Empress of India Vs. Lalai

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Court : Allahabad

Decided On : Dec-31-1969

Reported in : (1880)ILR2All313

Judge : Robert Stuart, C.J., ;Spankie and ;Oldfield, JJ.

Appellant : Empress of India

Respondent : Lalai

Judgement :

Robert Stuart, C.J.

1. These are two appeals by the Government against two acquittals of the same respondent, and on the same facts, although under different charges or different denominations of crime. The facts common to both cases are these: On or about the 29th April 1878, an octroi muharrir, otherwise called a chungi muharrir, had been sent to the havalat at Gorakhpur on a charge of embezzlement. On the following day the accused Lalai in company with his brother named Lochan, an octroi chaprasi, came to the havalat about 12 o'clock noon and asked the head-constable, Bakhtawar Khan, who was in charge of the guard, to allow them to give some food to the chungi muharrir who was confined there; this the head-constable refused and told the accused and his brother Lochan to go away. About half an hour after, an alarm was raised by a constable on duty that some one was on the top of the havalat wall where there is a platform for the police sentry. The police were sent to the spot and the prisoner was taken. On being searched there, there was found on him a packet of 'puris' (wheat-cakes fried in ghi or oil) and vegetables and these together were the food which the accused and his brother attempted to give to the octroi muharrir. On these facts the accused Lalai was first charged with house-trespass under Section 448, Indian Penal Code, and tried before and convicted of that offence by the Joint Magistrate, and sentenced to rigorous imprisonment for three months. On appeal to the Judge, the Magistrate's order was reversed, the appeal allowed, and the accused ordered to be discharged; the Judge's order to that effect was dated 31st May 1878. Subsequently and on the same facts the accused, respondent, was tried before the Deputy Magistrate of Gorakhpur on a charge preferred under Section 45 of the Prisons Act XXVI of 1870, and convicted and sentenced on the 19th August 1878 to rigorous imprisonment for three months, but on appeal to the Judge, the Magistrate's order was reversed and the prisoner again released from custody. It would be convenient to notice and dispose of this second appeal first. But before considering the merits in this second appeal, I would notice an objection in the way of a plea of res judicata, and which objection was allowed by the Judge. 'In this case,' he said, 'I consider that there can be no doubt that appellant has been imprisoned for committing the same offence for which he was tried and sentenced on 15th May

1878, and released on appeal on 31st May. Under these circumstances, his second trial and imprisonment for the same offence must be quashed under Section 460* of the Procedure Criminal Code.' In this opinion I do not concur. By the second paragraph of Section 460 it is provided that a person convicted or acquitted of any offence may afterwards be tried for any other offence for which a separate charge might have been made against him on the former trial Under Section 454, Criminal Procedure Code, first paragraph which provides that 'if in one set of facts, so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with and tried for every such offence at the same time'; Section 460, however, providing that this may be done 'afterwards.' The Judge's objection therefore of res judicata or of autrefois acquit, as they would call it in English criminal pleading, fails, and the second prosecution and all that followed upon it were, perfectly valid.

