Kharkan And Others vs The State Of U.P on 29 August, 1963

Equivalent citations: 1965 AIR 83, 1964 SCR (4) 673, AIR 1965 SUPREME COURT 83, 1964 ALL. L. J. 162, 1965 MADLJ(CRI) 781, 1964 ALLCRIR 134, (1964) 1 SCWR 1, 1965 2 SCJ 546, 1964 4 SCR 673, 1964 SCD 27, ILR 1964 1 ALL 519

Author: M. Hidayatullah

Bench: M. Hidayatullah, S.K. Das, K.C. Das Gupta

PETITIONER:
KHARKAN AND OTHERS

Vs.

RESPONDENT:
THE STATE OF U.P.

DATE OF JUDGMENT:
29/08/1963

BENCH:
HIDAYATULLAH, M.
BENCH:
HIDAYATULLAH, M.
DAS, S.K.
GUPTA, K.C. DAS

CITATION:
1965 AIR 83 1964 SCR (4) 673
CITATOR INFO :
RF 1965 SC 87 (10)

ACT:
Criminal Procedure-Two incidents-Trial separate--Prior acquittal in one-If operates as bar to conviction in another caseCode of Criminal Procedure, 1898 (Act V of 1898), ss. 403, 236, 237.

HEADNOTE:
The eight appellants variously armed attacked one 'T' and as a result of the assault 'T' died. These appellants then proceeded to loot the house of 'T' and on the way met four others who joined them. They then came across one 'P' and assaulted him. There was a small gap of time and 'the

places of assault were different. The magistrate framed a single charge but the Session Judge framed two charges namely one connected with the attack on 'T' and the other connected with the attack on 'P'. He also separated the trials on the two charges. The Sessions judge convicted the appellants in both cases. The appeal in the second case i.e. the case relating to assault on 'P' was heard first by the High Court and the appellants were acquitted of the charges of being members of an unlawful assembly. Later the appeal connected with the assault on 'T' was heard by the High Court and in that appeal their convictions and sentences were confirmed. The present appeal arises out of the convictions and sentences passed by the High Court. The appellants contended that the prior acquittal in the second case operated as a bar to the conviction in the present case. The appellants relied on a decision of the Privy Council namely Sarnbasivam v. Public Prosecutor Federation of Malaya and of this Court in Pritam Singh v. State of Punjab.

Held: (i) There was nothing in common between the present appeal and the aforesaid two cases relied upon by the appellants.In this case the assault on 'T' was over when the unlawful assembly formed its new common object namely the assault on 'P'.

(ii) A plea of autrefois acquit which is statutorily recognised in India under s. 403 of the Code of Criminal Procedure arose when a person is tried again for the same offence or on the same facts for any other offence for which a different charge from the one made against him might have been made under s. 236 or for which he might have been convicted under s. 237. The prior acquittal in the other case did not operate as a bar to the conviction in the present case as the charge in the other case was quite different from and independent of the charge in the present case, and ss. 236 and 237 of Code of Criminal Procedure were not applicable to the present facts because the two offences were distinct.

Sambasivam v. Public Prosecutor Federation of Malaya, [1950] A.C. 458, Pritam Singh v. State of Punjab, A.I.R. 1956 S.C. 415, Gurcharan Singh v. State of Punjab, [1963] 3 S.C.R. 585 and

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Mohinder Singh v. State of Punjab, Cr. A. No. 140 of 1961 decided on 31-7-63, explained.

(iii) This court, in the absence of special circumstances, does not review for the third time evidence which has been accepted in the High Court and the trial court.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 95 of 1961.

Appeal by special leave from the judgment and order dated February 15, 1961, of the Allahabad High Court in Criminal Appeal No. 1597 of 1960.

