Birichh Bhuian and Others

Vs

State of Bihar

Criminal Appeal No. 224/60

(Syed Jafar Imam, K. Subha Rao, J. R. Mudholkar, N. Rajgopala Ayyangar JJ)

20.11.1962

JUDGMENT

SUBBA RAO, J. –

This appeal by Certificate raises the question of the scope of s. 537 of the Criminal Procedure Code.

The facts are not in dispute and may be briefly stated. On September 16, 1956, at about 3-55 P.M. the Sub Inspector of Police, attached to Chainpur outpost, found 10 to 15 persons gambling by the side of the road. He arrested five out of them and the rest had escaped. The Sub Inspector took the arrested persons to the out-post and as one of the arrested persons Jamal adopted a violent attitude, he ordered him to be handcuffed whereupon he began to abuse the Sub Inspector. It happened that a large number of Bhuians, male and female, were dancing close to the outpost. Some of them hearing the noise rushed with lathies to the out-post, assaulted the Sub-Inspector and two constables and looted the out-post. Three charge-sheets were filed in the court of the Sub-Divisional Officer in respect of the said incidents, first against the appellants Nos. 1 to 4 and others under ss. 147, 452 and 379 of the Indian Penal Code alleging that they raised the outpost, looted some properties and assaulted the informant and others; the second against the appellants 5 and 4 others under s. 224 of the Indian Penal Code and the third against appellant No. 5 and 4 others under s. 11 of the Bengal Public Gambling Act. The said Sub Divisional Officer took cognizance of the said cases and transferred them to the court of the Magistrate 1st Class, Daltonganj. On December 29, 1956, on a petition filed by the Prosecuting Inspector the said Magistrate held a joint trial. On July 22, 1957, he delivered a single judgment convicting appellants Nos. 1 to 4 under s. 147 of the India Penal Code and also under ss. 452 and 380/34 of the Indian Penal Code and sentencing them to undergo rigorous imprisonment for one year for the former offence. No sentence was imposed for the latter offences. The appellant No. 5, along with 4 others was convicted under s. 224 of the Indian Penal Code and sentenced to two years' rigorous imprisonment and was also convicted under s. 11 of the Bengal Public Gambling Act, and ss. 353 and 380/34 of the Indian Penal Code, but no separate sentence was awarded for the said offences, The appellant and others preferred an appeal against the said concessions and sentences to the court of the Additional Judicial Commissioner of Ranchi and he by his judgment dated July 10, 1958, convicted the appellants Nos. 1 to 4 under s. 147 of the Indian Penal Code and acquitted them in respect of other charges. The conviction of the appellant No. 5 under s. 224, Indian Penal Code, was maintained but the sentence was reduced to one year's rigorous imprisonment and a sentence of rigorous imprisonment for one month was imposed on appellants Nos. 4 and 5 and others under s. 11 of the Bengal Public Gambling Act. The learned Judicial Commissioner held that the offence under s. 11 of the Bengal Public Gambling Act was not committed in the course of the same transaction as the other offences were committed at the police-post and therefore there was a misjoinder of charges. Nonetheless he held that the said defect was

curable as no prejudice had been caused to the appellants. The appellants preferred a revision petition to the High Court of Judicature at Patna and the said High Court dismissed the same on the ground that by reason of s. 537(b) of the Criminal Procedure Code the conviction could not be set aside as the said misjoinder of charges did not occasion a failure of justice. The present appeal was filed against the said order on a certificate issued by the High Court.

The learned counsel for the appellants contended that s. 537(b) of the Criminal Procedure Code could only save irregularities in the matter of framing of charges but could not cure a joint trial of charges against one person or several persons, that was not sanctioned by the Code. Elaborating his argument the learned counsel contended that the expression 'mis-joinder of charges' in s. 537(b) of the Code must be confined only to mis-joinder of accusations - according to him charge in the Code means only an accusation - and therefore a joint trial of offences and persons outside the scope of ss. 233 to 239, of the Criminal Procedure Code, would not be misjoinder of charges within the meaning of said expression.

