

State of Gujarat

Vs

Yakub Ibrahim

Criminal Appeal No. 164 of 1970

(M. H. Beg, Y. V. Chandrachud JJ)

03.12.1973

JUDGMENT

BEG, J. –

1. The is an appeal, by special leave, against the acquittal of the appellant, from a charge framed on September 21, 1967 as follows :

"That you on or about the 31st day of March at about 9.30 p.m. were found in State of Transport corporation Workshop at Baroda in Ahmedabad, and you are a foreigner and you had come from Pakistan and you had been permitted to stay in India till 20th September, 1958, by Assistant Secretary to the Government of Bombay and did not depart from India before expiring of that permit issued by No. 19904 dated 6-12-1967 before the date 20th September 1958 and remained in India and thereby you contravened the provision of clause 7(iii) of foreigners Order 1948 and thereby committed an offence under Section 14 of the Foreigners Act 1946 and within my cognizance."

2. The above mentioned charge was supported by the statement of Mohmadmiya, P.W. 2, Sub-Inspector, Special Emergency Branch, Ahmedabad, showing that the appellant was working in Baroda Central State Transport Workshop when he was arrested as a consequence of the information that he was a Pakistani national who had come to India in 1955 on a Pakistan passport. The accused had produced his Pakistani passport (Ex. 11) dated September 8, 1955. The prosecution had also relied upon an application for a visa made by the accused to the High Commissioner of India in Pakistan on October 10, 1955 in which he had inter alia, stated that he had migrated from India to Pakistan in 1950. Undoubtedly, the prosecution was handicapped in producing evidence to show when and how and with what intention the appellant had gone to Pakistan. It could only show how and when and on what passport be returned to this country.

3. The accused-respondent had produced credible evidence to prove : that, he was born at Dhandhuka in the State of Gujarat on May 15, 1936, that he was living at Dhandhuka and attended School there until 1952 when he moved to Ahmedabad with his father; and that he had gone to Pakistan in a state of anger while he was a minor, after a quarrel with his father who had driven him out of his house. The respondent denied that he had the intention of setting down in Pakistan. He asserted that within six months of his arrival in Pakistan he regretted having left in India and tried to come back to his home. He alleged that, as he was unable to come home without a Pakistani passport, he had to apply for and get one. The Respondent asserted that he was an Indian citizen when the Constitution came into force on January 26, 1950, and that he had continued to be an

Indian citizen thereafter as he had never migrated to Pakistan. His explanations about the passport and the visa application implied that he had obtained the passport by making false declarations and that the statement in the visa application, that he had migrated to Pakistan in 1950 was one of those untrue declarations which had been made only to obtain a passport. Probably he had to show under the law in Pakistan that he had settled down in Pakistan and become a Pakistani national before obtaining a Pakistani passport.

4. The Judicial Magistrate had acquitted the respondent after examining the cases set up by the two sides and holding that the respondent had proved that he was an Indian citizen who had never, in fact, migrated to Pakistan. In an appeal against the acquittal, the High Court of Gujarat had upheld the acquittal and confirmed the finding that the appellant was an Indian citizen when the constitution came into force on January 26, 1950. It had also held that the appellant was a minor when he visited Pakistan. It had also held that the appellant was a minor when he visited Pakistan. It had found it unnecessary to record a finding on the question whether the Appellants visit to Pakistan could be held to be one made under compulsion or for a specific purpose so as to come within the class of those exceptional cases mentioned in *Kulathil Mammu v. The State of Kerala* in which a "migration" would not take place even if the wider of the term migration were adopted. That wider test would apply to those who had gone to Pakistan in the period between march 1, 1974, and the commencement of the Constitution. It has to be remembered that Article 7 of the Constitution was held, in *Kulathil Mammu's case (supra)*, to contain exception to the operation of Article 5 of the Constitution for conferring citizenship of India on persons who at, the commencement of the Constitution, had satisfied the test of India domicile.

