

Bhajahari Mondal

Vs

The State of West Bengal

Criminal Appeal No. 29 of 1956

(Syed Jafar Imam, J. L. Kapur JJ)

11.09.1958

JUDGMENT

KAPUR J. -

This is an appeal by leave of the High Court of Calcutta against the judgment and order of that court dismissing the appellant's appeal against the order of conviction by the Special Court of Burdwan for an offence under section 165-A, Indian Penal Code and six month's rigorous imprisonment.

The facts leading to this appeal are that one Istipada Ghosh and his son were being tried in the court of an Assistant Sessions Judge, Burdwan, with a jury of five. During the course of the jurors Baidya Nath Mukherjee and offered him illegal gratification as an inducement for giving a verdict favourable to Ghoshes. On the morning of September 6, 1952, the juror narrated these facts to the police and thereupon the officer in charge sent a sub Inspector to arrest the appellant if he offered the bribe. After a little while the appellant came to the appointed place and offered Rs. 40 in four 10 rupee notes to the juror and while he was trying to pass those notes to the juror the Police Officer arrested the appellant. The First Information Report for an offence under sections 161/116, Indian Penal Code was made soon after. And after investigation a report was made by the police officer in charge Burdwan police station which resulted in the case being sent to the Special Judge, Burdwan. On November 27, 1952, the Government issued the following notification No. 6603J under section 4(2) of the West Bengal Criminal Law ? Amendment (Special Courts) Act, 1949 (W.B. XXI of 1949) :

"In exercise of the power conferred by sub-section (2) of section 4 of the West Bengal Criminal Law Amendment (Special Courts) Act, 1949 (West Bengal Act XXI of 1949), the Governor is pleased to distribute to the Burdwan Special Court constituted by notification to the Burdwan Special Court constituted by notification No. 4632J, dated the 22nd August, 1952, under section 2 of the said act the following cases involving offences specified in the Schedule to the said Act to be tried by the said Special Court :-

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(4) The State versus Bhajhari Mondal son of Bhuson Chandra Mondal of Katwa Station Bazar Police Station Katwa, district Burdwan under sections 161-116 of the Indian Penal Code.....".

This notification shows that the offence charged against the appellant was one under sections 161-116 of the Indian Penal Code.

The order sheet of the Special Court shows that the records of the case State v. B. C. Mondal under sections 161/116 Indian Penal code were received by the Special Judge on December 23, 1952, and the Special Court took cognizance of the case, the appellant was summoned for appearance on January 22, 1953, and he did appear on that day. On December 21, 1953, after several adjournments the hearing of the case was fixed for January 29, 1954, on which date the examination of witnesses commenced. On February 10, 1954, a charge under section 165A, Indian Penal Code was framed by the Special Judge. The trial ended on June 7, 1954, and the appellant was convicted under section 165A of the Indian penal code and sentenced to six months rigorous imprisonment. Against this order of conviction the appellant took an appeal to the High Court of Calcutta which was dismissed. It held that the appellant had rightly been convicted under section 165A and that the Special court had jurisdiction to try the offence under that section from, July 28, 1952, to May 9, 1953, under section 7 of the Central Act (XLVI) of 1952) and from May 9, 1953, under the West Bengal Act (W.B. XV of 1953). It also held that any defect in the taking of cognizance was curable under section 529(e) of the Criminal Procedure Code and that as a matter of fact the Special Judge took cognizance under section 165A and not under sections 161/116, Indian Penal Code. On December 16, 1955, the High Court granted leave to appeal to this Court.

