Sunil Kumar Paul

Vs

State of West Bengal

Criminal Appeal No. 156 of 1961

(K. Subha Rao, K. C. Das Gupta, Raghuvar Dayal JJ)

06.03.1964

JUDGMENT

RAGHUBAR DAYAL, J. –

Sunil Kumar Paul has preferred this appeal, after obtaining a certificate from the Calcutta High Court under Art. 134(1)(c) of the Constitution. The facts leading to the appeal are these.

The appellant was a clerk in the office of the Sub-Divisional Health Officer at Barrackpore in 1955-56. He used to prepare bills of the establishment, to present them at the Sub-treasury and later present them at the State Bank at Barrackpore, to receive payment in cash and to make over that amount to the Sub-Divisional Health Officer. Certain bills were drawn under the heading '38 - Medical'. Certain bills were to be drawn under the heading '39 - Public Health'. Some other bills were drawn under other headings.

On October 5, 1956, the appellant presented a bill for Rs. 1,769 out of which a sum of Rs. 5-10-0 was to be credited in the Postal Life Insurance Ledger and the balance of Rs. 1,763-6-0 was to be received in cash. This bill was duly passed by the Sub-Treasury and was subsequently presented to the Bank on October, 6, 1956 for payment of Rs. 1,763-6-0. The Bank paid this amount to the appellant. The amount was not paid to the Sub-Divisional Health Officer. In fact, the records of the Office of the Sub-Divisional Health Officer did not refer to any such bill being prepared and submitted to the Sub-Treasury and the Bank for payment.

A bill for practically the same items which were mentioned in the bill cashed on October 6, was however presented on October 1, 1956. It was for an amount of Rs. 1,767 out of which Rs. 5-10-0 were to be credited to the PLI account ledger and the balance of Rs. 1,761-6-0 were to be paid in cash. The amount of this bill was received on October 1, and was duly handed over to the Sub-Divisional Health Officer. It may be mentioned that this bill cashed on October 1, 1956 was at first prepared for Rs. 1,769 and the amount to be received in cash was to be Rs. 1,763-6-0 but prior to this encashment, a correction was made at some stage, and the bill was reduced by Rs. 2 in the total amount and consequently in the amount to be paid in cash.

The fact of the presentation of a bill for its encashment of Rs. 1,763-6-0 on October 6, 1956 came to the notice of the Sub-Divisional Health Officer at the instance of the Accountant General and on enquiry it was found that no such bill had been actually presented by his office for encashment and that no such amount was received by him. This led to a complaint and further enquiries and investigation which ended in prosecution of the appellant.

The case was made over to the Special Judge by the Government in view of the provisions of the West Bengal Criminal Law Amendment (Special Courts) Act, 1949 (W.B. Act XXI of 1949), hereinafter called the Act, as it involved an offence punishable under s. 409 I.P.C. The Special Judge tried the appellant for that offence and convicted him and sentenced him to rigorous imprisonment for two years and to pay a fine of Rs. 2,000. The appellant went in appeal to the High Court of Calcutta. The High Court agreed with the appellant's contention that no offence under s. 409 I.P.C. had been made out, but held that he was proved to have committed an offence under s. 420 I.P.C. It accordingly altered his conviction from an offence under s. 409 I.P.C. to one under s. 420 I.P.C., for cheating the employees of the State Bank, Barrackpore, by representing that the bill for Rs. 1,769 gross and Rs. 1,763-6-0 cash drawn on October 6, 1956, was a genuine bill drawn by the Sub-Divisional Health Officer, and thereby dishonestly inducing the Bank's staff to make over the sum of Rs. 1,763-6-0 to him and sentenced him to rigorous imprisonment for one year and to a fine of Rs. 2,000. It is against this order that this appeal has been preferred.

