Fazal Mir Vs. the State

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SooperKanoon Citation : sooperkanoon.com/873591

Court : Kolkata

Decided On : Feb-02-1968

Reported in : 1968CriLJ816

Judge : R.N. Dutt and ;N.C. Talukdar, JJ.

Appellant : Fazal Mir

Respondent : The State

Judgement :

N.C. Talukdar, J.

1. This Rule is against an order dated the 26th November, 1965 passed by Shri L.C. Sen, Additional Sessions Judge, Murshidabad, dismissing an appeal from an order dated the 3rd November, 1965, passed by Shri S. Niyogi, Magistrate 1st Class, Kandi, convicting the present :petitioner under Section 5 of the Telegraph Wires (Unlawful Possession) Act, 1950 and sentencing him to suffer rigorous imprisonment for one year. The caroused Lal Bibi, who is the wife of the present petitioner, did neither file any appeal before the Sessions Judge Murshidabad nor prefer any motion in this Honourable Court.

2. The fasts leading on to the present Rule may be put in a short comas. The prosecution case is that on the 6th September, 1964, P.W. 1, A.S.I.N.N. Baul and P.W. 7, S.I.P.B. Das, lien attached to the Kandi Police station, leached upon

suspicion the house of the accused. petitioner Fazal Mir at Jiadara, P.S. Kandi and recovered two bundles of copper-wire, Exts. I and II respectively weighing about 605 grammas, bound within the folds of a Kantha, on a mach inside a room of the house having only one door and no window. Besides P.Ws. 1, 5 and 7 of the police group, P.Ws. 2 and 8 who belonged to the locality, witnessed the search. Neither the petitioner Fazal Mir nor his wife, the co-accused, could produce any permit or authority to possess those copper-wires. The Wires were sent to the Posts and Telegraph Department for examination by expert and P. W4, Bisweswar Mukherjee, an Assistant Engineer in the Posts and Telegraph Department, submitted a report (Ext. 4) stating inter alia that the said type of wire is exclusively used by the Posts and Tele, graphs Department for line communication and belongs to the prohibited category of telegraph wires not available in the open market. P.W. 5, A.K. Chakraborty, 0.C. Kandi Police-station, made the investigation and submitted the charge-sheet to P.W. 6, Jitendra Chandra Kar, the Circle Inspector of Police at Kandi, who was authorized to lodge the complaint under the Telegraph Wires (Unlawful Possession) Act, 1950. On 21.12.64, the charge-sheet along with the formal complaint by the said C.I. were filed in Court and the petitioner and the co accused were thereafter placed on their trial before the trying Magistrate to answer a charge under Section 5 of the Telegraph Wires (Unlawful Possession).Act, 1950.

3. The defence case inter alia is that the accused petitioner is not guilty; that the present case is a false one and that the copper, wires were planted in the house of the accused-petitioner toy the police in collusion with one Nurul Islam who was attracted towards the petitioner's wife, the co accused in this, case, and for which there was enmity between the accused-petitioner and the said Nurul Islam. The further defence of the cocooned Lal Bibi, who is not before us, was that she was living separately from her husband and as such she had no possession of the copper, wires in question as alleged or at all.

4. The prosecution in this case had examined seven witnesses to establish the crime besides proving several exhibits and we will consider the flame in the proper perspective.

5. Mr. Kishore Mukherjee, Advocate (with Mr. Dipak Kumar Sen Gupta, Advocate) appearing on behalf of the accused-petitioner has put forward a five-fold contention. The first two grounds urged by Mr. Mukherjee are procedural and if sustainable would go to the very roots of the case. Mr. Mukherjee has contended in the first instance that there has been doable cognizance in the present case vitiating the entire trial thereby, He has argued that the trying Magistrate having taken cognizance of the offence already on the 7th September, 1964 was sot entitled in law to take cognizance for the second time on the 24th December, 1964 and as such the resultant trial, based upon the said cognizance, has been void ab intitio. The expression 'cognizance' has not been defined in the Code. Cognizance, according to the Oxford English Dictionary, means generally 'knowledge as attained by observation or information' and in legal parlance it means the hearing and trying of a cause or the right of dealing with any matter judicially or even jurisdiction, In Wharton's Law Lexicon the expression 'cognizance (Judicial)' has been defined to be 'knowledge upon which a Judge is bound to act without having it proved in evidence.' The instances whereof, as given are inter alia, the public statutes of the realm, the ancient history of the realm, the order and course of proceedings in Parliament, the privileges of the House of Commons and such other things This, however, does not appear to be the 'cognizance' as mentioned in Section 190(1) of the Civil P.C. and the same has to be understood in the light of the observations made from time to time by the different Courts, laying down principles interpreting the same. In the case of Sourendra Mohan Chuckerbutty v. Emperor reported in ILR 37 Cal 412. Mr. Justice Stephen and Mr. Justice Carnduff held that 'Taking cognizance does not involve any formal action or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence.' In the case of Hafizar Eahaman, v. Aminal Hoque reported in 44 Cal W.N 1114 : AIR 1941 Cal 185, Mr. Justice Edgley while interpreting Section 192(1) of the Civil P.C. has also discussed the meaning of the expression 'cognizance.' At page 1118 His Lordship has referred to the abovementioned observations about cognizance made by Mr. Justice Stephen and Mr. Justice Carnduff and has thereafter held that:

It would therefore appear that cognizance maybe taken by a Magistrate of any matter in respect of which an enquiry or trial may be held under the provisions of

the Code of Criminal Procedure and, in taking cognizance of an offence or other case, for example oases under Sections 107, 110 or 145 of the Code, a Magistrate merely takes easily of the matter for the purpose of exercising the specific powers with which he has been vested under the code in connection with the case in question.

When a petition of complaint is filed before a Magistrate, the Magistrate may take cognizance under Section 190(1)(a) of the Criminal P.C. and proceed to examine the complaint under Section 200 and thereafter proceed according to the sub-squint sections of the Code or in the alternative may not take cognizance and may instead Bend it to the police for investigation under the provisional of Section 156(3), Criminal P.C.A reference in this connection may be made to the case of Dr. Robiul Hoasain Molla v. K.K. Ram reported in (1948) 82 Cal LJ 222 wherein Mr. Justice Box-burgh and Mr. Justice P.B. Chakraborty (as His Lordship then was) have held that:

What the Magistrate could have done was either (1) on getting the complaint not to treat it as a complaint but to send it to the Thana for the police to treat it as a First Information sager and act accordingly under Chapter Id of the Criminal F.C. Alternatively (2) he could have examined the complainant as in fact he did not and then direct an enquiry under Section 202 of the Criminal P.C. by a police officer, namely, officer-in-charge of Matiaburuj Thana.

A further reference in this context may be made to the ease of Pulin Behari Ghosh v. The King reported in (1949) 58 Cal W.N 658. Chief Justice Harries and Mr. Justice Das observed at page 661 of the said judgment that:

In our judgment when a complaint is filed before a Magistrate he should either take cognizance of it under Section 200 and proceed under Chapter 16 or send the complaint to the officer-in-charge of the police-station directing him to treat it as the First Information seaport under Section 154 and to proceed under Chapter 14.

If the Magistrate adapted the latter course it cannot be said that he was taking cognizance. Mr. Justice K.C. Dasgupta and Mr. Justice S.C. Lahiri, as Their Lordships then were, in the case of Supdt. and Remembrancer of Legal Affairs,

West Bengal v. Abani Kumar Banerjee reported in : AIR1950 Cal437 , have taken a similar view. At p. 488, Mr. Justice Dasgupta, who delivered the judgment, observed that:

What is 'taking cognizance' has not been defined in the Criminal Procedure Code and I have no desire now to attempt to define it. It seems to me clear, however, that before it can be said that any Magistrate has taken cognizance of an offence under Section 190(1)(a), Criminal P.C. he must not only have applied his mind to the contents of the petition, but he must have done so for the purpose of proceeding In a particular way as indicated in the subsequent provisions of this chapter proceeding under Section 200, and thereafter sending it for enquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this chapter, but for taking action of some other kind, e.g., ordering investigation under Section 158(3) or issuing a search warrant for the purpose of the investigation, be cannot be said to have taken cognizance of the offence.

The same view has been reiterated by the Supreme Court in the case of R.R. Shari v. State of Uttar Pradesh reported in : 1951 CriLJ775 . Chief Justice Kania who delivered the judgment, approved of the observations made in the above-mentioned decision and held ultimately that the said view constitutes a correct approach to the question before the court. In the case of Narayandas Bhagwandas v. State of West Bengal reported in : 1959 CriLJ1368 , Their Lordships after considering the above-mentioned decisions, held at pages 1128 and 1124 that:

As to when cognizance is taken of an offence will depend upon the acts and circumstances of each ease and it is impossible to attempt to define what is meant by taking cognizance. Issuing of a search warrant for the purpose of an investigation or of a warrant of arrest for that purpose cannot by themselves be regarded as acts by which cognizance is taken of an offence. It is only when a Magistrate applies his mind for the purpose of proceeding under Section 200 and subsequent sections of Chapter XVI, Criminal P.C. or under Section 204 of Chap. XVII of the Code that it can be positively stated that he bad applied his mind and therefore had taken cognizance.