Counsel for the appellant has not contested the appeal on any question of fact but has confined his arguments to the question of jurisdiction. He contended that the Special Judge had no jurisdiction to try the case as (1) at the time he took cognizance of the case, section 165A, Indian Penal Code, was not an offence specified in the Schedule of West Bengal Act XXI of 1949 : (2) the case distributed to him was one under sections 161/116 an offence which no longer existed in the Indian Penal Code, (3) the Special Judge was exercising jurisdiction under the West Bengal Act (W.B. XXI of 1949) and not under the Central Act (XLVI of 1952) as no Special Judges were appointed by the State Government under that Act; (4) the appellant could not be tried under the Act West Bengal Act XV of 1953 because there was no distribution of a case against him under section 165A, Indian Penal Code. In order to decide these matters it is necessary to set out the dates on which the various statutes came into force and to see what provisions were made therein. On March 11, 1947, Prevention of Corruption Act (Act II of 1947) was enacted by the Central Legislature. The West Bengal Legislature enacted the West Bengal Criminal law Amendment Act of 1949 (W.B. XXI of 1949) which received the assent of the Governor General on June 23, 1949. Its preamble shows the objects of the Act to be more speedy trial and more effective punishment of certain offences. By section 2 of this act, Special Courts were set up in West Bengal which under section 3 were to be presided over by Special Judges. Section 4 provided for allotment of cases for trial to the various Special Judges and also authorised the Provincial Government to transfer any case from one Special Judge to another and to make modifications in the description of cases (Whether in the name of the accused or in the charges preferred or in any other manner) as may be considered necessary. The Special Judge had jurisdiction to try the cases for the time being allotted to him under section 4(1) in respect of such of the charges for the offences specified in the Schedule as may be preferred against the accused. All cases pending before any court or before any other Special Judge were deemed to be transferred to the Special Judge to whom they were allotted. The Special Judge when trying a case allotted to him could also try any offence whether specified in the Schedule or not with which an accused could be charged at the same trial. By section 5 the Special Judge could take cognizance of a case without the case being committed and was to follow the procedure of warrant cases and the court of the Special Judge was deemed to be a court of Session trying without a jury. By section 8 rules of evidence were amended in certain particulars. Section 9 provided for enhanced

punishment. By section 10 the provisions of the prevention of Corruption Act were made applicable. The schedule to the Act enumerates the offences triable by a Special Judge, the relevant items of which were :

(1) "An offence punishable under sections 161, 162, 163 or section 165 of the Indian Penal Code.

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(8) Any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in items 1 to 7."

On July 28, 1952, the Central Legislature enacted the Criminal Law Amendment Act (Act XLVI of 1952) by section 3 of which an offence of abetment, section 165-A with an enhanced punishment was inserted.

Section 165A. "Whoever abets any offence punishable under section 161 or section 165, whether or not that offence is committed in consequence of abetment, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine or with both".

By section 6 the State Government were authorised by notification to appoint Special Judges for various areas to try the following offences :

(a) "an offence punishable under section 161, section 165 or section 165A of the Indian Penal Code (Act XLV of 1860) or sub-section (2) of section 5 of the Prevention of Corruption Act (II of 1947);

(b) any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in clause (a).....".

By section 7 exclusive jurisdiction was conferred on Special Judges. The effect of this enactment was the insertion in the Penal Code of an offence 165A and the creation of Special Judges to be appointed by the State. On August 12, 1952, the Central Legislature passed another Act, the Prevention of Corruption (Second Amendment) Act (59 of 1952), section 3 of which changes the rules of evidence in regard to presumption and onus by adding sub-section 2 to section 4 of the principal Act by which it was provided :

"Where in any trial of an offence punishable under section 165A of the Indian Penal Code (Act XLV of 1860) it is proved that any gratification (other than legal remuneration) or any valuable thing has been given or offered to be given or attempted to be given by an accused person, it shall be presumed unless the contrary is proved that he gave or offered to give or attempted to give that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 161 of the Indian Penal Code or, as the case may be, without consideration or for a consideration which he knows to be inadequate".

