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Court : Kolkata

Decided On : May-10-1904

Reported in : (1904)ILR31Cal715

Judge : Pratt and; Handley, JJ.

Appellant : JoharuddIn Sarkar

Respondent : Emperor

Judgement :

Pratt and Handley, JJ.

1. One Gulu Mahmad, son of Toki accused another man of the same name as well as several Other persons with forging a mortgage deed for his land and being parties to the registration thereof. Gulu Mahmad and Basarat Ali were tried and convicted at the Sessions and their conviction was upheld by the High Court. Thereafter the Sessions Judge directed a further inquiry regarding others, who had been complained against. In the result 'the present appellants, seven in number, were committed for trial on the 12th, December last, all of them except Joharuddin Sarkar for abetment of forgery, and Joharuddin Sarkar for an offence under Section 82(d) of the Indian Registration Act, a like charge, being also added against Kutub Ali Sarkar. The trial was fixed for the 3rd February and on that day, after the assessors had been chosen, the accused through their pleader asked the Section sessions Judge to refer the case to the High Court for transfer on the

ground that the Judge had previously convicted Gulu Mahmad and Basarat Ali. The Sessions Judge refused the application remarking that the pleader was unable to show that he had in any way prejudged the case. Another petition was then put in intimating that the High Court would be moved to transfer the case and asking for an adjournment.

2. This was refused and the trial was proceeded with After the case for the prosecution was closed two witnesses cited by the. accused Joharuddin were called. They were unable to testify to, any relevant fact and the case was then postponed to the 16th February, warrants being issued for ten witnesses cited by all the accused and who had failed to appear.

3. On the 16th February the defence was gone into and the trial concluded in the conviction of all the accused. During the interval between the 3rd and 16th February no application was made to the High Court for a transfer of the case.

4. The first plea taken before us is one of law. It is urged that under the circumstances, the trial of the appellants by the Sessions Judge was illegal and void.

5. The following cases were relied upon. Queen-Empress v. Gayitri Prosunno Ghosal (1888) I.L.R. 15 Calc. 455. Surat Lall Chowdhry v. Emperor (1902) I.L.R. 29 Calc. 211 : 6 C.W.N. 251 and Kishori Gir v. Ram Narayan Gir (1903) 8 C.W.N. 77. Now in the present case it is clear that the fact of two persons having been previously tried and convicted by the same Sessions Judge would not disqualify him from trying the case, or be a sufficient ground for transferring it. What are usually known as supplementary trials are very common and it would cause much public inconvenience, if Magistrates and Judges, who had tried one batch of persons, should be thereby debarred from trying a subsequent batch on the same facts. In the present instance, if the accused had moved the High Court for a transfer, we have no doubt that their application would have boon refused and we may reasonably infer that the legal advisors of the accused abstained from moving this Court either during the 53 days interval between commitment and trial or after a postponement was granted from the 3rd to the 16th February, because they were conscious that they had no chance of success.

6. Under the circumstances we hold that the application of the 3rd February was not a bond fide one under Section 526 of the Criminal Procedure Code, but merely a pretence. There was no real intention to make an application under this section to quote the terms of Clause (8). If we were to hold that the accused could legally insist on a retrial, the result would be a grave anomaly, which the Legislature could never have intended. For ex hypothesi there being no ground for a transfer the same Judge would retry the case precisely as before, although there was no defect in the previous trial or any possible advantage to be gained by duplicating the whole process.

7. In the cases relied upon for the appellant the applications were regarded as reasonable and proper and in two of them this Court ordered a transfer. The question of bona fides did not arise in those cases. If in laying down that owing to a refusal to grant an application for postponement purporting to be, made under Section 526 all the subsequent proceedings are necessarily illegal, it was intended by Stevens and Harington JJ. that such a dictum should be of general application, then we must respectfully, beg to differ from them. It seems to us that such an interpretation of the law might have disastrous effects on the administration of justice as it would lie in the power of every accused person to delay and thereby possibly defeat justice by intimating to the Court that he intended to move the High Court for a transfer, no matter how frivolous, groundless or illusory the application might be. In the cases of Kishori Gir v. Ram Narayan Gir (1903) 8 C.W.N. 77. and Queen-Empress v. Virasami (1896) I.L.R. 19 Mad. 315, it seems to have been held that an application for transfer should be made with due diligence or at the earliest possible time. We think that unreason able delay or total abstention from moving the High Court might well be taken into account in considering the bond fides of the accused in notifying his intention to the trying Court.

8. We are relieved of the necessity of referring the case to a Full Bench, because in our opinion the contention of the appellants must fail upon another ground.

9. The accused had a reasonable time for applying to this Court, before they were required to enter upon their defence, that is, before the 16th February. And as they, abstained from doing sO the proceedings of the Sessions Judge were not

void. This was also the view taken by Stevens and Harington J. in the case of Dhone Kristo Samanta v. King-Emperor (1902) 6 C.W.N. 717. In that, case it was further held that it was competent to the Magistrate before granting an adjournment to proceed with the case up to the point at which the accused would be called on for their defence. It would seem to follow that the trial is good and valid in every case at least up to the close of the case for the prosecution. And no doubt the terms of Clause (8) Section 526 admit of this construction, though it is perhaps not quite in accord with what was laid down by the same learned judges in the two other cases, to which reference has been made. Having disposed of the question of law we now turn to a consideration of the merits.

10. That the mortgage deed is a forgery has been sufficiently proved in this case. The accused Elamuddin, Meher, Kaltu and Jarip, whose names appear as attesting witnesses, gave evidence for the defence in the former trial and there admitted the part they took. Their depositions have been admitted in evidence and rightly so on the authority of the case of Moher Sheikh v. Queen-Empress (1893)I.L.R. 21 Calc.392. Against Kutub Ali there is the evidence of the cartman, who was relied on in the former case and against Joharuddin there is the same evidence, as also his thumb impression.

11. As regards the accused Phatu there is nothing but his statement to the Magistrate, and that is ambiguous and inconclusive. We therefore direct that Phatu be acquitted, The conviction and sentences of the other appellants are affirmed, and they must at once surrender to their bail.

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