Dhaniram Bhaiyalal Vs. State of Madhya Pradesh

LegalCrystal Citation : legalcrystal.com/498295

Court : Madhya Pradesh

Decided On : Feb-06-1960

Reported in : AIR1962MP43

Judge : T.P. Naik and ;P.K. Tare, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 234, 235, 236, 239, 269(3), and 537; Indian Penal Code (IPC) - Sections 395, 397, 412 and 452

Appeal No. : Misc. Criminal Case No. 186 of 1959

Appellant : Dhaniram Bhaiyalal

Respondent : State of Madhya Pradesh

Advocate for Def. : Rama Gupta, Dy. Government Adv.

Advocate for Pet/Ap. : N.N. Pandey, Adv.

Disposition : Application dismissed

Judgement :

Naik, J.

1. This is an application for a certificate that the case is a fit one for appeal to the Supreme Court under Article 134(1)(c) of the Constitution of India.

2. The facts giving rise to the application are these. Six accused persons, namely, Sultansingh, Saboo, Bisram, Laxman, Suratsingh and Durga, were prosecuted in the Court of the Additional Sessions Judge, Jabalpur, under Sections 452, 395 and 397 of the Indian Penal Code for having entered the house of Achhelal on the night between the 6th and 7th August 1958 and for having committed dacoity therein, armed with deadly weapons. One other accused, Dhaniram, was charged under Section 412 of the Indian Penal Code in the same Court in relation to the same dacoity. The latter offence, namely, under Section 412 of the Indian Penal Code, was triable by a jury, while the other offences, namely, under Sections 452, 395 and 397 of the Indian Penal Code, were triable by the judge himself.

3 The offences under Sections 452, 395 and 397 of the Indian Penal Code, with which the six accused were charged, were tried by the judge himself, while the offence under Section 412 of the Indian. Penal Code, with which the accused Dhaniram, was charged, was tried by him with the help of a jury. The procedure at the trial for both classes of offences up to the point of summing up was the same. Thereafter, the judge

summed up the case for the jury with respect to the offence with which Dhaniram was charged and recorded their verdict. The jury held the accused not guilty of the offence under Section 412 of the Indian, Penal Code but gave a unanimous opinion that he Was guilty of an offence under Section 411, ibid. The judge thereafter convicted him under Section 411 of the Indian Penal Code and sentenced him to rigorous imprisonment for a period of one year. As regards the trial of the other accused, it was wholly conducted by the judge himself and we are not concerned with that part of the trial here.

4. No objection was taken by the accused applicant to this mode of trial either during the trial or in the course of the appeal.

5. For the first time, in the application for a certificate that the case is a fit one for appeal to the Supreme Court under Article 134(1)(c) of the Constitution, objection is being taken to the mode of the trial. It is now contended that the trial of the applicant jointly with the other accused was illegal and had so prejudiced him as to lead to a miscarriage of justice and that consequently his conviction under Section 411 I. P. C. was liable to be set aside. This was the only ground pressed before us, and on its basis a certificate of fitness was asked for.

6. In our opinion, there is no substance in the contention of the learned counsel for the applicant. Firstly, Section 233 of the Code of Criminal Procedure 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 the cases mentioned in Sections 234, 235, 236 and 239. Under Section 239(e), persons accused of an offence which includes theft, extortion, or criminal misappropriation, and, persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first-named persons, or of abetment of or attempting to commit any such last-named offence may be charged and tried together. The accused-applicant Dhaniram could thus validly be tried together with the other accused. It is at this stage that a difficulty arises, because all the accused were not charged with all the offences and also because some of the offences were triable by a jury and the others were not. Even so, if all the accused, in respect of all the offences had been tried wholly either by the jury or by the judge without objection from the accused, the trial would not have been invalid: (see Section 536 of the Code).

7. When a joint trial is permissible in terms of Section 239 of the Code of Criminal Procedure, but where some of the offences are triable by a jury and others are net, the procedure to be followed in some of the cases to which its provisions apply is now prescribed in Section 269(3). At this place, the legislative history of the section may usefully be noted. In the Code of Criminal Procedure of 1861 and 1872, there was no provision corresponding to Section. 269(3) of the present Code. But, as a matter of practice, which was tacitly approved by the High Court of Calcutta, the procedure followed was in some respects similar to the one which is now to be found in Section 269(3). It is reported in (1866) 5 Suth WR Cr. Letters 7 that

'in trials regarding offences, some of which should be tried by Jury and others with the aid of Assessors, ... the Sessions Judge should deliver his directions to the Jury, and take their verdict OH the heads of the charge relating to the former classes of offences, and should then proceed, with respect to the remaining heads of the charge, to obtain the opinion of Asseesors, regarding the Jurors as such, and deliver his

judgment accordingly. In two cases (Azumut Ghazee, Appellant, decided 9th June 1865. G. R. Smith, Appellant, decided 5th December 1865) in which this course was followed, the High Court, on the appeal of the convicts, did not think it necessary to notice or condemn the proceedings of the Sessions Judge held in the manner above described.'

