Supreme Court of India
A.A. Mulla And Others vs State Of Maharashtra And Anr on 28 October, 1996
Author: G Ray
Bench: G.N. Ray, G.B. Pattanaik

PETITIONER:
A.A. MULLA AND OTHERS

Vs.

RESPONDENT:
STATE OF MAHARASHTRA AND ANR.

DATE OF JUDGMENT: 28/10/1996

BENCH:
G.N. RAY, G.B. PATTANAIK

ACT:

HEADNOTE:

JUDGMENT:

THE 28TH DAY OF OCTOBER, 1996 Present :

Hon'ble Mr. Justice G.N. Ray Hon'ble Mr. Justice G.B. Pattanaik Sunil K. Jain, and Jatinder K. Bhatia, Advs. for the P.A. Chaudhary, Sr. Adv. and Ms. Sushma Suri, Adv. with him J U D G M E N T The following Judgment of the Court was delivered : A.A. Mulla and others V.

State of Maharashtra and Anr.

J U D G M E N T G.N. RAY, J.

This appeal is directed against judgment dated 16.1.1986 passed by the Bombay High Court in Criminal Writ Petition No. 36 of 1986. The appellants were charged under Section 409 IPC and Section 5 of the Prevention of Corruption Act for making false panchnama disclosing recovery of 90 gold biscuits on 21.9.1969 although according to prosecution case the appellants had recovered 99 gold biscuits. The appellants were tried in special case No. 8 of 1971 before the Special Judge for Greater Bombay. Two of the appellants were acquitted by the learned trial Judge and the remaining two appellants were acquitted on 6.12.1995 by the High Court inter alia on the finding that the prosecution had failed to prove misappropriation.

The appellants were also tried for offence under Section 120 B IPC and Sections 135 and 136 of the Customs Act. Sections 85 of the Gold Control Act and Section 23 (IA) of Foreign Exchange Regulation Act and Section 5 of Imports and Export Control Act. The appellants filed an application before the learned Judicial Magistrate contending that on the self same facts they could not be tried for the second time view of Section 403 of the Code of Criminal Procedure 1898 (corresponding to Section 300 of the Code of Criminal Procedure, 1973). The said application was rejected by the learned Magistrate and the appellants preferred Criminal Revision Application No. 201 of 1980 in the Bombay High Court. Such revision application was also dismissed by the High Court. Such revision application was also dismissed by the High Court inter alia by holding that it would be open for the appellants to make submissions and raise contentions as to the applicability of Section 403 Dr. P.C. before the learned Magistrate at the time of trial of the Criminal case and the learned Magistrate could decide such contentions if raised.

During the trial of case No. 19/CW of 1981, the learned Magistrate recorded evidence and after hearing arguments by judgment dated 15.1.1981 convicted the appellants under Section 135 (1) of the Customs Act and sentenced them to 9 months rigorous imprisonment and fine of Rs. 1,000/-, The appellants were also convicted under Section 65 of the Gold Control Act. The appeal preferred by the appellants against their convictions under the Customs Act and Gold Control Act and consequential sentence passed for such convictions before the Sessions Judge, Greater Bombay in Criminal Appeal No. 521 of 1981 was also dismissed by the learned Sessions Judge. Such order was assailed before the Bombay High Court in Criminal Writ Petition No. 36 of 1986 under Article 20(2) of the Constitution of India and Section 403 and 482 of Criminal Procedure Code. By the impugned judgment the writ petition was dismissed by the High Court.

For the purpose of appreciating the contention of the appellant challenging the maintainability of the Criminal Case instituted against them for the said offence under the Customs Act and the Gold Control Act, the following facts may be stated :-

On 10.10.1969 the appellant No.1 who was working as Customs Inspector was contacted by some of the villagers of village Vihoor informing that the gold bars had been found in the agricultural field owned by accused No.37. The appellants nos. 1 and 2 who were Sepoys of the Customs Department recovered the said gold bars of foreign origin. But the appellants prepared a false panchnama showing recovery of 90 pieces of gold bars even though 99 pieces were recovered. The remaining 9 pieces were distributed by the appellants amongst themselves and few others.

