Ramaswamy Nadar

Vs

The State of Madras

Criminal Appeal No. 153 of 1957

(B. P. Sinha, P. Govinda Menon, J. L. Kapur JJ)

21.10.1957

JUDGMENT

SINHA J. -

This appeal by special leave is directed against the judgment and order of a Single Judge of the Madras High Court, dated April 3, 1957, setting aside the order of acquittal passed by the fourth Presidency Magistrate at Madras, dated February 10, 1956, on a charge under s. 420, Indian Penal Code. The Government of Madras appealed against the order of acquittal and the appeal was heard by a Single Judge of that Court. The learned Judge allowed the appeal, but did not convict the appellant under s. 420, Indian Penal Code, which was the original charge against him in the trial court, but under s. 403, Indian Penal Code, for misappropriation, and sentenced him to the maximum period of two years' rigorous imprisonment. Hence, this appeal.

The appellant used to carry on prize-competitions as the proprietor of the 'Lotus Cross Words'. Certain persons who had paid moneys in connection with the prize-competition No. 92, complained that they had not received their prize money though it had been announced that they had competed for the prizes offered. The police, after investigation, submitted a charge-sheet against the accused to the effect that he had, between May 20, 1955, and June 10, 1955, in his capacity as the proprietor of the 'Lotus Cross Words', dishonestly induced P.Ws. 1 to 3 to compete in his "bumper competition" No. 92, by paying entry fees to the tune of Rs. 2,640 on the representation that the prize winners will get a sum of Rs. 3,10,000, and that on that representation, he had collected one lac and fifteen thousand odd rupees from the public, out of which he had spent about nineteen thousand rupees towards expenses of advertising and holding the competition. Though P.Ws. 1 to 3 and others had been declared as the first prize winners, the accused had not distributed even the amount actually collected minus the expenses aforesaid, that is to say Rs. 96,000 odd, the amount of the net collections. The prosecution examined a number of witnesses to prove that the appellant had been holding crossword competitions and a large number of persons had paid moneys by way of entry fees; that the competition in question, namely, competition No. 92, had been advertized with a guaranteed sum of Rs. 3,10,000 by way of prizes; that as a matter of fact a much smaller sum had been collected by way of entry fees; that the three prosecution witnesses aforesaid and others had been, in due course, declared to be the first prize winners, but that none of them had been paid any money. It is also in evidence that a large number of other 'bumper competitions', namely, Nos. 80, 84 and 88, had similarly been held and large sums were advertised to have been guaranteed as prize moneys. None of those 'bumper competitions' yielded the sums so guaranteed. The gravamen of the charge against the accused was that in spite of his recent experience that none of those 'bumper competitions' attracted a sufficiently large number of competitors to yield the guaranteed prize money, the accused had advertised the competition No. 92 with a guaranteed prize money of Rs.

3,10,000 and that in spite of his having collected about one lac and fifteen thousand odd rupees by way of entry fees, none of the prizes declared to have been won by prosecution witnesses 1 to 3 and others, had actually been paid. It was, therefore, suggested by the prosecution that the recent history of the prize competitions conducted by the appellant, would show that he was actuated by a dishonest intention when he collected one lac and fifteen thousand odd rupees by way of entry fees, and did not utilize any part of the collected amount towards payment of the prizes offered. A large volume of documentary evidence furnished by the appellant's registers and account books, was adduced in support of the prosecution case.

In his defence, the appellant stated in his written statement that he started the 'Lotus Cross Words' in August, 1953, with a capital of twenty thousand rupees, and conducted 93 competitions, but due to insufficient collections in the recent competitions, he was not able to respect all his obligations, so much so that he was forced to close down the business owing to loss, on June 22, 1955. And to show his bona fides, he had disbursed over a lac of rupees even after the closure of the business and had settled the claims of six thousand out of seven thousand prize winners. He thus, claimed that less than one thousand persons' claims had remained unsatisfied in spite of his borrowing money to carry out his obligations.

The learned magistrate, on an elaborate examination of the evidence led before him by the parties, observed in his judgment that the accused had not denied the truth of the allegations of fact made by the prosecution, but had only challenged the insinuations against him that he was actuated by a dishonest intention in carrying on the competitions, particularly, No. 92. He found that none of the statements made in the advertisements had been shown to be untrue; that it was a fact that at the time, the competition No. 92 had been announced in the papers, the accused owed a total debt of prize moneys amounting to about four lacs of rupees in respect of the previous competitions; that the accused had other debts to the tune of a lac and fifty seven thousand odd rupees and that recent competitions had not even yielded sufficient amounts, collected by way of entry fees, to cover the guaranteed prize moneys. But he also found that the accused had applied his own funds amounting to about a lac and a half rupees to the payment of prize moneys. He found that the prosecution had failed to substantiate its allegations that ninety six thousand odd rupees, out of the entry fees collected for the competition No. 92, had been utilized by him for his own purposes and not for carrying on the competitions. He observed that there was no evidence that the accused had used any part of the entry fees collected in any of the competitions, for his own use, or that he took any financial benefit out of the moneys collected in the recent competitions including No. 92. In other words, the court found that in order to meet the heavy demands of the prize winners in respect of the previous competitions, the accused had spent not only the amounts collected by him but also about one and a half lacs of rupees of his own capital. Thus, instead of making any gain for himself, the accused had incurred a total loss of about a lac and a half of rupees, and still he had to meet other prize winners' demands, including those of the three prosecution witnesses aforesaid. On those considerations, his finding was that the accused may have been "absolutely foolish and reckless and far too optimistic" in expecting large sums of money by way of collections of entry fees, but that he had not been guilty of any fraudulent or dishonest conduct. Ultimately, he came to the following conclusion :

