Kapildeo Upadhya vs State on 5 January, 1954

Equivalent citations: 1954CRILJ1185, AIR 1954 ALLAHABAD 557

ORDER

Harish Chandra, J.

1. These are two applications in revision arising out of Sessions Trials Nos. 35 and 36 of 1951 pending in the Court of the Assistant Sessions Judge, Banaras, on behalf of Sri Kapildeo Upadhya. He was an employee of the water Works Department at Banaras and charges under Sections 466, 409 and 477A, Penal Code have been framed against him in each case. The Committing Magistrate, when he committed these cases to the Court of Sessions, charged him in Section T. No. 35 with three offences of forgery alleged to have been committed by the applicant with respect to certain documents between 28-2-1947 and 13-3-1947 and also with having committed the offences of falsification of accounts and criminal breach of trust between the same dates. In Sessions Trial No. 36, he similarly charged him with having committed three offences of forgery with respect to certain documents between 1-11-1945 and 31-3-1946. He charged him in this case also with offences under Sections 477A and 409 said to have been committed between the same dates. These other offences are said to be connected with the offences of forgery with which the applicant was charged in each case. - ,

2. The learned Sessions Judge after recording some evidence, altered and realtered the charges so that the period during which the offences in the one case are alleged to have been committed now is between 28-2-1947 and 27-2-1948 in one case & between 1-11-1945 and 31-10-1946 (sic). It is said that the procedure adopted by him was illegal.

3. Three points are urged before me:

> 1. that under Section 227, Criminal P. C. the Court can alter or add to any charge only once and not more than once;
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> 2. that the three offences of the same kind with which the applicant has been charged cannot be combined with three offences of other kinds in the same trial; and
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> 3. that a charge could not be altered by the Sessions Judge so as to go beyond the scope of the enquiry in the Court of the Committing Magistrate.
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> 4. The language of Section 227 is very wide and does not seem to indicate that any alteration or addition to a charge can be made only once and I do not think the procedure adopted by the learned Assistant Sessions Judge was in any manner contrary to the provisions of that section.

5. Section 234 authorises the court to charge an accused person with and try him at one trial for any number of offences of the same kind not exceeding three in number. Section 235 provides that:

If, in one series of acts 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 at one trial for, every such offence.

It is not denied that the applicant could have been tried at one trial for offences under Sections 466, 477A and 409, Penal Code, if the alleged acts were so connected together as to form the same transaction, as in the present case. What is objected to is that three offences under Section 466 could not be combined at one trial with three offences of the same kind under Section 477A and three offences of the same kind under Section 409. In other words, it is said that Sections 234 and 235, Criminal P. C. are exclusive of one another and cannot be combined for the purpose of the trial of an accused person at one trial.

6. A number of cases has been cited before me. But I need not refer to them all. For the matter has been set at rest by the decision of a Division Bench of this Court in - 'Rex v. Daya Shankar' AIR 1950 All 167 (A), in which it was held that charges for criminal misappropriation with respect to three items could be linked with three charges for falsification of accounts arising out of the same three transactions. This decision was arrived at by the Court on a consideration of a number of cases that were cited before it, The following is reproduced from the judgment delivered by my brother Agarwala, J.:

The principle underlying Sections 235 and 236 is that if more offences than one are committed in one transaction, or it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges can be tried at one trial. The reason is that when the transaction is one, the evidence in proof of it will be the same, whatever be the nature of different offences committed by means of that transaction, and in such a case the legislature considers that there is no harm in combining the trial of different offences either cumulatively or alternatively when the transaction is the same.

In all such cases the main offence usually committed is one and the other offences are subsidiary ones. If it is considered advisable to try the subsidiary offences along with the main offence arising out of the same transaction, it does not stand to reason that these subsidiary offences, which go along with the main offence as part of the same transaction, may not be tagged on to the main offences, when three such main offences are considered by the legislature to be fit for joint trial under Section 234.

The combination of the subsidiary offences with the main offence is no more likely to confuse the jury or the Judge or to prejudice the accused than the trial of the three main offences themselves, because in both the cases the evidence will be the same. Even if the offences cannot be described as main or primary and secondary, the principle remains the same. Indeed, if the rule were otherwise, unnecessary multiplicity of proceedings and duplication of evidence and waste of public time and even harassment of the accused may be the result. In our opinion, Sections 234, 235, 236 and 239 ought to be read as supplemental and not as exclusive of one another.

7. In another case - 'Mangi v. State' AIR 1953 All 228 (B), the view expressed in - 'Rex v. Daya Shankar (A)' was endorsed. No doubt, a contrary view was expressed by a single Judge of this Court in - 'Damodar Swarup v. State', Cri. Ref. No. 267 of 1951 decided by Brij Mohan Lal J. on 4-12-1951 (All) (C); but obviously his attention was not invited to these and other cases previously decided by this Court and, I think, I am bound to follow the view taken by a Division Bench of this Court in - 'Daya Shankar Jaitly's case (A)' and hold that the charges as framed are not illegal.

8. In regard to the last contention of learned Counsel for the applicant, I am referred to the Calcutta case of - 'Birendra Lal v. Emperor', 1 Cri L J 794 (Cal) (D). In that case the accused had been convicted under Section 420 read with Section 511, Penal Code for an attempt to cheat the Jessore Loan Office. The accused had, however, been committed by the Magistrate to the Court of Session for trial on a complaint by a person who had no concern with the Jessore Loan Office and whose complaint related to antecedent events. The court held that the amendment of the charge so as to relate to the alleged offence of cheating the Jessore Loan Office was not in accordance with law.

