

Mrityunjoy Chatterjee and ors. Vs. the State

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Court : Kolkata

Decided On : Jan-11-1955

Reported in : AIR1955Cal439,1955CriLJ1171,59CWN470

Judge : P.N. Mookerjee, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 144, 353, 537 and 540A; ;[Indian Penal Code \(IPC\), 1860](#) - Section 188

Appeal No. : Criminal Revn. Case No. 1248 of 1954 and Criminal Ref. No. 45 of 1954

Appellant : Mrityunjoy Chatterjee and ors.

Respondent : The State

Advocate for Def. : Jogesh Chandra Sinha, Adv.

Advocate for Pet/Ap. : Jatish Chandra Banerjee, Adv.

Judgement :

ORDER

P.N. Mookerjee, J.

1. This Rule and the connected Reference case arise out of the same criminal proceeding started against five accused persons, three of whom figure in the Rule,

and one in the Reference case, the remaining accused having been acquitted by the learned trying Magistrate.

2. The offence alleged was under Section 188, Penal Code and, at the initial trial, four of the accused were convicted and sentenced to pay a fine of Rs. 25/- each, or in default, to suffer rigorous imprisonment for three weeks and one was acquitted under Section 245, Criminal P. C.

3. There was a motion to the learned Sessions Judge by the four convicted persons under Sections 435 and 436, Criminal P. C. for reference to this Court. But the learned Additional Sessions Judge who finally heard the application has made a Reference only in the case of one of the accused, Pulin Mondal, recommending a fresh trial in his case. This has given rise to the above Reference. The learned Additional Sessions Judge has rejected the prayer for reference in the case of the other three accused persons, convicted by the trying Magistrate, who have thereupon moved this Court and obtained the above Rule.

4. The facts, material for the purpose of my decision, may now be stated and, in short, they stand as follows:

5. On 17-4-1953, one Bejoy Krishna Das, describing himself as the complainant 1st party, applied before the learned Sub-Divisional Officer, Ali-pore, for 'inter alia', an injunction against the 2nd party who were six in number, namely, Mrityunjoy Chatterjee, Jiban Thakur alias Jiban Krishna Chatterjee, Kanai Lal Laskar alias Naskar, Pulin Mondal, Nilmoni Naskar and Kalipada Mondal, to restrain them from dispossessing him (the complainant) from certain lands which included two jhils. Upon receipt of the Police report, the learned Sub-Divisional Officer drew up proceedings under Section 144, Criminal P. C. on 24-4-1953, as there was apprehension of breach of the peace and restrained the 2nd party from entering upon the disputed plots.

6. The second party's petition for a similar restraint order on the 1st party was rejected by the learned Sub-Divisional Officer on 4-5-1953, but the 1st party was directed not to alter the condition of the Jhils in any way and he was allowed to exercise only 'his normal right of possession'.

7. The matter came up for final hearing on 22-6-1953, when the order under Section 144, Criminal P. C. was made absolute. Meanwhile, it appears, the 2nd party had filed a Title Suit in respect of the disputed plots and obtained an ex parte ad interim injunction against the 1st party, restraining him 'from catching fish from the disputed land'.

8. On 1-5-1953, when the Section 144 proceedings were pending, the 1st party alleged before the learned Sub-Divisional Officer that on 29-4-1953, the first five of the said 2nd party had disobeyed the order of injunction, issued against them under Section 144, Criminal P. C., as aforesaid, in spite of service of the said injunction order upon them on the 26th of that month. Police Report having confirmed the allegation, the learned Sub-Divisional Officer made a complaint against the said five persons under Section 188, Penal Code before Sri D.N. Banerjee, Magistrate, First Class, Alipore. On being summoned, the accused appeared before the learned trying Magistrate and they were examined on two dates under Section 242, Criminal P. C, and were given bails of Rs. 100/- each. The case was eventually taken up by the successor of the learned trying Magistrate on 26-12-1953, when accused Pulin Mondal was found absent and a petition was filed by co-accused Kanai Laskar stating that Pulin was ill. Thereupon the learned Magistrate passed the following order.

'....Accused Pulin Mondal is absent. Petition filed by Kanai Laskar stating that he is ill. Let the trial proceed with the four accused persons..'