The facts found by the High Court are sufficient to justify the finding that the appellant committed the offence under s. 420 I.P.C. Learned counsel for the appellant has urged the following points :

> (1) A case involving an offence under s. 420 I.P.C. cannot be allotted for trial to a Special Court by the State Government when such an offence is not committed by a public servant while purporting to act as such public servant.
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> (2) The Special Court could not take recourse to the provisions of s. 237 Cr.P.C., and if it could, the requirements of s. 237 Cr.P.C. were not satisfied in the present case, and that consequently the High Court could not have altered the conviction of the appellant from an offence under s. 409 I.P.C. to one under s. 420.
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> (3) The ingredients of an offence under s. 420 I.P.C. were neither alleged nor proved by the prosecution.
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> (4) The accused has been prejudiced on account of the absence of the necessary allegations and the omission to frame a charge for an offence under s. 420 I.P.C. and therefore the provisions of s. 537 Cr.P.C. would not cure this defect in trial.

To appreciate the first contention, reference may be made to the relevant provisions of the Act. They are :

> "4(1) Notwithstanding anything contained in the Code of Criminal Procedure, 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 same trial.

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> (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.
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(2) Save as provided in sub-section (1).....the provisions of the Code of Criminal Procedure, 1898, shall, so far as they are not inconsistent with this Act, apply to the proceedings of a Special Court; and for the purposes of the said provisions, a Special Court shall be deemed to be a Court of Session trying cases without a Jury, and a person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor."

THE SCHEDULE

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2. An offence punishable under section 409 of the Indian Penal Code, if committed by a public servant or by a person dealing with property belonging to Government as an agent of Government in respect of property -

with which he is entrusted, or over which he had dominion in his capacity of a public servant or in the way of his business as such agent.

3. An offence punishable under section 417 or section 420 of the Indian Penal Code, if committed by a public servant or by a person dealing with property belonging to Government as an agent of Government, while purporting to act as such public servant or agent.

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The Government notification allotting the present case to the Special Court is not on the record and therefore what its actual contents were cannot be stated with any precision. It may however be assumed that it mentioned the offence involved in the case to be that under s. 409 I.P.C., and, possibly, did not state the various facts which went to establish that offence against the appellant.

Section 409 I.P.C. is mentioned in the Schedule referred to in sub-s. (2) of s. 4 of the Act. The State Government was therefore competent to allot the case involving that offence to the Special Court. In fact it had to allot the case to the Special Court in view of the provision of sub-s. (1) of s. 4 to the effect that the offences specified in the Schedule shall be triable by Special Courts only. The question therefore really is whether the Special Court could try the appellant for the offence under s. 420 I.P.C. An offence under s. 420 I.P.C. when committed in certain circumstances is also mentioned in the Schedule. It has to be tried by Special Courts only when it is committed by a public servant while purporting to act as such. There is no doubt that the appellant is a public servant. This has not been disputed.

Learned counsel for the appellant, Mr. Mukherjee, has urged that the expression 'while purporting to act as such public servant' be construed to mean 'while purporting to act in the discharge of official duties' and that presentation of a false bill could not be in the discharge of official duty. Such presentation may not be in the discharge of official duty, but the question is different and is as to whether the presentation of a false bill was made by the public servant purporting to do so in the discharge of his duties. The appellant did present the false bill purporting to present it in the discharge of his duties as a clerk of the Office of the Sub-Divisional Health Officer who was duly authorised to present bills and cash them.

Reliance is placed on the case reported as Bhajahari Mondal v. The State or West Bengal [[1959] S.C.R. 1276] in support of the Contention that the appellant should not have been tried by the

Special Court of the Offence under s. 420 I.P.C. when the case was allotted as one involving an offence under s. 409 I.P.C. The facts of that case were very different. The order allotting the case mentioned the offence of which the accused was to be tried to be an offence under s. 161 read with s. 116 I.P.C. The order was made on November 27, 1952. Prior to this date, on July 28, 1952, abetment of an offence under s. 161 I.P.C. was made a distinct offence under s. 165-A I.P.C. by the Criminal Law Amendment Act XLVI of 1952. And offence under s. 165A was not mentioned in the Schedule to the Act as it stood on November 27, 1952. This Court held that the notification of the Government making over the case to the Special Court was bad as the case made over related to no existing offence. Such cannot be said of the Government notification allotting the case in the present appeal to the Special Court, as on the date of such notification there existed an offence under s. 409 I.P.C. and it was included in the Schedule to the Act.

