

Jagdish Vs. the State and ors.

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Court : Rajasthan

Decided On : Mar-09-1961

Reported in : 1963CriLJ233

Judge : D.S. Dave, J.

Appellant : Jagdish

Respondent : The State and ors.

Judgement :

ORDER

D.S. Dave, J.

1. This is an application in revision by complainant, Jagdish, against the order of the learned Additional Sessions Judge, Sikar, dated the 30th November, 1959.

2. The facts giving rise to it are that on the 16th of July, 1957, the present petitioner, Jagdish, filed a complaint in the court of the Magistrate First Class, Neem-ka-Thana, against 11 accused for offences under Sections 452, 323, 504 and 147 of the Indian Penal Code. It was stated in the complaint that in village Ajitgarh where he was residing he had a house and near that house he had his Nohra in which a bath-room was constructed. In the Nohra there was a door which led to a public well situated nearby. It was alleged that on the 20th of June, 1957, all the 11 accused mentioned in the complaint committed criminal trespass in the

said Nohra having made preparations to cause hurt to him. He proceeded to say that after having entered the Nohra, the accused started demolishing the bathroom and when the complainant asked them not to do so, they abused and assaulted him. It was further alleged that the accused had knowingly broken a few things and dismantled certain constructions which caused him a loss amounting, to about Rs. 500/-. It was also mentioned in the complaint that a report of this occurrence was made at the police station, but the police officers were showing favour to the accused, that they were delaying the case in not putting up a challan and therefore he had filed the complaint.

On receipt of this complaint, the Magistrate examined the complainant, registered the case and directed bailable warrants to be issued against all the accused. The case was listed for hearing on 4-9-57, but since some of the accused were not present on that day, the case was adjourned to 4-10-57. On 4-10-57, the police also put up a challan before the same Magistrate against the same 11 accused. The police, however, prosecuted the accused for offences under Sections 452 and 440 of the Indian Penal Code. The Magistrate registered a separate case No. 235 of 1957 on the police report and fixed 29th October, 1957, for hearing. In case Mo. 179 of 1957, which was registered earlier on the complaint of Jagdish, it was noted by the Magistrate that the police had put up a challan, that copies of relevant papers were supplied to the accused and that this case should therefore be dropped from the register and tagged with the challan case. Thereafter, the Magistrate proceeded with the trial of case No. 235 and eventually convicted and sentenced seven accused for offences under Sections 452 and 427 of the Indian Penal Code. The remaining 4 accused were acquitted by him. Aggrieved by this judgment dated 15-5-59 the seven accused persons, referred above, filed an appeal. At the same time, the State also filed a revision application for enhancement of the sentence which was awarded to the accused.

Both these cases were heard together by the learned, Additional Sessions Judge, Sikar. One of the arguments raised before the appellate court was, that a complaint was filed in the court of the Magistrate on 16-7-57, that a police challan was also made in respect of the same occurrence, that the first case having been instituted otherwise than on a police report, the trial court ought to have followed

the procedure laid down in Sections 257 to 258 of the Code of Criminal Procedure, that it should not have followed the procedure laid down in Section 251-A and that the trial was therefore illegal. Reference was made to *Gopal v. State*. The learned Judge realised that the case cited before him was distinguishable on facts, but It was further observed by him that the police had not challaned the accused for an offence under Section 427 of the Indian Penal Code, that the charge for this offence was made on the basis of the complaint, that the offence under Section 427 was not cognizable, nor was it a minor offence in relation to the offence under Section 440 of the Indian Penal Code and therefore in the opinion of the learned Judge the trial was illegal. He allowed the appeal, set aside the conviction of the accused and ordered a re-trial. In view of the said order, the application for enhancement of the sentence became in fructuous and therefore it was dismissed, it As against this order that the complainant has filed the present revision application.