On July 30, 1952, an Act, to amend the West Bengal Act XXI of 1949, the West Bengal Criminal Law Amendment (Special Court Amending Act) (W.B. XII of 1952) received the assent of the President and came into force. Section 3 of this Act substituted a new section 2 in place of section 2

of the West Bengal Act. (W.B. XXI of 1949). This substituted section authorised the State Government to constitute Special Court and to appoint Special Judges to preside over such courts which had jurisdiction throughout West Bengal. By section 5, the following was substituted in place of section 4 of the West Bengal Act XXI of 1949 :

"(1) Notwithstanding anything contained in the code of Criminal Procedure, 1898 (Act V of 1898) or in any other law, the offences specified in the Schedule shall be triable by Special Courts only :

Provided that when trying any case, a Special Court may also try any offence other than an offence specified in the Schedule, with which the accused may under the Code of Criminal Procedure, 1898, be charged at the at the same trial.

(2) The distribution amongst Special Courts of cases involving offences specified in the Schedule, to be tried by them shall be made by the State Government".

The Schedule under the West Bengal Act (W.B. XXI of 1949) was also amended by the insertion of section 164 Indian Penal Code only. The West Bengal Act XXI of 1949 was further amended by the West Bengal Criminal Law Amendment (Special Courts) Amending Act, 1953 (Act XV of 1953). It received the assent of the President and came into force on May, 9, 1953. This Act added section 165A, Indian Penal Code in item No. 1 of the Schedule of the 1949 West Bengal Act.

The result of these various enactments, Central as well as state was the creation of Special Courts to try offences which were specified in the case of West Bengal (W.B. XXI of 1949) in the Schedule and in the case of Central Act in the body of the Act itself. The West Bengal Act (W.B. XXI of 1949) created Special Judges to try cases involving offences specified in the Schedule and allotted to them by the State Government alone. Under the Central Act (XLVI of 1952) also the State Government was authorised to appoint Special Judges and the offences specified in the Act were triable by such Judges as stated in section 7(2) of the Act. The procedure to be followed by the Special Judges was that prescribed for the trial of warrant cases. Therefore the jurisdiction of Special Judges appointed under this State enactment to try cases relating to offences specified in the Schedule arose only when they were allotted to them. By the West Bengal Amending Act of 1952 (W.B. XII of 1952) in place of "Special Judges" the words "Special Courts" were substituted and two conditions necessary for conferring jurisdiction on such Courts were : (1) cases to be tried related to offences specified in the Schedule and (2) the State Government had to make the distribution of such cases to the various Special Courts. Therefore no Special court had jurisdiction to try a case unless it was for offences specified in the schedule and the State Government distributed it to the Special Court.

The notification in the present case specified the name of the accused, the offence for which he was to be tried as one under section 161/116, Indian Penal Code, and the case was distributed to the Special Court, Burdwan for trial. On the date of the notification section 161 and abetment of section 161 were offences specified in the Schedule but as a result of the amendment by the Criminal Law Amendment Act 1952 (XLVI of 1952) section 165A had been inserted in the Code Providing for punishment for abetment of offences mentioned in sections 161 or 165. Section 165A created a distinct and separate offence and therefore abetment of an offence under section 161 was no longer an offence mentioned in sections 161/116 of the Code. Section 165A was not included in the Schedule to the West Bengal Act (W.B. XXI of 1949). Counsel for the State contended that this section although not specifically mentioned was all the time specified in and

must be deemed to have been specified in the Schedule to the West Bengal Act. (W.B. XXI of 1949) because item 8 specifically mentioned abetment of offences in items 1 to 7 and that section 165A only prescribes punishment for abetment of offences under sections 161 or 165 and cannot be called a new or a different offence. Section 165A is not merely a restatement of the offence of abetment under section 116 of the Code. It also comprises abetment under section 109 of the Code and provides an enhanced penalty of three years imprisonment instead of 1/4th of three years impossible under section 116. It further attracts the application of section 4(2) of the Prevention of Corruption Act (II of 1947) as subsequently amended. It cannot be said therefore that merely because the abetment of an offence under section 161 was specified in the Schedule of the West Bengal Act of 1949, section 165A which did not then exist in the Penal Code, must be deemed to have been specified therein. It is significant that the West Bengal Act, was further amended on May 9, 1953, by Act XV of 1953 in order to include section 165A in the Schedule.