The appellants along with other accused tried in Special Case No. B of 1971 under Section 409 IPC and Section 5(1) (c) of Prevention of Corruption Act before the Special Judge for Greater Bombay. It is not necessary to refer to the other accused in the said Special Case No. 8 of 1971. As aforesaid, two of the appellants were acquitted by the learned Special Judge and the remaining two were also acquitted on appeal by the Bombay High Court inter alia holding that there was no legal evidence to establish that there was any entrustment of gold bars and hence there was no question of is appropriation of the gold bars. In the said trial, CBI was the prosecuting agency.

After obtaining required sanction under Section 137 of the Customs Act, another was being case No. 19/Cus. of 1981 was filed by the Customs Authority for the offence under Section 120B IPC read with Section 135 and 136 of the Customs Act, Section 23(1A) of the Foreign Exchange Regulation Act 1947 and Section 85 of the Gold Control Act and Section 5 of the Imports and Exports (Control) Act. Such case was filed in the court of the Additional Chief Metropolitan Magistrate III Court, Esplanade Bombay against accused persons including the appellants. The complainant in this case was the Additional Collector of Central Excise, Marine and Prevention Division, Bombay.

The learned Additional Chief Metropolitan Magistrate, Esplanade Bombay, convicted the appellants being accused No. 11, 27, 28, and 29 under Section 135 (1) (i) read with Section 135 (1) (a) and (b) of Customs Act and Sections 85

(ii) (iii), and (iv) of Gold (Control) act, 1968 and sentenced them to 9 months rigorous imprisonment and also fine of Rs. 1000/-, in default, further rigorous imprisonment for one month for each of the said offences. It was directed that substantive offence would run concurrently. It is not necessary to refer to the conviction and sentence passed against some of the other accused for the purpose of disposal of this appeal. The learned Magistrate reject the contention that the second trial was barred under Section 403 Dr. P.C. The learned Magistrate held that in the former trial against accused Nos. 11,27, 28 and 29 before the learned Special Judge, the charge was misappropriation of gold bars and the said accused were acquitted on a finding that as there was no legal entrustment of gold bars, question of misappropriation did not arise. The question as to whether the gold bars were smuggled and are of foreign origin and on account of retention of such gold bars of foreign origin, the accused have committed offence under Gold Control Act, Customs Act and Foreign Exchange Regulation Act were not required to be decided in the earlier trial. Hence, the subsequent trial was quite distinct from the former trial and the facts leading to the former trial and present trial were also different.

The convicted accused preferred separate appeals before the learned Sessions Judge for Greater Bombay. The appeal preferred by the appellants herein was numbered as Criminal Appeal No. 521 of 1981. Such appeal was disposed of by a common judgment dated 17.10.1985. Criminal Appeal No. 521 of 1981 was dismissed. Further challenge of the conviction and sentence before the High Court in the said Criminal writ Petition has also failed.

Mr. S.K. Jain, the learned counsel appearing for the appellants has contended that the trial of case No. 19/Cus of 1981 before the learned Additional Chief Metropolitan Magistrate was not maintainable under the provision of Section 403 Crl. P.C. of 1898 corresponding to Section 300 of the Code of Criminal Procedure, 1973. Mr. Jain has submitted that the salutary provision of Section 403 Dr. P.C. is based on the principle memo debit is vexari pro cause (no person should be vexed twice for the same offence). The provision of Section 403 Dr. P.C. is much wider in its scope and ambit than the principle of protection against double jeopardy guaranteed under Article 20(2) of the Constitution of India. The protection against double jeopardy prohibits second trial for the same offence. But bar of a Second trial is not permissible if for the self same facts the accused in the first trial could not also have been prosecuted for the other offence arising from such facts.

Mr. Jain has submitted that the appellants were entrusted to ensure recovery of several gold bars kept concealed in the agricultural field in a village. It is the prosecution case that although the appellants in fact, found out 99 gold bars or biscuits of foreign origin being kept concealed, they accounted for only 90 bars by making a false panchnama and misappropriated the remaining 9. Although in the first trial before the learned Special Judge no charge for offence under Customs Act, Gold Control Act or Foreign Exchange Regulation Act was brought against the appellants but after obtaining necessary sanction, such charges could also have been brought against the appellants in the first trial because facts constituting the first trial and the second trial are the same.

