Ram Prasad And Ors. vs State, Through Jai Narain And Anr. on 27 May, 1952

Equivalent citations: AIR1952ALL878, AIR 1952 ALLAHABAD 878

ORDER

Brij Mohan Lall, J.

1. This is a reference under Section 438 of the Criminal P. C. by the learned Additional Sessions Judge of Agra recommending that the conviction of Ram Prasad Vaidya and four others recorded by a learned Magistrate, first class, of Agra, under Section 297/149 "be set aside and the parties be directed to seek redress in the proper civil Courts if they are so advised".

2. A complaint was filed by two persons, viz. Sidh Behari and Jai Narain, against Earn Prasad Vaidya and his four campanions, charging them with having committed offences punishable under "Sections 295/297/147/149, Indian Penal Code" Sidh Behari described himself as the manager and trustee of a temple and Jai Narain called himself a Pujari thereof. It was alleged that the accused persons had forcibly entered the temple on 17-9-1948, dug out the Singhasan and the platform and thrown away the idols.

2a. The defence was that the building in question was not a temple but a private house which had been sold two days before by Shrimati Bibbo (the mother of one of the accused, viz. Gutti) to the wife of another accused, Earn Vinod, and the, purchasers had, in lawful exercise of their civil right, entered the house they had purchased and obtained possession thereof. A charge was framed by the learned Magistrate under Section 295/149, I.P.C. It ran as follows:

> "That you on or about the 17th day of September 1948, at 1 p. m. at Jumma Kinara damaged, defiled and destroyed the idols at Sri Laxmi Narainji temple with intent to cause icsult to the religion of the complainant and in doing so all acted with the common object and thereby committed an offence punishable under Section 295/ 149, Indian Penal Code, and within my cognizance".

3. The learned Magistrate held that the building in question was a temple and in a portion of the said building Jai Narain was living as a Pujari. Further, he held that Sidh Behari, the other complainant, was neither the Manager nor the trustee of the said temple. As regards the occurrence, he was of the opinion that the accused persons had, in fact, forcibly entered the temple, dug out the platform and thrown away the idols. On these findings, he recorded a conviction under Section 297/ 149 I. P. C. and sentenced every one of the accused to pay a fine of Rs. 50.

4. The accused persons filed a revision and the learned Session Judge was of the opinion that it was "difficult to hold that any idols were defiled or thrown away". There was, however, evidence in favour of the idols being thrown oway and, if the learned Magistrate was of the opinion that that evidence was believable it was not for the Sessions Judge to set aside that finding of fact in revision and to substitute his own finding in place thereof. It cannob be contended for a minute that the Magistrate's finding was either perverse or unsupported by evidence. This reference must therefore, be decided on the assumption that the learned Magistrate's findings of fact are correct.

5. The learned Sessions Judge had further held that, even accepting the findings of fact recorded by the learned magistrate, the conviction is" vitiated by several legal defects. It is stated, in the first instance, that the charge does not contain a statement to the effect that the accused persons were members of an unlawful assembly and therefore the conviction is bad. With this argument I am unable to agree. The accused knew full well what the allegations against them were. They were not prejudiced by the fact that membership of an unlawful assembly was not specifieially mentioned in the charge. The charge, as already stated, was framed under Section 295/149 I. P. C. The mention of Section 149 was a clear indication that the accused were being treated as members of an unlawful assembly. Section 537 (a) Cr. P. C. is clear on the point. It says that no sentence or order passed by a competent Court shall be reversed or altered by any Court of appeal or revision on account of any error, omission or irregularity in the charge, if there has been no failure of justice. I am satisfied that the accused were not prejudiced and there has been no failure of justice on account of this omission.

6. The next point of law urged by the learned Sessions Judge is that since the accused have not been convicted of an offence under Section 147 I. P. C. the provisions of Section 149 could not be invoked against them. This contention is also without force. Section 535 (1) Cr. P. C. lays down that a conviction can be recorded even in the absence of a charge, if there has been no failure of justice. The circumstances were such that the accused could be convicted of an offence punishable under Section 147 even in the absence of a charge. If they have not been convicted, so much the better for them. But the absence of a conviction under Section 147 is no ground for setting aside their conviction of any other offence which might have been proved against them. In the circumstances, I see no force in this argument also of the learned Sessions Judge.