2. But on the merits I am of opinion that it is too doubtful a case to justify Lalai's conviction. Lalai was charged under Section 45 of Act XXVI of 1870 of an offence against the Prisons Act, in that he had taken to the havalat and attempted to give to the octroi muharrir food contrary to the prison regulations. Now, a conviction on such a charge involves two things: first that the havalat is a prison within the meaning of that term in Section 3 of Act XXVI of 1870, and secondly, that the act of introducing food into a prison is prohibited by the prison regulations and therefore an offence. With reference to the first point a prison is by Section 3, Act XXVI of 1870, defined to mean 'any gaol or penitentiary, and includes the airing-grounds or buildings occupied for the use of the prison,' meaning by gaol, or penitentiary, as I understand those terms, a place of permanent confinement for a fixed and definite period, and not a mere place of temporary or preliminary custody, which appears to be the meaning of the term havalat. I observe that Act XXVI of 1870, Section 30, makes a clear distinction between criminal prisoners before trial and 'convicted prisoners' and, very properly, because the ultimate condition of the former class has yet to be determined. I am, therefore, rather of opinion that a havalat is not a prison within the meaning of Section 3, Act XXVI of 1870. As regards the second point, and assuming that a havalat is a prison as defined by Section 3, Act XXVI of 1870, I doubt very much whether the act of introducing food into a havalat in the way alleged in this case was an offence against the prison regulations. Such an act cannot, 1 consider, be deemed to be such an offence unless it can be shown to be so against some prohibitory law or regulation. Now, I can find nothing of that character either in Act XXVI of 1870 or in the rules for the management and discipline of prisoners adopted under the Act. This conviction appears to proceed on Section 45 of the Act, Clause 3, where it is provided that 'whoever contrary to such regulations (of the prison) conveys or attempts to convoy any letter or other article not allowed by such regulations into or out of any such prison or place' shall, on conviction, be liable, Ac. The question thus at once arises whether the food attempted to be taken into the havalat by the accused was an 'article' within the meaning of this section. According to the principles upon which statute laws are usually interpreted, 'article' here would mean something of the same kind with a letter such as other documents or a newspaper or a book or other matter brought to the accused in a printed or written form, and whatever else may have been intended, food does not necessarily come within the category, and this being a criminal case, we are not to determine against an accused person what is not plainly expressed or necessarily implied. Then, as to the prison regulations, I was referred to No. 418 which is one of the rules relating to prisoners under trial (and I presume received into havalat for that purpose). This rule provides that such prisoners shall receive the non-labouring rations of the gaol with certain additions of ghi and

mustard oil. I was also referred to Rule 524 which prescribes a dietary for native prisoners with a suggestion that such was the food the prisoners were to receive, and no other. That may have been the intention of the rule, but such intention is nowhere expressed, nor can I find any prohibition whatever against a friend of a prisoner in custody before trial and not after conviction doing what is here charged against Lalai. And again, I say we must not forget that this is a criminal case in which the presumption is against guilt, and we are not to assume that guilt without some express rule to the contrary, or without evidence which necessarily and irresistibly shows or, it may be, implies the accused's complicity. In fact, these prison regulations merely prescribe the diet that is to be given to different classes of prisoners without any other meaning in a penal sense, and there is nowhere in any of them any rule or order against such a contribution to a prisoner's food as Lalai attempted in the present case. It is also to be observed that Lalai and his brother came openly in the first instance to the havalat, and requested permission of the head-constable to give their friend, who was in custody then, a little food. This was refused, but it does not appear that Lalai was then informed that what he asked permission to do was against the rules of the havalat, much less that it was a criminal offence to give a little purl to a prisoner there. It may, as I have suggested, be reasonable to believe and to imply that the diet detailed in a prison regulations was to be all the food that the prison authorities were to provide, but it does not therefore follow that what was here done was a criminal violation of the regulations, unless we are to read Section 45 of the Act otherwise than I have done and so as to include within its sanction what Lalai attempted. But I repeat this is a criminal case and everything charged against the accused should, to justify his conviction, be clearly shown to be contrary to express law, and not merely to be implied by any covert inference, however reasonable, unless it be irresistible.

3. For all these reasons I consider the validity of Lalai's conviction under Act XXVI of 1870 is too doubtful, and I would quash it.

4. This, so far as my judgment is concerned, determines the second appeal before us, and I shall now proceed to dispose of the other or first appeal, and with a like result. The legality of the conviction in this first appeal depends on the solution of the question whether what Lalai did was an 'offence' within the meaning of Section 40* of the Indian Penal Code and Act XXVI of 1870. That question I have already determined by the opinion I have expressed in the second appeal to the effect that what Lalai did was not an offence as that term is so defined, or what is the same thing, that what he did was of too doubtful a character to necessitate conviction as an offence. That being so, Lalai was neither guilty of criminal trespass nor of house-trespass, the intent to commit an offence being essential under both sections. I would, therefore, disallow the appeal and affirm the order of the Judge in both these respects.

Spankie, J.