Five P. Ws. were examined and cross-examined on that day when Pulin was absent and they were discharged. Two more prosecution witnesses were examined and cross-examined on the two subsequent dates, 23-2-1954 and 12-4-1954. On this last mentioned date, all the accused were examined under Section 342, Criminal P. C, and accused Jiban Thakur was allowed to be represented by his lawyer under Section-540A, Criminal P, C. and then the case was adjourned to 27-5-1954, for defence, if any, and arguments. On the last date of hearing, namely, 27-5-1954, one D. W. was examined and cross-examined and arguments were heard and, on 31-5-1954, orders were passed by the learned Magistrate. Accused Jiban Krishna Chatterjee was acquitted under Section 245, Criminal P. C.

and the rest, including Pulin, were convicted and sentenced to pay a fine of Rs. 25/-each and in default to suffer rigorous imprisonment for 3 weeks under Section 188, Penal Code.

9. From the facts set out above, it is abundantly clear that a part of the evidence against the accused Pulin was taken in his absence. This was a clear violation of Section 353, Criminal P, C., unless the case could be brought under any of the exceptions, provided in that section. The only provision which can possibly be thought of in this connection is Section 540A, the first part of which provides that, in the case of a joint trial of more than one person, like the present, the trial may be proceeded with in the absence, of one or more of the accused, thus obviously permitting the taking of evidence during such absence. This provision, however, only applies when the absent accused is represented by a pleader. Admittedly, Pulin was not represented by any lawyer at any stage of the trial. The first part of Section 540A could not, therefore, apply to his case. There is no other statutory exception which may be applied so far as he is concerned.

None of the statutory exceptions, however, being applicable, there was clear contravention of Section 353 of the Code, so far as Pulin was concerned, and, as regards him, the trial was held in utter violation of the said provision, and, as practically the entire prosecution evidence against him was taken behind his back, he must be held to have been seriously prejudiced by reason of the said contravention of the statute and, whether the breach was an absolute illegality as, in my opinion, it was, or an illegality or irregularity, curable under Section 537 of the Code which applied only if no prejudice has been caused thereby on the above finding of prejudice, that section cannot aid the prosecution and, accordingly, Pulin's conviction cannot stand. That conviction, therefore, and the sentence passed upon the accused Pulin must be set aside and he should be ordered to be re-tried according to law, as recommended by the learned Additional Sessions Judge in his Letter of Reference.

10. The Reference must, accordingly, be accepted and the order of conviction and sentence, passed upon the accused Pulin Mondal, must be set aside and he should be ordered to be re-tried in accordance with law.

11. The Rule, however, ought to fail. As already held, there was clear breach of Section 353 of the Code so far as Pulin was concerned. Whether the taking of evidence during Pulin's absence would, leaving aside the exceptions, mentioned in the section, also amount to contravention of Section 353, so far as his co-accused are concerned, is a matter which may be open to some doubt but which it is not necessary to decide in the present case. Granting that there would be such contravention but for any appropriate statutory exception, it is quite clear that such exception would be furnished by the second part of Section 540A of the Code which empowers the Magistrate to order separate trial of the absent accused in such a case. There can be no question that this provision would have been applicable in this case and the actual proceeding with the trial of the other accused and the taking of evidence in the absence of Pulin would have been perfectly legal and quite regular if only the learned trying Magistrate had made an order under this second part of Section 540A of the Code, directing a separate trial in the case of Pulin.

This, however, he failed or omitted to do and the defect, if any, in the trial of these co-accused really arose from this failure or omission. It was thus, at the worst, an illegality which did not go to the root of the trying Magistrate's jurisdiction to hold the trial. Such a trial is not absolutely prohibited by the Code but would have been perfectly legal, only if the learned trying Magistrate had availed of the enabling provision of Section 540A, second part, and exercised the relevant powers under that provision. It was thus curable under Section 537 of the Code if, of course, no prejudice had been caused to the accused concerned on account of it.

In the case of these co-accused the answer to this question of prejudice must be in the negative. They were present throughout the trial and/or duly represented by lawyers and the evidence was taken in their presence and/or the presence of the said lawyers. They cannot, therefore, complain of any prejudice and, accordingly the defect, if any, in their trial is cured by Section 537 of the Code. This is plainly supported by the decision of the Judicial Committee in the case of 'Pulukuri Kotayya v. King Emperor', AIR 1947 PC 67 (A), where the scope of Section 537 has been elaborately examined and the law on the point authoritatively laid down after due consideration of the earlier decisions including the two Privy Council

cases, -- 'Subramania Iyer v. King Emperor', 28Ind App 257 (PC) (B) and -- 'Abdul Rahman v. Emperor' .

