

In Re: Raman Ambalam and ors.

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Court : Chennai

Decided On : Jul-25-1950

Reported in : AIR1951Mad258; (1950)2MLJ373

Judge : Govinda Menon and ;Basheer Ahamed Sayeed, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 32, 238 and 238(1);
Indian Penal Code (IPC) - Sections 326, 379, 392, 394 and 397

Appeal No. : Criminal Revn. No. 91 and Cri. Revn. Petn. No. 84 of 1950

Appellant : In Re: Raman Ambalam and ors.

Advocate for Def. : Public Prosecutor

Advocate for Pet/Ap. : C.K. Venkatanarasimham, Adv.

Judgement :

Govinda Menon, J.

1. The petitioners were sentenced to various terms of imprisonment by the learned Second Assistant Sessions Judge of Mathurai which sentences were confirmed on appeal by the learned Sessions Judge of the same division and in revision the question has been raised regarding the correctness of the convictions and sentences.

2. The charges framed against them were that petitioner 1 on or about 27-1-1949 at Siru-marudakanmoi of Ucharichanpatti village committed robbery of the property of one Sundara-rajana Ambalam along with the other two petitioners and that at the time of committing the said robbery, petitioner 1 used a deadly weapon to wit an aruval and voluntarily caused grievous hurt to the said Sundararajana Ambalam thereby committing an offence under Section 392 read with Section 397, Penal Code. As against the other two petitioners, the charge was that they were conjointly concerned with petitioner 1 in committing the robbery of the property of Sundararajana Ambalam and during the course of that concerted action, voluntarily caused hurt to Sundararajana Ambalam in committing the robbery and thereby committed an offence under Section 394, Penal Code. They were tried by the learned Assistant Sessions Judge with a jury as the offences were triable exclusively by jury. The unanimous verdict of the jury was that petitioner 1 was not guilty of an offence under Section 392, Penal Code read with Section 397, Penal Code, but that he was guilty of voluntarily causing grievous hurt with a dangerous weapon to the said Sundararajana, an offence under Section 326, Penal Code against petitioners 2 and 3, the unanimous verdict of the jury was that they were not guilty of the offence under Section 394, Penal Code but were guilty of an offence under Section 379, Penal Code; theft of the articles belonging to the said Sundararajana Ambalam. The trial Court accepted this unanimous verdict and sentenced petitioner 1 to rigorous imprisonment for four years and petitioners 2 and 3 to rigorous imprisonment for one year. These convictions and sentences were confirmed by the learned Sessions' Judge of Mathurai and hence this revision.

3. As the learned Assistant Sessions Judge has accepted the unanimous verdict of the jury which view has been endorsed by the learned Sessions Judge, it is not open to us to go into the correctness or otherwise of this verdict. The question is purely one of law, viz. Whether as regards petitioner 1 it is open to the jury in a trial for an offence under Section 392, read with Section 397, Penal Code to return a verdict regarding an offence under Section 326, Penal Code; likewise as regards petitioners 2 and 3, whether it is open to the jury to return a verdict under Section 379, Penal Code when the indictment related to an offence under Section 394, Penal Code.

4. At the very outset it has to be mentioned that under Section 636, Criminal P. C. if an offence triable with the aid of assessors is tried by a jury the trial shall not on that ground only be invalid ; so that if there had been separate charges under SECTIONS 326 and 379, Penal Code the trial in the Sessions Court would have been with the aid of assessors but as it has happened the trial was with the aid of jury then this section lays down that the trial shall not be invalid on that ground only. Such being the case, it is open to the jury to try a case which would ordinarily be triable with the aid of assessors and there is no illegality or irregularity committed by such a trial alone. We have then to find out whether the jury were justified in returning a verdict on two sections of the Code of which the respective accused had not been charged. In other words, can there be a conviction for the offences mentioned above without there being a charge and can a conviction on such a verdict be justified on legal grounds? Among the fasciculous of sections dealing with the form of charges and joinder of charges, we have s.s. 237 and 238, Criminal P. C., which deal with the state of circumstances when a person is charged with one offence, whether he can be convicted of another (Section 237) and when a minor offence which is included in the offence charged is proved whether it can be made the subject of a conviction. Section 237 lays down that in the case mentioned in the previous section (Section 236) where an accused is charged with an offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it. Section 238 (1) says that when a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it. In the light of these statutory provisions, we have to find out whether the sections with which the petitioners were respectively charged constituted combinations of minor offences or whether they without such integration, were each by itself offences which cannot be analysed into component minor misdemeanours. Taking first Section 397, Penal Code, it has to be observed that it is a mixture as it were of two different offences, viz. the offence of robbery and the offence of voluntarily causing grievous hurt with