As the question raised turns upon the construction of the provisions of s. 537 of the Criminal Procedure Code, it would be convenient to read the material part of it at this stage :-

> "Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account............
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> (a) of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or
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> (b) of any error, omission or irregularity in the charge, including any misjoinder of charges, or
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> #(c) XX XX XX XX##
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> (d) of any misdirection in any charge to a jury unless such error, omission, irregularity, or mis-direction has in fact occasioned a failure of justice.
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> EXPLANATION :- In determining whether any error, omission or irregularity in any proceeding under this Code has occassioned failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.
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> Clause (b) was inserted by Act XXVI of 1955. The word 'charge' which occured after 'warrant' in clause (a) was omitted and the new clause which specifically relates to charge was added. Further the expression 'mis-joinder of charges' was included in the general terms 'error, omission or irregularity in the charge'. The object of the section is manifest from its provisions. As the object of all rules of procedure is to ensure a fair trial so that justice may be done, the section in terms says that any violation of the provisions to the extent narrated therein not resulting in a failure of justice does not render a trial void. The scope of clause (b) could be best understood, if a brief historical background necessitating the amendment was noticed. The Judicial Committee in Subrahmania Ayyar v. King Emperor ((1902) I.L.R. 25 Mad. 61 L.R. 28 I.A. 257.) held that the disregard of an express provision of law as to the mode of

trial was not a mere irregularity such as could be remedied by s. 537 of the Criminal Procedure Code. There the trial was held in contravention of the provisions of ss. 233 and 234 of the Code of Criminal Procedure which provide that every separate offence shall be charged and tried separately except that the three offences of the same kind may be tried together in one charge if committed within a period of one year. It was held that the mis-joinder of charges was not an irregularity but an illegality and therefore the trial having been conducted in a manner prohibited by law was held to the altogether illegal. The Judicial Committee in Abdul Rehman v. The King Emperor ((1927) I.L.R. 5 Rangood 53; L.R. 54 I.A. 96.) considered that a violation of the provisions of s. 360 of the Code which provides that the depositions should be read over to the witnesses before they sign, was only an irregularity curable under s. 537 of the Code. Adverting to Subrahmania Ayyar's case it pointed out that the procedure adopted in that case was one which the Code positively prohibited and it was possible that in might have worked actual injustice to the accused. The question again came before the Privy Council in Babu Lal Choukhani v. Emperor ((1938) I.L.R. 2 Cal. 295.). One of the points there was whether the trial was held in infringement of s. 239(d) of the Criminal Procedure Code. The Board held that it was not. Then the question was posed that if there was a contravention of the said section, whether the case would be governed by Subrahmania Ayyar's case or Abdul Rehman's case. The Board did not think it was necessary to discuss the precise scope of what was decided in Subrahmania Ayyar's case because in their understanding of s. 239(d) of the Code that question did not arise in that case. The point was again mooted by the Board in Pulukuri Kotayya v. King Emperor (I.L.R. 1948 Mad. 1.). In that case there had been a breach of the proviso to s. 162 of the Code. It was held that in the circumstances of the case the said breach did not prejudice the accused and therefore the trial was saved by s. 537 thereof. Sir Join Beaumont speaking for the Board observed at p. 12 "When a trial is conducted in a manner different from that prescribed by the Code, as in Subrahmania Ayyar v. King Emperor (I.L.R. (1902) 26 Mad. 1.), the trial is bad, and no question of curing an irregularity arises, but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under s. 537, and no the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of the degree rather than of kind". It will be seen from the said observations that the Judicial Committee left to the courts to ascertain in each case whether an infringement of a provision of Code is an illegality or an irregularity. There was a marked cleavage of opinion in India whether the later decisions of the Privy Council modified the rigor of the rule laid down in Subrahmania Ayyar's case and a view was expressed in several decisions that a mere mis-joinder of charges did not necessarily vitiate the trial unless there was a failure of justice, while other decisions took a contrary view. This court in Janardan Reddy v. The State of Hyderabad ([1951] S.C.R. 344.) left open the question for future decision. In this state of law, the Parliament has intervened to set at rest the conflict by passing Act XXVI of 1955 making a separate provision in respect of errors, omissions or irregularities in a charge and also enlarging the meaning of the expression such errors etc. so as to include a misjoinder of charges. After the amendment there is no scope for contending that mis-joinder of charges is not saved

by s. 537 of the Criminal Procedure Code if it has not occassioned a failure of justice.