> "The mere fact that the accused had been utterly reckless and irresponsible in his conduct of the Lotus Cross Words and thereby caused loss to certain persons cannot however impute a criminal liability to him. Hence I find that the prosecution has not proved beyond reasonable doubts the guilt of the accused."

On appeal by the State to the High Court of Madras, the learned Single Judge (Somasundaram J.) agreed with the trial court in acquitting the appellant of the charge under s. 420, Indian Penal Code, but he convicted him of misappropriation, under s. 403, Indian Penal Code. He held that dishonesty at the initial stages may not have been there, but according to him, there was no justification for the accused not having disbursed the ninety six thousand odd rupees, the net amount of collection in competition No. 92 pro rata amongst the declared prize winners. As large amounts were involved in the transaction which was the subject-matter of the charge against the accused, he imposed the maximum punishment of two years' rigorous imprisonment.

Substantially two points were raised on behalf of the appellant in support of the appeal, namely, (1) that the High Court is not authorized by s. 423(1)(a), Criminal Procedure Code, to convert an order of acquittal into an order of conviction in respect of an offence other than that for which the accused was tried by the trial court and acquitted by it, that is to say, the High Court could not confirm the order of the trial court acquitting the accused of an offence under s. 420, Indian Penal Code, and, at the same time, convict him of an offence under s. 403, Indian Penal Code, and (2) that on the facts and circumstances of this case, no offence under s. 403, Indian Penal Code, has been made out. Before dealing with the appeal on the merits covered by the second contention, it is convenient to dispose of the first point. The powers of the High Court, while disposing of an appeal against an order of acquittal, are contained in s. 423(1)(a), Criminal Procedure Code, which is in these terms :

> 423(1)(a) : "in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;"

It was argued that the appellate court is authorized (a) to reverse an order of acquittal, and (b) to direct further inquiry, or (c) to direct that the accused be retried or committed for trial, or (d) to find him guilty and to sentence him according to law. It is pointed out that there is no power in the High Court to alter the finding or the charge or the nature of the offence, as is specifically conferred on the High Court under clause (b) of s. 423(1). This argument is based on the absence from clause (a) aforesaid, of the following words which occur in clause (b) :

> ".....or (2) alter the finding, maintaining the sentence, or with or without altering the finding, reduce the sentence, or (3) with or without such reduction and with or without altering the finding alter the nature of the sentence....."

In our opinion, the words just quoted out of clause (b) which deals with an appeal from a conviction, were not necessary for the purpose of clause (a) which deals with an appeal from an order of acquittal. Under both the clauses (a) and (b), the specific power to reverse the order appealed from, is there, but because there has been a conviction by the trial court or the court immediately below the High Court, the latter Court is authorized specifically to alter the finding or the nature of the sentence in clause (b). In clause (a), after the High Court has decided to reverse the order of acquittal, it has been given the power to find the accused guilty, besides other powers enumerated above. The question naturally arises 'find the accused person guilty of what ?' The answer sought to be given by the counsel for the appellant is that the High Court may find him guilty of the offence with which he stood charged in the court below and of which he was acquitted; but not of the offence disclosed by the evidence as that would be adding to the words of clause (a) the words "of the offence disclosed" or words to that effect which would be contrary to the intention of the Code as is shown by the words of clause (b). But this argument is wholly ineffective because in either view of the matter the court has to supply some words in answer to the question 'find him