a dangerous weapon. An admixture of the various elements constituting each of these offences would by such mixture make out Section 397 and so far as Section 394 is concerned, it is likewise a mixture of two different offences, viz, robbery and voluntarily causing hurt. Whereas Section 397 contemplates a combination of robbery and grievous hurt, Section 394 is an amalgam of robbery with simple hurt. It may be said that Section 397 is a more aggravated form of Section 394. If we analyse these sections into their component parts and if the provisions of Section 238 (1), Criminal P. C. are applied, then there is no difficulty whatever that a Court or a jury is entitled when the charge is for the graver offence to find the delinquent guilty of one of the constituent parts of that offence. Therefore, apart from any decisions or other judicial authority, the statute itself makes the point clear and but for certain decisions of this Court, no doubt could have been entertained on this point. It is, therefore, necessary to refer to and consider the cases cited at the bar on this topic.

5. In *P. Umbaru v. Emperor*, 20 Mad. 243 Benson and Bhashyam Aiyangar JJ. considered a similar point arising in a reference to this Court from a Sessions Judge under Section 307, Criminal P. C. What happened there was that two persons were charged before the Sessions Judge one of them alone with robbery, Section 392 read with Section 397, Penal Code and both of them were charged under Section 392. The jury returned a verdict that one of them was guilty of having voluntarily caused grievous hurt under s. 325, Penal Code, and there was a reference to the High Court under Section 307, Criminal P. C. as well. On the question as to whether in such circumstances it is open to the High Court to go into the question of fact and find out whether the evidence justified the conclusion arrived at by the jury, the learned Judges differed. Benson J. was of opinion that it was open to the Court to appreciate the facts and come to a conclusion whereas Bhashyam Aiyangar J took the contrary view, But both the learned Judges agreed on the next question that in a matter like this, where the offence charged was a major one which itself was a mixture of two minor offences, it is open to the jury to return a verdict that the accused was guilty of one of the minor offences alone. It is stated that an offence under s. 397, Penal Code, is a compound offence and is constituted by the combination of two offences committed in one transaction, that is, the offence of voluntarily causing grievous hurt (Section 326) and the offence of

robbery (Section 392) and Benson J. held that he could see no reason for regarding the conviction under Section 325, Penal Code, to be incorrect. Bhashyam Aiyangar J. was of opinion that if the Sessions Judge had also framed an additional charge under Section 325, the accused could have been tried by the Sessions Judge on that charge alone under Sub-section 3 of Section 269, Criminal P. C. with the aid of jurors or assessors. But applying Sub-section 1 of Section 238, Criminal P. C. the learned Judge held that the accused was liable to be convicted of the minor offence under Section 325 without there being a separate charge under that section. The effect of Section 238, according to the learned Judge, was to invest a jury trying an offence triable by a jury with authority to find as an incident to such trial that certain facts only are proved in the trial which facts constituted a minor offence and return a verdict of guilty of such offence though such minor offence be not triable by a jury. Therefore, it was open to the Sessions Judge to record judgment convicting the accused of such minor offence although he was not charged with it and tried on such a charge by the Sessions Judge with the aid of jurors or assessors. Whatever difference arose as regards the powers of this Court in hearing the appeal with regard to the right to appreciate questions of fact both the learned Judges were agreed on this point, viz., that it was open in a trial for an offence under Section 397, Penal Code, to find the accused guilty of a minor offence, say, Section 325, Penal Code 11 years later the same point arose before Ayling and Napier JJ. In *Re, A. Mut-yalu*, 37 Mad. 236 : A. I. R. 1914 Mad. 425 : 13 Cr. L. J. 739, and in a short judgment the learned Judges held that it was open to a jury to convict the accused of an offence under Section 326, Penal Code when the charge was under a major section. The learned Judges sought support for this conclusion not only from *P. Umbaru v. Emperor*, 26 Mad. 243, but also from two earlier decisions, *Queen-Empress v. Anga Valayan*, 22 Mad. 15 and *King-Empress v. Krishna Iyer*, 24 Mad. 641. It is not necessary for us to analyse and find out whether the decision in *Queen Empress v. Anga Valayan*, 22 Mad. 16 and *King-Emperor v. Krishna Aiyar*, 24 Mad. 641, really afford substantial support to the view taken by the learned Judges. But certainly *P. Umbaru v. Emperor*, 26 Mad. 248, afforded justification for the view taken by the learned Judges; though we find in the judgment a statement to the effect that Benson J., in *P. Umbaru v. Emperor*, 26 Mad. 243, on this aspect of the case took a different view from that of