Mr. Jain has submitted that in Mohammad Safi versus the State of West Bengal (1963 (3) SCC 467), this court has held that Section 403 (1) Dr. P.C. can be successfully plended as a bar to subsequent trial for the same offence as for an offence based on the same facts where an accused had been tried (a) by a court of (b) competent jurisdiction and

(c) acquitted.

In the instant case, the appellants were tried before a competent court for certain offence arising out of self same facts and in such trial, they were acquitted. Hence, the immunity against another trial for offence arising out of the self same facts is squarely attracted in the facts of the case. But the courts below failed to appreciate the scope and ambit of Section 403 Dr. P.C. and rejected the contention of appellants that the subsequent trial was not maintainable at all.

Mr Jain has also submitted that even if the contention of the appellants about the maintainability of the second trial is not accepted, the criminal trial is also liable to be quashed in the special facts of the case. The alleged incident had happened in 1969 and the appellants had suffered immensely because of the protracted criminal trials for unduly long period for no fault on the part of the appellants. The appellants did not put any hindrance in completing investigation regarding offence under Customs Act or Gold Control Act or Foreign Exchange Regulation Act. The prosecuting agency could easily complete the investigation required for bringing such charges against the appellants long back. The necessary sanction for prosecution of the appellants in the second trial could have been taken long back. It was only in 1981 the second trial was initiated. There is no manner of doubt that if the criminal trial is delayed unreasonably, the accused is found to suffer serious prejudice. The appellants have lost their jobs. Because of pendency of two separate trials in the different forum over an unusual long period the appellants have also suffered serious financial difficulties. Accordingly, the High Court should have quashed the second trial by holding that such trial had resulted in serious prejudice against the appellants and had also resuited in abuse of the process of law. Mr. Jain has submitted that considering the said facts, the criminal trial should be quashed by setting aside conviction and sentence passed against the appellants. The appellants are in advanced age and they are settled in family life.

Mr. S.M. Jadhav, the learned counsel appearing for respondent No. 1 State of Maharashtra has disputed the contention of Mr. Jain Mr. Jadhav has submitted that the criminal writ petition was filed by the appellants in the Bombay High Court under Section 20(2) of the Constitution of India and Section 403 and 482 Dr. P.C. Mr. Jadhav has submitted that the issue that arises for

consideration that whether the view of provisions of Article 20(2) of the Constitution and Section 403 Dr. P.C., the subsequent trial for offence under Customs Act and Gold Control Act was barred on the ground that in an earlier trial for offence under Section 409 IPC and Section 5(1) (f) of Prevention of Corruption Act, the appellants were acquitted. Mr. Jadhav has submitted that the present case is governed by old Section 403 Dr. P.C. of 1898. It is quite evident that the subsequent trial is for an offence which is distinct from the offence in earlier trial. Hence, such subsequent trial is not barred on a plain reading of Section 403(2) Dr. P.C. What is barred under Section 403 Dr. P.C. and Article 20(2) of the Constitution of the Constitution is the subsequent trial for the said offence and not for distinct offence under different enactments. For such a bar, the second trial must be for the same offence i.e. an offence whose ingredients are the same.

Mr. Jadhav has submitted that if the second prosecution is not for the same offence and the offence in the first and second prosecution are distinct, there is no question of application of the rule of double Jeopardy. For such contention, Mr. Jadhav has referred to the decision of this Court in State of Bombay Versus S.A. Apte and Anr. (AIR 1961 SC 578) and Harjinder Singh Versus State of Punjab (1985 (1) SCC 422). In this connection Mr. Jadhav has also referred to another decision of this Court in State of Bihar Versus Murad Ali Khan (1988 (4) SCC 655). In the said decision, it has been held that in case of killing an elephant, the fact that the police officer had filed a final report that no offence was made out under Section 429 IPC would not bar the initiation of another proceeding under Section 91(1) read with 51 of Wild Life Protection Act.

