

Sk. Ohid and ors. Vs. the Crown

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Court : Kolkata

Decided On : Nov-18-1949

Reported in : AIR1950Cal177

Judge : Harries, C.J. and ;Das Gupta, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 110, 117, 117(2), 117(4) and 117(5)

Appeal No. : Criminal Revn. No. 501 of 1949

Appellant : Sk. Ohid and ors.

Respondent : The Crown

Advocate for Def. : J.M. Banerji, Adv.

Advocate for Pet/Ap. : Sudhansu Sekhar Mukherji, Adv.

Judgement :

Das Gupta, J.

1. This application is against an order of the Additional Sessions Judge of Midnapur under Section 123, Criminal P. C., directing the petitioners to execute bonds for good behaviour for a period of three years, and in default to undergo rigorous imprisonment for the same period.

2. Proceedings under Section 110, Criminal P. C., were drawn up against these petitioners and other persons, the allegations being that they were habitual thieves, robbers, house breakers and were so dangerous and desperate that their being at large without security was hazardous to the community. A large number of witnesses were examined on behalf of the prosecution and quite a fair number for the defence. The learned Magistrate came to the conclusion, on a consideration of the evidence, that the allegations that these persons were habitual thieves, robbers and house breakers had been established and it was necessary for the maintenance of good behaviour that they should be ordered to execute bonds for being of good behaviour for a period of three years. Accordingly, he sent the papers to the learned Sessions Judge of Midnapore. The learned Magistrate discharged two of the persons against whom proceedings were drawn up, being of the view that the charge had not been established as against them.

3. The learned Sessions Judge has come to the conclusion that the learned Magistrate was right in his opinion that the evidence established the prosecution allegation that these persons were habitual thieves, robbers and house-breakers. He accordingly confirmed the order of the learned Magistrate. In fact he went a little further than the learned Magistrate inasmuch as he even passed an order as regards the two persons whom the Magistrate had discharged holding that the evidence showed that they also were habitual thieves and robbers and accordingly passed an order against them also directing them to execute bonds for good behaviour.

4. It appears that later on the learned Judge passed an order in order, as it is said, to rectify this wrong direction of him so that the present position as regards these two persons, namely, Abinash and Dhananjoy is that there is no order against them.

5. We are not concerned at present as to how the learned Judge could make such a mistake, nor how he himself having made such a wrong order had the jurisdiction to pass what is called the rectifying order. The mistake however shows this that the learned Judge was either thoroughly confused by the mass of

evidence on the record or that he did not give the matter the attention it deserved. There can be no other explanation of a learned Judge wrongly thinking, as regards persons who had been discharged, that the Magistrate had passed an order and then proceeding to confirm that order. When we turn to the judgment delivered by the learned Judge I am confirmed in my opinion that the learned Judge did not give the matter the attention it. deserved His judgment hardly contains any discussion of the evidence. It is true that Section 117 (4), Criminal P. C. provides that the fact that a person is a habitual offender may be proved by evidence of general repute. This is a very extraordinary rule of evidence and because of the special nature of this provision in law, it is necessary that Judges and Magistrates should consider very carefully the evidence of general repute that is adduced to decide whether in a particular case the evidence of general repute is sufficient to establish the truth of the prosecution allegation that a person is a habitual thief or a robber. Mere enumeration of the number of persons who have given evidence does not amount in my opinion to a sufficient consideration of the points that are at issue. The learned Judge, when considering the case of each accused, has merely given the number of persons who deposed to the general repute and then pointed out as regards the persons who spoke in favour of the general repute of the person that they should not be believed, because apart from being relations they did not belong to different castes and walks of life. While I am inclined to agree that the fact that a certain person is a relation is a circumstance which may be taken into consideration against his evidence, the fact that he belongs to the same caste and walk of life is, far from being a circumstance against the credibility of the witness in a matter of general repute, in my opinion, a circumstance in favour of his opinion because it is only people who belong to the same circle as the accused who can really give evidence of any value as to what he is reputed to be.