It appears therefore that under the notifications the case distributed to the Special Court for the appellant's trial was for a non-existing offence because when the Special Judge took cognizance of the case there was no such offence as sections 161/116 of the Indian Penal Code. The notification did not mention section 165A of the Code and at the time when the Special Judge purported to take cognizance he had no jurisdiction to do so and to try the case as the offence under section 165A was not in the Schedule of the West Bengal Act, 1949, as amended in 1952.

The crucial date for the purpose of determining the jurisdiction of the Court would be the date when the Court received the record and took cognizance of the case and took any step in aid of the progress of the case and not when the evidence of the witnesses began to be recorded. Under section 4 of West Bengal Act (W.B. XXI of 1949) as amended by the Act of 1952 the jurisdiction of the Court arises when the notification is issued distributing the case to a particular Special Court giving the name of the accuse and mentioning the charge or charges against him which must be under one of the offences specified in the Schedule. In the absence of any of these elements the Special Court would have no jurisdiction.

The High Court held :

"that the offence under section 165A was always triable by a Special Judge only from 28th July, 1952, to 9th May, 1953, under section 7 of the Central Act and from 9th May, 1953, under the W.B. under the W.B. Act XV of 1953".

As already stated the case which was distributed to the Special Judge was one under section 161/116. Indian Penal code an offence not then existing in the Code and as section 165A was not in the Schedule as an offence triable by a Special Judge it could not be held that the Special Judge was trying the appellant for an offence under section 165A. There is nothing to indicate that the appellant was being tried upto May 9, 1953, under section 7 of the Central Act. No notification of the State Government appointing any Special Judge under section 6 of the Central Act (Act XLVI of 1952) was brought to our notice. It was on the other hand stated by counsel for the State that there was no such notification. Nor is there anything to show that the Special Judge of Burdwan was trying the appellant's case under section 7 of that Act. We are of the opinion that the trial was not under the Central Act, 1952. Nor could the trial be under the provisions of West Bengal Act XV of 1953 because no distribution of the appellant's case was made to the Special Judge by a notification mentioning the charge against him to be one under section 165A, Indian Penal Code. The High Court also said :

"It is true that if the offence under section 165A be regarded as a distinct offence, the Special Judge appointed under the W.B. Act had no jurisdiction in December 1952 to take cognizance of the offence and cognizance could be taken only by a Special Judge appointed under the provision of the Central Act. But since in such case the Special Judge must be deemed to have acted erroneously in good faith, the provisions of section 529(e) of the Criminal Procedure Code would apply and the proceedings would not be vitiated..... It is trial without jurisdiction that vitiates a proceeding (section 530 Cr.P.C.) and not taking of cognizance in good faith without jurisdiction."

But that with respect, is an erroneous application of section 529 of the Code of Criminal Procedure which provides :

"If any Magistrate not empowered by law to do any of the following things, namely :

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(e) to take cognizance of an offence under section 190, sub-section (1), clause (a) or clause (b);

erroneously in good faith does that thing, his proceedings shall not be set aside merely on ground of his not being so empowered."

This section applies to Magistrates and would not apply to a Special Judge whose jurisdiction arises not on his taking cognizance under section 190 of the Code of Criminal Procedure, but on the case for an offence specified in the Schedule being distributed to him by the State Government by notification. The defect of jurisdiction therefore cannot be cured by section 529(e) of the Code of Criminal Procedure. The Special Judge was consequently not a Court of competent jurisdiction and the proceedings before him were null and ineffectual.

We are of the opinion, therefore, that when the case was distributed to the Special Court which is the basis of the jurisdiction of that Court section 165A was not one of the offences specified in the Schedule and consequently the appellant could not be tried for and convicted of that offence. The conviction is therefore by a court which had no jurisdiction to try the case against the appellant and the whole proceedings in this case are null and void.

We would accordingly allow the appeal and set aside the conviction of the appellant under section 165A, I.P.C., and the sentence imposed thereunder.

Appeal allowed.

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