3. It is contended by petitioner's learned Counsel that the appellate court was wrong in thinking that the trial court had consolidated the complaint with the challan. It is further urged that the learned Judge was not correct in saying that the charge under Section 427 of the Indian Penal Code was framed on the basis of the complaint. It is pointed out that there was no mention of the offence under Section 427 in the complaint and that the trial court had framed a charge under that section because it thought that the offence thereunder was a minor one as compared to the offence under Section 440 for which the police had put up the challan. It has also been argued that the trial court took no proceedings in the complaint case after the police had put up the challan, that the first case was dropped out and thereafter no reference was made to it at any stage when the case put up by the police was tried. Lastly, it has been urged that none of the accused had raised any objection in the trial court that it should not follow the procedure laid down in Section 251-A of the Code of Criminal Procedure, that they were unable to show if any prejudice was caused to them and, under these circumstances, the appellate court ought not to have ordered a re-trial.

4. Learned Counsel for the accused has contended, on. the other hand, that the Magistrate having once taken 'cognizance of the offence on the basis of the

complaint, it was incumbent upon him to follow the procedure laid down in Sections 252 to 258 of the Code of Criminal Procedure and that it was wrong on his part to adopt the procedure laid down in Section 251-A simply because a police challan was made in respect of the same occurrence. He has referred to *Ghisia v. State*, in support of his arguments.

5. The reply to the question involved in this revision application is not free from difficulty. In *Gopal's case*, on which reliance was placed by the appellate court, the police had filed a challan on 17-4-56 under Section 307 of the Indian Penal Code against one person Radhey Shyam. Subsequently, on 22-5-56 the complainant filed a complaint against 6 persons including Radhey Shyam in respect of the same incident. The Magistrate passed an order consolidating the two proceedings and began to proceed against all the accused. Thereupon, an application was submitted on behalf of one of the accused, namely, Gopal, that the procedure prescribed under Section 208 of the Criminal Procedure Code and subsequent sections should be followed. The Magistrate, however, preferred to adopt the procedure laid down in Section 207-A of the Criminal Procedure Code. Thereupon, Gopal filed a revision application and the matter was referred to this Court by the learned Sessions Judge, Jaipur. It was in those circumstances that it was observed that the 'Magistrate had committed a mistake in consolidating the challan with the complaint. It was further observed that 'the procedure for enquiry in cases triable by the Court of Session on police report was simplified and that by tagging the police challan with the complaint the very purpose of expediting the trial was frustrated. The learned Judges went on to say that the procedure laid down in Section 208 and subsequent sections of the Criminal Procedure Code was different. They, therefore, directed that the challan should be separated from the complaint and while the challan may be proceeded against, according to Section 207-A, the procedure in respect of the complaint may be followed under Section 208 and subsequent sections of the Code of Criminal Procedure.

6. It may be pointed out that the above case, is quite distinguishable from the present case inasmuch as the police had challaned only one accused in that case, while the complainant had filed a complaint against 6 persons. Since five of the accused were not challaned by the police and the case against them was

instituted only on the complaint, the procedure laid down in Section 207-A could not be adopted in their case. In the present case, the complaint was against 11 accused and the police had also challaned the same 11 persons. Of course, in the complaint the complainant had also alleged offences under Sections 323, 504 and 147 of the Indian Penal Code, while these offences were not mentioned in the police challan. The trial court could not, therefore, try the accused for the additional offences mentioned in the complaint by adopting the procedure mentioned in Section 251-A of the Code of Criminal Procedure. If the trial court had tried the accused for these offences, the appellate court would have been quite justified in ordering a re-trial. But it is significant that the accused were not charged with any of these offences. They were charged only for the offences under Sections 452 and 427 of the Indian Penal Code on the basis of the police report. It was not correct on the part of the appellate court to say that the charge under Section 427 of the Indian Penal Code was framed on the basis of the complaint and that it was not a minor offence as compared to the one under Section 440 of the Indian Penal Code. I have carefully gone through the complaint and find that there was no mention of the offence under Section 427 by the complainant. It was only in the police challan that Section 440 was mentioned. This section lays down that

whoever commits mischief, having made preparation for causing to any person death, or hurt, or wrongful restraint, or fear of death, or of hurt, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

It is thus clear that it prescribes penalty for committing mischief if the mischief is committed by the accused after having made preparation for causing to any person death or hurt or wrongful restraint or fear of death or of hurt or of wrongful restraint. Section 427 of the Indian Penal Code lays down that

whoever commits mischief and thereby causes loss or damage to the amount of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both.