On the facts proved, it is not to be doubted that the appellant presented the bill for Rs. 1,763-6-0 at the State Bank on October 6, purporting to act as the clerk of the Sub-Divisional Health Officer. The bill presented was on behalf of that officer. The Bank made the payment to him as the messenger of that officer duly authorised to receive payment in cash. It follows that the offence under s. 420 committed by the appellant would be committed by him as a public servant purporting to act as such, and that a case involving this offence also could have been allotted to the Special Court by the State Government for trial. The Special Court was therefore competent to try the accused for this offence if the facts proved established it.

Apart from the consideration that the offence of cheating of which the appellant-accused has been convicted fell within the offences mentioned in the Schedule, the appellant could be tried by the Special Court for this offence in view of the proviso to s. 4. The proviso authorizes the Special Court, when trying a case involving an offence specified in the Schedule to try any offence other than that offence with which the accused may be charged at the same trial in accordance with the provisions of the Code of Criminal Procedure. The accused could be charged with an offence under s. 420 I.P.C. if he could be tried for this offence at the trial for an offence under s. 409 I.P.C. He could be so tried in view of ss. 236 and 237 Cr.P.C.

It is urged for the appellant that the provisions of s. 236 Cr.P.C. would apply only to those cases where there be no doubt about the facts which can be proved and a doubt arises as to which of the several offences had been committed on the proved facts. Sections 236 and 237 read :

> "236. If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.
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> Illustrations
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> (a) A is accused of an act which may amount to theft, or receiving stolen property, or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft, or receiving stolen property, or criminal breach of trust or cheating.
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237. If, in the case mentioned in section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

Illustration

A is charged with theft. It appears that he committed the offence of criminal breach of trust, or that of receiving stolen goods. He may be convicted of criminal breach of trust or of receiving stolen goods (as the case may be) though he was not charged with such offence."

The framing of a charge under s. 236 is, in the nature of things, earlier than the stage when it can be said what facts have been proved, a stage which is reached when the court delivers its judgment. The power of the Court to frame various charges contemplated by s. 236 Cr.P.C. therefore arises when it cannot be said with any definiteness, either by the prosecutor or by the Court, that such and such facts would be proved. The Court has at the time of framing the charges, therefore to consider what different offences could be made out on the basis of the allegations made by the prosecution in the complaint or in the charge submitted by the investigating agency or by the allegations made by the various prosecution witnesses examined prior to the framing of the charge. All such possible offences could be charged in view of the provisions of s. 236 Cr.P.C. as it can be reasonably said that it was doubtful as to which of the offences the facts which could be ultimately proved would constitute. The facts which must have been alleged prior to the stage of the framing of the charge in the present case must have been what had been stated in the charge-sheet submitted by the Investigating Officer, 24-Parganas, which is printed at p. 3 of the appeal record. This charge-sheet narrates in the column meant for the name of offences and circumstances connected with it :

> "that on the 6th October 1956 Sunil Kumar Paul, a Public servant in the employment of the office the Sub-Divisional Health Officer, Barrackpore i.e., (clerk) dishonestly drew Rs. 1,763-6-0 excluding Postal Life Insurance deduction of Rs. 5-10-0 from the State Bank of India, Barrackpore Branch by submitting a false duplicate Estt. Pay Bill under head 39 for the month of September 1956 for the office of the said S.D.H.O., Barrackpore. The money drawn was not credited to the office of the Sub-Divisional Health Officer, Barrackpore."

