 1959 is set aside and he is directed to allow the prosecution to examine Bhalia as a witness at the trial.