Murlidhar Dalmia vs State on 18 September, 1952

Equivalent citations: AIR1953ALL245, AIR 1953 ALLAHABAD 245

Author: Raghubar Dayal

Bench: Raghubar Dayal

JUDGMENT

Raghubar Dayal, J.

1. Murlidhar Dalmiya is proprietor of firm Onkarnath Nandkishoro at Kanpur. His godown was searched on 4-6-1946 and there were found 133 pieces of cotton cambric cloth, each of 10 yards sewn in the shape of 'lehangas'. None of these pieces had any marking in compliance with the directions of Clause 10 or 10B, Government of India Cotton Cloth and Yarn Control Order, 1945. He was thereafter prosecuted and convicted under Rule 81 (4), Defence of India Rules, for breach of Clauses 13 (1) (c) and 18 (2), Government of India Cotton Cloth and Yarn Control Order, 1943, and Clause (4), U. P. Controlled Cotton Cloth and Yarn Dealers' Licensing Order, 1945 :

2. We may quote the various clauses for whose breach the applicant has been convicted, Clause 13 (1) (c) is :

> "Where the markings to be made and the time and manner of marking them in respect of any class or specification of cloth or yarn have been specified under Clauses 10 or 10B no person other than the manufacturer thereof shall have in his possession or under his control any such cloth or yarn which is not so marked, unless it be for bona fide personal requirements."

3. Clause 18 (2) is :

> "No dealer or other person not being a manufacturer shall, save with the permission of the Textile Commissioner, at any time hold stocks of cloth or yarn in excess of his normal requirements."

4. Clause 4, U. P. Controlled Cotton Cloth and Yarn Dealers' Licensing Order, 1945 is :

> "Subject to the provisions of Clause 16 no person other than a dealer shall obtain or attempt to obtain or store for sale or, distribution controlled cotton cloth or cotton yarn and save as hereinafter provided, no dealer shall obtain or attempt to obtain or store for sale or distribution or sell or distribute to any person controlled cotton cloth

> or cotton yarn except under and in accordance with the conditions of a licence in the appropriate form granted under this Order."

5. Controlled cotton cloth is defined in Clause 2 (a) of this Order thus :

> "Controlled cotton cloth means any type of cloth manufactured either wholly from cotton or partly from cotton and partly from any other matter and containiog not less than 10 per cent, of cotton by weight; but does not include --(1) ready-made clothing other than dhoties and sarees."

6. The definition of 'cloth' in Clause 3 (a), Government of India Cotton Cloth and Yarn Control Order, 1945, is identical with the definition of "Controlled Cotton Cloth" in Clause 2 (a), U. P. Controlled Cotton Cloth and Yarn Dealers' Licensing Order, 1945, and need not be quoted.

7. The conviction of the applicant for breaches of Clause 18 (2), Government of India Cotton Cloth and Yarn Control Order, 1945, and Clause 4, U. P. Controlled Cotton Cloth and Yarn Dealers' Licensing Order, 1945, cannot be maintained, oven if what was recovered from his possession comes within the definition of the words 'controlled cloth or cotton cloth'.

8. He would have committed a breach of Clause 4, U. P. Controlled Cotton Cloth and Yam Dealers' Licensing Order, 1945, if he had obtained or stored this cloth for sale when he had not obtained a license for it under this Order. It is admitted that he had not obtained any licence under this Order but had applied for one. It is now conceded in this Court on behalf of the State that he did apply for a licence under this Order within a month of the coming into force of this Order. The order came into force on 1-10-1945 and he applied on 27-10-1945. Prior to that he held a Registration Certificate granted under the U. P. Cotton Cloth and Yarn (Control) Order, 1943. In view of these facts and in view of the provisions of Clause 9, U. P. Controlled Cotton Cloth and Yarn Dealers' Licensing Order, 1945, it would be deemed that he held a licence under this Order on 4-6-1946 when this controlled cotton cloth was recovered from his godown.

Clause 9 is :

> "A registration certificate granted under the United Provinces Cotton Cloth and Yarn Control Order, 1943, or subsisting on the date of this Order shall be deemed to be a licence granted under this Order (i) until a licence under this Order is granted or refused, provided that application for such licence is marie within a month from the date on which this Order comes into force or (ii) for a period of one month from the date when this Order comes into force, if no application for a licence under this Order is made before the termination of such period."