6. When the prosecution relies mainly on the evidence of general repute to establish the case that a person is a habitual thief or robber, it seems to me absolutely necessary for the Magistrate and the Judge to consider how far the general repute is justified by good grounds. It may very well happen that a man is arrested several times, put on trial and acquitted. The fact that he has been arrested several times would itself create a general repute against him. The mere

fact that the house of a person has been searched several times would also be sufficient to create a general reputation against him even though there may not be good ground for such a search and the search may be the result of some party faction or a quarrel with the police. For these reasons it is necessary, when assessing the value of the evidence of general reputation, for the Judge and the Magistrate to examine the circumstances under which the accused acquired the general reputation.

7. In the present case the learned Judge has not dared to consider the evidence from that light at all. To my mind, the judgment delivered by the learned Additional Sessions Judge quite apart from the circumstance mentioned above that he has wrongly passed an order against two persons who had been discharged by the Magistrate is an entirely unsatisfactory one and does not show that he applied his judicial mind to the consideration of the matter at issue.

8. If that were all, I should be inclined to set aside the order passed by the learned Judge and send the matter for further enquiry by him. But there is a very much more fatal defect in this case. Eleven persons were dealt with together in the enquiry under Section 110, Criminal P. C. Sub-section (2) of Section 117 provides that an enquiry in proceedings under Section 110 shall be made as nearly as may be practicable in the manner prescribed for conducting trials and recording evidence in summons cases. There is a special provision in Sub-section (6) that where two or more persons have been associated together in the matter under enquiry, they may be dealt with in the same or separate enquiries as the Magistrate shall think just.

9. There can be no doubt that in view of these provisions a joint enquiry against a number of persons would be fully justified in law if and when these persons have jointly taken part as habitual robbers and thieves. It is settled law now that it is on the basis of the accusation made and not on the facts finally proved on the evidence that the legality or the illegality of a joint trial depends. This has been held by the Privy Council in the case of *Balulal Choukhani v. Emperor* .

10. It is contended by Mr. Banerji on behalf of the Crown that the decision of the Privy Council covers only cases of joint trials and does not cover cases of enquiry

under Section 110, Criminal P. C. In my opinion, there is no substance in this contention. Sub-section (5) of Section 117, Criminal P. C., which has been already mentioned runs thus :

'Where two or more persons have been associated together in the matter under enquiry, they may be dealt with in the same or separate enquiries as the Magistrate shall think just.'

11. When is the Magistrate to decide whether the same or separate enquiries are to be held Obviously before he starts the enquiries. Necessarily therefore he cannot decide whether to hold the same or separate enquiries before allegations are made before him that several persons have been associated together as habitual thieves and robbers. Curious consequences will follow, if the contention of Mr. Banerji that it is not necessary that an accusation that the persons have been associated together as habitual thieves and robbers should be made at the very outset before the enquiry commences be accepted. It may very well happen that after a large number of witnesses have been examined the Magistrate is satisfied on the evidence that the accused persons have not been associated together in the matter under enquiry. According to Mr. Banerji, he is then to scrap all the proceedings and start afresh. That clearly in my opinion is not the intention of the Legislature. The very language used in Sub-section (5) does in my judgment make it very clear that the Magistrate has to decide before the enquiry commences whether certain persons should be dealt with in the same or separate enquiries. My conclusion therefore is that in enquiries under Section 110, Criminal P. C., no less than in trials for offences under the Code, it is necessary before there can be a joint trial of certain persons that there should be an accusation which would justify a joint trial. It is quite clear that in the present case there was no such accusation. The necessary consequence that follows is that the enquiry which has been held has not been held in accordance with the provisions of law.

12. In this view I do not think that it is possible to send the matter for any enquiry by the learned Judge, for as there is no accusation of joint activity he cannot even now hold a joint enquiry.

13. I would therefore make this rule also. I will set aside the orders passed by the learned Judge and the Magistrate directing these persons to furnish security for good behaviour. They are discharged from their bail bonds.

14. Panchu, Jnan Giri and Puma Sahu against whom also orders were passed by the learned Magistrate and the learned Judge, have not moved this Court in revision. In view of my conclusion however that the whole enquiry has been illegal, I would set aside the orders passed by the learned Magistrate and the learned Judge against them as well. If they are in custody they should be set at liberty at once.

Harries, C.J.

I agree.