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Court : Chennai

Decided On : Nov-17-1908

Reported in : 2Ind.Cas.343

Judge : Wallis and ;Pinhey, JJ.

Appellant : Kullan

Respondent : Emperor

Judgement :

1. In this case a pardon was tendered to the appellant by the Committing Magistrate under the orders of the District Magistrate. The appellant was then examined as a witness before the Committing Magistrate and at the trial before the Sessions Judge when he retracted the evidence previously given by him in such a manner as to lead to the acquittal of some of the accused. Thereupon the District Magistrate under whose authority the pardon had been granted, acting apparently on the authority of Queen-Empress v. Ramasami 24 M.n 321 purported to withdraw the pardon and the appellant was subsequently tried and convicted of dacoity, the offence of which a pardon had been tendered. In the Sessions Court he appears to have pleaded his pardon, and to have relied mainly on the contention that the District Magistrate was not the person authorised to withdraw it. The learned Public Prosecutor has, however, on appeal, very rightly directed our attention to the Bombay decisions in King-Emperor v. Bala 25 B.p 675 and Emperor v. Kothia 30 B.n 611 which if they are correct, show that the pardon was

still in force and that the trial was illegal.

2. The question depends upon the true construction of Section 339 as it now stands in the Criminal Procedure Code of 1898, but with a view of arriving at a correct construction, it seems desirable to trace the various changes by which the section came to assume its present form.

3. In England the practice has been and still is to allow an accomplice to turn King's evidence as it is called on a promise of pardon if he makes a full and true disclosure, and if he fails to do so no pardon is granted him, and until a pardon is granted him he cannot plead it in bar of the trial. The King v. Garside 2 A. & E. 266. It is there pointed out that the most the Court before which he is indicted could do, if he claimed to have earned his pardon by making a full and true disclosure, would be to adjourn the case to enable him to apply for a pardon. The difficulties which have arisen under the Code of Criminal Procedure could, therefore, never have arisen in England.

4. In India tender of pardon was dealt with by Sections 209 and 211 of the Code of 1861. Act XXV of 1861, Section 211, empowered the Court of Session at the time of trial and also the Sadder Court as a Court of reference, if of opinion that the person who had accepted an offer of pardon had not conformed to the conditions under which it was tendered to order his commitment. The amending Act VIII of 1869 substituted a new Section 211 empowering the Magistrate before the committal or the Court of Session at the time of trial, or the High Court as a Court of reference to order the committal. In the next Code Act X of 1872, Section 349, conferred the like power on the Magistrate before the trial the Sessions Judge before judgment had been passed and the High Court as a Court of reference or revision, and contained this further provision: 'The statement made by a person under pardon which has been withdrawn under this section may be put in evidence against him.' The words ' withdrawn under this section' which make their appearance for the first time can only refer to the order of committal to be made by the Committing Magistrate, Court of Session or High Court under the section. In In the matter of the Petition of Nobin Chundra Banikya 8 C. 560, decided on. the 20th February 1882, Maclean, J., declined to be bound by an order of committal made

by a Sessions Judge under the section and sot aside the conviction which had ensued. Whether in consequence of this decision or not, the Code passed in that year Act X of 1882 no longer empowered Magistrates, Sessions Judges and High Courts to cormmit if it appeared to them that the conditions of the pardon had not been complied with but provided merely that ' Where a pardon may be tendered under Section 337 or Section 338 and any person who has accepted such tender has not complied with the condition on which the tender was made, he may be tried for the offence in respect of which the pardon was tendered, etc.' If the section had stopped there it would clearly have been open to the approver to plead the pardon in bar of trial and the Court would have been bound to adjudicate on it. The section, however, went on 'The statement made by a person who has accepted a tender of pardon may be given in evidence against him when the pardon has been withdrawn under this section.' This is in effect a reproduction of the similar provision in the Act of 1872 except that the expression 'a person under pardon' is replaced by a person who has accepted a tender of pardon,' but whereas in the Act of 1872 withdrawn ' clearly meant withdrawn by the Committing Magistrate, the Sessions Judge or the High Court as the case might be, in the Act of 1882 it was neither specified by whom the pardon waste be withdrawn nor was there any indication as to what the effect of such withdrawal should be. In this state of things Straight, J., as we understand him, held in Queen-Empress v. Ganga Charan 11 A.n 79 that making a full and true disclosure was a condition precedent to the right to pardon (p. 90) and that where a pardon has been tendered and accepted and not with drawn it could be pleaded in bar of further proceedings, the fact that it had not been withdrawn being taken as proof that the condition had been complied with. In that case the pardon had not been withdrawn, but in Queen-Empress v. Mulua 14 A.b 502 where the Sessions Judge had purported to withdraw the pardon and had wrongly put the approver back into the dock and tried him along with the other prisoners, Edge, C.J., and Blair, J., in directing him to be retried observed at p. 508 that should he plead his pardon in answer to the first charge of robbery it would have to be carefully considered, thus indicating that in spite of the withdrawal it was open to plead the tender of pardon and the compliance with the condition in bar of further proceedings. In Queen-Empress v. Sudra 14 A. b 336 the subsequent trial of the approver was alluded to