The applicant having applied for a licence within a month of the coming into force of this Order, his application not being either granted or refused till 4-6-1946, and he having held a registration certificate granted under the U. P. Cotton Cloth and Yarn Control Order, 1943, is to hold a licence granted under this Order and his registration certificate would be deemed to be such licence.

9. Clause 18 (2), Government of India Cotton Cloth and Yarn Control Order, 1945, will be contravened by the applicant if it be established that the amount of cloth recovered from his possession, that is, 1330 yards of cambric cloth, was in excess of his normal requirements as a dealer. The applicant is a dealer under this Order, as dealer defined in Clause 3 (b) means "a person carrying on the business of selling cloth or yarn or both, whether wholesale or retail." There is nothing on the record to show what were the normal requirements of the applicant for the purpose of his business and, in the absence of any such evidence, it cannot be held that 1330 yards of cloth was in excess of his normal requirements. He cannot, therefore, be held to have committed a breach of Clause 18 (2), Government of India Cotton Cloth and Yarn Control Order, 1945.

10. It is not disputed that this cloth recovered from his house did not have the necessary markings and that, therefore, ho would contravene Clause 13 (1) (c) if it be held that what was recovered from his possession came within the definition of the word "cloth" in the Government of India Cotton Cloth and Yarn Control Order, 1945. There is no question here of his possessing this cloth for bona fide personal requirements. It is contended for the applicant that what was recovered from his place was ready-made clothing as it consisted of 'lehengas' and, therefore, it did not come within the definition of 'cloth'.

11. We have seen the articles recovered from the applicant's godown, and are of opinion that they do answer the definition of the word 'cloth' in Clause 3 (a), Government of India Cotton Cloth and Yarn Control Order, 1945, and cannot be said to be "ready-made clothing".

12. The expression 'ready-made clothing' is not defined in the order. We are of opinion that it must mean clothing which is ready for immediate use and which is meant for such use. It cannot mean an article which may not be meant for immediate use in the form in which it is, but just happens to be in the shape of any article of apparel. In Shorter Oxford English Dictionary "Beady-made" is defined as "Of made and manufactured article : In a finished state; immediately ready for use; now spec. (Specially) of articles which are offered for sale in this state."

13. The articles recovered from the accused's possession just consist of ten yards pieces of white cambric cloth roughly sewn together with a loop of markin (inferior cloth) at one end for passing through the waist-cord. In as many as 74 out of 133, loops did not even have the opening for putting in the waist-cord. The impression on our minds is that the cloth had been put in this shape as an attempt to evade the Control Order if possible, and not with a view to provide ready-made lehngas for immediate use in the form in which they are to be delivered. It may be open to a person to do his best to evade the law if he can do so lawfully and such attempt to evade the law would not be punishable, but the case of the applicant is not such a case. They are not such which can be supposed to be used in that form by any woman. The whole thing, if a iehnga, in that form and of that cloth -is likely to be used, will have to be resewn. Cambric cloth is fairly thick stuff, and a Iehnga having two folds of this cambric cloth would be a pretty heavy thing without any particular use for a second fold of the cloth. The statement of Babu Lal D. w. 4 that the stitches of these lehngas were not of the type generally used in ordinary lehngas and that they could be removed very easily and that married Hindu ladies generally use coloured lehngas, fully supports our opinion that the articles recovered cannot be said to be readymade 'lehngas.' They, do not, therefore, come within the

readymade clothing which is exempted from the definition of cloth, as given in this order.

14. Sri C. E. David, Deputy Collector, in whose presence the godown was searched, states that the bale containing these so-called lehngas was placed under 4 or 5 bags of saresh, a sticking material. This shows the applicant's mala fides, with which really we are not concerned in this case. Of course the circumstance goes to strengthen the view that the recovered articles were not genuine lehngas and were not meant as such.

