

Yeditha Subbaya Vs. Emperor

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Court : Chennai

Decided On : May-03-1912

Reported in : (1912)23MLJ722

Appellant : Yeditha Subbaya

Respondent : Emperor

Judgement :

Sundara Aiyar, J.

1. The Petitioner in this case was the 3rd accused in Calender Case No. 189 of 1911 on the file of the 2nd class Magistrate of Kottapeta. The first accused was a dancing girl and the 3rd accused is said to have kept her. The facts on which the prosecution was based were that the complainant lent a jewel to the 1st accused; this jewel was subsequently pledged by the 2nd and 3rd accused to the 6th prosecution witness. The money obtained by the pledge was apparently appropriated by the 2nd accused. The jewel was given to the 2nd accused for being pledged. There can be no doubt that the 2nd and 3rd accused had no right to pledge the jewel. Both Courts have found as a fact that the 3rd accused was aware that the jewel did not belong to the 2nd accused and that he introduced the 2nd accused to the 6th prosecution witness, as a relation of his in order to induce the witness to give a loan to the 2nd accused on the pledge of the jewel. Both of them acted at the instance of the 1st accused who gave the jewel. On the facts the

Lower Courts have convicted the 3rd accused of criminal breach of trust.

2. It is contended that the conviction cannot be upheld as there was no entrustment of the jewel to the 3rd accused. Entrustment of the jewel to the third accused is, according to Section 406 Indian Penal Code a necessary element of the offence of Criminal Breach of Trust. It is urged by the learned Public Prosecutor that by confirming with the first and 2nd accused to pledge the jewel with prosecution witness 6, the 3rd accused would be guilty of abetment of criminal breach of trust; and that as he was present at the act of pledging he would be also guilty of the principal offence itself under the provisions of Section 114 of the Penal Code. That section enacts whenever any person who being absent would be liable to be punished as an abettor is present when the act or offence for which he would be punishable in consequence of the abetment is committed he shall be deemed to have committed such act or offence. I doubt whether under this section a principal offence would be committed where one of the elements of the offence is a particular relationship between the abettor and the 3rd person who is absent in the case. The act of pledging may no doubt be taken to have been committed by the third accused also in consequence of his presence at the time when the 2nd accused did the act. The language of the section no doubt lends itself to the argument that where ever a person is guilty of an abetment his presence at the commission of the offence would make him guilty of the principal offence. But the section I think would really be applicable only where the act at the doing of which the abettor is present would itself amount to an offence. Now the mere pledging would not be an offence by itself. Another equally essential element is the entrustment. I am inclined to think that the mere presence of the 3rd accused at the act of pledging would not make him guilty of the principal offence of criminal breach of trust. But I see no reason why he should not be held to be guilty of abetment of criminal breach of trust. The facts charged against him were that he was a party to the pledging of a jewel which was entrusted to the 1st accused. On those facts a charge of abetment of criminal breach of trust could have been framed against him. I think the provisions of sections 236 and 237 of the Criminal Procedure Code are applicable to such a case. It was a question whether on the facts alleged the accused would be guilty of Criminal breach of trust or of abetment of that offence. Both charges could have been framed against him on

the facts alleged by the prosecution and in such a case it is open to the court under Section 237 to convict the accused of the abetment of Criminal Breach of Trust, though no charge was framed against him for that offence. Mr. Venkatramiah relies on two cases in support of his argument that a person can in no case be convicted of the abetment of an offence when he was not charged with it, but only of the principal offence. The first of these cases is *Rex v. Chakmen and Pir Bai Adamji* I.L.R. (1874) B.H.C.R. 240. The offence charged against the accused there, was murder. Justice West held that he could not be convicted of abetment of murder. The learned Judge recognized that the question must be decided by a consideration of the provisions of Section 238 and he rested his judgment on the ground that the facts necessary to prove abetment would not be included in the facts required to prove the principal offence. And the facts charged against the accused were only those that were required for the principal offence of murder. The learned Judge says 'that section i.e., the section corresponding to Section 238 of the present Code, applies to cases in which the charge is an offence which consists of several particulars, a combination of some only of which, constitutes a complete minor offence. The graver charge in such a case gives notice to the accused of all the circumstances going to constitute the minor one of which he may be convicted. The latter is arrived at by mere subtraction from the former. But when this is not the case where the circumstances embodied in the major charge do not necessarily and according to the definition of the offence imputed by that charge, constitute the minor offence also, the principal no longer applies because notice of the former does not necessarily involve notice of all that constitute the latter. The section is not intended to apply to a collateral offence. It is not open to a court to find a man guilty of the abetment of an offence on a charge of the offence itself. When a man is accused of murder he may not be conscious that he will have to meet an imputation of collateral circumstances constituting abetment of it, which may be quite distinct from the circumstances constituting the murder itself. Similar observations may be applied to Section 236 also. It is quite true that if the facts are not the same, the accused cannot be convicted for another offence the elements of which are not all included in the offence charged against him. Ordinarily the facts required to prove the abetment should not be included in the 'facts

constituting the principal offence. The abetment would precede the commission of the principal offence itself where it consists of the abettor being a party to a conspiracy or in instigating the principal offence or helping in the commission of it. If he be present at the commission of the offence itself he would ordinarily be guilty of the principal offence. The abetment therefore would be complete before the principal offence is committed and the facts constituting the abetment need not be proved in order to prove the principal offence. No doubt in order to bring home the offence to any particular accused the facts preceding may be adduced in evidence which by themselves may make him the abettor. But when the charge is of the principal offence only it cannot be said that he has to meet facts which occurred before the principal offence. I entirely accept the law as laid by the learned Judge. The other case *Padmanaba Panji Kunniyah v. Emperor* 33 M.K 264, really also proceeds on an application of the principle of sections 236 and 237 to the facts of that case. The offence charged there was forgery. The observations I have made with regard to the act constituting the abetment of such an offence would precede the commission of the act which make the offence itself and a person who is charged only with the principal offence is not called upon to meet a charge which relates to acts done before it. I do not think that the learned judges who decided the case intended to lay down a universal rule that in no case can a conviction for abetment be possible where the charge was only of the principal offence. The question is what were the facts charged' If on those facts two charges could be framed namely, the commission of the principal offence and the abetment, then by virtue of provisions of Section 237 the accused may be convicted of the offence of the abetment though it was not charged separately against him. The act lays down no specific provision with respect to the question decided here. But the principle is laid in sections 236 and 237 and applying that principle I must come to the conclusion that in this case the accused may be convicted of the abetment of criminal breach of trust. I accordingly alter the finding into one of guilty of the offence of abetment of criminal breach of trust. I see no reason to interfere with the sentence. This Petition is therefore dismissed.