Mr. Jadhav has also referred to the decision of this Court in V.K. Agarwal, Assistant Collector of Customs Versus Vasantaraj (19988 (3) SCC 467). In that case, the incidence of Section 403 Dr. P.C. and Article 20(2) of the Constitution were taken into consideration. It has been held that Section 403(1) Dr. P.C. bars trial again for the same offence. In order to ascertain whether the two offence are the same. It is necessary to analyse the ingredients of two offence and not the allegations made in the two complaints. The ingredients required to be established for offence under Section 111 read with Section 135 Customs Act are altogether difference from these required to be established for offence under Gold Control Act.

Mr. Jadhav has submitted that the appellants were employees of the Customs Department. They have been found guilty for serious offence under Customs Act and Gold Control Act. Simply because they were not convicted for their improper acts as legal incidence of entrustment was not established for conviction under Section 409 IPC in previous trial, the second trial should not be quashed. The appellants do not deserve any sympathy or compassion. Hence, even on merits, no case for quashing under Section 482 Dr. P.C. has been made out.

Mr. P.A. Choudhary, learned senior counsel appearing for respondent No.2 Assistant Collector. D.R.I. Bombay has also disputed the contentions of Mr. Jain Mr. Choudhry has contended that the plea of bar of the second trial cannot be accepted either in principle or on authority of judicial decisions.

Mr. Choudhary has submitted that a criminal act that fails under Section 135 of Customs Act and Section 85 of Gold Control Act is different and distinct from a criminal act that falls under Section

409 IPC and Section 5 of the Prevention of Corruption Act. The violation of these sections of penal laws constitute distinct and separate offence within the meaning of offence as deferred in Section 4(1) of the Dr. P.C. They are incapable of attracting the principle of autrefois convict. Mr. Choudhary has also relied on the decision of this Court in V.K. Agarwal's case (supra). Mr. Choudhry has also relied on the decision of this Court in P.V. Mohammad Vs. Director (1993 Suppl (2) SCC

724) where similar view has been expressed. In Mohammad's case, two prosecutions were under Customs Act and Foreign Exchange Regulation Act but ingredients of two offence are found to be different.

Mr. Choudhary has also submitted that the plea of the appellants that there was a long delay in lodging the second criminal prosecution is similar to the plea which was raise in V.K. Agarwal's case (supra). Such plea has been rejected by this Court in the following words :-

"That 20 years have elapsed since the date of seizure of gold under section 111 read with Section 135 Customs Act is no ground for not proceeding further with the matter in as much as the offence in question is a serious economic offence which undermines are entire economy of Mr. Choudhry has submitted that the case for quashing the criminal case is devoid of any substance and should not be entertained by this Court. This appeal, therefore, should be dismissed.

After giving our careful consideration to the facts and circumstances of the case and the submissions made by the learned counsel for the respective parties, it appears to us that the ingredients of the offence for which appellants were charged in the first trial are entirely different. The second trial with which we are concerned in this appeal, envisages a different fact situation and the enquiry for finding out facts constituting offence under the Customs Act and the Gold Control Act in the second trial is of a different fact situation and the enquiry for finding out facts constituting offence under the Customs Act and the Gold Control Act in the second trial is of a different nature. It may be indicated here that the second trial has been initiated after obtaining necessary sanction for prosecuting the appellants. The principle of double jeopardy and bar of second trial as enunciated by this Court in V.K. Agarwal's case (supra) and P.V. Mohammad's case (supra) is applicable in the facts of this case. Not only the ingredients of offence in the previous and second trial are different, the factual foundation of first trial and such foundation for the second trial is also not indented. Accordingly, the second trial was not barred under Section 403 Dr. P.C. of 1898 as alleged by the appellant.

In the facts of the case, we also do not find any justification for quashing the criminal trial simply on the ground of delay and consequential suffering of the appellant. The offence and normally in such offence, a strict view is to be taken. We, therefore, find no reason to interfere with the impugned decision. This appeal, therefore, fails and is dismissed.