5. It appears to me that on the facts found, Lalai Ahir did commit the offence of criminal trespass. It was established by the evidence that an octroi muharrir had been sent to the havalat at Gorakhpur in custody on a charge of embezzlement. The next day Lalai Ahir came to the havalat about noon and asked the head-constable in charge of the guard to allow him to give some food to the muharrir. The head-constable refused to do so and warned him off. Some time afterwards an alarm was raised that some one was on the top of the havalat wall, where there is a platform for the police sentry. Constables were sent to the spot and Lalai Ahir was caught. On

being searched, a packet of 'puris' and vegetables were found on his person. The Assistant Magistrate being of opinion that a havalat does not come under the definition of a prison within the terms of Section 3, Act XXVI of 1870, convicted Lalai Ahir on the charge of house-trespass under Section 448, Indian Penal Code. The Sessions Judge considered that no offence had been committed. Lalai had entered the havalat for the purpose of giving food, and the giving food under such circumstances was not punishable by law. He, therefore, annulled the conviction.

6. Under Section 441, Indian Penal Code, whoever commits criminal trespass, by entering into or remaining in any building, tent, or vessel used as a human dwelling, or any building used as a place for worship or as a place for the custody of property, is said to commit house-trespass. This havalat or lock-up is certainly a place used as a human dwelling. Its officers, guards and persons accused of offences occupy it as a dwelling place. The introduction of any part of the trespasser's body is entering and sufficient to constitute house-trespass. But the trespass must be criminal. Under Section 441, Indian Penal Code, whoever enters into or upon property in the possession of another, with intent to commit an offence, or to intimidate, insult, or annoy any person in possession of such property; or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult, or annoy any such person, or with intent to commit an offence, is said to commit criminal trespass. Now, Lalai Ahir himself was a constable enrolled under the Police Act, and a public servant. Presumably he was quite aware that he was entering a place in which parties accused of offences were kept in custody and that the head-constable of the guard was only doing his duty when lie refused to allow him to give food to a person in custody and warned him to leave the premises, which he did do. But instead of keeping away, he managed to effect another entry and was caught. After due warning from the head-constable in charge of the building who was lawfully in possession of it, that he could not be allowed to give food to a person in custody therein, and after being told to leave the building, he is found after a short interval on the top of the wall with the food and vegetables, which lie was told could not be given to the prisoner, concealed on his person. We must judge of his intent from his conduct, and it appears to me that his re-entry into the lock-up was, on the facts established, made with an intent to commit an offence against prison regulations and rules, and thereby an offence against the Prisons Act. If he had no such intention why did he conceal the food, and re-enter a building which he had been told to leave

7. There cannot, I think, be a doubt that to secretly introduce food into the lock-up was an offence against the Prisons Act and therefore the offence of criminal trespass was committed, and on the facts found, which are also beyond a doubt, the offence of house-trespass was also committed. The conviction, therefore, under Section 448 might have been sustained by the Sessions Judge. But if there had been any room for doubt, the second conviction under Section 45 of Act XXVI of 1870 appears to have been good. I cannot admit that a havalat or lock-up is not a prison within the meaning of the Act. In Section 3 prison means any gaol or penitentiary, and includes the airing-grounds or other grounds or buildings occupied for the use of the prison. Criminal prisoner means any prisoner charged with or convicted of a crime. By Section 4 the Local Government is to provide for prisoners accommodation in a prison or prisons constituted and regulated in such manner as to comply with the requisitions of this Act in respect to the separation of prisoners. By Section 30, Clause 3, criminal prisoners before trial shall be kept apart from convicted prisoners. By Sections 34 and 35 a civil prisoner may maintain himself but is not allowed to sell any part of his food, clothing, bedding or necessaries to any other prisoner. By Section 45 whoever,

