Mohammad Safi

Vs

The State of West Bengal

Criminal Appeal No. 18 of 1963

(J. R. Madholkar, A. K. Sarkar, R. S. Bachawat JJ)

25.03.1965

JUDGMENT

MUDHOLKAR, J.

The only point which has been urged in this appeal by certificate from a judgment of the High Court at Calcutta is whether the trial and conviction of the appellant for an offence under s. 409, Indian Penal Code were barred by the provisions of s. 403 of the Code of Criminal Procedure (hereinafter referred to as the Code).

The facts which are not in dispute are these :

> The appellant was tried for an offence under s. 409, I.P.C. by Mr. T. Bhattacharjee, Judge, Birbhum Special Court and sentenced to undergo rigorous imprisonment for four years. His conviction was maintained in appeal by the High Court but the sentence was reduced to rigorous imprisonment for two years. One of the point urged before the High Court was that upon the same facts and with respect to the same offence the appellant was tried earlier by Mr. N. C. Ganguly, Judge, Birbhum Special Court and acquitted thereof. He could, therefore, not have been tried over again in respect of that offence and consequently his conviction and sentence are illegal.

What actually happened was this. The appellant who was a shed clerk at Sainthia Railway Station is alleged to have committed criminal breach of trust with respect to 8 bags of suji which had been booked by rail at Murarai by one Bhikam Chand Pipria, the consignee being the firm of Lalchand Phusraj of Sainthia. He was alleged to have done this in conspiracy with Ibrahim and Nepal Chandra Das. We are not concerned with these two persons and so we can leave them out of account. The offence was investigated into and a charge sheet was submitted against the appellant under s. 409, I.P.C. and two other persons by the Officer-in-charge, Government Railway Police, Asansol. Apparently he filed the charge sheet himself in the court of Judge, Birbhum Special Court. However, as set out in the order of Mr. Ganguly acquitting the appellant the case was distributed to the Birbhum Special Court for trial by notification No. 4515-J dated May 8, 1959 (Law Judicial Department), Government of West Bengal. The prosecution examined 21 witnesses before him and on August 28, 1959 he framed a charge against the appellant under s. 409, I.P.C. The prosecution witnesses were cross-examined on behalf of the appellant and the court examined him under s. 342 of the Code. At the time of the hearing of arguments the Public Prosecutor placed before him a typed copy of a judgment of the High Court in Criminal Appeal No. 377 of 1958 in which it was held that a Special Court cannot, in view of the amendment of s. 5(1) of the West Bengal Criminal Law Amendment (Special Courts) Act, 1949 by Act 27 of 1956 take cognizance upon a charge sheet

because it is neither entitled to follow the procedure for trial under s. 251-A nor can it take cognizance under s. 190(1)(c) unless in the latter case the provisions of s. 191 of the Code were complied with. The attention of the learned Judge was also drawn to A. P. Misra v. The State [[1958] Cr. L.J. 1386] where it was held that where a magistrate could not legally take cognizance of an offence on the basis of a charge sheet the entire proceedings before him are without jurisdiction. In view of these decisions the learned Judge made an order of which the relevant portion runs thus :

> "So the proceeding is without jurisdiction. As the unreported decision of their Lordships was not available at the time of framing of charge, charge was framed against the accused person and the case continued as usual. As the unreported decision of their Lordships has come to the notice of this Court, the accused persons against whom charge was framed should be acquitted. As the accused persons are acquitted because the entire proceeding is without jurisdiction I am of opinion that it is necessary (sic) to discuss the evidence on record and decide the merits of the case."

Thereafter a formal complaint was preferred by the Public Prosecutor on May 16, 1960 and Mr. Bhattacharjee who had succeeded Mr. Ganguly as Judge of the Special Court, Birbhum took cognizance of the offence and commenced a fresh proceeding against all the accused persons, including the appellant. He framed a charge under s. 409, I.P.C. against the appellant and eventually convicted and sentenced him with respect to it, as already stated, and the appeal from the conviction was dismissed by the High Court.

In order to appreciate the argument advanced before us by Mr. D. N. Mukherjee on behalf of the appellant it is necessary to set out the provision of sub-s. (1) of s. 403 of the Code. They are as follows;

> "A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236 or for which he might have been convicted under section 237."

