

Rameshwar Dayal Vs. State

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Court : Himachal Pradesh

Decided On : Jun-08-1953

Reported in : AIR1954HP21

Judge : Chowdhry, J.C.

Acts : Essential Supplies (Temporary Powers) Act, 1946 - Sections 7 and 11; ;Contravention of Cotton Textile Control Order, 1948; ;[Evidence Act, 1872](#) - Sections 58 and 114; ;Cotton Textile Control Order, 1948 - Section 9(1); ;Code of Criminal Procedure (CrPC) - Sections 225, 439 and 537

Appeal No. : Criminal Revn. No. 34 of 1952

Appellant : Rameshwar Dayal

Respondent : State

Advocate for Def. : A.C. Mehta, Acting Govt. Adv.

Advocate for Pet/Ap. : H.L. Sibal, Adv.

Disposition : Revision allowed

Judgement :

ORDER

Chowdhry, J.C.

1. The petitioner Rameshwar Dayal was convicted by a first class Magistrate under Section 7, Essential Supplies (Temporary Powers) Act, 1946, for contravention of Clause 24 (i), Cotton Textile (Control) Order, 1948, which prohibits sale of cloth at a price higher than the maximum price fixed by the Textile Commissioner under Clause 22, and sentenced to imprisonment till the rising of the Court and a fine of Rs. 300/-, or two months' simple imprisonment in default of payment of fine. The Sessions Judge dismissed his appeal. He has now come up in revision to this Court. The charge, which according to the Magistrate the petitioner had failed to disprove, but which the Sessions Judge found proved against him, was that he sold a measure of cloth to one Tika Ram at Rs. 2/- per yard instead of the controlled rate of Rs. 1-3-6 per yard.

2. The first contention of the learned counsel for the petitioner was that the notification of the Textile Commissioner fixing the maximum price under Clause 22 of the aforesaid Order had not been produced by the prosecution. And he cited two decisions in this connection, one of this Court, -- 'Abdul Ghani v. State', AIR 1952 Rilaipur 5 (A) and the other reported as -- 'Pannalal v. State', AIR 1953 Madh B 84 (B). It was laid down by this Court in the former, which was also a case of sale above the controlled price, that in order to find whether the provisions of the notification fixing the price had been contravened it is necessary for the prosecution to produce the notification. That case has no application here since there is no dispute with regard to the controlled price. The petitioner stated that he did not sell the cloth at Rs. 2/- but at Rs. 1/3/6 per yard, and he led evidence in support of this defence. He therefore impliedly admitted the alleged controlled rate, and since a fact admitted need not be proved, it is immaterial that the prosecution did not produce the notification in question. For the same reason the other case has also no application since the controlled price was not admitted there.

3. It was also argued that it had not been proved that the notification had been published in the Gazette of India, as required by Clause 9 (1) of the Order. In this connection also the aforesaid decision of this Court was cited. The full facts of that case do not appear. It may be that want of publication was specifically pleaded in that case. If so, it was certainly incumbent on the prosecution to prove it. No such plea was taken before the trying Magistrate, or even in the lower appellate Court.

Nor has it been taken in the grounds of revision filed in this Court. It was put forward for the first time only in the course of arguments by the learned counsel for the petitioner. In the circumstance, it was not incumbent on the prosecution to prove publication of the notification for, in the absence of a specific defence plea of want of publication, and fixation of controlled price being impliedly admitted, as adverted to above, the prosecution were entitled to the benefit of the presumption under illus. (e) to Section 114, Evidence Act that an official act, specially one required to be done under a mandatory procedural provision like the aforesaid Clause 9 (1), has been regularly performed.

4. Next it was argued that no legal cognizance of the offence was taken by the Magistrate since the provisions of Section 11 of the said Act had not been complied with. The section reads:

'No Court shall take cognizance of any offence punishable under this Act except on a report in writing of facts constituting such offence made by a person who is a public servant as defined in Section 21, Indian Penal Code.'