contrary to the regulations of the prison, conveys, or attempts to convey, any letter or other article not allowed by such regulations into the prison, is liable on conviction to rigorous imprisonment for a period not exceeding six months, or to a fine not exceeding Rs. 200, or to both. By Section 54 the Local Government may make rules consistent with the Act, amongst others, as to the food and clothing of criminal prisoners. The Government has exercised such powers, and Rule 417 allows prisoners under trial to cook their own food, and directs that they shall be subjected to no further restraint than is absolutely Necessary for their safe custody. Rule 418 directs that these prisoners under trial shall receive the non-labouring rations of the jail, with the addition of two chittaks of ghi or mustard oil to each group of 25 prisoners, the oil to be given with their vegetables and the ghi with their dal. So that the food, they are allowed to cook is not food which they purchase for themselves, but food which is supplied as rations. The head of a prison is the Superintendent (Section 7 of the Act) and the Inspector-General of Prisons for the North-Western Provinces has been vested with the general control and superintendence of all prisons situate in the territories under the Government, North-Western Provinces (Section 6). By the 424th rule made by the Government, the Inspector-General of Prisons is to exercise a legitimate watchfulness over the numbers and excessive detention of prisoners confined in the havalats under his inspection, and to call the attention of Government to the subject if circumstances necessitate this action. The classification of gaols in the North-Western Provinces authorized by the Government includes (i) Central Prison, (ii) 1st class District gaols, (iii) 2nd class District gaols, (iv) 3rd class District gaols, (v) 4th class District gaols, (vi) lock-ups.* But it may be said that these lock-ups are within the prisons, and persons committed for trial by the Magistrate are confined therein, and that the term lock-up does not include the Magistrate's havalat. This however is not the case, as Rule 14, p. 18 of the work just cited above directs that--'In lock-ups shall be confined all the prisoners under trial before any Court, unless, where the lock-up is separate from the District gaol, the Magistrate or committing officer may think it necessary for greater security to send any prisoner committed to the Sessions to the District gaol. On the 27th August 1864, the Lieutenant-Governor was pleased to approve of the proposal that all the 'havalats' (lock-ups) in the North-Western Provinces should be placed under the supervision of the Inspector-General of Prisons from 1st May 1865.+ The resolution also approved of the suggestions made by the Inspector-General of Prisons regarding the diet and clothing to be supplied to prisoners under trial.

8. The Magistrate of Gorakhpur reports to this Court that up to 1862 the gaol and lock-up were under charge of the Magistrate of the District. In 1862 the gaol was placed under charge of the Civil Surgeon as Superintendent. But the lock-up remained as before in charge of the Magistrate. In 1864 it was placed under the supervision of the Inspector-General of Prisons under the Government order dated 27th August 1864, quoted above, and in 1868 it was also placed under the supervision of the medical officer in charge of the district gaol by order dated 28th July 1868.*

9. It appears, therefore, to be quite certain that the Magistrate's havalat or lock-up is, under the rules which the Local Government is authorized by Section 54 of the Act to make, a fifth class gaol within the meaning of prison as defined in Section 3 of the Act, and therefore if the accused committed any breach of the regulations in force and authorized to be made by the Prisons Act, the conviction would be legal, if had under Section 45 of the Act. On the merits there can be no doubt that the facts proved in the second case show that an attempt was made to introduce to a prisoner

charged with an offence articles of food not allowed by the regulations. I would therefore decree the appeal and reverse the decision of the Sessions Judge and re-affirm the conviction and sentence passed under Section 45 of Act XXVI of 1870.

10. I would also decree the appeal in the house-trespass case, but as the subsequent conviction by the Magistrate has been affirmed in the other case, I do not think it necessary to do more than reverse the Sessions Judge's order and to approve the conviction of the Assistant Magistrate. There does not appear to be any necessity for pressing the sentence against the accused under Section 448, Indian Penal Code, and it might be remitted.

11. The learned Judges of the Division Bench having differed in opinion, the case was consequently referred to Oldfield, J., under Section 271B. of Act X of 1872.

Oldfield, J.