These provisions are based upon the general principle of auterfois acquit recognised by the English courts. The principle on which the right to plead auterfois acquit depends is that a man may not be put twice in jeopardy for the same offence. This principle has now been incorporated in Art. 20 of the Constitution. The defence of auterfois acquit, however, has no application where the accused person was not liable lawfully to be convicted at the first trial because the court lacked jurisdiction. This is what has been pointed out by the Court of Criminal Appeal in Thomas Ewart Flower v. R. [40 Cr. App. R. 189]. From the language used in s. 403(1) of the Code it is clear that what can be successfully pleaded as a bar to a subsequent trial for the same offence or for an offence based on the same facts is that the accused had been (a) tried by a court, (b) of competent jurisdiction and (c) acquitted of the offence alleged to have been committed by him or an offence with which he might have been charged under s. 236 or for which he might have been convicted under s. 237, of the Code. Mr. Mukherjee, however, says that in so far as competency of the court is concerned it was there because the offence in question was cognizable by a Special Court and Mr. Ganguly made the order of acquittal as Judge of the Special Court. The competence of a court, however, depends not merely on the circumstance that under some law it is entitled to try a case falling in the particular

category in which the offence alleged against the accused falls. In addition to this taking cognizance of the offence is also material in this regard. Under the Code of Criminal Procedure a court can take cognizance of an offence only if the conditions requisite for initiation of proceedings before it as set out in Part B of Chapter XV are fulfilled. If they are not fulfilled the court does not obtain jurisdiction to try the offence. In the case before us Mr. Ganguly took the view, though erroneously, that as one of the conditions requisite for taking cognizance of the offence was not satisfied he had no jurisdiction over the matter. Having come to that conclusion he had no option but to put a stop to those proceedings. It appears, however, that he felt that having already framed a charge the only manner in which he could put an end to the proceedings was by making an order of acquittal. It requires, however, no argument to say that only a court which is competent to initiate proceedings or to carry them on can properly make an order of acquittal, at any rate, an order of acquittal which will have the effect of barring a subsequent trial upon the same facts and for the same offence. Mr. Mukherjee, however, raises two contentions on this aspect of the matter. In the first place, according to him, the view taken by Mr. Ganguly that he could not have taken cognizance of the offence was erroneous as has been pointed out by this Court in Ajit Kumar Palit v. State of West Bengal [[1963] 1 Supp. S.C.R. 953] and, therefore, he could legally acquit the appellant. He further says that since Mr. Ganguly had not only framed a charge against the appellant but also examined all the witnesses both for the prosecution and for the defence and recorded the examination of the appellant he had completed the trial. In the second place, he says, that where a charge has been framed against an accused person in a warrant case the proceedings before the court can end either in acquittal or in conviction and in no other way. He points out that under s. 494 of the Code the Public Prosecutor may with the consent of the court withdraw before a certain stage is reached, the prosecution of any person and that the only order which the court is competent to make is to acquit the accused if the withdrawal is made after a charge has been framed.

It is true that Mr. Ganguly could properly take cognizance of the offence and, therefore, the proceedings before him were in fact not vitiated by reason of lack of jurisdiction. But we cannot close our eyes to the fact that Mr. Ganguly was himself of the opinion - and indeed he had no option in the matter because he was bound by the decisions of the High Court - that he could not take cognizance of the offence and consequently was incompetent to try the appellant. Where a court comes to such a conclusion, albeit erroneously, it is difficult to appreciate how that court can absolve the person arraigned before it completely of the offence alleged against him. Where a person has done something which is made punishable by law he is liable to face a trial and this liability cannot come to an end merely because the court before which he was placed for trial forms an opinion that it has no jurisdiction to try him or that it has no jurisdiction to take cognizance of the offence alleged against him. Where, therefore, a court says, though erroneously, that it was not competent to take cognizance of the offence it has no power to acquit that person of the offence. An order of acquittal made by it is in fact a nullity. In this connection we might profitably refer to the decision in Yusofally Mulla Noorbhoy v. The King [L.R. 76 I.A. 158]. That was a case where there was no valid sanction as required by cl. 14 of the Hoarding and Profiteering Prevention Ordinance, 1943 for the prosecution of the appellant therein on separate charges of hoarding and profiteering. The sanction for the prosecution had been granted by the Controller General of Civil Supplies who was authorised to give such sanction by virtue of a notification of the Government of India duly published. Charges were framed by the Magistrate and thereafter further evidence was called for by the prosecution and some of the witnesses were recalled for cross-examination. On the date of hearing, however, counsel for prosecution made a statement to the following effect :