It is practically on these facts that the conviction of the appellant for an offence under s. 420 I.P.C. has been founded. It follows that the Special Court could therefore have framed a charge under s. 420 I.P.C. at the relevant time if it had been of the opinion that it was doubtful whether these facts constitute an offence under s. 409 I.P.C. as stated in the charge-sheet or an offence under s. 420 I.P.C.

When a charge under s. 420 I.P.C. could have been framed by the trial Court by virtue of s. 236 Cr.P.C. that Court or the appellate Court can, in law, convict the appellant of this offence instead of an offence under s. 409 I.P.C. if it be of the view that the offence of cheating had been established. This would be in accordance with the provisions of s. 237 Cr.P.C.

In Begu v. The King Emperor [52 I.A. 191] ss. 236 and 237 were construed by Viscount Haldane thus :

> "The illustration makes the meaning of these words quite plain. A man may be

> convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made. That is what happened here. The three men who were sentenced to rigorous imprisonment were convicted of making away with the evidence of the crime by assisting in taking away the body. They were not charged with that formally, but they were tried on evidence which brings the case under s. 237."

This was approved by this Court in Ramaswamy Nadar v. The State of Madras [[1958] S.C.R. 739]. In this case, the accused, acquitted of an offence under s. 420 I.P.C. was convicted by the High Court of an offence under s. 403 I.P.C. This Court held that the High Court could do so. On facts, however, this Court did not find the offence under s. 403, proved.

In the State of Andhra Pradesh v. Kandimalla Subbaiah [[1962] 1 S.C.R. 194, 203] it was held that while a Special Judge appointed under s. 6 of the Criminal Law Amendment Act (XLVI of 1952) had jurisdiction to try cases under s. 5 of the Prevention of Corruption Act, he could, under s. 7(3) of the Criminal Law Amendment Act try other offences under the Code of Criminal Procedure if the accused could be charged with them at the same trial and that therefore the accused could be tried at the trial for an offence under s. 5 of the Prevention of Corruption Act for an offence under s. 120B read with ss. 466, 467, 420 I.P.C. and that the other accused who had abetted the commission of these offences could also be tried. Sub-s. (3) of s. 7 of the Criminal Law Amendment Act provided that when trying any case a Special Judge might also try any offence other than an offence specified in s. 6 with which the accused might, under the Code of Criminal procedure, 1898, be charged at the same trial.

In support of his contentions, learned counsel for the appellant referred to the case reported as Nanak Chand v. The State of Punjab [[1955] 1 S.C.R. 1201] wherein it was stated at p. 1212 :

> "The provisions of section 236 can apply only in cases where there is no doubt about the facts which can be proved but a doubt arises as to which of several offences have been committed on the proved facts in which case any number of charges can be framed and tried or alternative charges can be framed..... In the present case there is no doubt about the facts and if the allegation against the appellant the he had caused the injuries to the deceased with takwa was established by evidence, then there could be no doubt that the offence of murder had been committed."

This does not help the appellant's contention as the allegations in that case if proved could establish, according to the Court, the offence of murder only and therefore there was no room for any doubt about the nature of offence committed and for the application of s. 236 Cr.P.C. In that case, the appellant was tried along with others for an offence under s. 302 read with s. 149 I.P.C. The Sessions Judge convicted the appellant and a few others under s. 302 read with s. 34 I.P.C. The High Court acquitted the others and altered the conviction of the appellant to the offence under s. 302 I.P.C. It was, in this setting, that this Court held that on the basis of the specific allegation that the appellant had struck the deceased with a takwa, there could be no doubt of that fact constituting an offence under s. 302 and not an offence under s. 302 read with s. 149 I.P.C.

We therefore hold that at the trial of the appellant for an offence under s. 409 I.P.C., in this case, the appellant could have also been charged for an offence under s. 420 I.P.C. in view of s. 236 of the Code of Criminal Procedure.

