Rex Vs. Arumugam

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SooperKanoon Citation : sooperkanoon.com/785194

Court : Chennai

Decided On : Apr-16-1943

Reported in : (1943)2MLJ297

Appellant : Rex

Respondent : Arumugam

Judgement :
ORDER

King, J.

1. The accused in this case is charged with having committed the offence of grievous hurt under Section 326 of the Indian Penal Code by stabbing one Ganesan on the night of the 17th November, 1942. Ganesan died as a result of the stab, and this is the third occasion on which the accused has appeared in the dock at the High Court Sessions. He was first charged with the murder of Ganesan at the first sessions of the present year before Bell, J., and the jury returned a verdict of not guilty by a majority of 6 to 3. The case was ordered to be retried upon the same charge of murder. At the conclusion of the second trial the jury returned a verdict of guilty of causing grievous hurt by 5 to 4. The learned Judge, who again was Bell, J., ordered that the accused be kept in custody and be retried at the next sessions and he added ' Having regard to the jury's verdict, he should be tried only under Section 326, having been acquitted under Section 302.

2. A preliminary objection to the maintainability of the trial has been made on behalf of the accused at the commencement of to-day's proceedings. It is argued that he cannot be tried again even under the present charge according to the provisions of Section 403 of the Criminal Procedure Code. It is, of course, not asserted thathe has in fact been acquitted by any jury of the offence of causing grievous hurt, but it is argued that the language of Section 403(1) will apply nevertheless to the facts of the present case. If at the previous trial the accused had been convicted under Section 326, that would have been by virtue of the provisions of Sections 236 and 237 of the Code, and Section 403 prohibits the further trial of a person not only on a charge on which he has been actually convicted or acquitted but also upon any other charge which might have been made against him under Section 236 or for which he might have been convicted under Section 237. The answer to this objection on the part of the learned Crown Prosecutor is that Sections 236 and 237 do not apply, and that if the accused had been convicted at the previous trial of an offence of causing grievous hurt, that would have been justified by the provisions of Section 238. It seems to me that the essential question, therefore, for decision is whether a conviction under Section 326 of the Indian Penal Code at the previous trial would have resulted from the application of Section 237 or 238. If the former, then the accused cannot be tried under the present charge; if the latter, then there is no impediment against his trial.

3. There is no direct authority, so far as the cases have been brought to my notice, on this point; but in circumstances which are almost precisely similar, Mirza, J., in Emperor v. Abla Isak I.L.R.(1931) 55 Bom. 520 has held that Section 403 applies. He is dealing with a case which may be either murder or culpable homicide not amounting to murder, but does not directly discuss the applicability of Sections 236, 237 and 238. The main part of the judgment in fact is taken up with reasons for distinguishing a Calcutta Case which had been cited before him, Emperor v. Nirmal Kanta Roy I.L.R.(1914) Cal. 1072. That is admittedly a case in which there had originally been an alternative charge, and it was held that so long as the jury had not brought in a satisfactory verdict in regard to that charge, the ordering of a retrial was merely the equivalent of the continuation of the original trial on the original charge. In Emperor v. Abla Isak I.L.R.(1931) 55 Bom. 520 however, there was no such alternative charge actually framed, and the same is true of the

present case.

4. It seems to me prima facie that Section 236 must apply to the present case and therefore that any conviction for grievous hurt would have fallen under Section 237. Section 236 runs as follows:

If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

5. Now it is clear from the evidence in this case and from the charge to the jury of the learned Judge who tried it that the actual acts which formed the subject-matter of the charge are very simple. They consist simply of an attack made by the accused against the deceased and a wound which he inflicted with a stabbing instrument in the abdomen, which wound caused the death of the deceased. The learned Judge at the second trial suggested to the jury that on the evidence, if they believed it, alternative verdicts vere possible. He told them that if they held that the accused intended to kill the deceased, then his offence would be one of murder but that if he had no such intention, the offence would be causing grievous hurt with a dangerous weapon. The actual evidence which would have been adduced in the trial before me would not have differed in any way from the evidence already adduced at the previous trial. It is quite clear to my mind that this is a case in which on certain concrete facts which have been spoken to by the witnesses it was left to the jury to decide what the intention of the accused must be deemed to have been. In other words, it was doubtful from the 'single actor series of acts' which constituted the offence, whether the offence was the offence of murder or of causing grievous hurt with a dangerous weapon. Prima facie, therefore, Section 236 will apply.

6. As already stated, the learned Crown Prosecutor contends that Section 238 is the correct section in this respect. It seems to me that this is a. question which is primarily one which must be answered by examining the facts of the case. I think it is manifest that Section 238(1) cannot apply. The language of that sub-section is

quite inappropriate to a case of this kind where the only difference between the offence of murder and the offence of causing grievous hurt is one of the degree, of intention. The second portion of Section 238 reads as follows:

When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

7. The illustration which is given is the familiar one, of a plea of grave and sudden provocation by the accused. Now so far as my examination of this case goes, it is quite clear that this is not a case in which any ' facts have been proved ' to ' reduce ' the charge of murder to a minor offence. As already stated, the facts on either charge are the same, and the question has been left to the jury to decide what exactly those facts proved. There is no plea here by the accused that certain facts have been proved which show that he could not have had the intention to kill, and therefore he could not be convicted of murder. No such facts are referred to by the learned Judge in his charge, and no such facts have been mentioned to me in the argument to-day by the learned Crown Prosecutor. The learned Crown Prosecutor has indeed referred me to two rulings Queen-Empress v. Devji Govindji I.L.R.(1895) 20 Bom. 215 and Queen-Empress v. Sitanath Mandal I.L.R.(1895) Cal. 1006. Those are clear cases in which the facts justify the application of Section 238. They do not deal with facts similar to those with which I have to deal to-day, and therefore are of very little guidance in the decision of this particular question. As I have already said, that decision seems to me to depend almost entirely upon an analysis of the facts in this case. On that analysis it seems to me quite clear that the language of Section 403(1) must be deemed to apply to the present case, however anomalous it may seem that the accused should be protected from further trial for an offence of which, according to the opinion of five out of nine jurymen, he was actually proved guilty.

8. In the result, then, I sustain the preliminary objection and hold that it is not open to me to try the accused upon this charge. I accordingly acquit him.