It is quite clear from the language of this section that it also prescribes penalty for punishing a person for committing mischief but the mischief contemplated in this section is of a lesser degree. If the commission of the mischief results in a loss or damage to the amount of fifty rupees or upwards, the offender is punishable under Section 427, but if the offender commits mischief after making preparation for causing a serious offence mentioned in Section 440 of the Indian Penal Code, then he is liable to a greater punishment. It is obvious that both Sections 427 and 440 of the Indian Penal Code have been provided to punish an offender for committing a mischief and the offence contemplated under Section 427 is a minor one as compared to the offence under Section 440. It is rather surprising that the learned Additional Sessions Judge failed to notice this obvious difference. It is clear that although the police had alleged against the accused an offence under Section 440, the trial court proceeded to charge the accused under Section 427 of the Indian Penal Code, because it thought that they had committed only that minor offence and that the allegation made by the police was exaggerated. The charge under Section 427 was based certainly on the police challan and the appellate court was wrong in saying that it was framed on the basis of the complaint

7. It may be further observed that the appellate court was also not correct in observing that the Magistrate had consolidated both the cases. It appears from the order dated 4-10-57 recorded by the Magistrate in case No, 179 (which was instituted on complaint) that he ordered that case to be dropped from the register of institutions and simply said that it would remain with the 'challan case'. If he had not said that the file should be tagged with the other case, there could be no basis for saying that the two cases were consolidated. It is only because of the words - 'Is challan ke sath rahe' - that the accused have tried to raise a capital argument that the two cases were consolidated. The correct factual position, however, is that after 4-10-57, when the case No. 235 was instituted on police report no reference was made at any stage, to the complaint or the statement of the complainant recorded under Section 202 of the Code of Criminal Procedure, which were the only two relevant documents in that file. The Magistrate had not recorded the evidence of a single prosecution witness in the presence of the accused in the complaint case. The so-called consolidation, therefore, if at all it can be called a consolidation, was only in name, It seems that the complainant did not press that

he should be permitted to proceed with his complaint and therefore the additional offences which were alleged therein were never enquired into. I have not been referred to any application by the accused or any objection on record to the effect that they wanted the trial court to proceed with the complaint under the procedure laid down under Section 252 and that they had any objection in proceeding with the police case under Section 251-A of the Code of Criminal Procedure. The judgment of the trial court also does not show if any argument about any prejudice was raised by the accused. It was only in the appellate court that the argument was raised for the first time. The appellate court has not remarked if the accused were prejudiced in any way. I also do not think that the accused were prejudiced in any manner, because the trial magistrate proceeded to try under Section 251A only that case which was challaned by the police. The argument of learned Counsel for the accused is that the case having been once instituted on a private complaint, there was no alternative left for the Magistrate but to proceed under Sections 252 to 258 of the Code of Criminal Procedure. He has referred to Ghisia's case, ILR (1959) 9 Raj 909 : AIR 1959 Raj 266. In that case, two cases were instituted on the report of the Excise Inspector. It was held by the learned Judges that they were instituted otherwise than on a police report and therefore the trial, according to the procedure laid down under Section 251-A was an illegality sufficient to vitiate the trial. It was further held that it was not a curable irregularity within the meaning of Section 537 of the Code of Criminal Procedure. It may be observed that the said case, ILR is not helpful to the accused in the present case, because case No. 235 was instituted on the basis of a police challan and it is only that case which has been tried under Section 251A. In case No. 179 even the enquiry was not made- not to say of a regular trial. Looking to all these circumstances, I think that the learned Additional Sessions Judge was not correct in ordering a re-trial.

8. The revision application is allowed. The order passed by the learned Additional Sessions Judge is set aside. The case be sent back to him with direction that he should proceed to dispose of the appeal on merits, after hearing both the parties,