D. S. Tewatia and K. B. Mehta, for the appellants. O. P. Rana and C. P. Lal, for the respondents. August 29, 1963. The judgment of the Court was delivered by HIDAYATULLAH J.-This is an appeal by special leave against the judgment of the High Court of Allahabad in Criminal Appeal No. 1597 of 1960 decided on February 15, 1961. The appellants are eight in number and they have been convicted under S. 325 read with S. 149 of the Indian Penal Code and sentenced to three years rigorous imprisonment. They have also been convicted variously under ss. 147 & 148, Indian Penal Code and sentenced to smaller terms of imprisonment which need not be mentioned as those sentences are made to run concurrently with the above sentence. They were originally charged under S. 302 read with S. 149, Indian Penal Code for the murder of one Tikam on January 24, 1960 at about noon in village Nandgaon Police Station Barsana District Mathura. The Session Judge, Mathura, did not think that a case of murder was made out and convicted them of the lesser offence. Their appeal to the High Court was dismis- sed and the conviction and sentences were maintained. There was yet another trial at which these eight persons and four others were tried under S. 307/149, Indian Penal Code for causing hurt to one Puran with such intention and under such circumstances that if by that act they had caused his death they would have been guilty of murder and also under ss. 147 & 148 of the Penal Code for being members of an unlawful assembly, the common object of which was an attempt on Puran's life. The learned Sessions judge, Mathura held in the second case that the injuries sustained by Puran warranted an offence under s. 323, Indian Penal Code. The accused and Puran compounded that offence and all the accused were acquitted. The Sessions judge, however, convicted 11 out of 12 accused under ss. 147 & 148, Indian Penal Code and awarded different sentences, according to the weapons possessed by them. One Koka was acquitted because his plea that he was blind from birth was accepted. The 11 accused in the second case appealed to the High Court and were acquitted of the charge of being members of an unlawful assembly. That Judgment of the High Court was delivered on January 31, 1961, in Criminal Appeal No. 1598 of 1960, fifteen days before the confirmation of the conviction and sentences of the eight appellants in this appeal. The facts of the case may now be given.

There was enmity between Tikam (deceased) and the appellants and on January 24, 1960, just about noon time Tikam was sitting at the shop of a blacksmith in village Nandgaon. Dulli and Nathi who were examined as P. Ws. 2 & 3 were sitting near him. The appellants who were armed with Ballams, a Pharsa and Lathis arrived on the spot and on seeing Tikam started to assault him. Tikam was severely injured and fell in a ditch adjacent to the road but even after he fell in it the assault was continued by the appellants. He died the same day about five hours later. After assaulting Tikam, these appellants decided to ransack his house and started towards it. On the way they were met by the other four accused and this brought their number to twelve. While they were going to the house of Tikam they saw Puran and decided to beat him. Puran was assaulted and the second case arose out of the assault on him. The learned magistrate who committed the accused to stand their trial before the Court of Sessions framed a common charge in respect of the two incidents but the Sessions judge amended the charge and divided it into two charges namely one connected with the

attack on Tikam and the other connected with the attack on Puran., He also separated the two trials on the two charges. As stated already lie convicted the eight appellants in respect of their assault on Tikam and the same appellants with three others in respect of their assault on Puran.

The appeal in the second case was heard first and was allowed by the High Court and the 11 appellants in that appeal including the eight before us were ordered to be acquitted.

It was contended before us by Mr. Tewatia that Mr. Justice Sharma who delivered the judgment impugned before us did not allow the appellants a chance to reply to the arguments on behalf of the State and thus denied them a fair hearing. This fact was mentioned in the petition for certificate in the High Court and has been repeated in the petition for special leave. Mr. Justice Sharma had proceeded to deliver judgment as soon as the arguments were over and the judgment was delivered by him on two consecutive days in the presence of the appellants and their counsel. If any such right had been denied to the appellants they should have brought the matter immediately to the notice of the learned Judge and he would have rectified it. It appears that the appellants were hoping for an acquittal in view of the prior acquittal by the learned judge in the companion case and realised too late that their appeal was not accepted. It is for this reason that they do not appear to have raised this issue before the learned Judge when they asked him to certify the appeal and his Order does not show that they made a grievance that the hearing was not fair. In our opinion this point cannot be considered because though. it was mentioned in the petition for certificate it was apparently not pressed before Mr. Justice Sharma.

The next contention of the appellants is that the prior acquittal in the second case operates as a bar to the conviction in the present case and the High Court ought to have given the appellants the benefit of the prior ac- quittal. Reliance in this connection is placed upon a de- cision of the Privy Council in a case from Malaya State reported in Sambasivam v. Public Prosecutor/Federation of Malaya(1) and particularly the following passage from the judgment of Lord Mac Dermott:

> "The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence.
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> [1950] A.C., 458 at p. 479.
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> To that is must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maximum "Res judicata pro veritate accipitur" is no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and wasprecluded from taking anystep to challenge it at the second trial. And the ap- pellant was no less entitled to rely on his acquittal in so far as it might be relevant in his defence. That it was not conclusive of his innocence on the firearm charge is plain, but it undoubtedly reduced in some degree the weight of the case against him, for at the first trial the facts proved in support of one charge were clearly relevant to the

other having regard to the circumstances in which the ammunition and revolver were found and the fact that they fitted each other."