12. The order of conviction and sentence, passed on these accused (who are the petitioners before me in this Rule) must, therefore, stand. This was also the view, expressed by the learned Additional Sessions Judge in his Letter of Reference, and I entirely agree with him. This Rule must, therefore, fail.

13. The distinction between the case of Pulin and the other accused persons seems to be this. As Pulin was not represented by any lawyer, his case as already explained, could not be brought under any of the exceptions, referred to in Section 353 of the Code. The violation of this section was, therefore, absolute and the trial was conducted -- to use the language of the Judicial Committee -- 'in a manner different from that prescribed by the Code', as, in a case like the present, the Code does not authorise trial of a person in his absence when he is not represented by a lawyer. As regards the other accused persons, the situation was entirely different & it was one, contemplated by the second part of Section 540A of the Code, and no defect would have at all arisen if the learned Magistrate had exercised his relevant powers under that provision. Such a trial is not absolutely forbidden by the Code. It is within its contemplation subject to certain actions on the part of the learned trying Magistrate.

The trial of these accused persons, therefore, was conducted--to use again the language of the Judicial Committee -- 'substantially in the manner prescribed by the Code', though, 'in the course of such conduct', an irregularity or illegality occurred. The distinction is fundamental. It is -- to use a familiar phrase, -- one between absolute lack of jurisdiction and an error in the exercise of it. The latter is curable under Section 537 of the Code, the former is not. I do not, therefore, agree with the broad proposition, laid down in the Lahore case 'Pokhar Das Ganga Ram v. Emperor', AIR 1938 Lah 216 (D), relied on by the petitioners' Advocate. It states the proposition in absolute terms and it seems to have gone too far without due regard to Section 537 of the Code. The actual decision in the case may have been justified in spite of that section on the ground of prejudice, but the statement of the law, as contained in that judgment, is certainly too wide to be reconcilable with the

Privy Council decision in AIR 1947 PC 67 (A).

14. Before concluding, I ought to refer briefly to one other argument of Mr. Banerjee in support of the Rule which requires no serious discussion for its rejection. It is said that the prosecution ought to fail 'in limine' as, at the time of the alleged violation of the injunction order under Section 144 of the Code, the said order must have ceased to have any effect in law as a result of the issue of the 'ad interim' injunction by the Civil Court on the other party, namely, the first party (complainant) of the Section 144 proceeding, at whose instance the learned Sub-Divisional Officer had issued the injunction against the second party, including the present petitioners, under the said section. I do not find any substance in this argument. The Civil Court proceeding did not certainly take away the jurisdiction of the learned Sub-Divisional Officer as regards the Section 144-proceeding. His injunction order was not also set aside in any appropriate proceeding. It thus retained its full force and validity in spite of the Civil Court proceeding. This seems to be quite an obvious proposition.

But I may also refer in this connection to the case of -- P. Baba Sah v. K.G. Mohommad Hussain Sahib', AIR 1922 Mad 123 at p. 124 (E). Even apart from anything else, the injunction order of the Civil Court, which was in force at the date of the alleged breach of the Section 144 injunction order, was an 'ex parte ad interim' injunction not yet made final or absolute after hearing the other side, that is, the first party (complainant) in the Section 144 proceeding and merely restraining the said complainant first party from catching fish in the disputed jhils. It thus appears that the only effect of the Civil Court injunction, in force at the relevant time, was to put a further or greater restraint on the first party and it really supplemented the limited restraint, imposed upon the said first party by the Sub-Divisional Magistrate's order, dated 4-5-1953. It did not, in any way, interfere with, -- or even purport to interfere with or affect at all, the injunction order of the Criminal Court upon the second party, -- and could not, therefore, impair its force or validity.

15. It is thus clear that, in spite of the Civil Court injunction, the Section 144 order, restraining the second party from entering upon the disputed plots, remained in full

force and its violation was, therefore, clearly an offence under Section 188, Penal Code.

16. In the above view of the matter, I discharge the Rule and maintain the conviction and sentence, passed upon the petitioners Mrityunjoy Chatterjee, Kanailal Naskar and Nilmoni Naskar. I, however, accept the Reference, made by the learned Additional Sessions Judge, and set aside the conviction and sentence of accused Pulin Mondal and direct that he be re-tried in accordance with law.

17. The re-trial, in the circumstances of this case, should be held by some other Magistrate.

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