It is then urged for the appellant that under the proviso to s. 4 of the Act, the Special Court can try any other offence only when the accused is specifically charge with that offence. The language of the proviso does not lead to such a conclusion. It provides for the trial of the accused for any other offence provided the accused could be charged with that offence at the same trial under the provisions of the Code of Criminal Procedure. The proviso does not say that the charge must be framed, though of course, if the trial Court itself tries the accused for a certain offence, it will ordinarily frame a charge. The proviso empowers a Court to try the accused for that offence and has nothing to do with the power of the trial court or of the appellate Court to record a conviction for any other offence when an accused is being tried with respect to an offence mentioned in the Schedule. The Court's power to take recourse to the provisions which empower it to record a conviction for an offence not actuality charged, depends on other provisions of the Code and the Act.

Section 5(2) of the Act provides that the provisions of the Code of Criminal Procedure so far as they are not inconsistent with the Act, would apply to the proceedings of the Special Court and for the purposes of these provisions, the Special Court could be deemed to be a Court of Sessions. There is nothing in the provisions of s. 237 of the Code of Criminal Procedure which is inconsistent with the provisions of the Act. Section 237 simply empowers the Court to convict an accused of the offence with which he could have been charged under s. 236, even when he had not been charged with it. Section 237 really deals with the final orders which the Court can pass on a trial of an accused for a certain offence. In view of the proviso to sub-s. (1) of s. 4, the Special Court could have tried the appellant for the offence under s. 420 I.P.C. It did not actually try him for that offence. It was however open to it and to the appellate Court to convict him of the offence under s. 420 I.P.C. when trying for an offence under s. 409 I.P.C. in view of s. 237 of the Code.

It has also been urged for the appellant that the proviso to s. 4 does not give any power to the special Court to try an offence which be independent of the offence mentioned in the allotment order. That is to say, the Special Court, in this case, could have tried the appellant only for such offences which will be in some way related to the offence under s. 409 I.P.C. It is further urged that the ingredients of the offence under s. 420 I.P.C. are absolutely different from the ingredients of the offence under s. 409 I.P.C.

The ingredients of two offences must be different from one another and it is therefore not necessary to consider whether the ingredients of the two offences are in any way related. The Court has to see, for the purpose of the proviso, whether the accused could be charged with any offence other than the one referred to in the allotment order, in view of the provisions of the Code. There is nothing in the proviso which could lead to the construction that any limitations other than those laid down by the provisions of the Code of Criminal Procedure were to affect the nature of the offence which could be tried by the Special Court.

We are therefore of opinion that the Special Court could try the appellant for the offence under s. 420 I.P.C. and that therefore the High Court was right in altering his conviction from that under s. 409 to s. 420 I.P.C.

We have already referred to the statement in the charge-sheet that the appellant presented a false bill to the State Bank and cashed it. This allegation is sufficient for the purpose of the offence under s. 420 I.P.C. It was not necessary to allege or to prove that the appellant himself had prepared the false bill. Such an allegation could not be made in the present case in particular, as the bill which was cashed on October 6, could not be traced. The presentation of the bill for encashment carries with it

the representation that it is a genuine bill and therefore the allegations in the case attributed misrepresentation to the appellant at the time be presented the bill.

It may be mentioned here that if the bill had been a genuine bill, the offence made out in the present case would have been an offence under s. 409 I.P.C. In the circumstances, therefore, the appellant cannot be said to be prejudiced in his conviction under s. 420 I.P.C. on account of the non-framing of the charge, and consequent non-trial, under s. 420 I.P.C. In fact, in the circumstances of the case, no question of irregularity in the trial arises. The framing of the charge under s. 420 I.P.C. was not essential and s. 237 Cr.P.C. itself justifies his conviction of the offence under s. 420 if that be proved on the findings on the record.

The last contention for the appellant was that the sentence is severe. We do not consider a sentence of 1 year's rigorous imprisonment and a fine of Rs. 2,000 severe.

The appeal therefore fails and is dismissed.

Appeal dismissed.

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