guilty of what ?' According to the appellant, those additional words should be "of such offence as has been charged and of which he had been acquitted", and according to the other view, "of the offence disclosed". If, in construing the section, the court has to supply some words in order to make the meaning of the statute clear, it will naturally prefer the latter construction which is more in consonance with reason and justice. It was also argued on behalf of the appellant that this being a penal statute, the words of the statute should be very strictly construed, but even so, the necessity for supplying certain additional words is there in either view of the matter. It has not been contended that the trial court could not have exercised the powers contained in ss. 236, 237 and 238 of the Criminal Procedure Code. What was contended was that though those powers may be exercised by a trial court or even by a Court of Appeal exercising its powers under cl. (b) of s. 423(1), the High Court could not exercise those powers acting under cl. (a) of that section. But we do not see any sufficient ground for so restricting the powers of the High Court hearing an appeal under s. 423(1)(a). No rulings have been placed before us in support of the contention that s. 423(1)(a) does not authorize a High Court to find the accused person guilty of any offence other than that with which he has been charged. On the other hand, there is a ruling of a Division Bench of the Bombay High Court in Emperor v. Ismail Khadirsab [(1928) I.L.R. 52 Bom. 385]. In that case, the accused person had been acquitted of the charge of murder and on appeal against the acquittal, the Bombay High Court maintained the acquittal in respect of the charge of murder, but held the accused guilty of the offence of fabricating false evidence. We are not concerned with the correctness of the actual decision of the High Court, but only with the fact that the High Court recognized and acted upon the principle that it is open to the High Court, while deciding an appeal from an order of acquittal, to convict the accused person of an offence other than that with which he had been charged. It was sought to be argued on behalf of the appellant that the High Court purported to follow the decision of their Lordships of the Judicial Committee of the Privy Council in Begu v. Emperor [(1925) L.R. 52 I.A. 191] but it is contended that this was a case of an appeal from a conviction and not an appeal from an order of acquittal. But it would appear that the decision of their Lordships of the Judicial Committee, was not based on a consideration of the language of s. 423, but of the provisions of ss. 236 and 237 of the Code. In our opinion, there is no warrant either in principle or on authority, for the first contention raised on behalf of the appellant. This contention is, therefore, overruled.

It remains to consider the merits of the decision of the High Court. The conclusions of the High Court may be stated in its own words in the last paragraph of its judgment :

> "Before parting with this judgment I am constrained to observe that the order of acquittal passed by the Magistrate is a perverse one. He is aware and finds also that a sum of Rs. 96,548-2-3 remained with the accused without being paid to the prize winners. The learned Magistrate seems to think that the prosecution must let in further evidence of misappropriation. I am unable to understand the reasoning of the Magistrate when he says that there is no evidence of misappropriation. Having found that a sum of Rs. 96,548-2-3 has not been distributed to the prize winners in the competition No. 92 and that he utilized the same towards the debt incurred in the previous competitions, one would have thought that misappropriation is clearly established."

In our opinion, these observations are very much wide of the mark. The High Court has not reversed any of the findings of fact recorded by the learned magistrate. It has differed only on the inference to be derived from those findings. The learned trial magistrate refused to draw an inference of dishonesty from those facts. The High Court has come to the contrary conclusion. The question is : was the High Court justified in coming to the conclusion that "misappropriation is clearly

established ?" In our opinion, the High Court has erred in coming to that conclusion. In order to prove an offence under s. 403, Indian Penal Code, the prosecution has to prove that the property, in this case, the net amount of ninety six thousand odd rupees, was the property of the prosecution witnesses 1 to 3 and others, and (2) that the accused misappropriated that sum or converted it to his own use, and (3) that he did so dishonestly. In our opinion, none of these constituent elements of the offence can be categorically asserted to have been made out. The entry fees rightly came into the coffers of the accused. No doubt, he had promised to award prizes of the total value of Rs. 3,10,000, but there was no further obligation that the prize money had to come either wholly or in part, from out of the sum collected by him by way of entry fees. He was carrying on the business and was found by the courts below to have disbursed lacs of rupees to winners of prizes in the previous competitions, and it was conceded on behalf of the prosecution that there is no express provision in the rules and conditions of the "Lotus Cross Words" exhibited in this case that there was any obligation on the part of the appellant to set apart specific sums collected by way of entry fees for disbursement amongst the prize winners. As a matter of contract, the legal liability of the appellant to pay the prize winners was there irrespective of the consideration whether or not he made enough money to provide for the payment of the prizes declared as a result of the competition. But it was sought to be argued that though there was no specific provision in any statute or other law that the money collected by way of entry fees, should be reserved for payment to the prize winners in that very competition, the appellant was some sort of a trustee or bailee and should have seen to it that the collected amount was disbursed amongst the prize winners. There was no such entrustment nor was there any rule laid down for appropriation of the sum collected in a particular way. There being no duty to make appropriation in a particular way, the appellant could not be held guilty of having misappropriated the ninety six thousand odd rupees which was the total net collection in competition No. 92. As already pointed out, the learned trial magistrate had come to the finding that there is no evidence that any amount out of this collection had been appropriated by the appellant to his own personal use. Whatever amount he had been collecting, he had been applying to running his business. It is true that the later competitions were a losing concern, but as rightly pointed out by the learned trial magistrate, the appellant cannot be criminally liable for being reckless or unwise in carrying on his business. In our opinion, therefore, the learned Judge below was in error in characterizing the order of acquittal as a perverse one. The learned Judge's decision is based on an erroneous assumption that the appellant was bound by law to disburse the amounts collected in a particular competition amongst the prize winners of that competition. But it has not been pointed out by what process that conclusion was reached. Nor has the learned counsel for the respondent brought any statutory or other rule to our notice casting an obligation on the appellant to appropriate the entry fees in a particular manner. That being so, it must be held that misappropriation has not been made out either on evidence or as a matter of law.

In the result, the appeal is allowed and the order passed by the High Court set aside and the order of acquittal passed by the trial court is restored.

Appeal allowed.

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