15. Reference has been made to the decision of a single Judge of this Court in Banarsi Das v. Rex, cri. Kevn. no. 249 of 1948 (ALL.) where he held similar articles to be garments and, therefore, not cloth whose transmission by post was forbidden. The expression "garments'' is not identical with "readymade clothing." Readymade clothing, as already mentioned, is clothing with a certain special feature and that the particular feature is that it should be readymade, which means that it should be an article of clothing in such form that it be ready for immediate use as that particular article of clothing. Cloth put in the form of any garment would easily answer the expression "cloth made up into garments" and, therefore the decision in that case does not go against our interpretation of the expression "readymade clothing."

16. We are, therefore, of opinion that the so-called lehngas recovered from the applicant's possession are not readymade clothing and are, therefore, "Cloth" as defined in Clause 3 (a), Government of India Cotton Cloth and Yarn Control Order, 1945. The applicant, therefore, committed a breach of Clause 13 (1) (c) of that order which was punishable under Rule 81 (4), Defence of India Rules.

17. It was argued that the sanction of the District Magistrate to the prosecution of the applicant under Clause 23, Government of India Cotton Cloth and Yarn Control Order, 1945, was bad as it did not appear that he had been informed about the actual description of the articles recovered and that, therefore, it cannot be said that he sanctioned the prosecution after full knowledge of the facts. We do not agree with this contention. Exhibit P26 would show that he was informed that cloth pieces of 10 yards each camouflaged as petticoat had been recovered.

18. The other point taken before us was that the applicant had been given a combined sentence for his committing breaches of three different provisions of the two Control Orders and that such a combined sentence vitiates the entire trial in view of the case reported in Brij Nandan v. Emperor, 1947 ALL. l. J. 593. It may be mentioned that the learned Magistrate had framed two charges for offences under Rule 81 (4), Defence of India Rules, one with respect to the contravention of Clause 13 (1) (c), Government of India Cotton Cloth and Yarn Control Order, 1945, and the other with respect to the contravention of the provisions of Clause 18 (2) of the same order and of Clause 4, U. P. Controlled Cotton Cloth and Yarn Dealers' Licensing Order, 1945. The final order of the learned Magistrate was that the applicant was convicted of having committed an offence under the various clauses and was sentenced under Rule 81 (4), Defence of India Rules, to undergo rigorous imprisonment for six months and to pay a fine of RS. 1,000 or undergo further rigorous imprisonment for two months. We are of opinion that the case of Brij Nandan reported in 1947 ALL. L. J. 593 is distinguishable.

There the learned Magistrate trying the several accused for offences under Sections 147, 452 and 323 read with Section 149, Penal Code, simply recorded an order convicting them without specifying the offences of which he was convicting them and then passed a single sentence. Such an order of the Magistrate was held to be illegal in view of the non-compliance with the provisions of Sub-section (2) of Section 367, Criminal P. C., which required the judgment to specify both the offence of which an accused is convicted and the sentence awarded for that offence. It was held, in these circumstances, that the Magistrate did not appear to have applied his mind to the case of each applicant in judging the extent of each applicant's guilt and determining what sentences should be passed upon them for each offence and that, therefore, the error committed could not be cured by Section 537, Cr. P. C. One of us distinguished that case on this ground in Kashi Ram v. State, cri. Revn. No. 1187 of 1952, and held that it could not always be said that a composite punishment for the various offences which had been specified in the judgment and found to have been committed by a particular accused vitiated the trial and that the imposition of a composite punishment was merely an irregularity covered by Section 537, Cr. P. C. We are of the same opinion and hold that the mere fact that separate sentences for the different offences of which an accused is convicted have not been expressly passed in a case does not vitiate the trial, though it is essential that separate sentences should be expressly mentioned in the judgment with respect to each offence of which the accused is found guilty. The omission to do so is an irregularity which can be cured in view of the provisions of Section 537, Cr. P. C., if there had been no failure of justice.

19. The question arises as to what interpretation should be given to such a composite sentence and what would be the proper order in case, on appeal or revision, the conviction of the accused with respect to certain offences is set aside while his conviction with respect to other offences is confirmed. It is argued for the applicant that the sentence awarded ostensibly for the various offences should be taken to be an aggregate sentence of the various sentences which the Court intended to award with respect to each offence and that, therefore, when an accused is acquitted of some of the offences the sentence originally awarded must be reduced to some extent as a token of the fact that his sentence had not been enhanced as otherwise maintaining the same sen. tence for fewer offence would mean that the accused was to undergo some sentence which must be taken to have been passed by the Court for the offences of which he had been acquitted and which went to make up the aggregate sentence passed.