The Supreme Court again held the same view in the case of Gopal Das Bindhi v. State of Assam reported in AIR 1961 SC 986. At page 989 of the said report Their Lordships held that:

We cannot read the provisions of Section 190 to mean that once a complaint is tiled a Magistrate is bound to take cognizance if the facts stated in the complaint disclose the commission of any offence. We are unable to construe the word 'may' in Section 190 to mean 'must'.... When a Magistrate applies his mind not for the purpose of proceeding under the various sections of Chap. XVI but for taking action of some other kind as for example ordering investigation under Section 156(8) or issuing a search warrant for the purpose of investigation he cannot be said to have taken cognizance of any offence.

In a recent decision by the Supreme Court in the case of A.C. Agarwal v. Mat. Ram Kali reported in : 1968 CriLJ82 , Their Lordships have, however, interpreted the words 'may take cognizance' in Section 190(1) of the Criminal P.C. to mean 'must take cognizance' but in a different context, namely, in relation to Section 190(1)(b) of the Criminal P.C. At page 5, it has been found that:

Under Section 190(1)(b) of the Criminal P.C. the Magistrate is bound to take cognizance of any cognizable offence brought to his notice. The words 'may take cognizance' in the context means 'must take cognizance,' He has no discretion in the matter, otherwise that section will be volatile of Article 14.

In view of the facts and circumstances of the present case and in view of the decisions as mentioned above, we do not think that the first contention advanced on behalf of the accused-petitioner has any substance.

6. The next contention raised by Mr. Mukherjee is that the entire trial is vitiated because of a purported non-conformance to the mandatory provisions of Section 7 of the Telegraph Wires (Unlawful Possession) Act, 1950. Section 7 of the said Act lays down that no court shall take cognizance of any offence punishable under this Act, save on complaint made by or under the authority of the Central Government or by an officer specially empowered in this behalf by that Government. Mr. Mukherjee has urged that there is no evidence on record to establish that the

Circle Inspector of Police, Kandi Circle, is an officer specially empowered by the Central Government to make the requisite complaint under Section 7 of the Act and that in any event the said authorization should have accompanied the complaint. Mr. Manas Nath Roy, Advocate, appearing on behalf of the State, contended that there was no non-conformance to the provisions of Section 7 of the Act as alleged or at all and that the officer in question was legally authorized to prefer the complaint. In support of his contention he has produced before us the West Bengal Police Gazette, dated, Calcutta, Friday, July 22, 1955 (Vol. CXVI No. 29 of 1955) showing that in exercise of the powers conferred by Sub-section (1) of Section 7 of the Telegraph Wires (Unlawful Possession) Act, 1950, the Central Government duly empowered several officers as mentioned in the column below and that includes the Circle Inspector of Police, Kandi Circle. Mr. Makherjee contended that this authorization should have accompanied the complaint and, in any event this is not a due discharge of the onus upon the prosecution. We are afraid, we cannot agree with Mr. Mukherjee, The language of Section 7 of the Telegraph Wires (Unlawful Possession) Act, 1950, is that 'no court shall take cognizance' - the same language as used in Section 195(1) of the Code of Criminal Procedure or in Section 11 of the Essential Commodities Act, 1955 or in Section 6 of the Prevention of Corruption Act, 1947. The language however used in Section 20 of the Prevent. Mon of Pod Adulteration Act, 1954, is entirely Different and is that 'no prosecution for an offence under this Act shall be instituted except with a written consent etc'. The bar therefore as laid down in the Prevention of Food Adulteration act, 1954, is a bar in liming. which is not so in the case of the Telegraph Wires (Unlawful Possession) Act, 1950. If there is no such authorization produced at the inception, the entire prosecution would become null and void under the Prevention of Food Adulteration Act, 1954, but the position is not the same under the Telegraph Wires (Unlawful Possession) Act, 1950. The authorization enjoined under Section 7 need not accompany the complaint and it will be sufficient it can be proved that the officer in question was specially empowered by the Government. The evidence on record also disproves the contention pat forwarded by Mr. Mukherjee. P.W. 6, fattener Chandra Kar, who is the Circle Inspector of Police, Kandi, has stated that he was motorized by the Government of India to file she complaint and that ha could show the proper

certificate authorizing him to file such complaints. we hold therefore that P.W. 6 has been specially empowered in this behalf by the government to prefer the complaint and as such there has not seen any non-conformance to the mandatory provisions of Section 7 of the Telegraph Wires (Unlawful Possession) Act, 1950. Accordingly we and that the second argument of Mr. Mukherjee not also tenable.