5. Hence, the view of this Court in *Smt. Shanno Devi v. Mangal Sain*, was overruled. It has, however, to be remembered that in *Kulathil Mammu's case (supra)*, where the alleged migrant, who was also in minor at the time of the alleged migration had gone to Karachi in 1948 which was before the commencement of the constitution. In the case before us, the finding of that trial Court as well as the High Court, on the evidence before them was that the appellant had, as asserted, gone to Pakistan in 1953-54 which was after the commencement of the Constitution. Hence, the case of the respondent could not fall within the classes to which Article 7 was especially intended to apply. Article 7 had necessarily to be read with the Articles 5 and 6 of the Constitution and not in isolation.

6. The High Court had come to the conclusion that as the only case set up by the prosecution was that the respondent had migrated before January 26, 1950, it need not consider and decide the question whether he had gone to Pakistan after January 26, 1950, and thus had voluntarily acquired Pakistani nationality and lost Indian citizenship. If, as it rightly held, it had been proved that the respondent went to Pakistan after January 26, 1950, Article 5 of the Constitution would still operate in his favour. The High Court rightly pointed out that as the respondent was an Indian citizen on the date of commencement of the Constitution entitled to the benefit of Article 5 of the constitution, the further question only be decided by the Central Government as laid down in Section 9 of the Indian Citizenship Act. It acquitted the respondent because it thought that the prosecution had not proved the only case set up by it. We have, therefore, to examine the charge framed against the respondent so as to determine whether the view of the High court that the only question which need be considered by it was whether the respondent was an Indian citizen on January 26, 1950, was correct.

7. We find, from the charge set out above that the prosecution case was not confined to the determination of the citizenship of the respondent at the time of the commencement of the Constitution. We also find that the respondent had himself raised the question whether, on the facts set up by him, the prosecution could proceed at all in view of Section 9 of the Citizenship Act. The

trial court had observed.

"The lawyer of the accused argued that under Section 9 of the Citizenship Act 1955 the question whether any citizen of India had any time between the 24th day of January, 1950 and the commencement of the Citizenship Act 1955 required the citizenship of another country was to be determined by the Central Government. A Court should not decide whether an Indian citizen had acquired the citizenship of another country. The police prosecutor argued that as the accused had gone to Pakistan and he obtained Pakistani passport the accused must be held to be national of Pakistan and so a citizen of Pakistan and so is foreigner in India and so the accused must be convicted of the offence u/s 14 of the Foreigners Act read with Clause 7(3), Rule (iii) of Foreigners Order 1948. The Court had jurisdiction to decide whether that he is yet citizen of India, the accused should apply to the Central government and get decision under Section 9(2) of the Citizenship Act 1955. The Clause (3) of Schedule III of the citizenship Rules 1956 provides that the fact that a citizen of India has obtained on any date a passport from the Government of any other Country shall be conclusive proof of his having voluntarily acquired the citizenship of the country before the date. As this accused has come from Pakistan to India the Police Prosecutor argued, the accused should be convicted of the offence u/s 14 of Foreigners Act read with Clause 7(3) (iii) of foreigners Order."

We also find from the grounds of appeal against the acquittal of the respondent, the appellant's application for certificate of fitness for appeal to this Court under Article 134 of the Constitution and from the special leave petition under Article 136 of the Constitution in this court, that the prosecution had been inviting a decision on the question whether an order of acquittal could be passed without deciding a question which fell within the purview of Section 9 of the Indian Citizenship Act.

8. It was not proper for the prosecuting authorities to have proceeded with the case against the respondent, when upon the facts set up by the respondent, it became clear that the respondent could not be prosecuted or convicted without determination under Section 9 of the Citizenship of Pakistan between January 26, 1950, and the commencement of the Citizenship Act on December 30, 1955. This Court has repeatedly laid down that if such a question arises in the course of a trial, it must be left that if such a question arises in the course of a trial, it must be left for decision by the appropriate authorities. It may be that the rules framed by the Central Government under Section 30, sub-section (2) of the citizenship Rules, under Section 18 of the citizenship Act, had acquired the citizenship of the country whose passport he holds. We however do not know whether the Central Government has modified such a rule. When the validity of the Rule came up for consideration before a Bench of Seven Judges of this court, an assurance was given on behalf of the Central government that a suitable modification of the relevant rule would be made. However, that question is not under consideration before us now. All we need consider here is whether the acquittal of the respondent was, in the circumstances above justified.