8. Then came the Act of 1882. It mode a departure in the procedure so far followed because Section 269(2) of that Code provided that

'where the accused was charged with several offences some of which were and some were not triable by jury, he should be tried by jury for all such offences.'

This provision was, however, again altered by the Act of 1898, when the old practice, to a certain extent, was given a statutory recognition with the result that the sub-section was redrafted in the following form:

'When the accused is charged at the same trial with several offences of which some are and some are not triable by jury, he shall be tried by Jury for such of those offences as are triable by jury, and by the Court of Session, with the aid of the jurors as assessors, for such of them as are not triable by jury.'

The provision has been continued in the Act of 1955, with such consequential changes as were necessary because of the abolition of the system of trial with the aid of assessors. It would thus be seen that before the enactment of Section 269(3), the procedure followed was that in such a situation, where a joint trial was permissible but could not be held in the ordinary way due to some of the offences being triable by a jury, the trial with respect to offences triable by a jury was conducted with the aid of a jury, and the trial with respect to offences not so triable was conducted by the judge himself.

9. The question then is whether the enactment of Section 269(3) has made any difference. We do not think it has. Section 269(3) squarely applies to a case of an accused who is charged at the same trial with several offences some of which are and some are not triable by a jury. Though the section speaks of 'the accused' in singular, it has been held to apply to a case where there are more than one accused provided all are charged with all the offences, some of which are triable by a jury and the others are not. (See In re Sennimalai Goundan, AIR 1915 Mad 1036.). We, however, see no justification for limiting it to such a case only. The object of the section was to provide for cases where in joint trial, some of the offences were triable by a jury and others were not and the object of the section would certainly not be ful-filled if the provision were limited to the case of an accused or several accused where all are charged with all the offences. What then is to happen to cases where several accused are to be jointly tried, some of whom are charged with offences triable by a jury? The Section therefore ought to be so construed as to apply to all categories of joint trials where some of the offences are triable by a jury and the others by a judge.

10. We are mindful of the fact that the provisions of Sections 269 (3) were never considered satisfactory or adequate and were even adversely commented upon in several cases : (See AIR 1915 Mad 1036 (Supra), Emperor v. Haria Dhobi, AIR 1937 Pat 662 Cheru Sheikh v. Emperor, 40 Cal W. N. 1374, Sakhawat Imami v. Emperor, AIR 1937 Nag 50). But we see no reason for further limiting its efficacy by construing it narrowly. If a joint trial is permissible and the trial Court in its discretion elects to

hold one, we see no justification for limiting its provisions in such a way as to leave a large class of cases out of its ambit.

11. But even if the narrow interpretation be accepted so that its provisions are limited to cases where the accused are all charged with all the offences, We see no justification in principle for not extending the principle contained in Sections 269 (3) to a case where some accused are charged with offences which are triable by the judge and the others are charged with offences which are triable by him with the aid of a jury, and the offences are such which can be tried jointly by virtue of Sections 234, 235, 236 and 239. If prior to the enactment of Sections 269 (3) of the Code, the procedure therein prescribed could have been followed as a matter of practice, on the same analogy, in the absence of any provision now to govern cases like the present, the principle of the Section can be extended to cases, where a joint trial being permissible, some of the offences of some of the accused are triable by the judge and some of the offences of some of the accused are triable by him with the aid of a jury.

12. Reliance was, however, placed on a decision of a Division Bench of the Calcutta High Court reported in Ramgobinda Ghose v. Emperor, AIR 1938 Cal 364 for the proposition that a trial such as we have here was invalid. In that case there were five accused, four of whom were charged with murder and were triable by a jury, while the remaining one was charged with conspiracy to murder--an offence triable by the, judge with the aid of assessors. All of them were tried together at the same trial, the jury trying the murder charge in respect of the four accused and, acting as assessors for the conspiracy to murder charge in respect of the fifth accused. On these facts, on an appeal by the four accused, who were convicted and sentenced in the jury trial, the Division Bench held that Sections 269 (3) of the Code of Criminal procedure was not applicable and that consequently the form of the trial was erroneous.

The learned judges also found that the charge to the jury was bad as the trial judge had placed before the jury inadmissible and irrelevant evidence. The appeal was, therefore, allowed and the convictions of the accused were set aside. From this it is sought to be argued that their convictions were set aside as the form of the trial had been held to be erroneous. In our opinion, there is no warrant for such an inference. The more correct view would be that the convictions were set aside as the charge to the jury was bad. But whatever that may be, ever if it be held that the form of the trial was erroneous, it does not necessarily follow that it was invalid and that consequently the conviction must be held to be bad and liable to be set aside.