The next question is what is the meaning of the word 'charges' in the expression 'mis-joinder of charges'. The word 'charge', the learned counsel of the appellants contends means only an accusation of a crime or an information given by the Court of an allegation made against the accused. Does the section only save irregularities in the matter of mis-joinder of such accusations ? Does it only save the irregularities committed in mixing up accessions in respect of offences or persons the joinder whereof has been permitted by the provisions of the Criminal Procedure Code ? The mis-joinder cured by the section, it is said, is illustrated by the decision in Kadiri Kunhahammad v. The State of Madras (A.I.R. 1960 S.C. 661.). There in a case of conspiracy of commit a breach of trust a separate charge was framed in contravention of the proviso to s. 222 of the Criminal Procedure Code i.e. in regard to an amount misappropriated during the period exceeding one year. This Court held that as acts of misappropriation committeed during the curse of the same transaction could be tried together in one trial, the contravention of s. 222 was only an irregularity, for that act of misappropriation could have been split up into two parts, each of them covering a period less than one year and made subject of a separate charge. In that view it was held that s. 537 saved the trial, as there was no failure of justice. There a joint trial was permitted by the relevant provisions of the Code, but the defect was only in having one charge instead of two charges. The question is whether the expression should be given only the limited meaning as contended above. The word 'charge' is defined in s. 4(c). It says that the charge includes any head of a charge where charge contained more heads than one. This definition does not throw any light, but it may be noted that that is only an inclusive one. Chapter XIX provides for the form of charges and for joinder of charges. Section 221 to 232 give the particulars that a charge shall contain and the manner of rectifying defects if found therein. Section 221 says that in every charge the court shall state the offence with which the accused is charged. Section 222 provides that the charge shall contain such particulars as to the time and place of the alleged offence and the person against whom or the thing in respect of which it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged. Section 233 repeats that a charge shall also contain such particulars mentioned in ss. 221 and 222. The form of a charge prescribed in Schedule 5 shows that it contains an accusation that a person committed a particular offence. It is, therefore, clear that a charge is not an accusation made or information given in abstract but an accusation made against a person in respect of an act committed or omitted in violation of a penal law forbiding or commanding it. In other words it is an accusation made against a person in respect of an offence alleged to have been committed by him. If so, section 234 to 239 deal with joinder of such charges. Section 233 says that for every distinct offence of which any person is accused, there shall be a separate charge and every such charge shall be tried separately, except in cases maintained in ss. 234, 235, 236 and 239. Sections 234 to 236 permit joinder of charges and trial of different offences against a single accused in the circumstances mentioned in those sections and s. 239 provides for the joinder of charges and the trial of several persons. The scheme of the said sections also indicates that a charge is not a mere abstraction but a concrete accusation against a person in respect to an offence and that their joinder is permitted under certain circumstances whether the joinder of charges is against one person or different persons. If the joinder of such charges is made in contravention of the said provisions, it will be misjoinder of charges. As we have noted already, before sub-section (b) was added to s. 537 of the Criminal Procedure Code there was a conflict of view on the question whether such a misjoinder was only an irregularity which could be cured under that section, or an illegality which made it void. The amendment steered clear of that conflict and expressly included the misjoinder of charges in the errors and irregularities which could be cured thereunder. To summarise : a charge is a precise

formulation of a specific accusation made against person of an offence alleged to have been committed by him. Sections 234 to 239 permit the joinder of such charges under specified conditions for the purpose of a single trial. Such a joinder may be of charges in respect of different offences committed by a single person or several persons. If the joinder of charges was contrary to the provisions of the Code it would be a mis-joinder of charges. Section 537 prohibits the revisional or the appellate court from setting aside a finding, sentence or order passed by a court of competent jurisdiction on the ground of such a misjoinder unless it has occasioned a failure of justice. In this case there was a clear misjoinder of charges against several persons. But the High Court held that there was no failure of justice and the appellants held their full say in the matter and they were not prejudiced in any way. We, therefore, hold that the High Court was right in not setting aside the convictions of the accused and the sentence passed against them.

In the result the appeal fails and is dismissed.

Appeal dismissed.

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