The argument of the learned counsel for the petitioner was that the police report on which cognizance was taken did not comply with the provisions of this section. He cited the following rulings in this connection: -- 'Dr. N. G. Chatterji v. Emperor', AIR 1946 All 416 (C); -- 'Purushottam Devji v. Emperor', AIR 1944 Bom 247 (D); -- 'Gangadhar Sahu v. Emperor', AIR 1946 Pat 107 (E) and -- 'Rachpal Singh v. Rex', AIR 1949 Oudh 66 (F). In all these the provisions of Rule 130 (1), Defence of India Rules, 1939, which corresponded with the above cited Section 11, were found to have been contravened.

In the Allahabad and Oudh cases there was no mention of the facts constituting the offence. In the Patna case the report stated that no specific case against the accused was found. In the Bombay case no mention at all was made in the report of facts constituting the offence of contravention of the provision of the Bombay Retail Trade Control and Licensing Order for which the accused was prosecuted and convicted.

In the present case two challans were submitted by the investigating police officer, an incomplete challan dated 30-5-1951 and a complete challan dated 31-5-1951. I have had occasion to animadvert on the impropriety of submitting incomplete challans. Cognizance in this case was, however, taken on the complete challan. In the complete challan all the facts constituting the offence were mentioned in detail, as also the liability for punishment under Section 7 of the said Act. Only there was no reference to the notification fixing the price. It will thus be seen that none of the cited decisions has any application in the present case. As regards the omission to mention the notification, even if it be supposed that it was necessary, the omission stands cured under Section 537, Cr. P. Code, since, for reasons to be recorded presently in connection with a similar defect in the charge, it occasioned no failure of justice.

5. The omission to mention the notification in the charge was next pointed out as an illegality which vitiated the petitioner's trial. This contention is devoid of force and therefore neither direction of a new trial under Sub-section (1) nor quashing of conviction under Sub-section (2) of Section 232, Cr. P. Code, is called for, although the petitioner must be acquitted on another ground to be discussed presently. In support of the present contention relating to defect in the charge, the learned counsel for the petitioner cited again the aforesaid -- 'AIR 1946 All 416 (C)'. That was a case of conviction under R. 81 (4), Defence of India Rules, the following portion of which rule was cited:

'If any person contravenes any order made under this rule, he shall be punishable with imprisonment for a term.....'

The rule for the contravention of which the accused were convicted in that case was not mentioned in the charge, and it was held on the authority of -- 'N. A. Subramania Iyer v. King Emperor', 28 Ind App 257 (G), that the omission amounted to an illegality which could not be cured by Ss. 225 and 537, Criminal P. C. Sinha J. cited a long passage from the Privy Council ruling and relied specifically on the words 'specifying a definite criminal offence' in the sentence:

'The policy of such a provision is manifest, and the necessity of a system of written accusation specifying a definite criminal offence is of the essence of criminal

procedure.'

The provision to which their Lordships were referring was Section 234, Criminal P. C. That section, which provides that a person may only be tried for three offences of the same kind if committed within a period of twelve months, was contravened in that case inasmuch as the accused was tried on an indictment in which he was charged with no less than 41 acts extending over a period of two years. Their Lordships were of the opinion that disobedience to the express provision as to the mode of trial was an illegality, and not a mere irregularity, which could not be cured by Section 537. An omission to mention in the charge a notification like the one under Clause 22 of the aforesaid Order in the present case, is not tantamount to disobedience to some provision as to the mode of trial, as disobedience to the provision of Section 234 of the Code no doubt is. On the other hand, such an omission falls clearly and specifically within the 'omission to state the offence or the particulars required to be stated in the charge' which under Section 225 of the Code shall not at any stage of the case be regarded as material, provided the accused was not in fact misled by it and it has not occasioned a failure of justice, and which under Section 537 cannot be a ground for reversing a conviction or sentence, unless it has occasioned a failure of justice. The Privy Council decision is therefore no authority for adjudicating upon the effect of an error or omission in the charge, and it must be said with great respect that the omission which was the subject-matter of the aforesaid Allahabad decision should not have been decided on the authority of that ruling in disregard of the provisions of Ss. 225 and 537 of the Code.