13. Secondly, the form of the trial in the instant case was not in violation of any express or implied provisions of the Code of Criminal Procedure. Section 233 read with Sections 239 of the Code of Criminal Procedure, permits the trial of all the accused together. There could thus be no objection to their being tried together. Now, when, under Section 269 (3), a mixed trial is held, in effect, it is two trials held simultaneously. This can be seen from the fact that if, for any defect in the verdict of the jury, the conviction in the trial by jury is set aside, the trial conducted by the judge with the aid of assessors is not necessarily vitiated: (Satdeo v. Emperor, AIR 1936 Oudh 164). Similarly, it was pointed out by Napier, J. in Karuppa Goundan v. Emperor, AIR 1918 Mad 821 that the expression 'same trial' in the sub-section had been used in a distributive sense, so that a right of appeal under Section 410 of the Code of Criminal Procedure against the judgment in the trial held by the judge was always preserved in spite of the use of the expression 'same trial' in the Sections. In Ram Das v. Emperor AIR 1934 All 61 it was pointed out that:

'It is within the competence of the Sessions Judge, in a case where the accused persons are being jointly tried by jury, and by the Judge with the aid of assessors, to take into consideration the entire evidence produced in the case in dealing with the charge triable by him with the aid of assessors, in spite of the fact that that evidence may have been disbelieved by the jury who were dealing with the minor charge.'

(See also Jogneswar Ghose v Emperor, ILR (1937) 1 Cal 306: (AIR 1936 Cal 527). So that it will be noticed that in such a case of joint trial, in effect, the accused are being tried together, with such adjustments as the nature of the case warranted. It cannot, therefore, be said that the trial of the accused was in contravention of the Code of Criminal Procedure.

14. Thirdly, even if the form of the trial be held to be erroneous, it does not necessarily follow that it was invalid, or void. Commenting on the object of the Code of Criminal Procedure Rose J. in W. Slaney v. State of M. P., (S) AIR 1956 SC 116 at p. 121, said :

'The object of the Code is to ensure that an accused person gets' a full and fair trial along certain well-established and well-understood lines that accord with our notions of natural justice.

It he does, if he is tried by a competent court, if he is told and clearly understands the nature of the offence for which he is being tried if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is 'substantial' compliance with the outward forms of the law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial are regarded as venal by the Code and the trial is not vitiated unless the accused can show substantial prejudice. That, broadly speaking, is the basic principle on which the Code is based.

Now here, as in all procedural laws, certain things are regarded as vital. Disregard of a provision of that nature is fatal to the trial and at once invalidates the conviction. Others are not vital and whatever the irregularity they can be cured; and in that event the conviction must stand unless the Court is satisfied that there was prejudice.'

There are various sections in the Code providing for curing of irregular proceedings: (see Chapter XLV of the Code). Sections 536 and 537 of the Code may be perused in this connection. The first, inter alia, provides that if an offence triable by a jury is tried with the aid of assessors, the trial shall not, on that ground, be invalid, unless the objection is taken before the Court records evidence in the case. The second (Section 537) provides for circumstances when a finding or sentence is reversible by reason of error or omission in charge or other proceedings. What we want to emphasize is that the procedure of criminal trials subserves a purpose, e.g., that the accused gets a fair trial in accordance with the provisions of the Code of Criminal Procedure. To that end the various provisions of the Code, which have been enacted for that purpose, are to be observed in the letter and in the spirit.

What is required is that there ought not to be a substantial departure from the mode of conducting a criminal trial as provided by the Code, nor a deliberate violation of its mandatory provisions which are regarded as vital. Bearing this principle in mind if any departure is made, it has to be ascertained if that has prejudiced the accused. If

it has, the trial is vitiated. If not, the conviction, notwithstanding the irregularity or the illegality, has to stand. In the instant case, in spite of our repeated enquiries, the learned counsel for the applicant, could not point out to us any prejudice to the accused-applicant by his joint trial, which can be said to have occasioned a failure of justice.

15. Fourthly, so far as the applicant was concerned, he did net dispute that he was in recent possession of a few incriminating articles which were the subject-matter of the dacoity. The only question for decision in the trial and in the appeal was whether the applicant had reasonably accounted for his such recent possession of those articles. The explanation offered by him was unacceptable to the jury, as also to the trial judge, and the learned single Judge on a review of the evidence was also of opinion that the explanation did not satisfy him. The objection to the form of the trial was, therefore, of academic importance.

16. The contention of the learned counsel for the applicant that the trial of the applicant accused Dhaniram was vitiated has therefore no substance.

17. In the result, we are of opinion that the case does not involve any question of substantial or unusual importance to warrant the grant of the certificate prayed for,

18. The application is therefore, dismissed.