Bhashyam Aiyangar J, our understanding of the above decision does not enable us to agree with this statement of the learned Judges. But whatever that might be, these learned Judges were also of opinion that where the accused was tried by a jury for an offence under Section 397, Penal Code, which was a combination of robbery and voluntarily causing grievous hurt, it was open to the jury to find him guilty of an offence under Section 326, alone and therefore the Sessions Judge can accept that verdict and convict the accused of that offence. A single Judge, Srinivasa Aiyangar J., in *Arumuga Kone v. Emperor* : AIR1928 Mad275, followed *P. Umbaru v. Emperor*, 26 Mad. 243, and held that on a charge under Sections 434, 392 and 397, Penal Code, while the jury returned a verdict of not guilty with regard to the counts under the said sections, they at the same time found the accused guilty of voluntarily causing hurt by a dangerous weapon, an offence triable by a Judge only with assessors, that the conviction or sentence in such a case should not be set aside or interfered with unless it is clear that the irregularity has led to some miscarriage of justice. The learned Judge followed *P. Umbaru v. Emperor*, 26 Mad. 243, and he refers to Section 636 (1), Criminal P. C.

6. As against this trend of authority, we find a somewhat divergent view taken in *Re Ponniah Rowther*, 1929 M. W. N. 185 Col. 1 and *Alli v. Emperor*, 1936 M. W. N. 653. In the earlier of these cases Coutts-Trotter C. J. and Mackay J., laid down that on a charge of dacoity a conviction for hurt could not properly be the result because the essence of a charge of dacoity or robbery is the *animus furandi*. This case arose on a reference under Section 307, Criminal P. C., by the learned Sessions Judge of Trichinopoly, Mr. K. P. Lakshmana Rao (as he then was) where the accused were charged under Section 895, Penal Code, and the jury unanimously found accused 3 guilty of causing grievous hurt with a dangerous weapon and the other accused guilty of voluntarily causing hurt. On this reference this Court held as mentioned above. It will be seen that Section 395, Penal Code cannot be said to be a combination of offences as Section 397 is. Whereas as we have already stated Section 397 is an amalgam of two different legal conceptions enacted in Sections 396 and 325 or 326, Penal Code, as the case may be. Section 395 is a single offence, viz., robbery committed by five or more persons conjointly and thus becomes the offence of dacoity. There is no element of voluntarily causing hurt or grievous hurt in the composition of Section 395. It is only an