Such a view does find support from some cases, but we do not agree with that view and are of opinion that such a composite sentence of imprisonment should be taken to mean that that identical sentence was awarded for each of the offences of which the accused was convicted and that all such identical sentences for all the offences were ordered to run concurrently. This seems to us to be the most logical interpretation as otherwise the appellate or the revisional Court cannot be in a position to determine the specific punishments which the trial Court is supposed to have contemplated to award for each offence and whose total was simply mentioned as the sentence awarded to the accused. It can be said that ordinarily Courts do make the separate sentences concurrent and that it is only in special cases that the Courts order sentences to run consecutively. Section 35, Criminal P. C., provides that when a person is convicted at one trial of two or more offences, the Court may sentence him for such offences to the several punishments prescribed therefor which such Court was competent to inflict and that such punishments, when consisting of imprisonment or

transportation, shall commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.

This means that when a Court intends to award separate sentences for the various offences to run consecutively it is to express the order in which the sentences for the various offences would ran. When the Court passes just one sentence for the various offences, it would bo too much to suppose that the Court had separate sentences for each offence in mind and failed to give expression to its intention about the extent of the sentences and also failed to mention the order in which the sentences for the various offences were to run. It would be more probable in such a case that the Court contemplated the sentences to run concurrently and just expressed the maximum sentence which the Court thought that the accused should undergo for what he had done. No difficulty arises in interpreting one sentence awarded as a sentence for each offence with the direction that the sentences were to run concurrently. A difficulty may arise when the sentence awarded be in excess of the maximum sentence which could have been awarded for any of the offences of which the accused had been convicted, because in that case it would not be proper to hold that the Court intended to pass an illegal sentence and did pass an illegal sentence.

In such a case it can be held that the sentence passed for such an offence was the maximum fixed under law for that offence and that the Court ordered such maximum sentence to run concurrently with the higher sentence passed for other offences. This view agrees with the view expressed by this Court in Sohan Ahir v. Emperor, A. i. R. 1924 ALL. 492, where Daniels, J., interpreted a sentence of 18 months' rigorous imprisonment under Sections 326 and 148, Penal Code, as meaning that the Magistrate passed concurrent identical sentences under each section. When the composite sentence consists of or includes fine the amount of fine should be taken ordinarily to be the total of the fines the trial Court intended to impose for various offences and it may be presumed in the absence of any special circumstances that an equal amount of fine was imposed for each offence. It would follow that the acquittal of the accused for some offence must mean corresponding reduction in fine.

20. We may now refer to some cases of other High Courts on the point.

21. In Paramasiva Pillai v. Emperor, 30 Mad. 48, an accused convicted under Sections 147, 323 and 379, Penal Code, was sentenced to undergo two months' rigorous imprisonment and to pay a fine of Rs. 50. On appeal he was acquitted of the offence under Section 379, Penal Code, but the entire sentence was upheld in connection with his conviction under Sections 147 and 323, Penal Code. It was held :

> "In such cases some reduction of sentence by the appellate Court must be made, unless the Court thinks that the sentence ought not to be reduced, in which case it should refer the matter to the High Court for enhancement of the sentence."

The cases relied upon for this purpose were Queen-Empress v. Hanma, 22 Bom. 760, Ramzan Kunjra v. Hamkhelawan Chowbe, 24 cal. 316 and another unreported case of 1005, in which it was held that such an order amounted to an enhancement of the sentence passed for the offence, the conviction for which alone was maintained. The two cases of Bombay and Calcutta relied upon do

not support the view expressed in this case.

22. In both these cases the trial Court had awarded separate sentences for each of the offences the accused was convicted of, and in appeal the accused though acquitted of one of the offences, was sentenced to the aggregate term of the sentences awarded by the trial Court for the two offences. It is obvious that the sentence for the particular offence, conviction with respect to which was maintained, was enhanced by adding the sentence awarded by the trial Court for the other offence of which the accused was acquitted to the sentence awarded by that Court for the offence conviction for which was maintained by the appellate Court. It may be mentioned that both these cases were decided before 1898 and that till 1898 the Code of Criminal Procedure of 1882 or 1872 or 1861 did not empower Courts to order the various sentences awarded for several offences of which an accused was convicted to run concurrently. Section 35, Criminal P. C. Act 5 of 1898, gave this power to the Court for the first time.