7. Another argument advanced by the learned Sessions Judge is that the accused were enforcing a bona fide civil right and the trespass committed by them was, at the most, a civil and not a criminal trespass. He seems to be of the opinion that, unless there is a criminal trespass, an offence under Section 297 is not complete. This argument too is not sound. Section 297 speaks of "any trespass" and not of criminal trespass. Therefore, whether the trespass is of a civil or a criminal nature, the offence becomes complete. Since there is a clear finding by the learned Magistrate that there was a trespass in the present case, the ingredient of trespass required by Section 297, Penal Code is present. For the completion of the offence it is not necessary to record a finding that the trespass committed was necessarily a criminal trespass.

8. The next point put forward by the learned Sessions Judge is that since the charge was one under Section 295, a conviction could not be recorded under Section 297, Penal Code and that Section 297 cannot be described as a "minor offence" with reference to the offence punishable under Section

295. This contention is no doubt true. A minor offence means an offence made out by some of the ingredients of the major offence. For instance, an offence punishable under Section 323 is a minor offence with respect to an offence of grievous hurt punishable under Section 825, Penal Code. Similarly, an offence of causing assault or using criminal force punishable under Section 325, Penal Code is a minor offence with respect to an offence of causing assault or using criminal force with a view to dishonour a person punishable under Section 355, Penal Code. The offence punishable under Section 297 does not satisfy this test. In this offence there is an additional ingredient, viz. that of trespass, which forms no part of the offence punishable under Section 295, Penal Code. Because of the presence of this additional ingredient the offence punishable under Section 297 cannot be treated as a minor offence with respect to the offence punishable under Section 295, Penal Code. Therefore, a conviction under Section 297 while the charge was under Section 295, cannot be justified by the provisions of Section 238, Criminal P. C. But Section 238, Criminal P. C. is not the only section which permits the recording of a conviction of an offence different from the one mentioned in the charge sheet. Section 237 is another such section which says that :

> "If, in the case mentioned in Section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it."

9. It is, therefore, obvious that if the case is one which is covered by Section 236, Criminal P. C., a conviction can be recorded for an offence made out by the evidence even if it happens to be an offence different from that mentioned in the charge. The learned counsel, who appeared in support of the reference, conceded that this was so, but he maintained that in the present case Section 236, Criminal P. C. did not apply. He contended that it was not doubtful which of the two offences the facts proved would constitute. According to him, it was a clear case of Section 297 and nobody could ever entertain a doubt that it was possible to record a conviction under Section 295, Penal Code. This contention is not correct. From the very beginning there was a dispute between the parties whether or nob there was a temple and, secondly, whether the temple was a public temple or it consisted of a simple family idol. In case it was a public temple, throwing away of the idol and digging of the Chabutra would have amounted to insulting the religion of a "class of persons" and would have been covered by Section 295, Penal Code. On the other hand, if it was only a family idol, Section 295 had no application and an offence under Section 297, Penal Code could be made out. It could not be stated with certainty as to whether the evidence would establish that the temple was a public or a private temple. In the circumstances, the matter was entirely a doubtful one and the case fell within the four corners of Section 236, Criminal P. C. Therefore, Section 237, Criminal P. C, became applicable, and by virtue of this section a conviction could be recorded for an offence with which the accused were not specifically charged.

In the case of Begu v. Emperor, 52 Ind App. 191 (P.C.) the accused was charged with an offence punishable under Section 302, Penal Code but was convicted of an offence punishable under Section 201, Penal ode. Similarly, in the recent case of Bejoy Chand v. The State of West Bengal, 1952 ALL. L. J. 268 (S.C.) the accused was charged with an offence punishable under Section 307, Penal Code but was convicted of an offence punishable under Section 326, Penal Code which consists of an

additional ingredient, viz that the injury must have been caused by an 'instrument of shooting, stabbing or cutting or any instrument which, used as a weapon of offence, is likely to cause death." This conviction was upheld by the Supreme Court. The case of Amir Hassan v. Emperor, A. I. R. 1940 Pat. 414 is still more to the point. In that case the charge was, as here, under Section 293, Penal Code but a conviction was recorded under Section 297, Penal Code. I am, therefore, of the opinion that the provisions of Section 237, Criminal P. C. justified the recording of a conviction under Section 297/149, while the charge was under Section 295/149, Penal Code.

10. The reference is rejected. The papers shall be returned.