6. Coming to the omission in the present case, the question that arises, as a cumulative effect of the just cited two sections of the Code, is: Did the omission to state in the charge that the petitioner had contravened the notification of the Textile Commissioner under Clause 22 of the aforesaid Order in fact mislead him, and did it occasion a failure of justice? Now, there are two clear reasons for answering this question in the negative. In the first place, as adverted to above, the petitioner conducted his defence throughout in order to disprove the prosecution case that the cloth was sold at Rs. 2/- per yard and to prove the defence version that it was sold at the controlled rate of Rs. 1-3-8 per yard.

Although the notification was not mentioned in so many words, it was clearly specified in the charge, and again in the questions put to the petitioner under Section 342 of the Code, that he had sold the cloth in question at Rs. 2/- per yard which was in excess of the controlled rate of Rs. 1-3-6 per yard. Indeed, the presumption is that the petitioner as a licensed vendor of cloth was fully aware of the controlled price and the notification fixing that price. This conclusion is confirmed by the fact, and this is the second reason, that the petitioner did not make any objection to the defect in the form of the charge on this particular score at any stage of the trial before the Magistrate, vide the Expln. to Section 537. I hold that the omission to mention the notification in the charge in the present case, although all the facts constituting the offence were mentioned in the charge, could not, in the wordings of Section 225 of the Code, be regarded at any stage of the case as material, and, in the wordings of Section 537, as affording a ground for reversing the conviction and sentence of the petitioner.

7. The conviction and sentence of the petitioner should however be set aside as the finding of fact that he sold the cloth at a rate above the controlled rate is insupportable. There is no doubt that interference with a finding of fact by the High Court in revision is an exception rather than a rule; but, for reasons to be presently recorded, this is one of those exceptional cases in which this Court must itself consider the evidence as if in an appeal. The learned Sessions Judge has remarked that the depositions of the prosecution witnesses on the point were substantially correct and had been rightly acted upon by the trial Court. Neither of these assertions can for a moment be supported. In the first place, it is not correct to say that the trial Court had acted upon the depositions of the prosecution witnesses for, as adverted to above, and as noted by the learned Sessions Judge himself, the trying Magistrate convicted the petitioner, not because he found the prosecution version to have been proved by the evidence of the prosecution witnesses, but because the petitioner had failed to prove his innocence. The learned Sessions Judge has rightly remarked that the trying Magistrate was in error in thinking that it was for the petitioner to prove his innocence. (His Lordship went through the evidence and remarked that there were discrepancies in prosecution evidence which could not be brushed aside on the authority of -- 'Emperor v. Mahomed Khan', AIR 1934 Lah 710 (H). His Lordship continued). It is

manifest therefore that the learned Magistrate was of the view that the prosecution evidence was of a doubtful nature by reason of existence of discrepancies on material points, although it proceeded to record the finding of fact in question against the accused on the erroneous notion that the burden of proving his innocence lay on him.

8. From what has been stated above it is therefore clear that the learned Sessions Judge was wrong in thinking that the prosecution evidence had been acted upon by the trying Magistrate. On the contrary, the trying Magistrate regarded that evidence as of a doubtful nature due to the multifarious discrepancies on material points. That being so, it was incumbent upon the learned Sessions Judge to scrutinize that evidence carefully before arriving at the contrary conclusion that the depositions of the prosecution witnesses were substantially correct. The learned Sessions Judge has however done nothing of the kind. (His Lordship went through the appreciation of evidence by the Sessions Judge and continued:) It was incumbent upon the learned Sessions Judge to give cogent reasons for relying upon the testimony of the same prosecution witnesses in the case of the present petitioner; but, as already shown, he has given no such reasons besides making the aforesaid general observations.

9. The learned Sessions Judge has also given no reasons whatsoever for disbelieving the testimony of the defence witnesses. In fact, he has made no reference whatsoever to the defence evidence while dealing with the case of the present petitioner. (His Lordship went through defence evidence and continued:.) On a consideration of that evidence I am clearly of the opinion, for reasons already recorded, that the prosecution case against the petitioner is extremely doubtful, if not wholly untrue.

10. The revision is allowed, the conviction and sentence of the petitioner Rameshwar Dayal are set aside and he is acquitted. The fine if already realised, shall be refunded to him.