23. In the two Madras cases In re Mari, 11 cri. L. J. 243 (Mad.) and Kailappa Goundan v. Emperor, A. I. R. 1928 Mad. 651, the composite sentence was not reduced. In the former, it was observed :

> "But here the true inference to be drawn from the sentences is that the Magistrate did not mean to pass any sentence for the offence of hurt and that being so there was nothing to reduce."

In the other case, it was observed:

> "In this case there were three counts and the lower appellate Court thought that there was no distinct charge in respect of the separate counts and set aside the conviction in respect of two and declined to interfere with the sentence in respect of the third. This does not amount to an enhancement of the sentence."

It appears to us that in effect the two cases did not actually follow the case of Paramasiva Pillai v. Emperor, 30 Mad. 48.

24. In Emperor v. Dharamdas Lilaram, A.i.r. 1933 sind 9, the legality of convicting an accused of two offences but passing one sentence was considered. The question was not clearly answered. It was observed that it was desirable that the Court should at least record what punishment it awards for each of the two distinctive offences, and the Court split up the sentence passed into two sentences whose total came to the original sentence and the Court passed separate sentences making them concurrent, the longer sentence being equivalent to the sentence awarded by the trial Court. This case is not of much help except as supporting the view that the passing of a composite sentence is not absolutely illegal.

25. In Ishar Das v. Emperor, 8 Cri. l. j. 75 (Lah.), it was observed :

> "The argument that to uphold the sentence under one section alone amounts to an enhancement of sentence is one that is not supported by any authorities and does not

> appeal to us. The sentence was a joint sentence and we consider that it can be maintained in full on the conviction under Section 420 being upheld."

In this case each of the two accused was convicted by the trial Court of three offences and was awarded one sentence. Conviction of each with respect to one offence was maintained and the sentence was reduced.

26. In Bechu Singh v. Emperor, A. I. R. 1930 pat. 79 the trial Court had convicted the appellants of offences under ss. 147 and 323, Penal Code, and passed a sentence of imprisonment and fine under s. 147 only and passed no sentence under Section 323. The appellate Court acquitted the accused of the offence under Section 147 and. upholding the conviction under Section 323, maintained the sentence which bad been passed under Section 147. It was argued in the High Court that the order passed by the appellate Court amounted to enhancing the sentence. It was observed by Macpherson J.:

> "Manifestly it does not follow that if the conviction on one of several charges in a trial is set aside while one or more others are affirmed, there must necessarily be a, reduction of sentence. It depends on the circumstances of the particular case whether the retention of the sentence awarded by the trial Court constitutes an enhancement of sentence."

The sentence of fine was set aside because it was found that the other co-accused who were convicted of the offence under s. 147 only had been sentenced to fine only by the trial Court. The case does not support, therefore, the view that in all cases maintaining the same sentence, even though an accused is acquitted of one of the offences convicted of, amounts to enhancement.

27. In Superintendent & Remembrancer of Legal Affairs, Bengal v. Hossein Ali, A.i.r. 1938 Cal. 439, a Magistrate convicted the accused under Sections 363 and 498, Penal Code, but passed a sentence of 1 1/2 years under Section 363 and awarded no separate sentence under Section 498. The appellate Court found the accused guilty under Section 498, but not under Section 363. It then felt difficulty in passing a proper sentence as the Magistrate had not passed any sentence under Section 498. It was held that the Sessions Judge had jurisdiction to pass an appropriate sentence under Section 498, subject to the limit of one year and six months which the Magistrate had imposed, in view of Section 423, Criminal P. C., which allowed the appellate Court to alter the finding maintaining the sentence or, with or without altering the finding, to reduce the sentence. It was considered that the Sessions Judge had merely altered the conviction under Sections 363 and 498 to a conviction under Section 498 only. We do not agree with the reasoning, but are of opinion, in view of the interpretation given above, that the Sessions Judge could have passed a sentence under Section 498 up to 18 months, as held in this case. [28] It would appear from the above that none of the cases in which it was held that the maintenance of the sentence of imprisonment passed by a trial Court ostensibly as a joint sentence for the various offences proved against the accused amounted to an enhancement of the sentence refers to anything in the Code of Criminal Procedure or in the Penal Code to support the conclusion, references being only to some cases decided prior to 1898 when the law was different, and that even two of those cases, namely, those reported in