aggravated form of theft or robbery and offences of a similar nature. Therefore, it cannot be said that the decision in *In re Ponniah Rowther*, 1929 M. W. n. 185 when properly understood and when the *facta* are clearly analysed, runs counter to the decision in *P. Ummaru v. Emperor*, 26 Mad. 243, On perusing the Sessions Judge's order of reference we find that he has adverted to *P. Ummaru v. Emperor*, 26 Mad. 243 but as the charge against the accused in that case related only to offences under Section 395 and not Section 397, Penal Code, we cannot say that this decision has in any way whittled down the authority of *P. Ummaru v. Emperor*, 26 Mad. 243 followed as it is by another Bench in *In re A. Mutyalu*, 37 Mad. 236. Therefore we cannot accept the contention put forward by learned counsel for the petitioners that *Coutts Trotter C. J.* and *Mackay J.* have followed a different line of action and thought from what the learned Judges in *P. Ummaru v. Emperor*, 26 Mad. 243 adopted. The other case on which the learned counsel places reliance and which according to him is against the trend of authority mentioned by us is the decision of *Burn J.* in *Alli v. Emperor*, 1935 M. W. N. 653. The learned Judge held there that where the accused were charged with dacoity and the jury found them not guilty but returned a verdict of guilty for assault, they had no power to give a verdict of guilty for assault under Section 352, Penal Code, and the Sessions Judge had no power to accept such verdict. The judgment is a very short one and does not refer to any earlier cases on the point but, in our opinion, on the facts of the particular case, it cannot be held that the learned Judge came to a conclusion different from the trend of authority previously followed in this Court, It is sufficient for us to state that Section 395, Penal Code, cannot be said to be a combination of any offence with Section 352 and therefore under Section 239 (1), Criminal P. C., it will not be open to the Court to find the accused guilty of a minor offence. These are the only cases of our Court referred to at the bar before us, But a decision of the Calcutta High Court in *Meher Shekh v. Emperor*, 59 Cal. 8 : A.i.r. 1931 Cal 411 : 32 Cr. L. J. 892 was brought to our notice by Mr, C. K. Venkatanarasimham. What was held there was that with regard to an offence under Section 395, Penal Code, it cannot be said that offences under Sections 448 and 323, Penal Code, are minor ones so as to be necessarily involved in a charge under s. 395. We have already stated that it is difficult to say that Section 395 is a combination of any other offence with Section 323 or 448. The Calcutta decision can be said to be

in the same line as the two Madras cases referred to by ua. In re Ponniah Rowther 1929 M. W. N. 185 and Alli v. Emperor, 1935 M. W. N. 653. It seems to us, therefore, that what the lower Court has done can be supported by the authority of the earlier decisions of this Court and our reading and understanding of the later decisions cited at the Bar does not enable us to come to the conclusion that the reasoning in the earlier cases have either been dissented from or deviated in the subsequent cases. Even if it is to be held that the later decisions have taken a different view, we would with all due respect prefer the line of reasoning followed in P. Ummaru v. Emperor, 26 Mad. 243. Such being the case arid since the Courts below have followed the proper procedure we cannot say that the conviction of petitioner for an offence under Section 325 is not justified.

7. We have next to consider the convictions of petitioners 2 and 3 for an offence under Section 379, Penal Code. As remarked by us already the charge was under Section 394, Penal Code, in that these petitioners assisted petitioner 1 in the act of robbery. The lower Courts agreeing with the jury have found that there was no robbery committed at all. If petitioner 1 has not committed robbery then it cannot be said that petitioners 2 and 3 have abetted or assisted the commission of that offence. It is also clear that an offence under Section 379, Penal Code, cannot be said to be one of the component parts constituting the major offence under Section 394; nor can it be said that Section 379 is a minor offence in relation to Section 326, Penal Code. In those circumstances it seems to us that petitioners 2 and 3 were prejudiced by being found guilty of an offence under Section 379, Penal Code, when there was no separate charge framed for that offence. As we are of opinion that there has been an illegality committed in finding the petitioners 2 and 3 guilty of an offence under Section 379, Penal Code, we set aside their convictions and sentences and direct that they be acquitted and set at liberty.

8. We have next to see whether the sentence imposed on petitioner 1 for causing grievous hurt is excessive as contended for by learned counsel. Had it not been for the circumstance that petitioner 1 was tried before the Assistant Sessions Judge with a jury for a major offence for which he has been found not guilty, the ordinary course would have been to have him tried before a First Class Magistrate for an offence under Section 326, Penal Code, and if that were the case, the

maximum sentence which that Magistrate could have inflicted would only be rigorous imprisonment for two years. We, therefore, reduce the sentence on petitioner I to rigorous imprisonment for two years. In other respects we confirm his conviction.

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