as a trial for the alleged breach of the conditions on which the pardon was tendered, which assumes that the approver had been pardoned and that it was for the prosecution to show that he had forfeited the pardon by committing a breach of the condition on which it was granted; in other words that making a full and true disclosure was not a condition precedent to the pardon, hut making an incomplete and false disclosure was a condition subsequent forfeiting the pardon. This is not the view we should have been disposed to take under the Act of 1882. hut it must be borne in mind in considering the effect of the change introduced in 1898. The next case is Queen-Empress v. Munick Chandra Sarkar 24 C.v 492 in which the Court observed in answer to a reference from the Sessions Judge that it was for the authority which granted the conditional pardon to withdraw it, but had no occasion to consider what the effect of such withdrawal would be on the right of the approver to plead the pardon. This was in 1897. Next year, while the present Code was being passed, the Select Committee amended Section 339 by substituting the words ' forfeited under this section' for withdrawn under this section.' In Queen-Empress v. Ramasami 24 M.n 321 (December 1900) a case subsequent to the amendment, Benson, J., in a judgment in. which Davies, J., concurred followed Queen-Empress v. Manick Chandra Sarkar 24 C.k 492 in holding that it was for the authority who granted the pardon to withdraw it, without adverting to the substitution of ' forfeited ' for ' withdrawn,' and held further that if the authority granting the pardon was satisfied that the condition had been broken he had authority to withdraw it. Under the amended section, however, it does not appear that there is any necessity for withdrawal or that withdrawal has any effect. After the approver has given evidence the prosecution can proceed with the case against him if they choose and he can plead pardon in bar of the trial, and the only question appears to be, is making a full and true disclosure a, condition precedent which the approver has to prove to establish his right to pardon according to the view taken in Queen-Empress v. Ganga Charan 11 A.k 79 under the Code of 1882, or his failure to make such full and true disclosure a condition subsequent determining or forfeiting the pardon which was apparently the view taken in Queen-Empress v. Sudra 14 A.k 336 which is followed in Queen-Empress v. Natu 27 C.k 137 decided subsequently to 1898. Now the use of the word 'forfeited' in the present section, in our opinion, shows that the latter is the construction now

favoured by the legislature. Forfeiture orginally meant fine or punishment and was applied to the loss of property which was one of the consequences of a conviction for felony. Then it was extended to any loss sustained by a grantee on broach of the condition of his grant, as where a lease is said to be forfeited by breach of the conditions thereof. Both in law and ordinary parlance the word denotes depriving a man of something he has already got. An approver cannot, in our opinion, be said to forfeit a pardon, unless he has already been pardoned. If so it is for the prosecution to prove that the pardon has been forfeited. This is the view taken in King-Emperor v. Bala 25 B.k 675 and Emperor v. Kothia 30 B.k 611 with which we agree on this point.

5. It may, in certain cases, be difficult for the prosecution to discharge the burden, but on the other hand, it would be even harder for the approver if it were put upon him. In this connection, however, we desire to express our concurrence with the remarks of Benson, J. in Queen-Empress v. Ramasami 24 M.k 321 that the transaction is one of the utmost good faith, and that the approver commits a breach of the condition if he fails to make a full and true disclosure throughout. It is hot enough for him to make such disclosure before the Committing Magistrate if he withdraws it in the Sessions Court or to make it when examined-in-chief if he withdraws it in cross-examination. As regards the procedure to be followed we think that where a pardon has been tendered and the approver is afterwards put on trial he should be asked if he relies on it and if he says yes ' which is a plea of pardon the issue as to the pardon should be tried first.

6. In the present case this has not been done, and we think that the conviction is illegal and that it must be set aside and a fresh trial ordered.