9. In view of Section 9(2) of the citizenship Act which has been subject-matter of several decisions of this Court (See. *State of Andhra Pradesh v. Abdul Khader*, *Abdul sattar v. State of Gujarat* and *Akbar Khan v. Union of India*) the question whether a person voluntarily acquired the citizenship of Pakistan during the specified period could only be determined by the Central government. In *Akbar Khan* case (supra), it was observed by this Court : (at page 782) :

"If it was found that the appellants had been on January 26, 1950, Indian citizens then only the question whether they had renounced the citizenship and acquired a foreign citizenship would rise, that question the Courts cannot decide. The proper thing for the Court would then have been to stay the suit till their Indian citizenship and acquired a foreign citizenship and then dispose of the rest of the suit in such manner as the decision of the Central government may justify."

10. On principle it does not matter whether the question which can only be determined by the Central government under Section 9 of the citizenship Act arises in a civil suit or in a criminal prosecution. If the real question which arises for determination is whether a person, who was an Indian citizen when the C came into force, had acquired the citizenship of another country or not during the specified period, the proper thing to do for a Court where the question arises is to refuse to adjudicate on that question. In the case before us it appears that the issue was raised but not decided either in the trial Court or in the High Court. Indeed, the judgment of the High Court shows that probably for this very reason the prosecution had tried to obtain the conviction of the respondent on the ground that he had acquired Pakistani citizenship before the commencement of the Constitution. That question had been rightly decided against the appellant. On that short ground the acquittal of the appellant could have been upheld if the prosecution case was confined to that question. But, after having examined the charge framed, the cases set up by the two sides, the contentions advanced in the trial Court, the grounds of appeal to the High Court, and those given in the special leave petition in this Court, we think that a question of jurisdiction of the criminal Courts to record either a conviction or acquittal in the case of the respondent had properly arisen. Indeed, the real and decisive question to be considered and decided was not whether the respondent possessed Indian nationality and citizenship on January 26, 1950, but whether he had lost that nationality at the time when he entered this country on a Pakistani passport. The respondent has been charged for overstaying contrary to the terms of the permit issued on December 6, 1957, by which he was allowed to stay until December 20, 1958. Therefore it was clear that the decisive question which the Courts should have considered was whether at the time when permission was given and when the alleged overstay contrary to the provisions of Clause 7(iii) of the Foreigners Order 1948 took the respondent was a foreigner. Whether a decision of an appropriate authority on that question neither an acquittal nor a conviction be recorded.. as no finding can be given by criminal or civil Courts, in a case in which an issue triable exclusively by the Central Government has properly arisen, the question of burden of proof, dealt with in Section 9 of the Foreigners Act, 1946, is immaterial. 11. However, in view of the erroneous procedure adopted on behalf of the State in pressing for a conviction when it was clear that the charge could not succeed at all without obtaining a decision from the appropriate authority, we think that the correct order to pass in this case is not just to stay further proceedings after quashing the acquittal so as to await the decision of the appropriate authority but to quash the charge so that the accused may be discharged. This would leave the State to prosecute the respondent if and when a decision is obtained against from the appropriate authority in accordance with law. That authority will no doubt consider all the relevant facts, including the total period of the respondent's stay in this country as compared with the short period of his stay in Pakistan and the circumstances in which the respondent alleges having obtained a Pakistani passport and made a false statement in the visa application relied upon by the prosecution.

12. The result is that we allow this appeal and set aside the acquittal of the respondent. We also quash the charge framed against the respondent and order that he had discharged.

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