7. The next two grounds urged by Mr. Mukherjee are on merits. The first one relates to the factual of possession of the copper wires n question. It has been urged that in view of she evidence on record it has not been established beyond reasonable doubt that the accused-petitioner was in conscious, real and voluntary possession of the impugned articles. As we traverse the evidence on record, we find that P.Ws. 1 and 7, who are the police officers, searched the house of the accused and their evidence is that on search they found and recovered the wires, Exts. I and II respectively, from under a kantha from the accused-petitioner's room. The evidence further is that there was no window in the room where from the wires were seized. P.Ws. 2 and 3, who were present at the time of the search, are independent witnesses of the locality and corroborate the said evidence. P.W. 2 stated that the police officers allowed their bodies to be searched and thereafter the articles were recovered from the roof in question and that P.Ws. 2 and 8 were all along present during the search. We, therefore, hold that the factum of the accused petitioner's possession of the copper-wires in question has been proved beyond reasonable doubt and there is no reason as to why the said body of evidence should be disbelieved.

8. The fourth ground urged by Mr. Mukherjee is that the copper-wires seized are not 'Telegraph Wires' within the meaning of Section 2(b) of the Telegraph Wires (Unlawful Possession) Act, 1950 and hag also not been proved to belong to the Posts and Telegraphs Department. It is undoubtedly true that if the articles in question be not 'Telegraph Wires' within the meaning of the Act, neither the prohibitory clause under Section 4A nor the penalty clause under Section 5 of Act No. 74 of 1950 would be applicable. However, after having traversed the evidence, which we have been taken through by the learned Advocate appearing on behalf of the accused petitioner as well as the State, we have no doubt that this contention of Mr. Mukherjee also is not sub-stainable. desides the evidence of

P.W. 1, A.S.L.N.N. Baul, who states that 'these wires are not available in open market' and that 'the accused could not produce any papers to show that the wires belonged to him,' and of P.W. 3, Arman Sk. that 'the accused could not produce any papers as to how he obtained the wires', we have the material evidence of P.W. 4, B. Mukherjee, who is an Assistant Engineer, Posts' and Telegraphs Department. P.W. 4 had tested the copper-wires in question and found those to be 'exclusively used by the Posts and Tele, graphs Department for communication'. He further restated that 'these are of prohibitory category not sold in the open market'. His report which has been proved as exhibit 4 states that

It was found that the wires in both the coils are of wire copper and of a gauge corresponding to 150 lbs. per mile, copper-wire of the Posts and Telegraphs Department. This type of wires are exclusively used by Posts and Telegraphs Department for line communication and belongs to the prohibited category of Telegraph Wires and hence should not be available In the open market.

In view of the said clear and cogent evidence on record, we have no hesitation in holding that the wires seized come within the definition of 'Telegraph Wirea' under the Telegraph Wires (Unlawful Possession) Act; 1950. The theory of planting again as put forward on behalf of the defence appears to he very thin and through its gossamer-web can be found its inherent improbability and inconsistency, In any event, there is no evidence to establish the same and as such it is not possible for us to give any effect thereto. 'Of things that do not exist and things that do not appear, the reckoning in a court of law is the same'. The finding of fact on these points, as arrived at by the courts below, are clearly based on the clear and cogent evidence on record and sitting in revision, we find no reason to interfere with the same.

9. In the last place, Mr. Mukherjee has submitted that in any event, the sentence passed on the accused petitioner is severe. He has drawn our attention to the unfortunate troubles of the said petitioner on the domestic front as also to the period already served in custody, and be has accordingly urged that it is just and fair that justice in the case should be tempered with mercy. It is quite true that law is good but justice is better but it is also true that justice is as in accordance with

law. We find, however, in the present case that the Rule was issued on the 24th December, 1965 and the accused petitioner, though enlarged on bail on the 15th January, 1966, was surrendered in court by the sureties in August, 1967 and he is since then in jail. We accordingly hold that the ends of justice would be met if we reduce the sentence of the accused-petitioner to the period already undergone.

10. In the result, the Rule is disposed of as follows: The conviction of the accused petitioner is upheld under Section 5 of the Telegraph Wires (Unlawful Possession) Act, 1950 but the sentence is reduced to the period already undergone. Let the accused-petitioner be set at liberty forthwith.

R.N. Dutt, J.

11. I agree.