Queen-Empress v. Hanma, 22 Bom. 760 and Bamzan Kunjra v. Ramkhelawan Chowbe, 24 cal. 316 did not really lay this down. No case other than the one reported in Brij Nandan v. Emperor, 1947 ALL. l. J. 593, is referred to in support of the contention that the mere passing of one sentence in cases in which an accused was convicted of several offences would vitiate the trial. We, therefore, hold that the single sentence of imprisonment for the various offences for which an accused is convicted does not vitiate the trial, unless there had been a failure of justice and that the maintenance of that sentence by an appellate or revisional Court, even when the accused is acquitted of the offences convicted of, will not amount to an enhancement of the sentence and that such a sentence should be interpreted to mean that the trial Court awarded identically the same sentence for each of the offences of which the accused was convicted, provided of course that such a sentence was within the maximum limits of the sentence provided by law for that offence, and that the trial Court had ordered the sentences to run concurrently and that in cases where such a sentence went beyond the maximum limit of imprisonment provided for any of the offences of which the accused was convicted, the sentence for that offence would be deemed to be the maximum provided by law for that offence. We further hold that a composite sentence of fine should be treated to be made up of separate sentences of fine, equal in amount, for each of the offences of which the accused had been convicted, provided that such amount is not more than the maximum allowed under that offence,

29. It was also urged that Sections 3, 4 and 6, Essential Supplies Act, were ultra vires of the Central Legislature in view of its delegating its legislative power to the executive without laying down guiding principles for the exercise of that power. The contentions raised really were the same as were urged in Bhushan Lal v. State, cri. Revn. no. 711 of 1950 and were referred to the Full Bench for decision. The Full Bench has held that Sections 3 and 4 were not ultra vires and that Section 6 was ultra vires. Brij Bhushan Lal v. State, 1952 ALL. l. J. 412. The result is that the Government of India Cotton Cloth and Yarn Control Order, 1945, is valid.

30. The learned Magistrate had ordered under Clause 18, U. P. Controlled Cotton Cloth and Yarn Dealers' Licensing Order, 1945, that the property seized in the case, 133 petti-coats or lehangas, shall be forfeited to His Majesty and that they shall be disposed of according to the direction of the District Magistrate. It appears to us that this order cannot stand in view of our opinion that the applicant did not contravene Clause 4, U. P. Controlled Cotton Cloth and Yarn Dealers' Licensing Order, 1945. Such an order under Clause 18 could be passed in cases in which a person was convicted for contravening any of the provisions of this particular Order. It is true that a similar order could have been passed under Clause 22, Government of India Cotton Cloth and Yarn Control Order, 1945. As, however, such an order would amount to the enhancement of the sentence, we cannot pass this sentence now under Clause 22, Government of India Cotton Cloth and Yarn Control Order, 1945, on account of the conviction of the applicant for contravening the provisions of Clause 13 (i) (c) of that Order.

31. In view of the above, we allow the revision to this extent that we sot aside the conviction of the applicant under Rule 81 (4), Defence of India Rules, with respect to his alleged contravening the provisions of Clause 18 (2), Government of India Cotton Cloth and Yam Control Order, 1945, and Clause 4, U. P. Controlled Cotton Cloth and Yarn Dealers' Licensing Order, 1945, and set aside the

order of forfeiture of the property recovered.

32. We dismiss the revision with respect to the accused's conviction and sentence under Rule 81 (4), Defence of India Rules, with respect to his contravening the provisions of Clause 13 (1) (c), Government of India Cotton Cloth and Yarn Control Order, 1945, the sentence being of six months rigorous imprisonment and RS. 333-5-4 fine.

33. We direct that the property in suit be returned to the applicant and that the applicant who is on bail should surrender and serve out the sentence.