The above passage was cited with approval by this Court in Pritam Singh v. State of Punjab(1). The two cited cases were considered and distinguished by this Court in Mohinder Singh v. State of Punjab(2) and Pritam Singh's case was again distinguished in Gurcharen Singh & anr. v. State of Punjab(1). As pointed out in Mohinder Singh v. State of Punjab(2), the case of the Privy Council involved a confession by an accused in which he admited possession of a firearm and some ammunition which were both offences under the relative law of Malaya State. He was convicted on the basis of that statement on two counts but on appeal was acquitted in respect of the count relating to the possession of ammunition and a fresh trial was ordered in respect of the count relating to the possession of the firearm. In the second trial the confession was again relied upon and he was convicted. The Privy Council set aside the conviction because the confession was incapable of being divided into two parts so as to make separate confessions about the (1) A.I.R. 1956 S.C. 415. .

(2) Cr. A. No. 140 of 1961, decided on 31-7-63 (Unreported).

(3) [1963] 3 S.C.R. 585.

possession of firearm and about the possession of am- munition. Their Lordships held that the confession which was indivisible could not be used at all, in view of the acquittal recorded earlier on the other count. In Pritam Singh's case(1) the accused made a statement leading to the recovery of a firearm with which he was alleged to have shot one of the victims. He was prosecuted for possession of the firearm and was acquitted but the evidence of the possession of the firearm was used in the murder charge. This was held to be not permissible. As explained in Mohinder Singh's case(2), the acquittal in respect of the possession of firearm affected the admissibility of the same evidence in connection with the murder case, because the firearm could not at the same time be possessed as well as not possessed by the accussed. The acquittal under the Arms Act,, being proper, affected the evidence of possession in the murder case. In Mohinder Singh's case(2) as well as in Gurcharan's(3) case Pritam's(1) case was distinguished because in those cases, the acquittal under the Arms Act was later than the conviction on the substantive charge. There is nothing in common between the present appeal and the two cases relied upon by the appellants. In this case there is no doubt a prior acquittal but on a charge which was quite different from and independent of the charge in the present case. The assault on Tikam was over when the unlawful assembly formed its now common object namely the assault on Puran. The acquittal proceeded mainly because Puran compounded the offence under s. 323 and the High Court did not feel impressed by the evidence about the remaining charges, The charges on which that acquittal took place had nothing whatever to do with the charges on which there is conviction in the present appeal. A plea of autrefois acquit which is statutorily recognised in India under s. 403 of the Code of Criminal Procedure arises when a person is tried again for the same offence or on the same facts for any other offence for which a different charge from the one made against him might have been made un- (1) A.I.R. 1956 S. C. 415.

(2) Cr. A. No. 140 of 1961, decided on 31-7-63 (unreported).

(3) [1963] 3 S.C.R. 585.

der s. 236 or for which he might have been convicted under s. 237.

Section 236 provides for a situation where it is doubtful what offence has been committed. When 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, that section permits that 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 such offences. Section 237 enables the Court to convict an accused charged with one offence for a different offence where the facts show that a different offence has been committed.

Neither of these provisions is applicable to the present facts because the two offences were distinct and spaced slightly by time and place. The trials were separate as the two incidents were viewed as distinct transactions. Even if the two incidents could be viewed as connected so as to form parts of one transaction it is obvious that the offences were distinct and required different charges. The assault on Tikam in fulfilment of the common object of the unlawful assembly was over when the unlawful assembly proceeded to the house of Tikam to loot it. The new common object to beat Puran was formed at a time when the common object in respect of Tikam had been fully worked out and even if the two incidents could be taken to be connected by unity of time and place (which they were not), the offences were dis- tinct and required separate charges. The learned Sessions judge was right in breaking up the single charge framed by the magistrate and ordering separate trials. In this view the prior acquittal cannot create a bar in respect of the conviction herein reached.

It was contended by Mr. Tewatia that the earlier judgment involved almost the same evidence and the reasoning of the learned judge in Puran's case destroys the prosecution case in the present appeal. He attempted to use the earlier judgment to establish this point. In our opinion he cannot be allowed to rely upon the reasoning in the earlier judgment proceeding as it did upon evidence which was separately recorded and separately considered. The eye witnesses in this case are five in number, while in the other case there were only two, but that apart, the earlier judgment can only be relevant if it fulfils the conditions laid down by the Indian Evidence Act in ss. 40-43. The earlier judgment is no doubt admissible to show the parties and the decision but it is not admissible for the purpose of relying upon the appreciation of evidence. Since the bar under s. 403 Criminal Procedure Code did not operate, the earlier judgment is not relevant for the interpretation of evidence in the present case. Mr. Tewatia attempted to argue on the facts of this case but we did not permit him to do so because this Court, in the absence of special circumstances, does not review for the third time, evidence, which has been accepted in the High Court and the Court below. No such circumstance has been pointed out to us to make us depart from the settled practice. The appeal therefore fails and is dismissed. Appeal dismissed.