> "In view of the High Court decision in Revisional Application No. 191 of 1945, as this court is not competent to try this offence, he does not wish to tender the

> witnesses already examined for further cross-examination nor to lead any further evidence."

Thereupon the Magistrate recorded an order in the following terms :

> "Mr. Mullick's evidence is deleted. Accused acquitted for reasons to be recorded separately."

After referring to the statement of counsel for the prosecution and the order made on it the Magistrate continued :

> "On a perusal of the said decision, however, I find that the filing of this charge sheet by the prosecution itself is invalid in law, because the sanction is signed by the Controller-General under a Notification of the Government of India, and the said Notification does not state that the various officers therein mentioned are not below the rank of a District Magistrate. Thus it is the incompetence of the prosecution to proceed against the accused without sanction as provided for in law. As, however, the invalidity of the sanction invalidates the prosecution in court, the accused was acquitted."

The Government filed an appeal against the order of acquittal. The High Court allowed it and set aside the orders of the Magistrate acquitting the appellant and directed that the case should be tried by another Magistrate having jurisdiction to try it and dealt with according to law. Against the decision of the High Court the appellant took an appeal to the Privy Council. The Privy Council accepted the view of the Federal Court in Basdeo Agarwalla v. King Emperor [[1945] F.C.R. 93] that the prosecution launched without valid sanction is invalid and held that under the common law a plea of auterfois acquit or convict can only be raised where the first trial was before a court competent to pass a valid order of acquittal or conviction. Unless the earlier trail was a lawful one which might have resulted in a conviction, the accused was never in jeopardy. The principle upon which the decision of the Privy Council is based must apply equally to a case like the present in which the court which made the order of acquittal was itself of the opinion that it had no jurisdiction to proceed with the case and therefore the accused was not in jeopardy.

As regards the second contention of Mr. Mukherjee it is necessary to point out that a criminal court is precluded from determining the case before it in which a charge has been framed otherwise than by making an order of acquittal or conviction only where the charge was framed by a court competent to frame it and by a court competent to try the case and make a valid order of acquittal or conviction. No doubt, here the charge was framed by Mr. Ganguly but on his own view he was not competent to take cognizance of the offence and, therefore, incompetent to frame a charge. For this reason the mere fact that a charge had been framed in this case does not help the appellant. Similarly the provisions of s. 494 of the Code cannot be attracted to a case of this kind because that provision itself assumes the withdrawal by a public prosecutor of a charge competently made and before a court competent to entertain the application for withdrawal.

In addition to the competent of the court, s. 403 of the Code speaks of there having been a trial and the trial having ended in an acquittal. From what we have said above, it will be clear that the fact that all the witnesses for the prosecution as well as for the defence had been examined before Mr. Ganguly and the further fact that the appellant was also examined under s. 342 cannot in law be deemed to be a trial at all. It would be only repetition to say that for proceedings to amount to a trial

they must be held before a court which is in fact competent to hold them and which is not of opinion that it has no jurisdiction to hold them. A fortiori it would also follow that the ultimate order made by it by whatever name it is characterised cannot in law operate as an acquittal. In the Privy Council case it was interpreted by Sir John Beaumont who delivered the opinion of the Board to be an order of discharge. It is unnecessary for us to say whether such an order amounts to an order of discharge in the absence of any express provision governing the matter in the Code or it does not amount to an order of discharge. It is sufficient to say that it does not amount to an order of acquittal as contemplated by s. 403(1) and since the proceedings before the Special Judge ended with that order it would be enough to look upon it merely as an order putting a stop to the proceedings. For these reasons we hold that the trial and eventual conviction of the appellant by Mr. Bhattacharjee were valid in law and dismiss the appeal.

Appeal dismissed.

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