12. I will first deal with the offence under Section 45 of Act XXVI of 1870.

13. The definition of the word prison in Section 3 of that Act appears to me to include a havalat or lock-up in which prisoners under trial are confined. That such was the intention of the Act would appear from the definition of criminal prisoner in Section 3, which 'means any prisoner charged with or convicted of an offence,' and by the Act treating of prisoners under trial as well as after conviction. It is unnecessary, however, for me to determine this point, for assuming that an offence against the prison regulations of the nature of those provided for in Section 45 committed with reference to a prisoner under trial confined in the havalat will be an offence under Section 45, I am unable to hold that such an offence has been committed in this case. The offence alleged against the accused is that he conveyed or attempted to convey some food to a man confined in the havalat and under trial, and by doing so has contravened Section 45 of Act XXVI of 1870, which provides, inter alia, that 'whoever, contrary to such regulations (i.e., the regulations of the prison), conveys, or attempts to convey, any letter or other article not allowed by such regulations into or out of any such prison or place, shall on conviction before a Magistrate be liable to rigorous imprisonment for a term not exceeding six months, or to fine not exceeding Rs. 200, or to both.' Before, however, a conviction can be had under this part of Section 45, it must be shown that to convey food to a prisoner in the havalat is contrary to the regulations of the prison. Now, the only regulations on the subject to which we are referred is Rule 418 of the Rules for the management and discipline of prisoners in the North-Western Provinces issued under the authority of Government under Section 54 of the -Prisons Act. This rule refers to prisoners under trial and amongst other provisions provides that 'they shall receive the non-labouring rations of the gaol with the addition of two chittaks of ghi or mustard-oil to each group of 25 prisoners, the oil to be given with their vegetables, and the ghi with their dal'; and the authorised scale of dietary is laid down in Rule 524.

14. It is urged that, inasmuch as these rules provide a particular ration of food to lie supplied by the prison authorities, it is contrary to the regulations to convey any food to such prisoners, and to do so will amount to the offence contemplated in Section 45. But this contention cannot, in my opinion, be maintained. To render the act of conveying, or attempting to convey, any article to a prisoner in havalat penal, it must be shown distinctly that there is a regulation which prohibits it. The rules in question merely deal with the articles of food which such prisoners are to receive from the

prison authorities; they contain no prohibition against their receiving any other supplies of food, or any prohibition against any person conveying or attempting to convey food to them; and we are not at liberty to make assumptions or introduce prohibitions not contained in the regulations. We cannot hold that an act done by a person is 'contrary to the regulations' merely because it is something not affirmatively allowed by the regulations. I hold, therefore, that the conviction under Section 45, Act XXVI of 1870, cannot be maintained, and it will follow that there can be no conviction of the offence of house-trespass or criminal trespass, since it cannot be shown that there was the intent required to constitute criminal trespass. It is not urged that there was an intent to commit an offence punishable under the Penal Code, and there was none to commit an offence punishable under special or local law, since the only offence under such a law to which such an intent could be referred is the offence under Section 45, Act XXVI of 1870, which in my opinion is not proved in this case.

15. I therefore affirm the order of the Judge in both the appeals before this Court.

----------Foot Note----------

*[Person once convicted or acquitted not to be tried for same offence.

Section 460: A person who has once been tried 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 on the same facts for the same offence, nor for any other offence for which a different charge from the one made against him might have been made under section four hundred and fifty-five or for which he might have been convicted under section four-hundred and fifty-six.

A person, convicted or acquitted of any offence, may be afterwards tried for any offence, for which a separate charge might have been made against him on the former trial under section four hundred and fifty-four, paragraph I. A person acquitted or convicted of any offence in respect of any act causing consequence which, together with such act, constituted a different offence from that for which such person was acquitted or convicted, may be afterwards tried for such-last mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was acquitted or convicted. A person acquitted or convicted of any offence in respect of any facts may, notwithstanding such acquittal or conviction, be subsequently charged with and tried for any other offence which he may have committed in respect of the same facts, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.]

*['Offence.'

Section 40: Rhe word 'offence' denotes a thing made punishable by this Code or by any special (or local law, Act IV, 1876).]

*Rules for the management and discipline of prisons authorized by Government North-Western Provinces, published at Allahabad in 1874.

+ General Department, No. 2663 A. of 1864, dated Naini Tal, the 27th August 1864.

* Government, North-Western Provinces, Circular No. 9 A. of 1868, No. 148 A of 1868, to all Commissioners of Divisions, dated Naini Tal, 28th July 1868.