9. Another case which has been cited before me is - 'Mutirakkal Kovilagatha Rama Varma Raja v. Queen' 3 Mad 351 (E), in which it was held by the Madras High Court that an amendment of the charges by the Sessions Judge which is not based on any evidence recorded by the committing Magistrate was illegal. It appeared that the amended charge was based on the evidence of a witness who had not been examined at the enquiry by the Magistrate and was for the first time examined in the Court of Session.

10. The provisions of Section 227, Criminal p. C. are, however, very wide. The section is as follows:

(1) Any Court may alter or add to any charge at any time before judgment is pronounced, or, in the case of trials before the Court of Session or High Court, before the verdict of the jury is returned or the opinions of the assessors are expressed. (2) Every such alteration or addition shall be read and explained to the accused.

The subsequent sections, namely, Sections 228, 229, 230 and 231, Criminal P. C. are also of importance.

11. According to Section 228, if the alteration or addition is such as is not likely, in the opinion of the Court, to prejudice the accused in his defence, the trial may proceed as if the new or altered charge had been the original charge. According to Section 229, if, in the opinion of the Court, the alteration or amendment is likely to prejudice the accused or the prosecutor, the Court may either direct a new trial or adjourn the trial for such period as may be necessary. According to Section 230, if the offence stated in the new or altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with unless such sanction is obtained.

According to Section 231, whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed to re-call or re-summon, and examine with reference to such alteration, or addition, any witness who may have been examined and also to call any further witness whom the Court may think to be material.

It would thus appear that the power of the Court to alter or add to, any charge is very wide and so far as the Court of Session is concerned, such alteration or addition can be made before the verdict of the jury is returned or the opinions of the assessors are expressed.

12. On a perusal of these sections it does not appear that the intention of the legislature was that the Court of Session cannot make any alteration or addition to a charge framed by the committing Magistrate unless it is supported by the evidence recorded before the committing Magistrate. In a Sind case - 'Dodo v. Emperor' AIR 1915 Sind 50 (P), these two cases were considered and the view expressed by the Calcutta and Madras High Courts was not accepted. I respectfully agree with the reasoning adopted by the learned Judges who decided that case.

They have referred to an Allahabad case - 'Queen-Empress v. Gordon', 9 All 525 (G). In that case, charges under Sections 467 and 471, Penal Code had been framed against the accused, A number of witnesses was called in support of the charges. When the case for the prosecution had concluded and the prisoner had made a statement, it was submitted by counsel for the accused that there was no case to go to the jury upon either of the charges, After hearing the public prosecutor, the Judge directed the clerk of the crown to add a charge of fabricating false evidence under Section 193, Penal Code with reference to the provisions of Section 227, Criminal P. C. The objection, that the court could not add another charge was overruled and a change under Section 193, was added and on that charge he was found guilty and convicted.

13. Another case - 'Emperor v. Stewart' AIR 1927 Sind 28 (H), was cited before me by learned Counsel for the applicant. This case was also decided by the Judicial Commissioner's Court at Sind. In this case the Sessions Judge had re-fused to frame a charge at the suggestion made by the prosecution. Ultimately the accused was acquitted on the charge already framed against him. There was an appeal against the order of acquittal and it was said that the Judge was wrong in refusing to amend a charge at the suggestion made by the prosecution. The judgment shows that what the court considered was whether the discretion exercised by the Sessions Judge was or was not correct and

whether the accused would or would not be prejudiced in his trial by the suggested amendment of the charge; the power of the judge to amend the charge was not questioned, although one of the Judges who decided the case expressed a doubt as to whether the Sessions Court had jurisdiction to add or substitute a new charge on fresh evidence led or to be led in the Sessions Court for the first time.

14. Having regard to the generality of the provisions of Section 227 and the subsequent sections, namely, Sections 228, 229, 230 and 231, Criminal P. C., my view is that the alteration made by the learned Assistant Sessions Judge in the charges framed against the applicant was in accordance with law. It will be noted that they clearly relate to the original charges and cannot be said to have been based on entirely new evidence. The Judge has also taken ample precaution to avoid any prejudice being caused to the applicant and has allowed him to cross-examine the prosecution witnesses, afresh and to produce such evidence in his defence as he may consider proper.

15. One other point has also been raised on behalf of the applicant and it is this. It appears from the order of the learned Assistant Sessions Judge that the evidence recorded by the Committing Magistrate was very sketchy and that all the documents which should have been exhibited in the case were not exhibited before him. Some further witnesses had also to be examined in the Sessions Court, it is said that the commitment was, therefore, defective and that it should for that reason be set aside. But, in my view, this cannot be done. Under Section 537, Criminal P. C., no finding or sentence or order passed by a court of competent jurisdiction can be reversed or altered on appeal or revision on account of any error, omission or irregularity in the order, judgment or other proceeding before or during trial or in any inquiry or other proceeding under the Code of Criminal Procedure, unless such error, omission or irregularity has, in fact, occasioned a failure of justice.

There is nothing to indicate that the alleged irregularity on the part of the committing Magistrate has prejudiced the applicant in any way. As a matter of fact, this point was not even raised in the grounds of revision either before the learned Sessions Judge or in this Court. The evidence of the witnesses was recorded in his presence in the Court of Session and he was given full opportunity to cross-examine them. After the alteration of the charges too he is to be given a further opportunity to cross-examine the prosecution witnesses and to produce such evidence as he may desire.

16. For the reasons given above, I dismiss the applications to. revision. Let the records be returned so that the cases may now proceed without any further delay. The orders staying the proceedings are discharged.

17. A certificate that these are fit cases for appeal to the Supreme Court is asked for but is refused.